HCJ 2887/04

Salim Abu Madigam
and others
v.
1. Israel Land Administration
2. Ministry of Industry, Trade and Employment
3. Ministry of Agriculture

The Supreme Court sitting as the High Court of Justice
[14 April 2007]
Before Justices M. Naor, E. Arbel, S. Joubran

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In response to large scale incursions onto state land in the Negev by Bedouins and their planting of agricultural crops on that land, the respondents decided to destroy the crops by spraying herbicide from the air. The petitioners challenged this policy on the grounds that the spraying of herbicide was done *ultra vires* and also endangered the health and dignity of Bedouins in the vicinity of the spraying. The respondents denied that the herbicide used presented any risks to health.

Held: (Justice Joubran) The respondents have no power under the law to spray herbicide in order to prevent incursions onto state land. The policy of spraying herbicide from the air is therefore *ultra vires*. Additionally, the user instructions and warnings on the herbicide used indicate that the spraying of herbicide does involve a potential danger to health.
(Justices Arbel and Naor) The respondents have power under the law to enforce their property rights, and the law does not exclude spraying as a means of enforcing those rights. Therefore the spraying is not *ultra vires*. However the use of spraying to enforce property rights is disproportionate, in view of the potential risks to health and dignity that the spraying presents, even if only as a result of accidents.

Petition granted. Costs awarded by majority decision, Justice Naor dissenting.

Legislation cited:
Basic Law: Human Dignity and Liberty, s. 8.

Basic Law: Israel Land.
Emergency Defence Regulations, 1945.
Israel Land Administration Law, 5720-1960.
Land Law, 5729-1969, chapter 3 article 2, ss. 18, 18(b), 21, 22.
National Parks, Nature Preserves, National Sites and Memorial Sites Law, 5752-1992, s. 60(a).
Penal Law, 5737-1977, ss. 336, 452.
Planning and Building Law, 5725-1965, s. 238A.
Plant Protection (Use of Herbicides) Regulations, 5729-1969, rr. 1, 5, 12.
Plant Protection Law, 5716-1956.
Public Land (Eviction of Squatters) (Implementation of Order) Regulations, 5765-2005, r. 4(a).
Public Land (Eviction of Squatters) Law, 5741-1981, ss. 4(a), 5(a), 5(c), 5(e).
Torts (State Liability) Law, 5712-1952.

Israeli Supreme Court cases cited:

[1] HCJ 36/51 *Het v. Haifa Municipal Council* [1951] IsrSC 5(2) 1553.
[2] LCA 4311/00 *State of Israel v. Ben-Simhon* [2004] IsrSC 58(1) 827.
[3] HCJ 477/81 *Ben-Yisrael v. Chief Commissioner of Police* [1982] IsrSC 36(4) 349.
[4] LCrimA 5584/03 *Pinto v. Haifa Municipality* [2005] IsrSC 59(3) 577.
[5] HCJ 7611/01 *Maccabi Mutual Insurance against Disease Cooperative Society Ltd v. Minister of Finance* [2006] (3) 2680.
[6] HCJ 2324/91 *Association for Civil Rights in Israel v. National Planning and Building Council* [1991] IsrSC 45(3) 678.
[7] HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [1996] IsrSC 50(3) 2.
[8] HCJ 492/79 *A v. Ministry of Defence* [1980] IsrSC 34(3) 706.
[9] HCJ 297/82 *Berger v. Minister of Interior* [1983] IsrSC 37(3) 29.
[10] HCJ 624/06 *Ron-Gal Transport Ltd v. Minister of Education* [2007] (1) TakSC 1174.
[11] HCJ 528/88 *Avitan v. Israel Land Administration* [1989] IsrSC 43(2) 297.
[12] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
[13] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [2006] (2) TakSC 1754; **[2006] (1) IsrLR 443**.
[14] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[15] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.
[16] HCJ 3939/99 *Sedei Nahum Kibbutz v. Israel Land Administration* [2002] IsrSC 56(6) 25.

[17] CA 5964/03 *Estate of Edward Aridor v. Petah Tikva Municipality* [2006] (1) TakSC 2149.
[18] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[19] HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* [2006] (2) TakSC 4362; **[2006] (2) IsrLR 56**.
[20] HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [2005] (4) TakSC 49; **[2005] (2) IsrLR 206**.
[21] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [2006] (2) TakSC 1559.
[22] HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [2006] (4) TakSC 3675; **[2006] (2) IsrLR 352**.

For the petitioner — M. Dalal.
For the respondent — O. Koren.

JUDGMENT

Justice S. Joubran

1. This petition, in which an order *nisi* has been made, concerns the petitioners' request to prevent the respondents continuing to spray from the air agricultural crops that are cultivated by Bedouin Arab citizens in the Negev (hereafter: the spraying), because according to the petitioners this spraying is unlawful and endangers human life and health, and in addition it is dangerous to the lives and health of animals in the vicinity of the spraying.

2. Petitioners 1-3 live in the area of El-Arakib, south of Rahat and north of Beer-Sheba. The fourth petitioner lives in the area of Wadi Albakar, south-west of Sedeh Boker in the Negev. The fifth petitioner is a human rights organization that is involved in the field of public health. The main occupation of the fifth petitioner is to protect and advance health rights in Israel and the territories. The sixth petitioner is a non-profit organization registered in Israel that focuses on protecting the rights of the residents of unrecognized villages in Israel. The seventh petitioner is an organization of activists, including many academics, who are mainly from the southern part of the country. The eighth petitioner is a company registered in Israel, which seeks to increase awareness of the position of the Bedouin Arab population in the Negev. The ninth petitioner is an organization of activists whose purpose

is to achieve equality and peace for everyone. The tenth petitioner is a registered non-profit organization in Israel, which is active in protecting the rights of Bedouin Arab citizens in Israel. The eleventh petitioner is a human rights organization whose main sphere of operations is to document human rights violations in Israel and to educate people to respect human rights. The twelfth petitioner is a registered non-profit organization, whose goal is to increase public awareness of the importance of the right to health. The thirteenth petitioner is a human rights organization whose main activity is to protect the right of the Arab minority in the legal sphere.

The respondents spray agricultural crops of Bedouin Arab citizens in unrecognized villages in the Negev. The spraying is carried out from the air, by means of airplanes, by or on behalf of the Israel Land Administration, in order to clear areas that have been unlawfully entered for the purpose of agricultural cultivation and planting crops.

3. The petitioners claim that the spraying of the agricultural crops by the respondents is carried out from the air on crops of wheat, barley, corn and watermelons, as well as on people. No warning is given before the spraying occurs. According to them this is a very dangerous act, since the first respondent makes use of a 'Roundup' type substance for spraying the agricultural crops; this is a toxic substance and the respondents attach no importance to the disastrous repercussions that may ensue.

This led to the petition before us.

The petitioners' arguments

4. According to the petitioners, the Plant Protection Law, 5716-1956, authorizes the Minister of Agriculture to carry out pest control activities for one clear main purpose only, which is the protection of plants and the environment in general. We are speaking of a power and a course of action whose environmental and sanitation objectives are manifest from the language, purpose and normative context of the law. The power in the law is not given in order to achieve any purpose beyond the interest protected by that law, which is the environmental and sanitation interest. Therefore the petitioners argue that the action of the Israel Land Administration is *ultra vires* and its purpose is a complete violation of constitutional basic rights.

According to the petitioners, not only have the respondents carried out dangerous acts for which they have no authority in statute, but they have also sprayed from the air a substance that is not approved by the competent authority.

According to the petitioners, the respondents' argument that the spraying is a legitimate act in its enforcement of rights under the laws of protection of ownership and possession under the Land Law, 5729-1969, should not be accepted. This is because s. 18 of the Land Law is not relevant, if only because the spraying carried out by the first respondent is not being done during the thirty days allotted by the law, even on the assumption that the respondent has the right to use force. Moreover, not only is spraying a measure that they are not permitted to use in order to enforce an alleged right, but it is also extremely unreasonable and disproportionate for the alleged purpose, even if it is justified, namely the enforcement of alleged rights in the land. After all, it is not permitted to endanger human beings and their environment solely in order to realize a conflicting property interest.

The petitioners also claim that the spraying being carried out by the first respondent has immediate and long-term negative repercussions on their right to life and their right to health.

The petitioners further claim that the spraying of the agricultural crops of Bedouin Arab citizens in unrecognized villages in the Negev is a blatant violation of the constitutional rights of those persons to dignity. The first respondent or people acting on its behalf are spraying agricultural crops, and in many cases people as well, with a substance that is dangerous and toxic to human beings, animals and the environment. This harmful and dangerous activity of the first respondent is being carried out without prior warning and without explaining the inherent danger in their activity to the persons who are being harmed by it. According to them, the respondents' airplane looks down on the reality beneath it, but it does not succeed in seeing the small but significant details — neither the presence, nor the toil and certainly not the memory of the population that is being sprayed in the unrecognized villages in the Negev.

The respondents' arguments

5. The respondents argue that the State of Israel is confronting a serious problem whereby nomadic Bedouin inhabitants make repeated incursions onto land owned and held by the state in the Negev. According to them, the phenomenon of incursions onto state land in the Negev is characterized in many cases by ploughing and planting during the relevant season, after which the land is abandoned until the harvest season, when the same people return in order to collect the crops that they planted. This means that the act of incursion is expressed in the act of planting, which results in agricultural crops that are growing on land owned by the state. In some cases the

incursions are made in order to build illegal sturdy structures, including the building of residential buildings, businesses, various factories or petrol stations, on a scale of thousands of buildings throughout the Negev.

According to the Israel Land Administration Law, 5720-1960, the duty to administer land belonging to the state, the Jewish National Fund and the Development Authority was entrusted to the Israel Land Administration. By virtue of its aforesaid duty, the Israel Land Administration is required to protect the state's ownership and possession of its land in a way that will allow it to manage the land for various purposes according to objective considerations, in an equal and transparent manner, and in accordance with the objectives that are determined by the Israel Land Council. For this purpose the state acts in order to remove squatters from the land, with the assistance of other authorities. Of these the main one is the 'Green Patrol' that operates by virtue of government decision no. 6014 of 22 August 1995 and by virtue of an inter-ministerial agreement that was signed on 5 August 2001 with regard to determining the budget and regulating the activity of the Open Spaces Supervisory Unit (hereafter: 'the Green Patrol'). The Israel Land Administration is also assisted by the Israel Police.

The supervisory and enforcement powers are given to the Green Patrol by virtue of s. 60(a) of the National Parks, Nature Preserves, National Sites and Memorial Sites Law, 5752-1992.

According to the respondents, in so far as the problem of incursions by means of seasonal planting on state land in the Negev is concerned, there is a need to use active force to realize the powers provided in the law in order to protect the rights of the state as the owner and occupier of the land, including the powers provided in article 2 of chapter 3 ('Protection of Ownership and Possession') and chapter 4 ('Building and Planting on Land Belonging to Others') of the Land Law, 5729-1969, and the powers provided by law in order to protect army firing ranges against incursions, since all the other possible methods of removing squatters who were cultivating state land without permission, such as signposts, warnings and lawsuits, achieved nothing.

The respondents claim that over the years the Israel Land Administration has tried various methods of realizing the aforesaid powers, including technologies for ploughing up land that has been planted illegally and spraying from the ground, but these have only met with limited success. The scale of the incursions has grown every year and the rate of removing the squatters cannot keep up with this increase. Moreover, the use of these

methods resulted in friction between law enforcement officers and the squatters and their supporters, which resulted in physical injuries and damage to property, in addition to a concern that the situation would deteriorate and more widespread disturbances would ensue. For this reason, the operations required large-scale police participation for each eviction operation that took place on the ground. Since we are speaking of many thousands of dunams, carrying out the eviction operations involved considerable difficulties. These circumstances led to a reduction in the scale of the operations, so much so that they were completed stopped during the years 1999-2001. Moreover, the operations made considerable demands upon the Israel Police, which was called upon to deploy considerable manpower to support the eviction operations.

Therefore, in view of the great public interest in protecting the land resources of the state and in view of the problems encountered by the other law enforcement measures in confronting the phenomenon of incursions for the purpose of seasonal agricultural cultivation of its land in the Negev, the respondents decided that in appropriate cases it would also make use of the measure of spraying from the air, when the incursions onto open tracts of state land in the Negev occurred on a large scale.

According to the respondents, the use of the measure of spraying from the air, in order to vacate areas where incursions had occurred for the purpose of agricultural cultivation and planting, only began after the squatters by their conduct in the past caused serious disturbances of the peace, when the state tried to protect its property by other means such as ploughing. In these cases, on more than one occasion the state encountered violent behaviour on the part of the squatters, who resorted to force in order to try and prevent the ploughing operations that were used to remove squatters who were trespassing for the purpose of seasonal cultivation and planting. This violent behaviour led to physical injuries both to the persons carrying out the eviction and those being evicted. Disturbances of the peace led at that time to a complete moratorium on the part of the state in dealing with the phenomenon of incursions onto land in the Negev, because of the fear of violence and a concern that the situation would deteriorate and more widespread disturbances would ensue. As a result, the respondents argue that the state was compelled to search for alternative measures to physical ploughing of the land, by means of which it could protect its ownership of public land without conflicts and danger to human life, and spraying from the air was found to be a suitable alternative measure for this purpose.

The respondents also claim that the results on the ground show the effectiveness and the safety of the measure of spraying from the air in general, and particularly in view to the serious consequences of the other measures available to the state in the circumstances of the case, both in terms of efficiency and in terms of the physical injuries to which the persons concerned are exposed.

According to the respondents, the spraying activities are carried out by and on behalf of the state with authority and according to law, mainly by virtue of provisions of statute that allow owners of land and/or lawful occupiers to take action to evict squatters from it. They further claim that the operations themselves are carried out by a properly licensed operator, who abides strictly by the rules that set out the method of using the spray preparation 'Roundup' that it used in these operations.

With regard to the safety of spraying the crops, the respondents claim that the use of the sprays for various agricultural purposes, including for dealing with seasonal crops, is widespread and the 'Roundup' preparation that the state uses in the spraying operations is the most common herbicide in Israel and around the world.

According to the respondents, the use of spraying as one of the measures for dealing with the incursions onto the land for the sake of seasonal agricultural cultivation is an essential and necessary measure in the special circumstances of the case that relate to the incursions for the sake of seasonal agricultural cultivations of state land in the Negev.

The respondents further claim that there is no indication at all that the spraying operations from the air that the state has carried out have caused any health hazard at all. According to the respondents, if the petitioners had any proof of any real harm that gives rise to a cause of action in torts, they would undoubtedly have made use of it in an appropriate civil action. The fact that the petitioners have made no use of such an action until now speaks for itself.

The respondents further claim, with regard to the effectiveness of this measure, that experience shows that since the state began to make use of spraying from the air, there has been a real decrease in the scope of the incursions into its land in the Negev. At the same time there has been a decrease in the level of violence involved in the law enforcement operations to evict the petitioners.

Deliberations

6. Are the spraying operations from the air that are carried out by and on behalf of the state on land that it owns and possesses in the Negev a

legitimate tool for contending with the problem of incursions that are carried out by the Bedouin nomads? This is the main question that lies at the heart of this petition.

I will therefore consider this question.

The normative framework

7. According to the Israel Land Administration, all of the inhabitants of the unrecognized villages are nothing more than trespassers in the area. It follows, according to the Israel Land Administration, that it has the right and duty to contend with this civilian population in order to protect the land.

In this regard, the respondents claim that the law permits several legal measures for dealing with situations of incursions onto land, some of which are common to all persons who own or have possession of land, including the state, and some of which are only available to the state. According to them, with regard to all owners and lawful occupiers of land, the matter is regulated in the Land Law, 5729-1969 (hereafter: the Land Law), in article 2 of chapter 3 (Protection of Ownership and Possession) and in chapter 4 (Building and Planting on Land Belonging to Others), and with regard to state land the matter is also regulated in the Public Land (Eviction of Squatters) Law, 5741-1981 (hereafter: the Public Land (Eviction of Squatters) Law). According to the respondents, as we have said, problems arose as a result of using agricultural methods of removing crops that were unlawfully planted on state land. They therefore wish to reduce the size of the forces and the time required to carry out the operations to evict squatters, and to avoid friction between the forces carrying out evictions and the squatters as much as they can, since in the past this has exacted a price in terms of physical injuries both to the law enforcement authorities and to the local population. Consequently the respondents decided also to make use of spraying from the air in appropriate circumstances.

I cannot accept this argument. Let me explain.

Incursions onto state land are certainly illegal acts that are intended to deprive the state of its right and duty to administer its land in accordance with the criteria and needs determined by the competent authorities. But the way in which the state deals with the phenomenon of these incursions by spraying from the air is not lawful, even though according to the state it observes all the instructions for using the pest control preparation with which the spraying is carried out.

Article 2 of chapter 3 (Protection of Ownership and Possession) and chapter 4 (Building and Planting on Land Belonging to Others') of the Land

Law, 5729-1969, are not relevant in the case before us, since spraying is a measure that cannot be used in order to realize any alleged right of the respondents. Pest control may not be used by anyone as a means of enforcing an alleged right, and this is especially the case when the person claiming a right has no authority to carry out pest control measures. The same applies also to the Public Land (Eviction of Squatters) Law, 5741-1981. Spraying in Israel, whether from the air or from the ground, is carried out in accordance with the Plant Protection Law, 5716-1956 (hereafter: 'the Plant Protection Law'), solely for environmental and sanitation purposes.

The respondents' claim — that because of the serious violence that the authorities in charge of protecting state land in the Negev encountered, they decided to carry out spraying operations to remove squatters from state land — should be completely rejected. As long as the respondents have not been given authority in statute to act by means of spraying crops in order to remove squatters, the respondents cannot protect state land and discharge their duties properly by carrying out spraying operations whenever they wish, even if they think that spraying is an effective measure for evicting the squatters.

With regard to carrying out operations to eliminate diseases, s. 2A1 of the Protection of Plants Law provides as follows:

'Authority to carry out operations to eliminate diseases (amended: 5726, 5730)

2A1. (a) The Minister of Agriculture may carry out operations, throughout the state or in any part of it, in order to eliminate diseases, including the destruction of plants and associated items, whether infected or not infected (hereafter — pest control operations), *if he sees a need to do so in order to prevent the spread of diseases, after consulting an advisory committee under section 9 on matters of pest control* (hereafter — the pest control committee);

> (b) If the Minister of Agriculture decides upon pest control operations, the pest control committee shall prepare, itself or by means of others, and approve a plan for carrying out the operations (hereafter — the pest control plan); the details that will be included in the plan, the conditions for implementing it and the ways of publishing it shall be determined in regulations.'

(Emphases supplied).

Moreover, r. 12 of the Plant Protection (Use of Herbicides) Regulations, 5729-1969, provides:

'Prohibition of spraying from the air

> 12. Approval will not be given for the spraying of herbicides from the air, if in the opinion of the director [the director of the Plant Protection Department at the Ministry of Agriculture] a crop in the neighbourhood of the field being treated may be harmed.'

It follows that the authority to carry out pest control operations on plants is given to the Minister of Agriculture only and not to the respondents or anyone acting on their behalf. In addition, the specific purposes of the Plant Protection Law and the regulations thereunder concern health, sanitation and the environment, and they are intended to protect the health of human beings and the environment against potential hazards in plants. It is inconceivable that an authority should spray agricultural crops with chemicals in order to enforce its alleged rights in land. It would appear that the purpose for which the spraying is carried out is illegal. In these circumstances I am of the opinion that even though the state has the power to remove squatters from its land, this power does not include the activity of spraying the agricultural crops of the inhabitants of villages in the Negev, and these operations are being carried out *ultra vires*.

The dangers of spraying

8. The first respondent is making use of a substance of the 'Roundup' type to carry out the spraying of the agricultural crops.

As we have said, the petitioners claim in their petition that the spraying causes irreversible harm, including a risk of causing birth defects and an increased risk of contracting cancer.

In reply the respondents claim, as we have said, that there is no indication that the spraying operations from the air, which the state is carrying out, cause any harm to health at all. According to the respondents, if the petitioners had any evidence of real tangible harm that gives rise to a cause of action in torts, they would have made use of it in an appropriate civil action. According to them, the fact that until now the petitioners have not filed such an action speaks for itself.

The petitioners filed two expert opinions in this court. These set out the serious risks of the spraying that is being carried out by the first respondent. The first opinion is that of Dr Eliahu Richter, a senior lecturer and head of the Environmental and Occupational Health Department at the Hebrew University; the second opinion is that of Dr Ahmad Yazbak, an expert in toxic substances who has a doctorate from the Chemistry Faculty at the Technion Institute in Haifa.

Dr Eliahu Richter sets out in his opinion the risks inherent in the use of a 'Roundup' type substance. According to him, we are speaking of risks to fertility, the causing of congenital defects and the danger that the substance is carcinogenic. Dr Richter summarizes in his expert opinion the risks that the 'Roundup' substance presents to human beings and the environment by saying the following:

> 'Herbicides are unique in that they are the only chemicals whose purpose is to harm living organisms. Literature has shown a true potential for negative toxic effects on health, even if there is uncertainty with regard to the existence and seriousness of the effects of "Roundup," as it is used, of glyphosate and of the inert substances. The evidence from research shows a risk to fertility as a result of exposure of fathers and mothers in animals and humans. There is a possibility that the substance is carcinogenic. There are testimonies regarding the effects on the ecosystem that harm the quality of the crops.
>
> The criterion for protection should be the protection of the persons most susceptible to risk. Children — both born and unborn — are among those who are exposed to the spraying. Toxicological figures that are based on health risk figures relating to adult humans or adult mammals cannot serve as an index for children or infants that may be exposed in the case under discussion. Children, infants and foetuses develop rapidly, the facial area is greater relative to body weight, the kinetics and

> absorption ratios are higher per kilogram of body weight, there are no figures in epidemiological literature with regard to the effects of exposure in childhood for human beings since these risks have not been researched. These risks have not been researched because exposure of this kind is not supposed to happen.
>
> The dispersion of herbicides or insecticides when spraying from the air near inhabited settlements is dangerous and should be stopped. A preliminary warning that may or may not take place is not a reason to disregard this finding since there is a possibility of exposure to residues after the spraying. Ground spraying with a machine may also cause dispersion, but not to such great distances as spraying from the air. Spraying from the air, depending on the height at which it is dispersed, the quantity, size of the particles and the method of spraying may result in dispersion over distances of several kilometres.
>
> Without solid testimony that there is no risk, spraying herbicides from the air is clearly an immoral stratagem of human testing, where the subjects of the test, i.e., the inhabitants including children who are exposed to the spraying, are participating against their will.'

Dr Ahmad Yazbak states in his opinion that the dangers of the 'Roundup' substance include eye and skin irritations, more frequent abortions, nausea, breathing difficulties and more. The following is what Dr Yazbak says with regard to toxicity:

> 'Toxicity
>
> Several tests with glyphosate have shown acute toxic effects such as eye and skin irritation as well as effects on the circulatory system. Tests made upon rats resulted in LD50 values at 4,320 mg/kg bodyweight…
>
> Surfactants often have more toxic effects then the glyphosate itself…
>
> Skin and eye irritations are the most common symptoms. Table 1 shows a summary of chemicals used as surfactants in Roundup and other herbicides. The information about their toxic effect is obtained from tests made on animals.'

In reply the respondents argue that the use of crop sprays is done on an everyday basis throughout Israel for various agricultural needs, including for

dealing with seasonal crops. The respondents supported this argument with an opinion of Prof. Gary Winston, the chief toxicologist of the Department of Environmental Health at the Ministry of Health. According to the opinion, the spraying operations that are carried out by the state do not present any health danger to human beings. Prof. Winston's opinion relates to glyphosate, which is the active substance in the herbicides that the respondents claim were used for the spraying. Prof. Winston says in his opinion that of all the herbicide preparations, glyphosate is the most commonly used active substance in the world. In his opinion, Prof. Winston reviews various research that was carried out with regard to the effects of glyphosate on the skin, the risk of contracting a cancerous disease and the creation of congenital defects, and he shows that the effect of glyphosate on the skin is no greater than the effect of domestic cleaning substances and also that there is no connection between glyphosate and cancer. Prof. Winston also claims that various research works that have been carried out show that glyphosate has no mutagenic effect; in other words, it does not harm DNA.

I think that there is no need to make a decision with regard to the different opinions, since it would appear that the danger presented by the substance 'Roundup' to human beings and the environment can be seen from the user instructions and warnings that appear on the spray container itself, where it is stated that whoever uses that substance should take great care not to come into any contact with it. Moreover, the user instructions on 'Roundup' specifically state that this substance should not be used for spraying over fish tanks. The following are the user instructions and warnings that appear on the one litre container of the substance:

> 'Warnings: Roundup may irritate the skin and eyes. The substance is dangerous to fish. Do not spray into fish tanks.
>
> Precautions: All the precautions that are customary when using pest control preparations should be adopted. When dealing with the concentrated preparation, wear gloves and do not breathe in the fumes from the preparation. When spraying, wear clothes that cover all parts of the body. Do not eat and do not smoke when using the preparation. After spraying, wash all the parts of the body that came into contract with the substance with water and soap. Do not feed animals or enter a sprayed area within seven days of the spraying.'

The precautions on the one litre container of the spray substance Roundup go on to say:

> 'User instructions:
>
> …
>
> Warning: Roundup attacks metals apart from stainless steel. Use only spraying devices that have canisters made of synthetic materials or stainless steel. Do not allow the spray or mist to come into contact with foliage and fruits of cultivated plants and tree trunks that do not yet have bark and all beneficial plants, fish tanks and water sources…'

The instructions on the Roundup spray container also say expressly that it is a toxic and dangerous substance: 'Toxicity level IV — dangerous.'

In reply, the respondents argue that the relevant label for the Roundup preparation is the label that is approved for the 20 litre container, and not the label that was approved for the 1 litre container as claimed by the petitioners. According to the respondents, a reading of the label on the 20 litre container shows that, contrary to the representation made by the petitioners, the preparation is classified with the lowest toxicity level of a pesticide preparation and that the Roundup preparation, when it is in a 20 litre container, is also intended for spraying from the air. According to them, the label on the 20 litre containers includes various instructions concerning the volume of the spray that should be used when spraying from the air and the conditions of the area and the spraying where it is done from the air.

It seems to me, however, that the user instructions and warnings on the 20 litre container of Roundup are similar to the user instructions and warnings on the 1 litre container. The following are the instructions and warnings that appear on the 20 litre container:

> 'All the precautions that are customary when using pest control preparations should be adopted:
>
> When dealing with the concentrated preparation, wear gloves and protective goggles. Do not breathe in the fumes from the preparation.
>
> Roundup may irritate the skin and eyes. When spraying wear clothes that cover all parts of the body.
>
> Do not eat and do not smoke when using the preparation.
>
> After spraying, wash all the parts of the body that came into contract with the substance with water and soap…
>
> The substance is dangerous to fish. Do not spray into fish tanks.

> Do not feed animals or enter a sprayed area within seven days of the spraying.
>
> In the event of contact with skin, wash well with water. In the event that some substance was splashed into the eyes, rinse for 15 minutes with flowing water and have a medical check.'

In these circumstances it seems to me that it can be said that the risks of the Roundup spray substance can be seen from the user instructions and the warnings that appear on the preparation itself.

The respondents also point out that spraying from the air with the Typhoon preparation has not been permitted, but in view of the chemical composition of Typhoon, which they claim is based, like Roundup, on the active substance glyphosate, it is reasonable to assume that there would be no difficulty from a health perspective in obtaining its approval for spraying from the air. Therefore the Israel Land Administration says that from now on, in future contracts if there are any, it will take care to ensure that spraying from the air will be done only with preparations that have been approved for this purpose by the Ministry of Agriculture.

So far we have seen that not only have the respondents carried out spraying operations for which they have no authority in statute, but they even sprayed from the air a spray substance that was not approved by the competent authority, the Ministry of Agriculture.

9. It should be pointed out that the United Nations Committee on Economic, Social and Cultural Rights, which addresses matters relating to the International Covenant on Economic, Social and Cultural Rights of 1966, determined in 1998 with regard to the inhabitants of the unrecognized villages that the spraying of the agricultural crops of those inhabitants deprived them of basic rights, including the right to health. On 4 December 1998 the committee determined the following:

> '28. The Committee expresses its grave concern about the situation of the Bedouin Palestinians settled in Israel. The number of Bedouins living below the poverty line, their living and housing conditions, their levels of malnutrition, unemployment and infant mortality are all significantly higher than the national averages. They have no access to water, electricity and sanitation and are subjected on a regular basis to land confiscations, house demolitions, fines for building "illegally," destruction of agricultural fields and trees, and systematic harassment and persecution by the Green Patrol. The

> Committee notes in particular that the Government's policy of settling Bedouins in seven "townships" has caused high levels of unemployment and loss of livelihood.'

Similar remarks were determined by the United Nations Committee on Economic Social and Cultural Rights on 23 May 2003:

> '27. The Committee continues to be concerned about the situation of Bedouins residing in Israel, and in particular those living in villages that are still unrecognized… the quality of living and housing conditions of the Bedouins continue to be significantly lower, with limited or no access to water, electricity and sanitation.
>
> Moreover, Bedouins continue to be subjected on a regular basis to land confiscations, house demolitions, fines for building "illegally," destruction of agricultural crops, fields and trees, and systematic harassment and persecution by the Green Patrol, in order to force them to resettle in "townships".'

In the circumstances of our case, I have been persuaded that the Israel Land Administration is carrying out the spraying operations without having been given any authority in law, even if these operations are in its opinion effective in removing squatters from state land. The fact that there is a concern that these operations may cause harm to human life and health in the area being sprayed exacerbates the position.

10. In conclusion, and for all of the aforesaid reasons, I shall propose to my colleagues that the petition should be granted and the order *nisi* should be made absolute.

Moreover, in the circumstances of the case I shall propose to my colleagues that the respondents should be ordered to pay the petitioners legal fees in a sum of NIS 20,000.

Justice E. Arbel

1. Between the years 2002-2004 the state made use of the measure of spraying from the air in order to remove agricultural crops that were planted unlawfully on state land in the Negev by citizens of the state who are Bedouin nomads. The use of this measure was stopped in 2005 after this court made an order *nisi* that the state should not continue using this measure until we decided the petition that was filed in this matter.

2. At the heart of the petition lies the question whether the state is entitled to carry out spraying from the air on agricultural crops as a means of dealing with the phenomenon of Bedouin incursions onto land that the state claims is owned by it.

The issue is very difficult. The decision in it requires a balance between conflicting values and interests, which is complex. On the one hand, we have the property interest of the state and its rights as the owner of land to protect the land and to prevent incursions onto it. This right is in fact also a duty — the duty of the state as a public trustee to administer the use of its land in a deliberate and logical manner and in accordance with the criteria and needs that were determined by the competent authorities. In addition to this interest, and of no less importance, we have the right and duty of the state not to give in to acts of lawlessness and violations of the rule of law, which are expressed in our case both in the phenomenon of the incursions themselves and also in the violent responses to the attempts to remove the squatters from the land. On the other hand we have the various rights of the Bedouin squatters, as citizens of the state, including their right to fair and proper treatment by the state authorities and preservation of their dignity, lives and health.

3. My colleague, Justice Joubran, reached the conclusion that the spraying operations that were carried out by the state were done *ultra vires*, because the state's authority to evict squatters from its land does not include a power to spray the agricultural crops of the Bedouin inhabitants in the Negev, and because use was made of a spray substance that was not approved by the competent authority, the Ministry of Agriculture. My colleague is also of the opinion that in view of the danger presented by the spray substance that the state used, which can be seen from the user instructions and the warnings that appear on the spray substance container, there is a concern that the aforesaid spraying operations may cause damage to human life and health in the vicinity of the area being sprayed. In view of this, my colleague is of the opinion that the petition should be granted and the order *nisi* should be made absolute.

4. After lengthy and strenuous consideration, I too have reached the conclusion that my colleague reached, and I too am of the opinion that the petition should be granted and an absolute order should be made against the aforesaid spraying operations that are being carried out by the state. But I have reached this result by means of a different path from that of my

colleague. Because of the complexity and importance of the issue that is before us, I too shall address the matter.

The background to the petition

5. For many years there has been a dispute between the Bedouin population and the state authorities over the question of the ownership of extensive tracts of land in the Negev. We are not required to decide this dispute in the current petition. We are only concerned with one of the indirect consequences of it, namely the state's decision to make use of the measure of spraying a pest control substance from the air in order to deal with incursions carried out by the Bedouin citizens by way of sowing and planting agricultural crops on land that the state claims belongs to it. It should be remembered that the petitioners' position on this issue is that this is not land that belongs to the state, but land that is undergoing land settlement proceedings in which the question of ownership has not yet been decided.

6. In response to the petition, the respondents describe in detail the situation that led to the decision to make use of the measure of spraying from the air in order to stop the incursions. I will state the matter in brief. According to the respondents, every year the state authorities, and mainly the first respondent, the Israel Land Administration, which has been given the responsibility of administering state land, are compelled to deal with a phenomenon of repeated incursions onto extensive tracts of land owned by the state in the Negev. One of the expressions of this phenomenon takes the form of incursions that are made by means of seasonal agricultural cultivation of state land. In some cases, the respondents point out, we are speaking of land that has been leased by the state to other Bedouin citizens who have been expelled by those squatters, and in some cases we are speaking of state land that has been declared army firing ranges.

In view of the clear public interest in preserving the limited land resources of the State of Israel, the state carries out operations to remove the squatters, by using all the legal measures available to it. With regard to those incursions that are made by means of seasonal agricultural cultivation of the land, since the act of squatting is reflected in the procedure of sowing and planting the agricultural crops, the incursion is dealt with by means of removing those crops, and the state acts in order to realize this purpose.

7. In their reply the respondents made it clear that originally, until 1998, the agricultural incursions were dealt with from the land itself, by using agrotechnological methods, and especially tractors, that ploughed the cultivated land and thus removed the crops. According to the respondents,

this measure proved to be ineffective: the scope of the incursions increased each year and the rate of removing the crops did not succeed in keeping up with the incursions. Moreover, another significant difficulty arose in the use of agrotechnological methods. Ever since 1995 the authorities who were involved in dealing with the incursions were required to contend with intense and violent opposition to the clearing of the land, which was accompanied by attacks on the forces carrying out the eviction, and on more than one occasion resulted in eviction operations being stopped before they were completed. Despite this, the eviction operations continued, albeit on a smaller scale. In 1998, the respondents claim that there was a serious deterioration in the violence towards the persons working for the authorities in removing the agricultural crops. Thus, for example, in one case before a planned eviction operation was begun on a parcel where there had been an incursion, groups of inhabitants gathered around that parcel and within a short time they began to act violently against the eviction forces by throwing stones and using private cars to trample policemen. These violent phenomena resulted in personal injuries both to the eviction forces and to the inhabitants, and because of a concern as to the safety and health of both parties, the authorities were compelled to stop the aforesaid eviction operations.

In view of the serious situation that had arisen on the ground, a reassessment was made with regard to the appropriate methods of removing squatters from state lands. Until a solution was found, because of the concern that violent incidents would reoccur, no activity was carried out in the years 1999-2001 in order to stop the agricultural incursions. As a result of the cessation of activity the scale of the incursions during that period increased significantly.

Eventually, because of the problems that arose in using the agrotechnological measures to deal with the incursions, because of a desire to reduce the size of the forces and the time required in order to carry out the eviction operations, and in order to avoid in so far as possible any friction between the forces carrying out the evictions and the inhabitants, as well as any injuries or fatalities, it was found that in the appropriate cases, i.e., with regard to large scale incursions that were at a safe distance from inhabited areas, the procedure of spraying from the air might be a proper alternative measure for protecting the state's ownership of the land. As we have said, this is the measure that is under scrutiny in this petition.

8. Now that I have presented the background, I will turn to examine the main issues that arise in the petition. The order that I shall address these is as

follows: I shall begin by examining the provisions of statute relevant to the matter and the question whether the spraying operations carried out by the state were done *intra vires*. After that I shall consider the question whether these operations involve a violation of any basic rights of the Bedouin citizens. Finally I shall examine the question whether this violation was constitutional.

The normative framework — the question of authority

9. It is a basic rule of administrative law and our legal system that administrative authorities may not act without being authorized to do so in statute or in accordance with statute. Administrative authorities only exist by virtue of statute and they have no right or authority unless it is provided in statute. Therefore every administrative act that is carried out by an authority should have direct or indirect, express or implied authorization in statute (I. Zamir, *Administrative Authority* (vol. 1, 1996), at pp. 49-54; B. Bracha, *Administrative Law* (vol. 1, 1997), at p. 35; B. Bracha, 'Constitutional Human Rights and Administrative Law,' *Izhak Zamir Book — On Law, Government and Society* (Y. Dotan and A. Bendor, eds., 2005) 161, at p. 167; HCJ 36/51 *Het v. Haifa Municipal Council* [1], at p. 1557).

10. The petitioners' position is that the spraying operations were carried out by the state *ultra vires*. They argue that under the Plant Protection Law, 5716-1956 (hereafter: the Plant Protection Law), the authority to carry out pest control operations on plants is given to the Minister of Agriculture and not to the first respondent or anyone acting on its behalf, and it is given for health, sanitation and environmental purposes only. In other words, the power is given solely in order to protect the health of human beings and the environment against potential hazards from the plants themselves. Since this is the only law that regulates the use of herbicides, they claim that no use may be made of this measure for any purpose other than the purposes that underlie the power, including for enforcing the alleged right of the state in the land. According to them, the lack of authority to carry out the spraying operations also derives from r. 12 of the Plant Protection (Use of Herbicides) Regulations, 5729-1969 (hereafter: the Plant Protection Regulations), according to which no approval may be given for spraying herbicides from the air where it may harm crops near the field being treated, as in our case. The petitioners also claim that in the spraying operations the first respondent is committing the criminal offences set out in ss. 336 and 452 of the Penal Law, 5737-1977, which concern the use of a dangerous poison and deliberate damage.

11. The respondents claim in reply that the source of authority for carrying out the aforesaid spraying operations is not in the Plant Protection Law but in the provisions of law that permit the owner of land or someone who has lawful possession thereof to take action to remove an incursion onto his property. In particular the respondents mention the provisions set out in chapter 3 (article 2) and chapter 4 of the Land Law, 5729-1969 (hereafter: the Land Law) and the provisions set out in the Public Land (Eviction of Squatters) Law, 5741-1981 (hereafter: the Public Law (Eviction of Squatters) Law). With regard to land that is used as firing ranges, it is argued that the state has power to remove squatters under the Emergency Defence Regulations, 1945, by virtue of which the areas were declared closed military zones.

12. I will at once say that on this issue, unlike my colleague, I agree with the respondents' position. Israeli legislation gives a landowner and someone who has lawful possession of land various legal tools to contend with an incursion onto the land. Some of the tools apply equally to all owners or persons who have lawful possession of land, including the state, and some apply only to the state. In our case the relevant provisions are those that permit the state, as the owner of land and by virtue of its lawful possession of the land, to act to enforce the law itself in order to contend with incursions onto its land. I shall review the relevant provisions in brief.

The arrangements in the Land Law

13. According to s. 18(b) of the Land Law, a person who has lawful possession of land may exercise reasonable force in order to expel a person who has entered the land unlawfully, on condition that the action is carried out within thirty days of the date of the incursion. On the considerations underlying this permission, Justice Procaccia said the following:

> 'Although the Land Law clearly prefers a resolution of disputes by legal means, it recognizes the need, within narrow limits, to strike a proper balance between the recognition of a person's natural need to take action himself to prevent interference by others to his property and the general public interest of limiting the use of force as much as possible in order to protect public safety. This balance characterizes the fact that the law recognizes a person's human needs, which include the need to react naturally and immediately to a loss of possession of a property that occurs very soon after the act of interference. But this is countered by the recognition that resorting to self-help

> can be done in very limited cases only' (LCA 4311/00 *State of Israel v. Ben-Simhon* [2], at p. 839).

The permission to adopt the measure of resorting to self-help to expel a squatter under s. 18 is limited to someone who actually had lawful possession of the land and was deprived of possession. Someone who has unlawful possession of land and someone who is entitled to possession of land but has not had actual possession of it may not resort to self-help under the section in order to take back possession; he needs to apply to the courts to obtain relief (*State of Israel v. Ben-Simhon* [2], *ibid.*). In addition, the use of this measure is limited to a situation where the fact of the incursion has a high degree of certainty, and it is only intended to allow a response to a 'recent incursion,' which is an incursion that took place no more than thirty days before the action is carried out (see for example HCJ 477/81 *Ben-Yisrael v. Chief Commissioner of Police* [3], at p. 353; *State of Israel v. Ben-Simhon* [2], at pp. 839, 846-848). As we have said, the permission to use force is limited to reasonable force only.

14. Whereas s. 18 relates to a situation in which '*a person* occupies land unlawfully,' the Land Law recognizes that an unlawful incursion onto land may also be carried out by way of building or planting on someone else's property. In this situation, s. 21 of the Land Law gives the landowner — whether he actually has possession of the land or not — the possibility of choosing between leaving the fixtures in place or removing them. If the landowner chooses to remove the fixtures, he is entitled to demand that the person who built them unlawfully should remove them from the land and return the land to its original state, and if that person does not do this within a reasonable time, the landowner may *remove them himself*, at the expense of the person who built them. We can therefore see that this section also gives the landowner permission to resort to self-help to protect his right in the land, without applying to the law courts to receive relief (Y. Weisman, *Property Law (General Part)* (1993), at pp. 157-158; according to Prof. Weisman, we are speaking of resorting to self-help in two respects: the first derives from the ability to remove the fixtures, and the second derives from the ability to recover the expenses of the removal by realizing the removed fixtures; see also M. Deutch, 'The Law of Building and Planting on the Land of Others according to the New Civil Codex,' *Land* D/2 17 (March 2005), at p. 19). It should also be noted that the right of the landowner to make the aforesaid choice is limited, according to s. 22 of the law, to a period of six months from the date on which he receives a written demand from the builder to choose one of the alternatives. Should the landowner not expressly choose one of the

options, he is regarded as having chosen to keep the fixtures, and therefore he can no longer demand that the builder should remove them (see Weisman, *Property Law (General Part)*, at p. 159).

The arrangement in the Public Land (Eviction of Squatters) Law

15. The permission in s. 18(b) of the Land Law to resort to self-help is given, as we have said, to every person who has lawful possession of land, whereas the permission to resort to self-help under s. 21 of the Land Law is given to every landowner. The state, as a landowner and as a lawful occupier of land, may exercise these powers like any private individual. Notwithstanding, the widespread phenomenon of seizing possession of public land has led over the years to the development of an approach that regards the general arrangements that we have described for removing squatters as insufficient where public land is concerned. The inability of the general law to deal with the realistic needs concerning public land are reflected in two main ways: first, in many open areas that are owned by the state, the state does not realize its right of ownership by actually taking possession of the land, and therefore it is not entitled to resort to self-help under s. 18 of the Land Law. Second, when we are speaking of public land, a long period of time may sometimes pass between the date of the incursion and the date on which the fact of the incursion becomes known to the landowner, and therefore in this respect also it is difficult with regard to public land to satisfy the requirement in s. 18 of the Land Law that the eviction operation should be a response to a 'recent incursion' (*State of Israel v. Ben-Simhon* [2], at pp. 841-842; see also the explanatory notes to the draft Public Land (Eviction of Squatters) Law, 5741-1980, *Draft Laws* 1484, 20; Weisman, *Property Law (General Part)*, at pp. 270-271). The Public Land (Eviction of Squatters) Law, which was enacted in 1981, is designed to contend with these problems. It applies to Israel land as defined in the Basic Law: Israel Land, and to the land of local authorities:

> '… Special administrative needs that derive from the extent and location of state land and the need to protect it from incursions and thereby to protect an important public interest are what dictated the need for a significant broadening of the ability to act to remove squatters without going through the courts. It may be assumed that these measures were also needed in order to give the state an effective means of acting against mass incursions of large groups of people, without which it would be necessary to file individual legal actions against each member of the group,

> something that it would be very difficult to do. The protection of public land against incursions of trespassers and giving the public authority an effective means of dealing with this phenomenon are what led to the enactment of the law and giving the powers to issue evictions orders thereunder' (*State of Israel v. Ben-Simhon* [2], at p. 842).

16. The Public Land (Eviction of Squatters) Law significantly extended the right of the state to protect its land by resorting to self-help (*State of Israel v. Ben-Simhon* [2], at p. 840). Originally the law gave the competent authority the power to make an eviction order against a squatter, which demanded that the squatter should remove himself from the public land and vacate it, and the status of this order was similar to the status of a judgment which can be implemented by means of the Enforcement Office authorities. But as the years passed, it transpired that even this power was insufficient. The enforcement authorities encountered significant difficulties in contending with the problem of incursions onto public land, and once again it was necessary to change the existing legislation in order to give the authorities improved tools for dealing with incursions and squatters (the explanatory notes to the draft Public Land (Eviction of Squatters) Law (Amendment), 5763-2002, *Government Draft Laws* 14, 169). Ultimately this need led in 2005 to a wide-ranging amendment of the Public Land (Eviction of Squatters) Law, which included, *inter alia*, the following changes:

First, the provision in the law that provided that an order made under the law had the same status as a judgment of a court was repealed. Instead s. 5(a) of the law now provides that should the date for the eviction or for vacating the land provided in the order pass and its provisions are not implemented by the occupier, the director is competent to instruct the supervisor to carry out the order, provided that more than sixty days have not passed from the date stipulated in the order for the eviction or for vacating the land. The instruction to carry out the order is conditional upon approval from the director of the supervision department at the Israel Land Administration, in the case of Israel Land, and upon the approval of the legal adviser of the local authority in the case of land belonging to that authority. Section 5(c) is particularly relevant to our case; it provides that in order to carry out the order the supervisor may enter the public land to which the order applies, remove from it any property and persons and take all the steps required to ensure the implementation and performance of the order. When necessary, the supervisor may even use reasonable force and receive appropriate help from the police for this purpose.

Second, the times within which the directors under the law are entitled to issue an order for an eviction and for vacating public land were extended. Whereas in the past the director was entitled to issue an order within three months of the date on which it became clear to him that the occupation was unlawful, and no later than twelve months from the date on which the land became occupied, under s. 4(a) of the law as it now stands the director may make such an order within six months from the date on which it became clear to him that the occupation was unlawful, and no later than thirty-six months from the date on which the land became occupied.

Third, a definition of the term 'vacating public land' was added to the law; this clarifies that the term includes vacating the land 'of every person, movable property, animals, everything built and planted on it, and everything else that is permanently affixed to it' (s. 1 of the law; on the Public Land (Eviction of Squatters) Law before and after the amendment, see A. Caine, 'The Public Land (Eviction of Squatters) Law — Between Resorting to Self-Help and Administrative Enforcement,' *Land* D/5 24 (September 2005)). The measures available to the competent authority for the purpose of removing fixtures from public land were also given greater detail and clarification in the Public Land (Eviction of Squatters) (Implementation of Order) Regulations, 5765-2005, which were enacted in the same year by the Minister of Justice at that time by virtue of her authority under s. 5(e) of the Public Land (Eviction of Squatters) Law. Regulation 4(a) of these regulations provides, with regard to fixtures that are found on the land when implementing the order that was made or at a later date, if they are not removed by the occupier in accordance with the order, that the supervisor may 'remove them, destroy them, uproot them or do any other act in order to return the land, in so far as possible, to its original state prior to the occupation.' It need not be said that 'fixtures' in this context also include plants or other agricultural crops that were sown or planted on the land.

17. As we have said, in this petition we are concerned with incursions onto land that are carried out by sowing and planting agricultural crops on land that the state claims belongs to it. The first question that we are called upon to decide is whether the measure of spraying the crops from the air, which was adopted by the state in order to remove the crops, was done *intra vires*. In order to answer this question, we need to determine whether the powers given to the state in order to prevent incursions onto its land, which derive from the provisions of statute that we have described, also include a power to carry out spraying from the air.

An examination of the relevant provisions of statute (ss. 18 and 21 of the Land Law and the aforesaid sections of the Public Land (Eviction of Squatters) Law) shows that the power to remove squatters is described by using various terms that all have the same meaning: according to s. 18 of the Land Law, the lawful occupier may 'expel' from land anyone who has seized possession of it; according to s. 21 of the Land Law the owner of the land may 'remove' from land any building or planting that was done unlawfully; and according to s. 5 of the Public Land (Eviction of Squatters) Law and the regulations enacted thereunder the competent authority is entitled to clear public land of fixtures, including plants, by *destroying or uprooting them or by doing any other act in order to return the land to its original state*. The authority is also entitled under this law to take all the steps that are required in order to ensure the implementation and performance of the order to remove the incursion. These provisions contain no express mention of the possibility of removing or evicting an incursion that was carried out by way of sowing or planting agricultural crops by destroying them by spraying them from the air. Should we infer from this that the aforesaid spraying operations were done *ultra vires*? I think not.

The question whether, when exercising a power granted to it by statute, an authority may make use of one measure or another, like the question whether a statute gives an authority a power that is not mentioned expressly therein, is mainly a question of interpretation of the statute (cf. Zamir, *Administrative Authority*, *supra*, at p. 256). This interpretation, like any interpretation, begins with the language of the law, continues with its purpose and ends — when applying the purpose to the text raises more than one interpretive possibility — with judicial discretion (A. Barak, *Legal Interpretation* (vol. 2, 'Statutory Interpretation,' 1993), at pp. 79-81). As a rule, it is obviously desirable that the powers of the administrative authority should be determined in statute expressly and specifically. But on some occasions the power of the authority is defined in relatively general terms or without the statute expressly stating the possible ways of exercising it. This kind of drafting is intended to allow the administrative authority to exercise its functions effectively (cf. Zamir, *Administrative Authority*, *supra*, at p. 257). It gives it the possibility of examining and assessing various courses of action and exercising its discretion in choosing the most appropriate one. Often the choice of a certain course of action is a result of changes in the realities and the development of needs that were not originally foreseen by the legislature. Sometimes it is a result of the conclusion that a certain measure that was

adopted in the past has not realized its purpose as hoped and therefore it is necessary to adopt another measure in its stead.

18. In LCrimA 5584/03 *Pinto v. Haifa Municipality* [4] the court considered a question somewhat similar to the one before us. That case concerned a couple who carried out building works, without a permit, to take advantage of a storage area that was situated under their apartment. In response to these building works the chairman of the Local Planning and Building Committee made an administrative demolition order with regard to what had been built. In an application for leave to appeal that was filed by the couple, this court considered whether, in view of the fact that the chairman of the committee was competent to order the *demolition, dismantling* or *removal* of a structure that was built unlawfully, was he also entitled to order the performance of these operations by way of *building* (for example, by sealing up an entrance that had been made in a wall illegally), where this was required in view of the character of the illegal building. In order to decide this question, the court was required to interpret the provisions of s. 238A of the Planning and Building Law, 5725-1965, by virtue of which the demolition order was made. It was held (*per* Justice M. Cheshin) that the chairman of the committee was competent to make an administrative order that the building should be returned to its original state both by means of demolition — according to the narrow meaning of the concept — and by means of building. In examining the language of the statute Justice Cheshin said the following:

> 'In everyday language, the words demolish, dismantle and remove have the meaning that the applicants claim, namely a meaning of destruction and demolition. But there are two main reasons for rejecting the applicants' claim that the scope of these concepts should be limited in this context solely to destruction and demolition. *First*, these verbs are intended to describe the final result of an order of the competent authority, i.e., that the unlawful building will be destroyed, dismantled or removed, but the aforesaid verbs do not exhaust the spectrum of actions that can be carried out in order to arrive at the intended result. The concern of the law is that at the end of the process the illegal building will disappear as if it had never happened, and this is the result that the legislature ordered. The law is not concerned with the manner of the demolition' (*Pinto v. Haifa Municipality* [4], at p. 584).

I am of the opinion that this approach is also correct in our case. As we have said, the relevant provisions of the statute speak in relatively general terms and do not expressly and unambiguously define the courses of action that the landowner is entitled to adopt in order to exercise his authority. Notwithstanding, an examination of the language and purpose of the provisions of the statute shows, in my opinion, that the legislation did not intend specifically to rule out the possibility of spraying. As in *Pinto v. Haifa Municipality* [4], so too in our case the provisions of statute are directed towards describing the final result of the operation, i.e., the removal of the incursion, and not necessarily the variety of operations that may be carried out to arrive at this result. The purpose of the provisions of the statute is to give the landowner or the lawful occupier of the land an effective means of contending with the incursion onto his property, which will allow him to frustrate the incursion and to return the land to its original state, subject to the restrictions of the statute that are intended to ensure that this measure is adopted only in the appropriate cases. Even though spraying is not mentioned in the statute expressly, I am of the opinion that as a part of the state's power to remove and evict incursions onto its land, which includes the power to demolish and uproot fixtures that were attached to it, it may also destroy crops that were sown or planted on it unlawfully by way of spraying from the air, provided that this is done strictly in accordance with the procedures that are required by the use of this measure.

19. It should be emphasized, as we will make clear below, that in my opinion there can be no real dispute that the use of pesticides may involve risks, and for this reason it requires clear instructions and significant and satisfactory supervision. We can also not ignore the fact that originally this measure was intended for purposes other than the ones for which the first respondent made use of it. But I do not think that the fact that the Plant Protection Law gives the Minister of Agriculture power to carry out pest control operations to prevent the spread of diseases in plants completely rules out the possibility that this measure may also be used for other purposes by other authorities — subject, as we have said, to compliance with the conditions required by the actual use of pesticides. An interpretation of the kind that the petitioners proposed is also not supported by the explanatory notes to the draft Plant Protection Law (Amendment), 5726-1965, which introduced the power of the Minister of Agriculture to carry out operations to destroy diseases in plants (see the explanatory noted to the draft Plant Protection Law (Amendment), 5726-1965, *Government Draft Laws* 678, 63). We should also point out that r. 12 of the Plant Protection Regulations, on

which the petitioners relied in support of their claim that the spraying operations were carried out unlawfully, is totally irrelevant to our case, since the pesticide that the first respondent used (Roundup) does not appear on the list of herbicides to which the regulations apply and for which spraying from the air is a use that requires approval under r. 5 (see also r. 1 of the Plant Protection Regulations, which lists the preparations that are considered 'herbicides').

20. In summary of what we have said so far, on the first question that we are required to decide — the question of the actual authority of the first respondent to carry out spraying operations from the air to destroy agricultural crops that were sown or planted on state land unlawfully — I have not found that the operations were carried out *ultra vires*. According to my approach, the first respondent and those acting on its behalf had the authority to carry out these operations, and this is enshrined in the provisions of statute that were described, and especially in the arrangement provided in the Public Land (Eviction of Squatters) Law and the regulations enacted thereunder. Since this is my conclusion, I shall turn to consider the question whether — as the petitioners allege — these operations involve a violation of human rights.

The question of whether there is a violation of basic rights

21. According to the petitioners, even if it is possible to say that the first respondent was authorized to carry out the spraying operations, the use of this measure should not be permitted because of the risk that it presents to human beings and animals that are exposed to the spray substance. According to them, spraying the Roundup substance, which the state used, involves a real risk to human beings who are exposed to the spraying: it is alleged that on an immediate basis the spraying causes increased tension, skin and eye irritations, breathing difficulties, dizziness, nausea and fainting. In the long term the spray substance may cause congenital deformities in children whose parents were exposed to the spray substance, fertility problems, miscarriages and an increased likelihood of contracting cancer. In addition, the spray is also dangerous to animals that are exposed to it, and these constitute a significant part of the food and livelihood resources for the citizens whose crops are being sprayed. According to the petitioners, even though the spraying is directed at agricultural crops, in many cases human beings are sprayed as well, without any prior warning, without any explanation as to the danger involved in exposure to the spray substance and without the relevant authorities having examined the repercussions of spraying human beings.

According to the petitioners, the impression that this gives is that the respondents do not regard the Bedouin citizens as entitled to minimal human treatment, and the message that this conveys is degrading, humiliating and violates their dignity. In view of all this, the petitioners argue that the spraying operations clearly violate the constitutional rights of the Bedouin citizens to life, dignity and health, and this violation does not satisfy the conditions of the limitations clause prescribed in s. 8 of the Basic Law: Human Dignity and Liberty. It is an extremely unreasonable and disproportionate act and therefore the state should not, in their opinion, be allowed to use it.

22. The respondents reject the petitioners' position utterly and argue that there is no basis for their contention that the spraying operations endanger the life and health of human beings and animals in the sprayed area. *First*, the respondents emphasize that the spraying operations are not directed at human beings, but against incursions that are carried out by way of agricultural cultivation of land. The sole purpose of the spraying is to cause the plants and seedlings on the land where the incursions have taken place to wither, and the spraying is carried out solely on land where incursions have taken place on a large scale and the land is at a sufficient distance from residential areas. *Second*, the respondents claim that according to the opinion of the chief toxicologist of the Ministry of Health, the spraying operations that are carried out by the state do not give rise to any health danger to human beings at all and there is no indication that any harm to health has been caused as a result. The proof of this, according to the respondents, is that since the use of this measure began, no legal proceeding has been filed in which it is alleged that there has been any medical injury or loss of health as a result of the spraying, and therefore there is no judicial finding to this effect. *In addition*, the respondents say that spraying agricultural crops from the air is done throughout Israel on a regular basis, and they claim in particular that the Roundup substance that was used is the most commonly used herbicide in the world. In view of all this, the respondents' position is that the spraying operations from the air do not violate any human rights of the Bedouin citizens.

23. Examining the question whether the spraying operations are capable of violating any rights of the Bedouin citizens in the Negev requires us first to consider the question whether these operations involve any risk. With regard to this question the parties presented us with three professional opinions. The petitioner submitted an opinion of Dr Eliahu Richter, the head of the Environmental and Occupational Health Department at the School of

Public Health and Community Medicine at the Hebrew University, and an opinion of Dr Ahmad Yazbak, who has a doctorate from the Chemistry Faculty at the Technion Institute in Haifa and is an expert in toxic substances. In both of these opinions it is alleged that the spraying that was carried out involves a significant risk to the health of human beings who are exposed to it. In addition to this, the petitioners rely on the user instructions and the warnings that appear on the spray substance container, which also indicate the risk presented by the substance. The respondents, on the other hand, filed the opinion of the chief toxicologist of the Ministry of Health (the Department of Environmental Health), Prof. Gary Winston, who is of the opinion that there is no merit to the claim of any health risk to human beings that is involved in the spraying as it was carried out. Each of the three opinions relies on various works of scientific research that have been carried out on this issue.

Deciding between the opinions

24. Professional disagreements frequently occur in cases where questions of assessment and expertise arise, and therefore this is not the first time and it will certainly not be the last time that this court is required to decide between positions that are based on conflicting professional opinions on different areas of expertise (see, for example, HCJ 7611/01 *Maccabi Mutual Insurance against Disease Cooperative Society Ltd v. Minister of Finance* [5], at p. 2691).

Whenever a decision is required between the position of the responsible authority, which relies on experts that it has consulted, and the position of another party that also relies on the opinion of experts, a clear and unambiguous rule has been formulated in our case law over the years, according to which the court will tend not to intervene in a decision of the authority that is based as aforesaid on a professional opinion, even if there are opinions that present conflicting conclusions (see, for example, HCJ 2324/91 *Association for Civil Rights in Israel v. National Planning and Building Council* [6], at pp. 687-689; HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [7], at pp. 21-23 and the references cited there). This rule is based on the recognition that where there is a genuine and real dispute between experts in what are clearly fields of professional expertise, the court is unable to research the issue on its own and to arrive at an independent conclusion on the matter (HCJ 492/79 *A v. Ministry of Defence* [8], at p. 713). It follows that the court will usually not intervene in questions that are clearly a matter of professional expertise unless the decision of the competent

authorities reveals a clear and extreme departure from the margin of reasonableness. But where there is no reason or justification for preferring another opinion over the opinion of the competent authorities, this court will not replace the discretion of the authority with its own discretion nor will it intervene in its decision (see, for example, HCJ 297/82 *Berger v. Minister of Interior* [9], at p. 55 (*per* Vice-President Shamgar in a minority opinion); HCJ 624/06 *Ron-Gal Transport Ltd v. Minister of Education* [10]; HCJ 528/88 *Avitan v. Israel Land Administration* [11], at p. 305). The remarks of Justice Witkon in another well-known case are pertinent in this context:

> 'It is well known that the courts are frequently called upon to decide questions requiring special expertise — an expertise that is usually not within the scope of judicial knowledge. We are presented with the opinions of respected experts, and these contradict each other in every particular. This sometimes happens in cases that raise medical questions, and also, for example, in every case of a breach of patent that gives rise to problems in the fields of chemistry, physics and the other natural sciences. In security matters, when the petitioner relies on an opinion of an expert on security matters, whereas the respondent relies on the opinion of someone who is both an expert and also the person responsible for security in the state, it is natural that we give special weight to the opinion of the latter. As Vice-President Landau said in HCJ 258/79 *Amira v. Minister of Defence*: "In such a dispute on professional military matters, where the court does not have any established knowledge of its own, we rely on a presumption that the professional assessments of the deponent on behalf of the respondent, who speaks for those people who are actually in charge of maintaining security in the occupied territories and within the Green Line, are genuine ones"' (HCJ 390/79 *Dawikat v. Government of Israel* [12], at p. 25).

This is the position in security matters, and it is also the position in the various fields of science, in planning and building matters and other areas of expertise, and *prima facie* it is also the case in this petition. When the respondents rely on the opinion of the chief toxicologist of the Ministry of Health as someone who has the responsibility, on behalf of the administrative authority, of ensuring the health of the inhabitants of the state in the field of poisons, the presumption is that his position was reached after examining the issue on its merits and it is well founded. As the court has said:

> 'Even if there are conflicting opinions of respected experts, the court will presume that the public authority has examined the matter on its merits and will respect its decision since it is the authority responsible for making the decision' (HCJ 492/79 *A v. Ministry of Defence* [8]).

25. However, in that case the court held — immediately after the remarks cited above — that 'Even in this matter no firm guidelines should be laid down; there is no absolute rule, and each case should be considered on its merits according to its special circumstances.' Indeed, in the circumstances of the case before us, I am of the opinion that there is a basis for determining that this presumption should not be given the validity and weight that it is usually given.

After the respondents filed the opinion in support of their position, the petitioners claimed that parts of the opinion were copied from a public relations statement of the Monsanto Company, which manufactures the spray substance that was used, without saying that this statement was a source for the opinion. Moreover, ten of the sixteen references that appear in the opinion are taken from the statement of the manufacturing company. In reply to this claim, the respondents argued that although the scientific material that was published by the Monsanto Company with regard to the Roundup preparation and its components was used as a starting point for the examination made by their toxicologist, giving significant weight to scientific information that has been assembled by manufacturers during the application process for the approvals required for registration and distribution of preparations from the regulatory authorities in the various countries is an accepted practice, since in order to obtain approvals as aforesaid, the manufacturers are required to comply with very strict criteria, and for this purpose they hire reputable experts to prepare research on which the registration applications are based. Articles that summarize the examination findings of those persons are also published on a regular basis in scientific journals. The respondents also argue that the chief toxicologist did not accept what was stated as holy writ, but he examined the references on which those researchers based their articles, as well as additional references to the spray preparation and its components in scientific articles and publications of regulatory authorities and international health organizations.

In my opinion, the state's reply in this regard is unsatisfactory. I do not of course regard it as improper to avail oneself of information published by the manufacturing company. But this cannot explain the fact that this information

was cited — almost word for word — in the opinion filed on behalf of the state, without its source being mentioned as one of the sources that were used when writing the opinion. This fact, together with the fact that more than half of the references cited in the opinion are taken from the synopsis published by the manufacturing company, gives rise to questions concerning the thoroughness of the examination that was made, and in any case it gives rise to a doubt as to whether we can accept the declaration of the state's toxicologist that the assessment contained in his opinion is based on the most up-to-date and best literature and information in his possession. As we have said, the premise for the aforementioned presumption in favour of the authority's position is the assumption that the state authorities make their decisions on the basis of a thorough and comprehensive examination of the professional issues in their sphere of responsibility. It is difficult to persuade ourselves that their conduct in this case supports that assumption.

In these circumstances, I think that we cannot make any *a priori* assumption in favour of the respondents' position, and therefore the opinion filed by them should be regarded as having the same status as the opinions filed by the petitioners.

26. After reading and rereading the three opinions, as well as some of the references on which they rely, I have not been persuaded that it is possible to say that a coincidental exposure to the spray substance involves a real risk or a concrete potential risk to human life, as the petitioners claim. The research on which the petitioners rely in this regard — and especially the research of Garry *et al.* and the research of Hardell & Eriksson, from which it appears *prima facie* that there is a possibility that there is a link between exposure to the Roundup spray substance and a certain type of cancer and that exposure to this spray substance may lead to fertility problems and to deformities in children whose parents were exposed to the spray substance — is only preliminary research, and even according to the petitioners' experts additional research is required in order to authenticate and support the findings in them. We can also not ignore the fact that the position presented in those research papers is exceptional in the scientific world in that it is inconsistent with the position of the regulatory bodies of various countries around the world, such as Health Canada and the United States Environmental Protection Agency, and international health organizations such as the World Health Organization and the European Commission, which have researched the issue and found that the aforesaid spray substance does not pose a health risk to human beings. Thus, for example, the United States

Environmental Protection Agency states in a report concerning the substance glyphosate, which is the active component of the Roundup preparation, that:

> 'Glyphosate is of relatively low oral and dermal acute toxicity… Several chronic toxicity / carcinogenicity studies using rats, mice and beagle dogs resulted in no effects based on the parameters examined, or resulted in findings that glyphosate was not carcinogenic in the study. In June 1991, EPA [the Environmental Protection Agency] classified glyphosate as a Group E oncogen — one that shows evidence of non-carcinogenicity for humans — based on the lack of convincing evidence of carcinogenicity in adequate studies.
>
> …
>
> … Glyphosate does not cause mutations.
>
> …
>
> EPA's worst case risk assessment of glyphosate's many registered food uses concludes that human dietary exposure and risk are minimal. Existing and proposed tolerance have been reassessed, and no significant changes are needed to protect the public.
>
> Exposure to workers and other applicators generally is not expected to pose undue risks, due to glyphosate's low acute toxicity…
>
> …
>
> The use of currently registered pesticide products containing the isopropylamine and sodium salts of glyphosate in accordance with the labeling specified in this RED [Re-registration Eligibility Decision] will not pose unreasonable risks or adverse effects to humans or the environment. Therefore, all uses of these products are eligible for reregistration' (U.S. Environmental Protection Agency Re-Registration Eligibility Decision (RED): Glyphosate (U.S. Environmental Protection Agency, Office of Prevention, Pesticides and Toxic Substances, Washington D.C., 1993), at pp. 2, 4 & 6).

Similarly the World Health Organization determines in its report on the substance glysophate, *inter alia*, that:

> 'In animals, glyphosate has very low acute toxicity by the oral and dermal administration routes…

> Animal studies show that glyphosate is not carcinogenic, mutagenic or teratogenic. Reproductive effects were only seen at dose levels producing maternal toxicity.
>
> …
>
> Glyphosate and its concentrated formulations produce moderate to severe eye irritation, but only slight skin irritation. Neither glyphosate nor tested formulations induce sensitization' (World Health Organization Environmental Health Criteria 159: Glyphosate (World Health Organization, Geneva, Switzerland, 1994), at p. 82).

27. Notwithstanding all this, I have not been persuaded that it can be determined that the spraying operations, as carried out by the state, have absolutely no harmful potential. In my opinion, it is sufficient that exposure to the spray substance can cause skin and eye irritation, breathing difficulties (even if minor), or feelings of nausea or dizziness in order to determine that the spray substance may at least result in harm to health, and in extreme cases to the physical integrity of those who are exposed to it. This conclusion is supported by the opinion filed by the petitioners and the affidavits that they filed (see petitioners' exhibit 2) and it can also be seen from the user instructions and warnings that appear on the spray substance container that was used. It will be recalled that these instructions say, *inter alia*, that:

> 'Roundup may irritate the skin and eyes… When spraying wear clothes that cover all parts of the body… After spraying, wash all the parts of the body that came into contact with the substance with water and soap… In the event of contact with skin, wash well with water. In the event that some substance was splashed into the eyes, rinse for 15 minutes with flowing water and have a medical check' (see respondents' exhibit 4).

28. In my opinion, in addition to the concern of harm to health there is also a violation of the dignity of the Bedouin citizens. Even without accepting the petitioners' claims in full, I am of the opinion that it can be determined that there is at least a doubt — contrary to the respondents' argument — that the spraying operations that were carried out were not preceded on each occasion by warnings to the inhabitants whose crops were sprayed, and in any case it would appear that the information did not always reach them; perhaps not all the sprayings were carried out in areas sufficiently distance from inhabited areas; and perhaps, despite the precautions taken, in some cases the Bedouin citizens, including children,

were exposed to the spray substance, even if it was a minor and temporary exposure. In this context I should point out that in affidavits filed by the petitioners, which in my opinion were not challenged in this respect by the respondents, it was alleged that at least some of the spraying operations that were carried out were not preceded by warnings to the inhabitants and only after the spraying occurred were signs placed on the site to give notice that the area had been sprayed with pesticide (see petitioners' exhibit 4). It can also be seen that at least some of the sprayings were carried out in areas near the homes of the persons cultivating the crops, areas in which the inhabitants also tend their sheep (see petitioners' exhibit 9). Given the fact that some of the Bedouins whose crops were sprayed live close to those agricultural areas, I doubt whether in practice those Bedouins who were exposed to the spraying on the occasions when it was carried out had any real possibility of avoiding it. No matter how minor or temporary this exposure was, carrying out spraying operations, without taking care to give an advance warning to the inhabitants of the intention to spray their crops and without giving an explanation concerning the risks that may be caused as a result of exposure to the substance and concerning the precautions that should be taken in the areas that were sprayed, is improper and is unworthy of the state authorities, and it caused deep feelings of degradation and humiliation among the Bedouin citizens. Even if we are speaking of citizens who are lawbreakers, the state has a duty not to endanger them by its actions, to protect their welfare and to treat them decently. I have not been persuaded that the state succeeded in discharging this duty in its actions that are under review in the present petition. The way in which the spraying operations were carried out not only harmed the health of the Bedouin citizens, but also injured their dignity.

29. One might ask how we can determine that this specific spraying, as opposed to other spraying operations, involves a violation of dignity and physical integrity when both in Israel and around the world frequent use is made of the spray substance that the state used in the case before us. I would answer this by saying that in my opinion there is a major difference between the two: spraying that is carried out on a regular basis for agricultural purposes is carried out by the farmers themselves — who are the *de facto* occupiers and cultivators of the land — or by another administrative authority that carries it out *in coordination with them*. When the spraying is done to further the interests of the farmer and in coordination with him, no violation of dignity can occur. In addition, there is a presumption that the farmer takes all the necessary steps in order to protect himself or anyone acting on his behalf from being harmed. In the case before us, however, the

spraying was carried out without the cooperation of the persons who are occupying and using the land, even if they are doing so illegally, and therefore the concern that they or even innocent bystanders will be unintentionally exposed to the spraying is much greater. This increased risk, and the fact that there remains a concern that the spraying was carried out without taking sufficient care to give a prior warning to the inhabitants and to prevent their possible exposure to the spray substance, are what give rise in my opinion, in the specific circumstances of the case before us, to the risk of harm to the health of the Bedouin citizens, and in extreme cases to the concern, even if it is a remote one, of harm to their physical integrity, as well as a constitutional violation of the dignity.

My conclusion is therefore that the spraying operations that were carried out by the state, in the manner that they were carried out, violated the constitutional rights of the Bedouin citizens to physical integrity, health and dignity. What is the significance of this violation?

Constitutionality of the violation

30. It is well known that the fact that a law or an executive action violates a human right does not automatically lead to the conclusion that this violation is unlawful. Sometimes the state violates human rights, but the violation remains constitutional because it satisfies the requirements of the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty (see, for example, HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13], at p. 1765 {507-508}, and the references cited there). We should therefore examine the violation in accordance with the tests in the limitations clause, which provides the following:

> 'Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose and is not excessive, or in accordance with such a law by virtue of an express authorization therein.'

Much has been written about the importance of the limitations clause and about its role in striking a balance between the needs of society and the rights of the individual:

> 'This test reflects a balance between basic rights and other important values. It arises from a reality in which there are no absolute truths and no absolute values. It is built on a perspective that regards both human rights and social values as

> relative. It is based on the assumption that achieving harmony between the rights of the individual and the needs of the public requires a compromise, and that the nucleus of the compromise is what underlies the harmonious arrangement between all the rights of the individual and the values of society. It is a prerequisite for a civilized society and proper constitutional government' (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13], at p. 1884 {689}).

31. As stated above, the limitations clause sets out four conditions that, when they are all satisfied, will permit a lawful violation of human rights enshrined in the Basic Law. The conditions are: that there is authority in statute for the violation, that the violation befits the values of the state; that the violating norm has a proper purpose; and that the violation is not excessive. The petitioners' claim is that the first, third and fourth conditions are not satisfied.

On the question of authorization, I have already held at the beginning of my remarks that in my opinion the law can be interpreted in a manner that recognizes the authority of the state to carry out the spraying operations that are under discussion and therefore there is no need for me to repeat this. With regard to the condition of befitting the values of the state, the petitioners raised no argument, and therefore the scope of the dispute that still requires a decision is limited to whether the third condition, which concerns the existence of a proper purpose that underlies the violation, and the fourth condition, which concerns the proportionality of the violation, are satisfied.

For a proper purpose?

32. As we have said, according to the third condition that is laid down in the limitations clause, the violation of a constitutional right should be 'for a proper purpose.' The meaning of this expression with regard to a decision of an administrative authority is different from its meaning with regard to a statute: the purpose of a statute will be deemed proper if it serves a public purpose whose realization may justify a violation of human rights (see for example HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [14]). But with regard to an administrative decision, we first should examine the question whether the purpose of the decision falls within the scope of the general and particular purposes of the law that provides the authority (HCJ 4541/94 *Miller v. Minister of Defence* [15], at p. 140 {234}, and the references cited there). Notwithstanding the petitioners' position that the spraying operations were carried out for an improper purpose, I agree in this matter with the

position of the respondents, and there is no doubt in my mind that the purpose underlying the operations under consideration in this petition is a very proper one.

33. The State of Israel is a small country. Its territory is limited, and its land is a very valuable resource. Public land in particular constitutes an important national asset, since it is an essential basis for future development of the state and society in the fields of urban planning, industry, agriculture, tourism, etc.. The first respondent, which is responsible under the law for retaining possession of state land and managing it, has the duty to protect it so that it can be used to further various national and other goals, according to the land policy that is determined from time to time by the government and by the Israel Land Council. The supreme importance of state land was discussed by Justice Or:

> 'Land is a unique asset among state assets. It is hard to exaggerate its importance to society and the state. If the nation and its cultural enterprise are the "soul" of the people, then its land is its "body." On the basis of land the individual and society conduct their whole lives:
>
> > "Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal, or precious stones. We live on land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence, and its distribution and use are of vital importance" (S.R. Simpson, *Land Law and Registration* (Cambridge, 1976), at p. 3).
>
> … Land is an unparalleled vital resource and it has great value. It is of especially great importance in a country like Israel, where the territory is small, the population density is high and there is a policy of absorbing immigration. It is impossible to create land, and therefore a state should decide its policies with a view to the land resources in its possession…
>
> In such circumstances, the state and those to whom it entrusts its land should act with careful discretion with regard to any waiver of rights in land and ensure that it has sufficient land reserves for the various needs in the future, whether for building, agriculture, industry and other gainful occupations, or whether for open

> areas for various purposes, including protecting the environment, all of which in accordance with current and future city building plans. Awareness of the need to spread the population is also required. A considered and balanced land policy that takes all of these considerations into account is required (HCJ 3939/99 *Sedei Nahum Kibbutz v. Israel Land Administration* [16], at pp. 62-63).

Indeed, a 'considered and balanced land policy,' in the words of Justice Or, is needed in order to manage state land properly and effectively. But no less important is the need for real enforcement of this policy in order to implement it, and in this framework, *inter alia*, the state is required to act forcefully, through its various executive organs, against incursions onto its land. The widespread phenomenon of incursions onto state land in the Negev in particular requires the state to take effective measures to remove the squatters and the incursions. With regard to incursions that are carried out by way of sowing or planting agricultural crops unlawfully, the state decided, as we have said, that after other measures were tried, it would take action to stop the incursions by means of spraying the crops from the air. The purpose of this decision is consistent with the purpose of the arrangements in the law by virtue of which these operations were carried out — both the purpose of the general arrangements provided in the Land Law, as described earlier in my remarks, and especially the specific arrangement provided in the Public Land (Eviction of Squatters) Law. These arrangements are intended as aforesaid to give the landowner, or in our case the state, a possibility of resorting to self-help to remove squatters and stop incursions, without applying to the courts, all of which in order to protect its rights in the land, including the clear public interest inherent therein. Here we should mentioned that the property right that the state is seeking to protect by means of the actions under discussion is a right that has been recognized in our legal system since its earliest days as an important and central right, and it has been given the status of a basic right that enjoys constitutional protection within the framework of the Basic Law: Human Dignity and Liberty (see for example CA 5964/03 *Estate of Edward Aridor v. Petah Tikva Municipality* [17]).

34. Moreover, apart from the clear interest in preserving the land resources of the State of Israel, there is also another important interest that lies at the heart of the decision to carry out the spraying operations and at the heart of the arrangements in the law by virtue of which the operations were carried out. This is the public interest of upholding the rule of law in the state. Incursions onto the land of others — whether it is private land or public

land — are illegal acts that are intended to deprive the landowner of his rights and to profit at his expense. Recurring incursions and acts of resistance towards the representatives of the state that act against those incursions constitute an attack upon the rule of law that cannot be tolerated. Against this background it can be understood that the state is required to adopt an unequivocal and uncompromising position in order to frustrate the attempts of persons who act in illegal ways to realize their goals.

Therefore my conclusion is, as I have said, that the purpose underlying the spraying operations is a very proper one. But is this proper purpose realized in a proportionate manner? This, in my opinion, is the question that lies at the heart of our decision in this petition.

Proportionality of the violation

35. The essence of the limitations clause lies in the fourth condition, which concerns the proportionality of the violation of human rights. It is well known that the requirement of proportionality was formulated in the case law of this court as a criterion for examining every act of administrative authorities. According to this condition, an act of an authority will only be regarded as lawful if the executive measure that was adopted in order to realize the executive purpose is proportionate. We therefore examine in this context the question of the correlation between the purpose that the authority is trying to achieve and the means adopted to achieve it (HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [18], at pp. 836-839 {293-296}).

36. As in other legal systems around the world, Israeli law also lays down three fundamental subtests that give the principle of proportionality concrete content. According to the first subtest, which is the 'appropriate measure' or the 'logical measure' test, there should be a logical connection between the purpose and the means of achieving it, so that the means should lead rationally to the achievement of the purpose; in the second test, which is the 'least harmful measure' or the 'need/necessity' test, we ask whether the measure adopted causes the least possible harm to the right of the individual under consideration; finally, in the third subtest, which is the test of proportionality 'in the narrow sense' or the 'proportionate measure' test, a balance is made between the benefit arising from the action and the harm that it causes, and we consider the question whether the harm caused to the individual as a result of the measure that the administrative authority is adopting is commensurate with the benefit that arises from it. Only if these three subtests are all satisfied will the measure adopted by the authority be

deemed a proportionate measure (on the nature of the requirement of proportionality, the elements of the requirement and the manner of implementing it, see for example the fundamental and comprehensive analysis of President Barak in *Beit Sourik Village Council v. Government of Israel* [18], at pp. 838-840 {296-298}), as well as the references cited there; I see no need to add to what he says). How is this implemented in our case?

37. There is no doubt in my mind that there is a logical connection between the aforesaid spraying operations and the purpose of protecting state land by removing squatters. The spraying causes the destruction of agricultural crops that are sown or planted on state law unlawfully, and in this way the unlawful incursions are removed and the ability to realize the rights in the land is recovered by the state, as well as by the person to whom it transferred these rights. Therefore it is certainly possible to say that the spraying operations further the purpose for which this measure was adopted and they lead in a logical manner to its realization. I am aware of course that this subtest is not satisfied with merely a technical causal relationship between the measure and the purpose, and therefore the requirement that there is a logical connection is directed, *inter alia*, to the fact that an arbitrary, unfair or irrational measure should not be adopted (see HCJ 9593/04 *Morar v. IDF Commander in Judaea and Samaria* [19], at p. 4375 {78}, and the references cited there). But in the circumstances of the case I have not been persuaded that the measure that we are considering does indeed fail to comply with these criteria.

38. With regard to the second subtest, the respondents claim that the measure of spraying is the safest and most effective measure for protecting state land against incursions by way of seasonal agricultural cultivation. According to them, the use of this measure began because in the past when the state tried to protect its property in other ways, and especially when it tried to stop incursions by ploughing the land, it encountered fierce opposition from squatters who resorted to violence in order to prevent the ploughing operations. This opposition resulted in physical injuries both to the persons carrying out the evictions and to the squatters. In an attempt to find a course of action that would remove the crops most effectively as well as reduce the fear of disturbances of the peace during the eviction process, the measure of spraying was chosen as aforesaid.

39. In their reply to the petition, the respondents set out all of the steps that they took to ensure the safety of the measure of spraying: *first*, it was clarified that adopting this measure was done only after the squatters were

given the usual warnings: warning signs were set up in the area, stating that the land was state property and entering the land was prohibited; warnings were sent to the squatters in which they were required to vacate the land and remove the crops; in appropriate cases complaints were filed with the police. After it became clear that these measures had no effect, there was no alternative to taking effective measures to remove the incursions, including spraying the crops from the air. *Second*, it was argued that, in the spraying operations that were carried out, the provisions of the law regarding this matter and the user instructions for the spray substance that was used were strictly followed. In this context, the respondents observed the instructions concerning the safety limits from other agricultural crops, orchards and gardens and those concerning the weather conditions at the time of spraying, the direction of the wind and the size of the drops of the spray substance. They also took into account greater safety limits that the ones required for various parameters addressed by the package label on the spray container and they maintained a distance of at least 300 metres from nearby buildings, if and in so far as there were any in the vicinity. *Third*, the respondents point out that before each spraying the area designated for spraying was marked by the 'Green Patrol,' after it checked that there were no human beings or animals in the area, and during the whole spraying process persons from the 'Green Patrol' stood at a distance of 120 meters from the area holding flags. If it transpired that a human being or animal entered the area being sprayed, the spraying was stopped until the area was completely evacuated. In remote areas and in areas where there is a considerable chance of friction with the population, the spraying was carried out by means of two airplanes, where one of them outlined to the other the borders of the spray area and supervised to make sure that the spraying did not go beyond the designated area.

In summary, the respondents claim that the results on the ground show the effectiveness and the safety of the measure of spraying from the air in general, and especially in comparison with the alternative measures that are available to the state in the circumstances of the case. During the period when use was made of this measure, there was a substantial decrease in the scope of the incursions onto state land in the Negev and also a decrease in the violence that resulted from the law enforcement operations to remove the squatters, so that it was also possible to carry out these operations with a limited amount of eviction personnel and police assistance. On the other hand, it was alleged that since the order *nisi* was made in this petition, there has once again been a significant increase in the amount of the incursions onto state land.

40. Indeed, from the reply of the respondents it can be seen that the use of the measure of spraying from the air began only after previous measures that were adopted did not provide a proper and satisfactory solution to the problem of the incursions. It was also alleged that when this measure was chosen, the state carried out all of the actions required to avert all the possible risks that might be involved.

But despite the actions carried out and despite the respondents' declaration that the spraying was carried out in strict compliance with the requirements of the law and the user instructions on the spray container as aforesaid, in my opinion there remains a doubt as to whether sufficient warning was in fact given in every case of the state's intention to spray the crops. There is also a doubt as to whether all the spraying operations were carried out at the required distance from inhabited areas, in order to rule out the possibility that the Bedouins, whether those whose crops were sprayed or those passing by, would be exposed to the spray substance. If this is not enough, then in addition it transpires that the pest control company that carried out the spraying on behalf of the state also made use of spray substances that were not permitted for use by law, which was in breach of the agreement made with it, even though it has been made clear that this use was stopped.

41. The risks involved in the spraying operations are substantially different from the risk created as a result of the agrotechnical operations that were carried out by the state in the past in order to contend with the phenomenon of the incursions. Therefore there is a real difficulty in comparing the two measures in order to determine which of them, if at all, is the less harmful measure. I deliberated for a long time as to whether it is possible to determine, with the required degree of certainty, that the measure of spraying is indeed the less harmful measure. I had difficulty in doing so. I also seriously considered the possibility of ordering the state to prepare a detailed work procedure, which would include strict conditions for the manner in which the spraying should be carried out, so that subject to compliance with this we would be able to permit the continued use of spraying while minimizing the harm to the Bedouin population. Ultimately I reached the conclusion that it is not possible, nor would it be right, to content ourselves with this. There are two main reasons for my conclusion.

First, I have not been persuaded that in the situation that has been created and in the circumstances that have been described it will be possible to allay the concern of harm to the Bedouin citizens to the required degree. The

longstanding disputes between the Bedouin citizens and the state authorities with regard to the ownership of land in the Negev have created a very complex reality on the ground, and only certain aspects of this are expressed in the petition before us: I will mention briefly that the state, for its part, is trying to protect its alleged rights in the land and is acting in accordance with the powers given to it in the law to do so, whereas the Bedouins, for their part, refuse to recognize the state's ownership claims and take action in order to prevent their eviction from the land, even at the cost of danger to themselves. In this complex situation there are a large number of concerns: given that we are speaking of extensive amounts of land, where the identity of the party making the incursions is not always known to the authorities, there is a difficulty in knowing who exactly will be present on the land, and therefore it is difficult to ensure that before the spraying operations are carried out, *everyone* who may be exposed to risk — including innocent passers-by, children and the elderly — is given a warning so that any likelihood that human beings or animals will be exposed to the spray substance is averted. In the circumstances that have been described, and especially in view of the state's description of the reactions of the Bedouins to its attempts in the past to vacate the land where there were incursions, which included their deliberate entry into these areas in an attempt to prevent the vacating of the land and the use of violence, there is a real concern that the citizens will not pay attention to the warnings and will enter the sprayed areas despite the danger. Even if in such a case of a deliberate entry into the sprayed areas despite the warnings, the liability for the risks involved rests with whoever ignores the warnings, in view of the fact that the aforesaid scenario is foreseeable, the state also cannot shirk its responsibility to its citizens and it is bound to protect them and prevent any harm to them as a direct or indirect result of its operations. In addition, even if we assume that warnings will be given as necessary before the spraying is carried out, there remains a concern that human beings and animals will be exposed to the spray residue that will remain on the sprayed land after the spraying, and that the spray substance will be carried by the wind to nearby population centres and nearby agricultural land that is being cultivated legally. Finally, we also cannot ignore the concern that there will be various flaws in the system, whether as a result of accidents in the spraying or as a result of failures to observe the instructions and procedures for carrying it out. This concern, which *prima facie* exists in every case where operations involving potential risks are concerned, is exacerbated in the light of experience and the accidents that have already occurred in the state's operations, as described

above, and because the realities of life teach us that even when spraying is done for agricultural purposes, accidents involving a clear departure from the procedures sometimes happen. This can be seen, for example, from the information provided by the Ministry of the Environment, which supervises the use of pesticides in agriculture:

> '*Accidents occur*
>
> Admittedly the spray pilots are aware of the regulations concerning spraying from the air, but sometimes they do not comply with the regulations. Economic constraints, competition between spray companies and human errors with regard to the precise location of spray areas cause mistakes, such as spraying in the vicinity of homes at a distance of less than 120 metres, and spraying over and near sources of water' (see the website of the Ministry of the Environment (information last updated on 21 December 2003)).

In the circumstances of the case before us, and especially in view of the fact that, despite the accidents that occurred in the past, the respondents' position still remains that apart from the use made by the spraying company of a spray substance that was not permitted, no mishap has occurred in the spraying operations that were carried out and everything was done in strict compliance with all of the necessary instructions, whereas at the same time there is as aforesaid a real concern that the Bedouins who regard themselves as injured by the spraying operations will not abide by the warnings, I am not persuaded that any work procedure that seeks to ensure that the risks are averted will be sufficient to allow us to determine that the measure that is under scrutiny in this petition is indeed the least harmful measure (on the difficulty of ensuring the implementation of a written procedure in problematic conditions, see the remarks of Vice-President Cheshin in a case where the court considered the legality of the 'prior warning' procedure: HCJ 3799/02 *Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Central Commander* [20], at p. 59 {227}; see also the remarks of Justice Beinisch in that case, at p. 61 {229-230}).

Second, in addition to this, I am of the opinion that it is not possible and would not be right to permit the spraying to continue even subject to the formulation of a procedure as aforesaid, since I have reached the conclusion that even if the spraying operations that are carried out by the state satisfy the first subtest of the requirement of proportionality, and even if it can be said that they satisfy — or in certain conditions they may satisfy — the second

subtest of this requirement, they do not satisfy the third subtest, and therefore in any case it should be held that these operations are not proportionate.

42. As we have said, this last test concerns the question of whether the purpose for which the measure was adopted is proportionate to the damage that it causes to constitutional human rights. Although it is usual to call this test the test of proportionality 'in the narrow sense,' in the case law of this court it has on several occasions been said that this test is in fact a 'value' test, which concerns a balance between conflicting values and interests. The remarks of Vice-President Cheshin in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13] are pertinent in this context:

> '… there are three subtests in the test of proportionality, and for reasons that I do not understand the third subtest is called by the name of the test of proportionality "in the narrow sense." This name is a mystery to me. The test of proportionality "in the narrow sense" is, in my opinion, actually the second subtest, since it is a test whose beginning, middle and end all concern proportionality (*United Mizrahi Bank Ltd v. Migdal Cooperative Village*, at p. 437). But the third subtest before us, the test in which we place on each pan of the scales the values that conflict with one another, the benefit values against the damage values, ought to be called the test of proportionality "in the value sense." This test is concerned with values, and therefore it should be given that name' (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13], at para. 107 {635-636} of the opinion of Vice-President Cheshin); see also HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [21], at para. 60 of the opinion of President Barak).

43. The relationship between this subtest and the two other subtests of the requirement of proportionality was, as usual, well explained by President Barak in a case that examined the question of the constitutionality of amendment no. 7 to the Torts (State Liability) Law, 5712-1952, which added to the law sections that exempted the state from liability in torts for damage caused in a conflict zone as a result of an act carried out by the security forces:

> '… there is a major difference between the first and second subtests and the third subtest. The first two subtests — the rational connection and the least harmful measure — focus on the means of realizing the purpose. If it transpires, according to

> these, that there is a rational connection between realizing the purpose and the legislative measure that was chosen, and that there is no legislative measure that is less harmful, the violation of the human right — no matter how great — satisfies the subtests. The third subtest is of a different kind. It does not focus merely on the means used to achieve the purpose. It focuses on the violation of the human right that is caused as a result of realizing the proper purpose. It recognizes that not all means that have a rational connection and are the least harmful justify the realization of the purpose. This subtest seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one' (HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [22], at p. 3689 {379}).

Indeed, as President Barak said in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13], the third subtest of the requirement of proportionality 'returns us to first principles that are the foundation of our constitutional democracy' (*ibid*. [13], at para. 73 of his opinion {p. 539}):

> 'A proper purpose, a rational connection between it and the provisions of the law and the minimization of the violation of human rights that is capable of realizing the proper purposes are essential conditions for the constitutionality of the violation of human rights. But they are not sufficient in themselves. A constitutional regime that wishes to maintain a system of human rights cannot be satisfied only with these. It determines a threshold of protection for human rights that the legislature may not cross. It demands that the realization of the proper purpose, through rational measures that make use of the lowest level for realizing the purpose, will not lead to a disproportionate violation of human rights…
>
> This subtest therefore provides a value test that is based on a balance between conflicting values and interests (see Alexy, *A Theory of Constitutional Law*, at p. 66). It reflects the approach that there are violations of human rights that are so serious that a law cannot be allowed to commit them, even if the purpose of

> the law is a proper one, its provisions are rational and there is no reasonable alternative that violates them to a lesser degree.
>
> …
>
> Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end does not justify the means… Our democracy is characterized by the fact that it imposes limits on the ability to violate human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority' (*ibid.* [13], at paras. 75 and 93 {pp. 525-526 and 539}).

Against this background we should consider how the third subtest of the requirement of proportionality applies in our case. We should mention that when we endeavour to carry out the necessary act of balancing within the framework of this test we should consider, on the one hand, the nature of the violated right and the scope of the violation and, on the other hand, the nature of the public interest under discussion: when the right is a more fundamental one and the violation of it is more serious and acute, the considerations underlying the public interest will have to be of greater weight and of more decisive importance in order to justify the violation. Conversely, when the public interest is substantial and the benefit to the public that arises from its realization is substantial, it is capable of justifying a more serious violation of human rights (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [13], at para. 74 {pp. 523-524} of the opinion of President Barak).

44. The basic rights that are in the balance in this petition — the right to health, the right to physical integrity and the right to dignity — are all fundamental human rights that are protected in the State of Israel. Of course, the state's property interests in its land, as well as the public interest in upholding the rule of law in Israel, also lie at the heart of our legal system. But in the circumstances of the case before us, I am of the opinion that these interests should yield to the need to prevent harm to the aforesaid rights, since the balance between the benefit that may arise from employing the measure of spraying from the air in order to remove incursions onto state land and the harm that may be caused to human rights as a result thereof, against the background of all the values of our legal system, leads in my

opinion to the conclusion that the relationship between the two is not a proportionate one.

Indeed, the arrangements in the Land Law and in the Public Land (Eviction of Squatters) Law give the state a power to resort to self-help in order to remove squatters from its land. Clearly the premise in our case is that the state is acting legitimately in order to realize this purpose, and certainly it seeks to prevent any harm to the Bedouin citizens. Moreover, the measure of spraying from the air serves the purpose of removing agricultural incursions and it is possible — even though, as I have said, I have not been entirely convinced of this — that it may be said that of all the measures available to the state in the circumstances of the case, this is the measure that causes the least harm to human rights. But it is still not a proper measure. It is not a measure that a state should use against its citizens in order to protect its property rights. No matter how important these rights are, the advancement thereof does not, in my opinion, justify the use of a harmful measure such as the spraying that was carried out, in the way that it was carried out.

45. In my opinion, the spraying operations, in the way that they were carried out, violate a series of rights and values that need to be protected in order to safeguard the life and dignity of a person as a human being. Alongside the duty of the state to protect its land, it has another duty of supreme importance — to protect the safety and welfare of its citizens, men and women, the young and the old, upright citizens and lawbreakers. In this framework the state has a duty to protect the health, physical integrity and dignity of the members of the Bedouin population in the Negev, each of whom is a citizen of the state, and therefore it is obliged to realize its goals and policy, with regard to land and in general, by means that are consistent with its responsibility to protect the basic rights of its citizens.

Take the case of a Bedouin citizen who cultivates his crops lawfully in an area that is adjacent to land where the crops that were sown are designated for destruction by spraying; take the case of a young child who plays with his friends in the open areas around his home, which also are adjacent to the areas where there was an incursion; take the case of a woman who is tending a flock of sheep for pasture near the parcel that is designated for spraying (or even in it). In certain circumstances one of them — unwittingly and unintentionally — may be harmed by the spray substance that will be dispersed from the sky by the spray airplane, either because the wind is blowing a little stronger than expected and disperses the spray substance beyond the boundaries of the parcel, or because from the outset the

boundaries of the parcel were not sufficiently clear, and that farmer, child or woman entered it, or because the sheep that provide milk and food for the inhabitants ate grass that had been sprayed. Those inhabitants may, at the very least, suffer from breathing difficulties, skin irritations and feelings of nausea and dizziness; the crops of that farmer — which as we said were cultivated lawfully — may wither; the sheep may also be harmed. Ultimately it is possible that the inhabitants will suffer harm to their health and safety as well as to their economic welfare and their ability to provide for their families. In addition, some will also mention the terrible feeling that is likely to be experienced by a farmer who ploughs, sows, waters and weeds the land in order to earn his bread — his family's livelihood — from it, and in a moment all of his efforts are destroyed.

The expression 'the end does not justify the means' is not merely an empty slogan, but a rule of great value and importance. The end in our case does not, in my opinion, justify the means of using the measure that was chosen, which sends (even if unintentionally) a message of insensitivity and disrespect to the Bedouin citizens. In addition to this there is, as we have said, the concern of danger to their health, and perhaps even to the physical integrity of Bedouin citizens who may, in the complex situation that prevails in the area, be exposed to the spray substance and be harmed by it. In the balance between the public interest in the furtherance of which the state seeks to act and the fear of harm to the rights of the individual, I am of the opinion that the considerations that require us to prohibit the possibility that the state may destroy the crops of citizens by means of spraying from the air — and especially the concern of potential harm to their health, physical integrity and dignity — should prevail.

46. As I said, I considered ordering the state to draw up a work procedure that would ensure that the spraying operations would be carried out legally and without any risk to human life or any harm to the health and dignity of the inhabitants. I repeatedly asked myself whether it was possible, by means of such a procedure, to minimize the risk and limit the possibility of harm to citizens, whether they are squatters and lawbreakers or innocent passers-by. Ultimately I was not convinced that such a procedure would be capable of achieving the proper purpose of protecting state land in a way that is proportionate, appropriate and proper. I have already described the wide variety of concerns that arise in the complex reality on the ground and I have explained that it cannot be taken for granted that it is possible to eliminate these concerns. Even though I would like to assume that such a procedure could ensure no harm befalls, I fear that in view of the difficulties and the

scenarios that I described, just as in the case of the accidents that have already occurred, an assumption of this kind may turn out to be unrealistic and unfounded. In such circumstances, taking a risk of harm to the Bedouin inhabitants, their health, their dignity, their safety and their welfare, even if it is minimal, is not in my opinion proportionate to the purpose of protecting state land, important though it is. Therefore I cannot approve it.

47. Finally I would like to emphasize that we should not ignore the fact that the Bedouin citizens themselves have considerable responsibility for the situation that has been created, and that some of their actions should be unequivocally condemned. Their adoption of illegal methods in order to achieve their purposes and certainly the use of violence against the authorities are problems in themselves and merit a proper response. I have also not overlooked the claim that some of the petitioners themselves did not observe orders made by courts in their cases, and the conclusion that I have reached does not justify their actions nor should it prevent the state from acting against the incursions. At the same time, since the matter under scrutiny addresses the manner in which the state acts, rather than the conduct of the petitioners, my position is that even if we are speaking of squatters, and even if we are speaking of lawbreakers, the state cannot continue to act in this way. They are still entitled to retain their dignity. The state's responsibility for the safety and welfare of its citizens requires it to act towards the Bedouin citizens with greater respect and to protect their safety and health with greater care and diligence than it has done in the past and it seeks to continue to do by carrying out the spraying operations.

48. My conclusion is therefore that the spraying operations that were carried out by the state, by virtue of its power under the law, do not satisfy the tests of the limitations clause in the Basic Law: Human Dignity and Liberty, since they create a disproportionate relationship between the benefit arising from them and the damage caused by them. In these circumstances, we have in my opinion no alternative but to find that the result of this unconstitutional violation is that the state may not continue to make use of this measure for the purpose for which it was chosen.

A final remark

49. The issue that was brought before us in this petition is an important and complex issue: it required us to look into questions of fact, questions of law, and also, to some extent, complex questions of ethics. But no matter how important and complex it may be, this petition brought before us only one issue out of a much wider spectrum of issues that need to be resolved; all

of these concern the situation of Bedouin society in the State of Israel and the relationship between it and government authorities. From a broader perspective than what is required in this case, I would like to add several remarks on this matter.

The Bedouin population has been a part of the population of the State of Israel since its foundation and it is an integral part of Israeli society. As I have already said, it is not possible to ignore the fact that those citizens who trespass onto state land are lawbreakers. The repeated and extensive incursions amount to an attack on the rule of law, a disrespect for the basic principles of our legal system and a danger to human life. At the same time, we cannot ignore the fact that at least in part this reality is the result of their distress:

> 'The Bedouin population in the Negev is the poorest population in Israel. During the period under consideration, 65%-70% of this population lived below the poverty line. Six out of seven Bedouin towns were rated on the lowest socio-economic level. The Bedouins are at the top of the unemployment table in Israel. The living conditions of this population are very difficult. The nomadic inhabitants, most of whom live in shacks and huts, do not have regular electricity and running water, refuse collection services and paved roads. Sewage flows in the open, and in addition waste from the towns in the Negev is deposited into streams in the areas where they live. The health, education and welfare services also fall a long way short of what is required' (see the Report of the State Commission of Inquiry into the Conflicts between the Security Forces and Israeli Citizens in October 2000, chaired by Justice Emeritus T. Or, at p. 53).

Distress, no matter how great it is, cannot justify breaking the law. Lawbreaking, resorting to violence and undermining the rule of law are all courses of action that cannot be tolerated in a civilized country that is governed by the rule of law, and the public interest requires the state to take determined and uncompromising action against those who choose to act in these ways.

Alongside this, the situation described in this petition, together with the distress and problems that I have described, should remind all of us that, as we already knew, the serious situation in which the Bedouin population finds itself in the State of Israel requires a complete and comprehensive systemic solution, and the sooner the better. Solutions in specific cases, whether better

or worse, cannot be genuine solutions in the long term. The time has come to formulate and realize a genuinely wide-ranging solution in this matter.

We do not have the authority or the ability to provide or even to suggest such a solution within the framework of the current petition. We have been called upon solely to decide the specific issue that was brought before us, and this is what we have done. But I will take advantage of this opportunity to call for a comprehensive examination of the issue and for speedy action in order to reach a comprehensive solution, which will be capable of allowing the integration of the Bedouins once and for all in Israelis society as citizens of equal status, who have equal rights and equal obligations. It should be emphasized that this call is not directed solely at the state authorities. It is also directed at the Bedouin population itself, which as I have said is also responsible for the position in which it finds itself, as well as for the nature of its relationship with the authorities. The two sides are jointly responsible for the situation which I call upon them to change, even if in greater or lesser degrees and in different ways. Only by means of communication, collaboration, tolerance, a recognition of joint interests and a willingness to make compromises — *on both sides* — will it be possible to succeed in changing the situation. This change is in the interests of the state and it is certainly also in the interests of the Bedouin population.

50. Therefore, for all of the reasons set out in my opinion, I agree with the result reached by my colleague Justice Joubran. My conclusion is also that the petition should be granted and the order *nisi* should be made absolute. I also agree with my colleague's proposal that the respondents shall be liable to pay the petitioners' legal fees and court costs.

Justice M. Naor

Like my colleague Justice Arbel, I too am of the opinion that the state had the authority to carry out the spraying operations that it did. This issue is of practical importance, since after our judgment the state will presumably consider adopting other, more proportionate, means of stopping the incursions onto public land.

I also agree with my colleague's conclusion that the spraying operations do not satisfy the tests of the limitations clause in the Basic Law: Human Dignity and Liberty. The measure of spraying, which may harm human beings, albeit slightly, is unacceptable to us, even when we are speaking of lawbreakers. The state should adopt other, more proportionate, means of protecting state land.

It is therefore also my opinion that the order *nisi* should be made absolute. I would refrain from making an order for costs.

Petition granted. Costs awarded by majority decision, Justice Naor dissenting.

27 Nissan 5767.
14 April 2007.