HCJ 453/94, 454/94

Israel Women's Network

v.

1. **Government of Israel**
2. **Minister of Transport**
3. **Ports and Railways Authority**
4. **Amir Haiek**
5. **Minister of Energy and Infrastructure**
6. **Minister of Finance**
7. **Oil Refineries Ltd**
8. **Doron Kashuv**
9. **Yaakov Wagner**

The Supreme Court sitting as the High Court of Justice

[1 November 1994]

Before Justices E. Mazza, Y. Kedmi, I. Zamir

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

Facts: In 1993, the Government Corporations Law was amended, and s. 18A was added. This section provides that the boards of directors of Government corporations shall have equal representation of men and women, and until such time as this goal is achieved, members of the underrepresented sex should be appointed, 'to the extent that circumstances allow' (affirmative action).

After the new section came into effect, and despite the new section, men were appointed in two cases by Government ministers to boards of directors of Government corporations, on which there were no women directors.

The petitioner argued that the appointments were therefore unlawful. The respondents argued that, notwithstanding the new s. 18A, the appointees were the best candidates for the positions, and even if the court held that the ministers had acted wrongly, the appointments should not be cancelled on this occasion, as it was the first time the matter had come before the court.

Held: (Majority opinion — Justice E. Mazza and Justice I. Zamir): The appointments were unlawful since the ministers had not obeyed the provisions of the new section, and they should therefore be revoked, so that the ministers could begin the appointment processes again.

(Minority opinion — Justice Y. Kedmi): The main consideration in making an appointment is the qualifications of the candidates, even after the new section of the law came into effect. It was sufficient for the minister to consult a list of female candidates in his ministry, and he did not have to look outside the ministry. Thus in the case where the minister had such a list, his decision was valid. In the other case where the minister did not have such a list, the appointment was flawed, but in this case, the appointment should not be set aside, both because of the injustice that would result to the appointees who had done nothing wrong, and also because the petitioner had not shown that there existed a specific female candidate with qualifications equal to those of the appointees.

Petition allowed, by majority opinion.

Legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992, s. 1.

Development Towns and Areas Law, 5748-1988.

Emergency (Emergency Plans for Building Residential Units) Regulations, 5750-1990.

Employment Service Law, 5719-1959, s. 42(a).

Equal Employment Opportunities Law, 5748-1988.

Equal Remuneration for Female and Male Employees Law, 5724-1964.

Equal Retirement Age for Female and Male Employees Law, 5747-1987.

Government Corporations Law, 5735-1975, ss. 18A, 18A(a), 18a(b), 18B, 60A.

Government Corporations (Amendment no. 6) (Appointments) Law, 5753-1993.

Ports and Railways Authority Law, 5721-1961, ss. 2, 6(a).

Women's Equal Rights Law, 5711-1951, s. 1.

Israeli Supreme Court cases cited:

[1] FH 10/69 *Boronovski v. Chief Rabbis* [1971] IsrSC 25(1) 7.

[2] HCJ 202/57 *Sidis v. President and Members of Great Rabbinical Court* [1958] IsrSC 12 1528.

[3] HCJ 1000/92 *Bavli v. Great Rabbinical Court* [1994] IsrSC 48(2) 221.

[4] CA 337/61 *Lubinsky v. Tax Authority, Tel-Aviv* [1962] IsrSC 16 403.

[5] HC 153/87 *Shakdiel v. Minister of Religious Affairs* [1988] IsrSC 42(2) 221; IsrSJ 8 186.
[6] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv–Jaffa* [1988] IsrSC 42(2) 309.
[7] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; IsrSJ 10 136.
[8] HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [1981] IsrSC 35(4) 1; IsrSJ 8 21.
[9] HCJ 720/82 *Elitzur Religious Sports Association, Nahariyah Branch v. Nahariyah Municipality* [1983] IsrSC 37(3) 17.
[10] HCJ 528/88 *Avitan v. Israel Lands Administration* [1989] IsrSC 43(2) 292.
[11] HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3) 353.
[12] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[13] HCJ 292/61 *Rehovot Packing House Ltd v. Minister of Agriculture* [1962] IsrSC 16 20; IsrSJ 4 96.
[14] HCJ 199/86 *Amir Publishing Co. Ltd v. Minister of Tourism* [1986] IsrSC 40(2) 528.
[15] HCJ 5023/91 *Poraz v. Minister of Building* [1992] IsrSC 46(2) 793.
[16] HCJ 2994/90 *Poraz v. Government of Israel* [1990] IsrSC 44(3) 317.
[17] HCJ 2918/93 *Kiryat Gat Municipality v. State of Israel* [1993] IsrSC 47(5) 832.

American cases cited:

[18] *Griggs v. Duke Power Co.* 401 U.S. 424 (1971).
[19] *University of California Regents v. Bakke* 438 U.S. 265 (1978).
[20] *Wygant v. Jackson Board of Education* 106 S. Ct. 1842 (1986).
[21] *Steelworkers v. Weber* 443 U.S. 193 (1979).
[22] *Johnson v. Transportation Agency, Santa Clara County* 480 U.S. 616 (1987).
[23] *Teamasters v. United States* 431 U.S. 324 (1977).
[24] *Hazelwood School District v. United States* 433 U.S. 299 (1972).

Canadian cases cited:

[25] *C.N. v. Canada (Human Rights Commission)* [1987] 1 S.C.R. 1115.

For the petitioner — R. Meller-Ulshinsky, R. Benziman.
For respondents 1-6 — A. Mendel, Senior Assistant and Head of High Court of Justice Cases at the State Attorney's Office.

For respondent 7 — M. Sheler.

JUDGMENT

Justice E. Mazza

1. The petitions before us concern the practical application of s. 18A of the Government Corporations Law, 5735-1975, which was added to the law by the Government Corporations Law (Amendment no. 6) (Appointments), 5753-1993 (hereafter — 'the Appointments Law').

Introduction

2. The Appointments Law was passed in the Knesset on 16 March 1993. It includes a series of amendments to the Government Corporations Law about the qualifications and methods of appointing candidates for the office of directors in Government corporations. Among these amendments section 18A was added to the Government Corporations Law, and this provides:

> '(a) The composition of the board of directors of a Government corporation shall give proper expression to representation of both sexes.
>
> (b) Until proper expression of such representation is achieved, ministers shall appoint, in so far as is possible in the circumstances of the case, directors of the sex that is not properly represented at that time on the board of directors of the corporation.'

Under s. 60A of the Government Corporations Law, which also was added to the law by its amendment under the Appointments Law, the provision of s. 18A applies (*inter alia* and *mutatis mutandis*) also to appointments — by a minister or the Government, or on the recommendation of, or with the approval of, either of these — of members of the boards of management of statutory corporations.

3. The petitioner — the Israel Women's Network — is a registered society (*amuta*). Its declared purpose is to struggle to promote equality of the sexes in Israeli society. The petitioner's main activities are directed towards achieving equal representation for women among decision-makers and policy-makers in the various sectors of public and social activity. Its two petitions — in which a

panel of three justices issued show cause orders — are directed at decisions to appoint directors under the Government Corporations Law made after the Appointments Law came into effect. The petition in HCJ 453/94 concerns the appointment of a new member of the board of the Ports and Railways Authority. The petition in HCJ 454/94 relates to the appointment of two new directors on behalf of the State to the board of directors of Oil Refineries Ltd. All three new appointees are men, and the composition of the two relevant boards do not have (nor did they prior to the said appointments) even one woman.

The petitioner complains about these appointments. It should be said at once that the petitioner does not have even the smallest criticism of the qualifications and abilities of any of the appointees for any of the said positions. It should also be stated — and this too is not disputed — that each of the appointments was preceded by a consultation with the Appointments Review Committee, in accordance with s. 18B of the Government Corporations Law. Nonetheless, the petitioner challenges the lawfulness of the appointments. Its argument is that, in the circumstances of both cases, and under the provision of s. 18A of the Government Corporations Law, preference should have been given to the appointment of women; however, in their decisions with regard to the appointments made, the authorities ignored the express directive of the law. For this reason — the petitioner argues — the appointments made cannot stand. It therefore asks for an order that cancels the appointments and reopens the appointment procedures, so that the provision of s. 18A may be implemented in these cases.

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4. The Ports and Railways Authority (the third respondent) was established by the Ports and Railways Authority Law, 5721-1961. Under s. 2 of the law, 'the Authority is a corporation, competent to acquire any right, to undertake any obligation, to be a party in any law suit and a party to any contract.' However, s. 6(a) of the law stipulates that:

> 'The Government shall appoint, on the recommendation of the Minister of Transport, a board for the Authority (hereafter 'the board'); the board shall have seventeen members, of whom ten shall come from the public and seven shall be State employees, including two representatives of the Ministry of Transport, a representative of the Ministry of Finance and a representative of the Ministry of Industry and Trade.'

There is therefore no doubt — nor is there any dispute — that the provision of s. 18A of the Government Corporations Law does indeed apply to the appointment of members of the board of the said authority.

5. On 9 January 1994, the Government decided, on the recommendation of the Minister of Transport, to appoint Mr Amir Haiek (the fourth respondent) as a member of the board of the authority. Mr Haiek, an accountant by profession, is an employee of the Ministry of Industry and Trade. The recommendation of the Minister of Transport to appoint him was based on the recommendation of the Minister of Industry and Trade, who chose him as its new representative on the board (instead of its previous representative who finished his term of office). Prior to the appointment of Mr Haiek, fifteen members served on the board of the authority, all men. The argument of the petitioner is that, in these circumstances and under the provision of s. 18A of the law, preference should have been given to the appointment of a woman to this position. We should say once more that the petitioner does not dispute that Mr Haiek has all the essential qualifications for the office to which he was appointed. It also agreed that he has suitable personal qualities and traits. Nonetheless, the petitioner points to the fact that the senior staff of the Ministry of Industry and Trade also include twenty-five women. There are employees of the ministry who are on the four highest levels of seniority, with the rank of academics or the rank of lawyers. Its argument is that had thought been given to the matter, a suitable candidate for membership on the board of the authority could have been found among these women employees. The choice of a male candidate, when the possibility of recommending a suitable female candidate was not even considered, is inconsistent with the provision of s. 18A of the law, and it should be made void.

6. The show cause order granted in this petition was directed at the Government of Israel (which appointed Mr Haiek) and the Minister of Transport (on whose recommendation the appointment was made). The Government's affidavit in reply was given by the Minister of Industry and Trade. A separate affidavit was not submitted by the Minister of Transport. We will therefore assume that what is stated in the affidavit of the Minister of Industry and Trade also represents the position of the Minister of Transport.

In his affidavit in reply, the Minister of Industry and Trade argued that Mr Haiek's appointment was within the framework of the law and there was nothing wrong with it. The Minister pointed out in his affidavit that the Ministry of Industry and Trade has only one representative on the Authority's

council. In such circumstances, he argued, he was bound to consider 'only who was the best and most suitable candidate for the position from among the employees of the Ministry and not from the general public.' Mr Haiek is his economic adviser. Upon assuming his position as Minister of Industry and Trade, he appointed Mr Haiek as the person responsible for all aspects of freight, handling, and delivery of matters related to industry and trade, both inside Israel, and to and from Israel. Since the Authority is responsible for a significant proportion of land and sea freight, Mr Haiek was required, by virtue of his position, to maintain contact with the Authority. When the one and only place on the Authority's council reserved for a representative of the Ministry of Industry and Trade became vacant, it was only natural that he would choose Mr Haiek. As to his reasons for selecting Mr Haiek, the Minister says in his affidavit as follows:

> 'My decision to recommend the fourth respondent as the representative of the Ministry of Industry and Trade on the Authority's council was made in view of the fact that he is in charge of, and responsible on behalf of the Ministry for, the issue of sea and land freight with regard to the implications of this for industry and trade in Israel. Because of this position of his, Mr Haiek is more of an expert, with regard to the activity of the Ports and Railways Authority, than anyone else in my Ministry, and he has the tools and the breadth of vision required in order to represent faithfully, on the Authority council, all the issues in which the spheres of responsibility of the Ministry of Industry and Trade overlap with the areas of activity of the Ports and Railways Authority.'

The Minister goes on to reject the petitioner's claim that the Minister of Transport should have submitted to the Government a proposal to appoint a woman from among the senior female employees of the Ministry of Industry and Trade. When a need arose to appoint a new representative for the Ministry of Industry and Trade, the discretion in choosing the appropriate candidate was exercised by him as the responsible Minister. The obligation to appoint a woman is not absolute, but is imposed on ministers (according to what is stated in s. 18A(b) of the law) only 'to the extent that circumstances allow'. Although the Minister does not question the excellent qualifications of the senior female employees in his Ministry, his not choosing one of them does not indicate that he did not comply with his duty under the law, for, in view of the special qualifications required for the candidate, and the necessity that he

should have a general and extensive familiarity with all the needs and requirements of the various divisions and departments of the Ministry, the circumstances of the case did not allow him to propose the candidacy of a woman for this position.

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7. Oil Refineries Ltd (hereinafter — 'the Refineries') — one of the respondents in this petition — is a Government corporation as defined in the Government Corporations Law. Its business is the refining of crude oil and the manufacture of oil products. Its board of directors has twelve members, eight of whom represent the State and four represent private shareholders. All the board members are men. Throughout 1993, several directors completed their terms and new directors were appointed in their stead. Four of the new directors were appointed on behalf of the State, and the appointment procedures for three of them were conducted after the Appointments Law came into effect. First, on 7 June 1993, Mr Moshe Ritov was appointed. On 9 November 1993, Mr Doron Kashuv was appointed, and on 16 December 1993 the appointment of Mr Yaakov Wagner was finalized (the latter two are both respondents in this petition).

The petitioner complains about the appointment of Mr Kashuv and Mr Wagner as directors. Here too the petitioner completely accepts that Mr Kashuv and Mr Wagner are qualified and desirable candidates for the office to which they were appointed. But the appointment of two additional men as new directors on a board of directors that has only male members is contrary to the provision of s. 18A. This, and this alone, is the subject of this petition.

8. The show cause order granted in this petition was directed at the Minister of Energy and Infrastructure and the Finance Minister, since by their joint decision (by virtue of their authority under the Government Corporations Law) Mr Kashuv and Mr Wagner were appointed to the office of directors. In the reply to the order, affidavits were submitted on behalf of each of the Ministers. Affidavits were also submitted by Mr Kashuv and Mr Wagner. The 'Refineries' gave notice that it is not adopting a position.

In the main affidavit in reply on behalf of the Minister of Energy and Infrastructure (by the director of the Planning and Economics administration in this Ministry), it is stated that the Minister's decision to appoint Mr Kashuv and Mr Wagner as directors was based on the professional qualifications of the candidates, which were of the kind required on the board of directors of the 'Refineries'. Mr Wagner worked at the 'Refineries' for many years and served

as its assistant director-general for about fifteen years. He has considerable professional expertise and is an expert on all secret workings of the 'Refineries'. It was also stated that Mr Wagner already served in the past as a director in the 'Refineries', and during his earlier term of office he made a significant contribution to the activities of the board of directors. Mr Kashuv is described in the affidavit as a senior administrator, someone with an extensive academic background in business management, and an expert in the fields of finance and marketing. In the past, he worked in auditing and gained experience also in this field. Further on it states that the Minister is aware of the need to present the candidacy of a woman for membership of the board of directors of the 'Refineries'. The committee for examining appointments, within the framework of the approval of Mr Wagner's candidacy, also drew the Minister's attention to the fact that the board of directors of the 'Refineries' did not include any women. However, the State's quota of directors on the board of directors of the 'Refineries' is not yet filled, and prior to filling the two positions that are still vacant the Minister is indeed considering the appointment of a woman to this board of directors.

In reply to the questions presented by counsel for the petitioner, a further affidavit was submitted on behalf of the Minister of Energy and Infrastructure (this time by the Director-General of the Ministry). From this affidavit it transpires that the Minister originally considered the appointment of a senior female employee in his Ministry to the office of director at the 'Refineries', but the candidacy of this employee was withdrawn because of a suspicion that she might find herself in a conflict of interests between the needs of the 'Refineries' and the Ministry's policy regarding the status of the 'Refineries'. The deponent goes on to concede that, prior to the appointments, the Minister did not examine a list of suitable female candidates, since such a list — which is currently in his possession — did not yet exist when the previous appointments were made.

9. In the affidavit in reply on behalf of the Finance Minister (made by the Minister's assistant), the deponent focused on a description of the procedure determined by the Finance Minister for implementing s. 18A. This should, in my opinion, be quoted in full:

> '… Since s. 18A of the Government Corporations Law, 5735-1975, which sets out the requirement for proper representation on boards of directors of the sex that is not represented, came into effect, I examine, according to the Minister's directive, whether

> any women hold office on the board of directors for which a candidate is required. If no woman holds office on the board of directors, and we are concerned with one of the last vacant positions in the quota of directors (usually the two or three last places), I make a further investigation in order to find a suitable women candidate from the pool of candidates at the Finance Ministry, which includes the names of candidates submitted by the Forum of Businesswomen and the Na'amat Organization. At the same time, I contact the Prime Minister's Adviser on the Status of Women, Mrs Nava Arad, who has in her possession a larger selection of suitable women candidates.
>
> To the best of my knowledge, since the said amendment came into effect, there were only a few cases where a Government corporation reached its maximum quota of directors and a woman was not appointed when a position became available.
>
> As a rule, whenever there remain, as stated, only two or three places on a board of directors, efforts are made to appoint a woman as the first of these.'

10. Mr Kashuv and Mr Wagner submitted affidavits that were identical in their contents. Each of them discussed briefly his reputation and good character that he acquired for himself in his work and expressed a concern about the severe harm that he would suffer should the court decide to cancel his appointment. Since the fact of the appointments was made public, their cancellation might create an erroneous impression on the public as to the reason for their cancellation. In the nature of things, the reason for the cancellation would be forgotten, while the actual cancellation would be well remembered.

The points of contention

11. Section 18A of the Government Corporations Law contains two parts. The first part, s. 18A(a), defines the desired and binding purpose of the law. The purpose and the obligation are that 'the composition of the board of director of a Government corporation shall reflect the proper representation of persons of both sexes.' The second part, s. 18A(b), prescribes a binding course of action which ministers are ordered to follow 'until such proper representation is achieved...'.

Counsel for respondents 1-6 pointed to the vagueness of the term 'proper' (representation) which appears in both parts of the section. Nonetheless she

agrees that the fact that before the appointments under discussion not even one woman held office — either on the council of the Authority or the board of directors of the 'Refineries' — is sufficient for us to be compelled to conclude that on neither of these bodies was there 'proper' representation of women. Counsel for the said respondents therefore concedes that in making their decision regarding the choice of candidates for the positions in question, the Ministers were obliged (and, in the case of the appointment of a new member to the council of the Authority — the Government was also obliged) to act in accordance with the provision of s. 18A(b) of the law.

In view of this agreement, the dispute between the parties focused on the following three questions: first, what is the nature of the duty imposed on the Minister (and, where relevant, on the Government) under s. 18A(b)? Second, in the appointments under discussion in these petitions, did the Ministers (or the Government) fulfil the duty that was imposed on them? Third, assuming that the answer to this second question is no (i.e., that the duty was not fulfilled), what is the law with regard to the appointments that were made, now that they have become a *fait accompli*?

12. The premise for the respondents' position, with regard to the first question, is that the section imposes on ministers only a relative and qualified duty. The respondents base this position on the qualification stated in the section itself: 'to the extent that circumstances allow'. From this qualification, they appear to wish to infer that the section merely provides a kind of general guideline with regard to the factors that ministers must take into account in their considerations for choosing the candidate for the appointment. It follows that if in a specific instance the minister thinks that in the circumstances of the case he must prefer other considerations, he may depart from the guideline in the section. From the explanations included in the affidavits in reply, counsel for respondents 1-6 wishes to submit that no defect occurred in the appointments under discussion, for in the circumstances of both instances objective considerations determined the outcome in favour of the appointments that were made. Alternatively, counsel for the said respondents argues that, even if it transpires that the possibility of appointing a woman to either of the positions under discussion was not properly considered by either of the Ministers, this is insufficient to justify cancelling the appointments. The reason for this is that we are concerned with a new and innovative statutory provision; if it was not applied correctly in the cases under discussion, this should be deemed an error and a result of insufficient understanding of the nature and scope of the duty prescribed. Similarly, we should take account of

the fact that in practice the decisions do not harm the public, since no-one disputes that the candidates who were appointed are qualified and fitting candidates; however, cancelling the appointments retrospectively will harm the candidates who were appointed. Therefore we should not make an order that might correct one wrong with another wrong, but should merely apprise the Government and its Ministers of their error and lay down guidelines for applying the provision of s. 18A(b) in the future.

13. The petitioner also does not dispute the fact that the obligation to appoint directors of the sex that is not properly represented, as set out in s. 18A(b), is not an absolute duty, but a relative duty, qualified by the possibilities that exist in the circumstances of the case. However, subject to this qualification, the petitioner argues that the duty imposed on the ministers making the appointments under this section is clear. The purpose set out in the section is that in the interim period (until proper representation is achieved for both sexes), affirmative action should be adopted in order to close the gap between the extensive representation of men and the hitherto minimal and negligible representation of women. The duty of the minister making an appointment, according to the express directive of the section, is therefore clear: assuming that all other qualifications are equal, he must prefer the choice of a female candidate to the choice of a male candidate. If he does otherwise, he must show that, in the circumstances of the case, it was not possible to find a suitable female candidate. The petitioner adds that from what is stated in the affidavits in reply it can be clearly seen that, in making the appointments under discussion, the Ministers and the Government acted with total disregard for this provision of the section. She also argues that from what is stated in the affidavits in reply there is no (even *ex post facto*) evidence that in the circumstances of either of the appointments it was impossible to comply with the letter and the spirit of the duty under the section. In such circumstances we must conclude that the appointments made are unlawful and they should therefore be cancelled. The rule that 'one should not remedy an injustice with an injustice' does not apply here, for the fear that cancelling the appointments may harm the candidates who were appointed is countered by the need to repair the harm arising from the impropriety of the proceedings and to implement the law.

Section 18A — introductory remarks

14. Section 18A was intended to apply equitable criteria for the representation of women on the boards of management of Government and

statutory corporations. It should immediately be said that we are not speaking of a new statutory basis for established rights, such as the basic right to equality of the sexes and the rights deriving therefrom with regard to the acknowledged right of women to equal opportunities in public, social and economic life, and in the fields of employment and labour; we are speaking of a new norm whose purpose is to enforce, by means of a duty, proper representation of the members of both sexes in the composition of boards of directors of Government corporations and the equivalent executive organs of corporations created by statute.

The purpose of the section is to correct a social injustice. It appears that the participation of women on the boards of directors of Government corporations and on the boards of management of statutory corporations has always been negligible. The proponents of the draft Government Corporations Law (Amendment No. 6) (Appointments), 5753-1993, on behalf of the Constitution, Law and Justice Committee of the Knesset, MK D. Zucker and MK H. Oron, pointed out in this respect that 'only a few percent of directors are women and, in absolute terms, their number is minimal' (Explanatory Notes to the draft Government Corporations Law (Amendment No. 6) (Appointments), at p. 75). Within the framework of the Knesset's deliberations about the draft law, MK Oron stated that of the approximately one thousand and eight hundred directors holding office in Government corporations, only thirty-five were women (Proceedings of the Thirteenth Knesset, second session, 5753, at p. 4061). The proposal to add s. 18A to the Government Corporations Law was designed to correct this extreme injustice. With regard to the manner of the proposed amendment, the Constitution Committee brought two alternative versions before the Knesset: the first alternative was limited merely to a provision (now included in s. 18A(a) of the law) that 'the composition of the board of directors of a Government corporation shall give proper expression to representation of both sexes;' the second alternative, however, presented the text of the section with both parts, i.e., with the addition of the provision of s. 18A(b), that 'until proper expression of such representation is achieved, ministers shall appoint, in so far as is possible in the circumstances of the case, directors of the sex that is not properly represented at that time on the board of directors of the corporation.' With regard to the decision of the Constitution, Law and Justice Committee to bring two alternative proposals before the Knesset, it is stated in the explanatory notes (*ibid.)*:

> 'The Constitution Committee chose not to decide, at this stage, whether to set a minimum quota of women or whether to instead adopt a policy of "affirmative action". The Committee thought that, since we are speaking of passing a fundamental and unprecedented provision in Israeli legislation, this question ought to be submitted for wide public debate, *inter alia* before the plenum of the Knesset, at the time of the first reading.'

The Knesset chose the second alternative. Thus a binding criterion for achieving equality of the sexes, based on the principle of affirmative action, was enacted in legislation for the first time. The desired objective set forth in s. 18A(a), as stated, is that the composition of every board of directors (or equivalent board of management) 'shall give proper expression to representation of both sexes.' Section 18A(b) goes on to provide that 'until proper expression of such representation is achieved, ministers shall appoint, in so far as is possible in the circumstances of the case, directors of the sex that is not properly represented at that time on the board of directors of the corporation.' The petitioner correctly argues that the provision of s. 18A(b) requires that, in the interim period until the goal stipulated in s. 18A(a) is achieved, a path of affirmative action is adopted. But it is important to point out that even s. 18A(a), which presents the long-term purpose of the law, does not merely declare the existence of the said purpose, as a goal that we should aspire to within the framework of well-known and established doctrines; instead, it sets out a practical mission which must be accomplished immediately. The mission is to achieve proper representation of both sexes; and the duty to accomplish it — stipulated in the words '*shall give*' — is imposed on the ministers who make the appointments (and, where relevant, on the Government). The reason for this is that, since the ministers have the authority to make appointments, it is they (and they alone) who are able to do the work and turn the desired objective of the law into a practised and accepted social reality. It transpires that the criterion for affirmative action, which s. 18A(b) expressly mandates with regard to the interim period, is in fact incorporated also in the provision of s. 18A(a). Is not the significance of the duty to give proper expression to the representation of members of both sexes that also at every time in the future proper expression to such representation must continue to be maintained? It follows that the need to consider also the sex of a candidate will arise anew when appointing every new member to a board of directors; whether in order to maintain the balance between representatives of the two sexes that was achieved in the composition

of the board of directors before the departure of the director, whom the new appointment is intended to replace, or in order to correct the exact balance, if this was breached by a prior appointment of any other director.

15. The clear purpose of s. 18A, which as stated was one of the innovations of the Appointments Law, is to correct existing injustices in the scant representation given to women in the composition of the boards of directors of Government corporations. The method set out in the section for achieving this purpose is the application of a norm of affirmative action. This is, without a doubt, a normative innovation. We shall therefore begin by establishing the basic nature of the norm.

Affirmative action

16. The idea of 'affirmative action' derives from the principle of equality, and its essence lies in establishing a legal policy for achieving equality as a *resultant* social norm. The core of the principle of equality (according to the traditional approach) is 'equal treatment of equals', and its usual expression in social life lies in affording equal opportunities to everyone. The problem is that affording equal opportunities is likely to achieve an equal result only when the population groups who are competing do so from a starting point that is more or less equal; for only under circumstances of initial equality do they have equal opportunities to achieve it. This is not the case with respect to populations composed of very strong groups and very weak groups. A significant gap in equality of opportunity — whether it originates in discriminatory laws that were in force in the past but are now obsolete, or whether they were created by mistaken beliefs that became entrenched in society — increases the chances of the strong groups and reduces the chances of the weak groups. Affirmative action seeks to close this gap. It is based on the view that in a society where some elements start at a disadvantage, it is insufficient to give everyone an equal opportunity. Giving an equal opportunity in such circumstances merely complies with a kind of formal equality, but it does not afford persons in the disadvantaged groups a real chance to receive their share of the resources of society. The existence of formal equality in the long term raises the fear that because of the way of the world and human behaviour, the results of the discrimination will be perpetuated. Correcting the injustices of the past and achieving actual equality can, therefore, only be done by giving preferential treatment to members of the weak group.

17. The doctrine of affirmative action is practised in the United States. It began with public movements that arose in the middle of the 1940s and that

set themselves the goal of ridding American society of the scourges of discrimination and prejudice, mostly on the basis of race and ethnic origin. These movements sought *de facto* to realize the principle of affording equal opportunities to members of the disadvantaged groups in society, as a practical expression of the equal protection clause set out in the Fourteenth Amendment of the Constitution. This objective was ostensibly achieved upon the enactment, in 1964, of a federal statute (The Civil Rights Act), which in paragraph 703 declares unlawful any practice of selecting, employing or promoting employees on the basis of discrimination because of the race, colour, religion, sex or national origin of the candidate or the employee. On the basis of this prohibition, the Supreme Court forbade aptitude tests for the acceptance of employees, which ostensibly afforded equal opportunities to all candidates, but were in practice irrelevant to the substance of the job and their real purpose was to negate the chances of black candidates (see *Griggs v. Duke Power Co.* (1974) [18]).

Eventually it became clear that even when equal opportunities were given the desired results were not achieved. Against this background, a new trend emerged at the end of the 1960s: no longer only giving equal opportunities, but also a redistribution of resources and 'social engineering', designed to produce equal results. According to this approach, which grew stronger during the seventies, the existence of social equality is not measured in terms of providing the means for achieving it (granting equal opportunities), but in actual achievements, namely results. But bitter opponents challenged this approach. They argued that equality and preference (even if 'corrective') are contradictory. Preference for reasons of race or ethnic origin violates the right of equality of anyone who is not of the preferred racial or origin. So it transpires that the burden of the correction of the injustices of discrimination against one person unjustly falls on the shoulders of another. There were also some who pointed out a contradiction between the reasons for affirmative action and other relevant considerations that oblige the authorities to develop a social policy devoid of favouritism, such as considerations of viability and economic advantage. It should be noted that the critics also included recognized liberals. Thus, for example, the scholar Morris Abram (himself one of the founders of the social movement for the elimination of discrimination) criticized the quota system involved in implementing the policy of preference for the weak (see Morris B. Abram, 'Affirmative Action: Fair Shakers and Social Engineers', 99 *Harv. L. Rev.*, 1985-1986, 1312). But there were also

some who answered the critics of the affirmative action approach in their own terms. Particularly appropriate here are the remarks of Professor Sunstein:

> 'The antidiscrimination principle — of course, widely accepted — forbids government from discriminating against blacks and women, even when such discrimination is economically rational. Affirmative action — of course, a highly controversial practice — calls for employment and other preferences for members of disadvantaged groups. The two ideas are often thought to be in severe tension, and indeed, for advocates of affirmative action, the antidiscrimination principle sometimes seems an embarrassment.
>
> In some settings, however, an antidiscrimination norm, conceived as a barrier to economically rational behavior, has the same purposes and effects as affirmative action. Affirmative action is controversial partly because it can be economically irrational, can impose serious social costs, and harms innocent victims. But an antidiscrimination principle often does precisely the same as what affirmative action does, and also does it in the interest of long-term social goals. For example, an antidiscrimination norm may require innocent victims to sacrifice — customers may be required to pay higher prices — in order to produce long-term equality.
>
> A great failure of the assault on affirmative action is in its inability to account for the ways in which a requirement of nondiscrimination involves very much the same considerations. Indeed, the distinction between affirmative action and antidiscrimination is sharp only to those who see discrimination as always grounded in hostility and irrationality, which it clearly is not' (C.R. Sunstein, 'Three Civil Rights Fallacies', 79 *Cal. L. Rev.*, 1991, 751, at p. 757).

18. The socio-political argument in the United States with respect to the question of affirmative action finds clear and strong expression in the rulings of the Supreme Court. It appears that only three of the justices (Steven, Marshall and Blackmun) were prepared to recognize affirmative action as a criterion of equality. In view of 'past iniquities', they argued, the perpetuation of the status quo in itself also creates and amounts to discrimination. It follows that affirmative action should be seen as one of the corollaries of the principle

of equality itself. It does not ignore the reasons why substantive equality does not exist, but it recognizes their existence and acts directly in order to eliminate them; thus it constitutes a real guarantee for the realization of equality. The remarks of Justice Blackmun in *University of California Regents v. Bakke* (1978) [19] in this respect are well-known; in his criticism of the approach that views affirmative action as contrary to the protected constitutional right of equality, he said, at p. 407:

> 'I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. *And in order to treat some persons equally, we must treat them differently.* We cannot — we dare not — let the equal protection clause perpetuate racial supremacy' (emphasis added).

But the tendency of the majority of the justices was to recognize affirmative action merely as a permissible exception to the equality principle. The rationale underlying this approach was that affirmative action may be recognized only when it is proved that it is designed to compensate an individual or group, which belong to the weaker strata of society, for the sins of social discrimination from which they suffered in the past. In other words, affirmative action will succeed in being recognized only when it applies a measure of 'reverse discrimination'. On the basis of this approach, the court, in *University of California Regents v. Bakke* [19], disqualified an admissions scheme for a medical school that reserved sixteen out of one hundred places for students from under-privileged minority groups, but even the judges who formed the majority agreed that a candidate's racial origin could be considered by the university as one of the considerations for determining his eligibility for admission to the school. In subsequent years the question was submitted several times to the Supreme Court, but in all the cases the court refrained from an overall endorsement or an overall rejection of affirmative action as a social norm. In an interesting survey written in response to the judgment in the case of *Wygant v. Jackson Board of Education* (1986) [20] — in which the court disqualified a collective agreement, which, for reasons of affirmative action, gave non-white teachers a degree of preferential treatment over white teachers in the event of a work stoppage — Professor Sullivan showed that, despite the different approaches in the majority and minority opinions of the justices, in the six cases (up to 1986) in which the court approved arrangements based on affirmative action, the common denominator for the

positive decision was expressed in the reasoning that the need to compensate for past discrimination prevailed, in the circumstances of the case, over the consideration of preserving the principle of equality (see K. M. Sullivan, 'Sins of Discrimination: Last Term's Affirmative Action Cases', 100 *Harv. L. Rev.*, 1986-87, 78). The criteria for the limited recognition of affirmative action were defined (by Justice Brennan) in the case of *Steelworkers v. Weber* (1979) [21]. According to him, affirmative action may only be recognized as a temporary means for correcting injustices resulting from racial imbalance, as opposed to an intention to achieve racial balance ('… a temporary measure, not intended to maintain racial balance but simply to eliminate racial imbalance'). It should be noted that on the basis of this approach, the court upheld the legality of a program under which the promotion of a female employee was preferred to that of a male employee who was also found equally deserving of promotion (*Johnson v. Transportation Agency, Santa Clara County* (1987) [22]). Even though the factor which tipped the scales in making the selection was the sex of the candidate, the court decided (this time also through Justice Brennan) that the program was legitimate, since it was designed to rectify an injustice of non-representation of women in jobs at that level of seniority that had previously been held only by men, but it did not impede the promotion of male employees.

19. We see therefore that the doctrine of affirmative action gained a foothold in American law neither easily nor openly, but cautiously, narrowly and subject to qualifications. It would appear that two main reasons were jointly responsible for this.

First, the recurring need to reconcile affirmative action with the mandate of the Constitution, which in its rigid definitions forbade preference of any kind. Second, the fact that most affirmative action programs submitted for the court's review were designed to promote the black population, and American society sometimes has difficulty in admitting the *de facto* discrimination of this population.

Canada learned a clear lesson from the difficulties posed by the United States' Constitution, and in drafting the Canadian Charter of Rights and Freedoms, which constitutes the first part of the Constitution Act, 1982, it included the principle of affirmative action within the framework of the definition of the right of equality. The following is the text of s. 15 of the Charter of Rights:

'*Equality Rights*

> *Equality before and under the law and equal protection and benefit of law*
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Affirmative action programs*
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

It should be pointed out that the constitutional recognition of the existence of the need to practise affirmative action is very evident in the reasoning of the Canadian Supreme Court, also with regard to the rationale justifying this need. Canada's Chief Justice (Chief Justice Lamer) expressed this well in *C.N. v. Canada (Human Rights Commission*) (1987) [25], at p. 1143:

> 'The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.'

20. It should be noted that other countries have also adopted legislation that accepted the criterion of affirmative action in order to advance the material equality of women. Examples of this can be found among European countries that acted under the inspiration of 'positive action' of European legislation (see, for example, the article of D.A. Grossman, 'Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality' 4 *Comp. Lab. J.*, 1992-1993, 185). However, I think that the most striking example of all is Australia, which in 1986 incorporated the principle of affirmative action in a law prescribing equal employment opportunities for women: The Affirmative Action (Equal Employment Opportunity For Women) Act, 1986. In this context, see J.J. Macken, G. McCarry & C. Sappideen, *The*

Law of Employment, Sydney, 3rd ed., 1990, 609; and also the chapter 'Anti-discrimination legislation and affirmative action legislation', in the book of C. O'Donell & P. Hall, *Getting Equal*, Sydney, 1988, 75).

21. It should be recalled that, according the approach of those who recognize affirmative action as a norm in the field of equality, the true test of equality does not lie in declarations of recognition of equality but in its actual realization and its practical results. Indeed, together with the dissemination of the 'redistribution' approach, there has been an increase in the importance of statistical evidence; instead of dealing with the question of the existence of discriminatory intent, the importance of which has greatly declined, attention has focused on the realities of the situation. This, *inter alia*, led to the extensive consideration in the rulings of the United States Supreme Court as to the proper degree of use of affirmative action as a device for correcting existing injustices in real equality. Thus, for example, in relating to the expression of practical equality in the labour market, case-law distinguished between 'ordinary' jobs, and jobs and positions for which special professional training is required. With regard to the first category it was held that as a rule it should be expected that there will be more or less equal representation in the work force of all elements of the various racial and ethnic groups in the community (*Teamasters v. United States* (1977) [23]). However, that equality should *prima facie* prevail in the representation of the various elements of the community, who have the special professional qualifications, also in the professions and the jobs that require those qualifications *(Hazelwood School District v. United States* (1977) [24]; see also the case of *Johnson* [22], at p. 632).

The equality of women – de facto

22. The principle of equality, which in the words of President Agranat 'is merely the opposite of discrimination…' (FH 10/69 *Boronovski v. Chief Rabbis* [1], at p. 35), has long been recognized in our law as one of the principles of justice and fairness which every public authority is commanded to uphold. We will not dwell upon the case-law development of basic human right of equality. We should, however, emphasize that as a rule there has never appeared to be a need to enshrine the principle of equality in statute, and certainly it has never been necessary to lay down statutory formulae to impose it in the various spheres of public and social activity. Even the possible entrenchment in the Basic Law: Human Dignity and Liberty, as part of the value of human dignity, is not express but implied (see H. H. Cohn, 'The

Values of a Jewish and Democratic State — Studies in the Basic Law: Human Dignity and Liberty', *HaPraklit — Jubilee Volume*, 1994, 9, 32; A. Barak, *Judicial Construction*, Vol. 3, *Constitutional Interpretation*, Nevo, 1994, at 423-426; Y. Carp, 'The Basic Law: Human Dignity and Liberty – A Biography of a Struggle', 1 *Law and Government*, 1993, 323, 345 *et seq.*). It is merely that the statement at the beginning of the Declaration of Independence that the State of Israel would '… guarantee absolute social and political equality to all of its citizens irrespective of religion, race and sex', and the rapid absorption of democratic practices into civil life were sufficient to establish the principle of equality as part of the basic principles and ways of life accepted by all citizens.

But this rule had one exception: although the binding application of the principle of equality in general was easy and clear, upholding the right of equality for women (at least in the social sphere, as distinct from the political sphere) was not so simple and evident. Initially, for historical reasons related to religious laws and ethnic traditions, the social equality of women was a special problem (see A. Rubinstein, *The Constitutional Law of the State of Israel*, Shocken, 4th ed., 1991, 325). The Women's Equal Rights Law, 5711-1951, which was enacted in the first years of the State, was intended to correct this injustice. However, the law was mainly intended to cancel the force of prevailing laws and customs, in so far as these discriminated directly against women. However, in addition to its specific provisions — which established women's property rights, made women and men equal with regard to the guardianship of children, etc. — the law asserted the equality of women (in s. 1) 'for every legal act'. In this way, statute recognized the binding legal nature of absolute equality of rights for women. Although the 'formal' status of the Women's Equal Rights Law is no different from that of an 'ordinary law', it has always been regarded as a law with a 'special status'. Indeed, Justice (later Vice-President) Silberg attributed its special status to its being 'an ideological and revolutionary law that changes the social order; its name and its first "programmatic" section indicate that — apart from the reservation in s. 5 — it seeks to eliminate utterly anything which, under the prevailing law, involves any legal discrimination whatsoever against women…' (HCJ 202/57 *Sidis v. President and Members of Great Rabbinical Court* [2], at p. 1537). Recently, Vice-President Justice Barak called the law a 'majestic' statute (HCJ 1000/92 *Bavli v. Great Rabbinical Court* [3], at p. 240). In practice, the law has been interpreted, at least as a rule, as protecting the right of women not merely to equality 'for every legal act' in the narrow meaning of the statute,

but to equality 'in every legal respect' (in the words of Justice Witkon in CA 337/61 *Lubinsky v. Assessing Officer, Tel-Aviv* [4], at p. 406), i.e., a right to full and complete equality under the law in every respect (for comments on this point see the article of Professor F. Raday, 'On Equality', 24 *Mishpatim*, 1994-1995, 241, at pp. 250-254). Based on this approach, *inter alia*, the right of women to have an equal part in several spheres of public and social activities which were previously deemed the exclusive province of men, was implemented and enforced *de facto* (see particularly: HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [5]; HCJ 953/87 *Poraz v. Mayor of Tel-Aviv–Jaffa* [6]).

Unfortunately the recognition, in principle, that women have equal rights, did not help that much in affording women equal status and rights in the fields of employment, work and salary. In order to prevent unfairness and discrimination against women, and to enforce equal standards for both sexes in these fields, the legislator resorted to a series of specific statutes (see, mainly, s. 42(a) of the Employment Service Law, 5719-1959; the Equal Remuneration for Female and Male Employees Law, 5724-1964; the Equal Retirement Age for Female and Male Employees Law, 5747-1987; the Equal Employment Opportunities Law, 5748-1988). But even in these fields the court was at times required to make a decision, not in accordance with provisions in a specific statute, but based on the principle of equality. The most striking example is the disqualification of a provision in an employment agreement, which was made before the Retirement Age Law came into effect, that discriminated between Female and Male Employees with regard to retirement age (HCJ 104/87 *Nevo v. National Labour Court* [7]).

23. The negligible representation of women on boards of directors of Government corporations is one expression of the discrimination against women in Israeli society. Before we turn to consider the purpose of s. 18A of the Government Corporations Law, which was intended to correct this injustice, we ought to note that discrimination against women in modern society is not an unusual phenomenon even in other free countries that are considered civilized in every respect. We ought to see clearly that discrimination against women in the fields of employment and economic activity has a destructive effect on the equality of the social status of women in its widest sense.

It is merely that attitudes and assumptions from the past continue to exert their influence almost everywhere. Note that we are not dealing at all with

discrimination based on a stated ideology but with social habits that have become entrenched and are fed by the existence of a kind of unconscious consensus — which prevails of course even among women themselves — that makes discrimination into a continuing social phenomenon. An indication of this attitude can be found in a report submitted in 1984 by a commission chaired by Rosalie S. Abella (who has since been appointed judge in the Court of Appeals for Ontario), which investigated instances of inequality in the employment of women in Canada. The report presented by the Abella Commission (Report on Equality in Employment, Ottawa, Ministry of Supply and Services of Canada, 1984) contains a discussion of factors that create systematic discrimination against women. Below is a brief excerpt from the report, at pp. 9-10, on this matter:

> 'In other words, systematic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job".'

Searching for the causes of discrimination against women in any sector, when its existence as social reality in that sector is proved by statistical evidence, is of secondary importance; for in general it is possible to assume that discrimination against women in any sphere — particularly when their promotion does not depend merely on the qualifications of candidates but also on decisions made at organizational power centres — is a result of a deep-rooted consensus which many upright people act upon without being aware of the impropriety in their behaviour. But the absence of discriminatory intent is irrelevant; for the problem is the phenomenon of discrimination against women, as a proven fact, and discrimination is wrong even when there is no intention to discriminate (see: the remarks of Justice Bach in *Nevo v. National Labour Court* [7] at p. 759; the remarks of the Vice President Barak in *Bavli v. Great Rabbinical Court* [3] at pp. 241-242).

It is also important to understand, in the spirit of what has already been suggested, that discrimination against women in the employment and economic sectors has a cumulative effect on their negative image, as a class which is

supposedly inferior, in other spheres as well. Thus, for instance, the lack of proper representation of women in various fields and various workplaces contributes to fostering a negative image of their ability to manage their lives independently. It follows that discrimination against women in economic spheres in its own way nurtures the long-term entrenchment of distorted social outlooks. Remarks to this effect were recently written in the United States:

> 'Practices that prevent women from participating equally in the work place are not justifiable, even if done by employers who are unaware of the discriminatory effects. Maintenance of the status quo is itself discriminatory and has more than a merely economic impact on women's lives. Inequality in the workplace translates into more general restrictions on women's abilities to direct and control their lives; political and social influence follow from the independence that can come only with economic freedom' (Note, 'The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation', 106 *Harv. L. Rev.*, 1992-93, 1621, 1622).

See and cf. also remarks made, to exactly the same effect, in *C.N. v. Canada (Human Rights Commission*) [25], at pp. 1143-1144.

Section 18A construed according to its purpose

24. Section 18A was intended to correct the injustice in the lack of proper representation of women on the boards of directors of Government corporations. In order to realize this objective effectively, the legislator employed, for the first time, the principle of affirmative action.

It should be mentioned that the principle of affirmative action, which is set out in s. 18A, is not a complete innovation in our legal system, and that on several occasions in the past the court has considered it as a possible means for achieving equality in special cases. Thus, for instance, in HCJ 246/81 *Derech Eretz Association v. Broadcasting Authorities* [8], Justice Shamgar pointed out that the premise 'whereby equality means that equals are to be treated equally and non-equals unequally still makes it necessary to determine the characteristics and elements by which equality is measured and to evaluate their extent and degree in each specific case' (*ibid.*, at p. 19 {38}). He went on to state:

> 'A question that derives from this is, for example, whether instantaneous equality is indeed just in its immediate result, or whether there are circumstances in which equality can only be

> achieved by adopting operative methods that treat people unequally, such as when seeking to apply reverse discrimination…'

In the same judgment, Justice Barak emphasized that 'it is not at all a paradox that in order to achieve equality one must act differentially' (*ibid.*, at p. 11 {31}), and after quoting from Justice Blackmun's opinion in *University of California Regents v. Bakke* [19], he added graphically (*ibid.* [8], at p. 12):

> 'Indeed, affording a rich man and a pauper the equal opportunity to sleep under a bridge does not create equality between the two in respect of their chances of a good night's sleep.'

Another example can be found in the remarks of Justice Netanyahu in HCJ 720/82 *Elitzur Religious Sports Association, Nahariyah Branch v. Nahariyah Municipality* [9], at p. 21:

> 'Moreover, equal treatment does not always lead to a just result, and sometimes one must act unequally in order to achieve justice, depending on the objective that we wish to achieve. When the starting position of one person is lower than that of another, it is necessary to give him more in order to make the two equal… the justice of the result is what counts and not the sanctity of the principle of equality, which merely serves the purpose of achieving justice.'

In this spirit Justice Or held, in HCJ 528/88 *Avitan v. Israel Lands Administration* [10], that leasing land cheaply for the housing requirements of Bedouins, which the State has an obvious interest in achieving, does not contravene the principle of equality, and therefore it does not entitle someone who is not a Bedouin (like the petitioner) to claim that he too should be leased land for housing on the same terms.

But it can be shown that examples in case-law of the principle of affirmative action are few and of limited application. Professor Raday was therefore correct in pointing out (in her article, *supra*, at p. 259) that 'the concept of affirmative action is almost unknown in Israel'. Its incorporation as a statutory norm, in s. 18A of the Government Corporations Law, can indeed be regarded as a significant innovation in the normative outlook. In my opinion, it should be accepted and recognized as a criterion of equality, which is one of the necessary implications and one of the main guarantees of the principle of equality itself (similar to the approach adopted in Canada), rather than as a tolerated exception to the principle of equality (like the limited

approach that has taken root in the United States). Time will tell what will be the scope of operation of the principle of affirmative action in Israeli society *de facto*. But by including the principle of affirmative action within the framework of the said s. 18A, the legislator rightly expressed a clear intention to oblige ministers (and the Government, where relevant) to initiate deliberate and intentional action whose clear objective is to correct existing injustices in the real equality of women in the economic sector that *de facto* is within the Government's control. Ostensibly this is a defined and limited specific need, which appears indispensable in view of the figures presented to the Knesset with regard to the negligible representation of women on boards of directors of Government corporations. But these figures were evidence of a social phenomenon that is clearly more widespread; in other words, general acknowledgement of the right of women to complete and absolute social equality does not truly exist in real life. They clearly showed that in our society, which recognizes equality and supports it as a principle of justice and fairness, talk about equality is one thing and its application is quite another. Indeed, personally I refuse to believe that the figures presented to the Knesset indicate a phenomenon that is unique to the composition of boards of directors of Government corporations. It is far more logical to assume that the figures presented, about the significant and obvious discrimination against women in the composition of these boards of directors, are merely a reflection of a much wider social phenomenon. Therefore it is quite possible that the innovation of s. 18A may and should be interpreted against a background of the objective context of a broad social need, namely, the need to strengthen the share of women in employment frameworks in general, and management levels in particular, in all sectors of the economy. This approach would appear to be required by the recognition that the enactment of the Basic Law: Human Dignity and Liberty raised the principle of equality to 'a constitutional, super-legislative normative status' (in the words of Justice Or in HCJ 5394/92 *Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority* [11], at p. 362). Therefore there are grounds for an assessment that from now on the right of equality will be construed — according to the criteria of the Basic Law: Human Dignity and Liberty — as protecting the individual not merely from the arbitrariness of authorities, but also from the lack of good faith of others within the framework of the relationship in the field of private law (see the remarks of Justice Barak in CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [12], at pp. 530 *et seq.*; in his article 'Human Rights Protected in Private Law', in *The Klinghoffer Book on Public Law*,

The Harry and Michael Sacher Institute for the Research of Legislation and Comparative Law, edited by I. Zamir, 1993, 163; and in his book, *supra*, at pp. 647 *et seq.*. See also Professor F. Raday's article, 'The "Privatization of Human Rights" and the Abuse of Power', 23 *Mishpatim*, 1994, 21).

25. The lesson that must be derived from this is: since discrimination against women in modern society is mainly a phenomenon rooted in subconscious beliefs, the moral strength of a society that aspires to equality can be measured by the extent of the positive measures and efforts that it is prepared to adopt and invest in breaking down the status quo and creating a new and egalitarian reality. In this context, affirmative action has great, and maybe decisive, importance; the intentional and deliberate *de facto* advancement of the group that is a victim of discrimination towards the positions of which it was deprived in the past not only corrects the practical injustices of inequality, but also creates a new reality, which will eventually eliminate from the world even the hidden roots of discrimination and the consequences that accompany it. In this way an act of affirmative action, designed mainly to correct a specific injustice, is likely to serve a general purpose of realizing the principle of equality. A simple example given in the article 'Human Rights — Statutory Interpretation — Affirmative Action', by D. Greschner and K. Norman, 63 *Can. B. Rev.*, 1985, 805, 812, will emphasize this:

> 'When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefiting from the program.'

The test of 'proper expression' and the 'circumstances of the case' reservation

26. In view of the aforesaid, let us return to the questions that are the subject of dispute between the parties and that we defined at the end of paragraph 11 *supra*. The first question requiring clarification is: what is the nature of the obligation imposed on the competent minister (or, where relevant, on the Government) under s. 18A(b) of the Government Corporations Law? The answer to this question derives from the construction of two key concepts in the text of the section: one is 'proper expression of representation', which determines the criterion for affirmative action with which the Minister is compelled to comply; the other is 'to the extent that circumstances allow', which establishes a qualification to the minister's duty to comply with this criterion *de facto* with respect to every appointment.

27. Since counsel for respondents 1-6 concedes that neither of the bodies in question give 'proper expression' to the representation of women, I see no need to propose a comprehensive answer to the substance of this concept. Nonetheless, and in view of the affidavit in reply submitted to us (by the assistant to the Minister of Finance) about the procedure prescribed by the Minister for implementing s. 18A (the precise wording of the deponent were set out in paragraph 9 *supra*), I would like to make the following comments:

I accept that the term 'proper representation' — with regard to the representation of both sexes in the composition of a board of directors — must be construed in accordance with the special circumstances of the case. This means that we are not speaking of fixing equal quotas, or any quotas at all, for the representation of either men or women; but we are speaking of giving proportional representation to each of the sexes, and the proper degree thereof should be determined in accordance with the character, the purposes and the special needs of the Government or statutory corporation under discussion, and according to the distribution of the candidates of both sexes found to be suitable for the specific office that is sought. It is possible that the conclusion that derives from this premise is that in the absence of proven circumstances that justify giving greater weight to members of one sex, 'proper expression' should be interpreted to require equal representation for men and women. However, in general and specifically, we must take care not to instil an approach that holds that giving *any* representation to women may be deemed giving women *proper* representation. The procedure established by the Minister of Finance, according to the affidavit in reply submitted on his behalf, has precisely this deficiency; for it appears from what is stated in the affidavit that the Minister directed himself to consider the appointment of a woman to the board of directors of a Government corporation only when it

transpired that *no woman* held office on the current board of directors, and the appointment under discussion was one of the last three vacancies in the total number of directors. It should therefore be emphasized that this procedure is inconsistent with the approach underlying the provision of s. 18A, which requires proper expression — and not any expression — of the representation of women.

28. We shall now consider the reservation 'to the extent that circumstances allow'.

Section 18A(b) imposes a duty on ministers to appoint directors of the sex that is not properly represented, until proper expression of the representation of both sexes is achieved in the composition of the board of directors. This obligation is not absolute but relative, since its application for ministers is qualified by the words in the section: 'to the extent that circumstances allow'. By providing this qualification, the legislator wished to balance between two potentially conflicting interests: the obligation of affirmative action and the existence of constraints arising from the prevailing practicalities. But what is the precise nature of the proper balance? Obviously if for a particular office there is not one female candidate who has the necessary qualifications, it will be easy to determine that the terms of the reservation are satisfied, i.e., the appointment of a woman is impossible in the circumstances of the case. But what about a case where both the male and the female candidates for a position have the necessary qualifications, but the qualifications of each of the female candidates do not reach the same standard of the qualifications of one of the male candidates? Even in such a case is it not possible to determine that the male candidate who, in comparison with the other male and female candidates is the best, should be preferred? It should be noted that counsel for the petitioner suggested that this question should be answered in the affirmative. Affirmative action for women — she claimed — merely means that when there is absolute equality in all other respects, the appointment of a woman is preferable to the appointment of a man. But I would prefer to adopt a more flexible test, that makes the decision conditional upon the special circumstances of each case, after considering the relevance in the said context of the relative advantage of the male candidate, against a background of the recognition of the centrality of the principle of affirmative action. Thus, for instance, if the relative advantage of the male candidate over a female competitor derives from his particularly rich practical experience as a director on various boards, I would tend to regard taking the candidate's experience into account as a valid consideration justifying his being given preference only

if it were proven that, in the circumstances of the case, the extensive experience of the candidate is an especially relevant consideration. An example of this would be where the existing composition of the board of directors only contains a few experienced directors, and for this reason it is especially important to bring in a director with extensive experience. If this is not the case, a female candidate ought *prima facie* to be chosen, even though she is less experienced. The reason for this derives from the principle of affirmative action, for in a social context where women have been the victims of discrimination, it is only natural that more men than women with be found with experience in management. Preferring male candidates over female candidates because they have greater and more varied practical experience, is liable to perpetuate the same models of discrimination against women that section 18A was intended to eliminate. It is not superfluous to point out that the very same considerations may test the definition of qualifications, according to which a minister will decide that, in the circumstances of the case, a woman cannot be appointed. In other words, if it transpires that the qualifications, according to which the Minister decided to prefer the appointment of a man, are irrelevant for carrying out the particular job, it may and should be determined that the reservation does not apply and that the duty to prefer the appointment of a woman has been breached.

29. In principle it should be emphasized that in the internal balance between the duty of ministers to prefer the appointment of women and the extent of the taking into account the limits of the framework within which ministers are directed to carry out this duty, primary importance should be attached to the duty to prefer women. We should remember that the duty of preference in the appointment considerations is general, while the reservation (that releases the appointing minister from the said duty) is likely to apply only in exceptional cases, in which carrying out the duty is not possible.

30. An additional conclusion that is required here is that the burden of proof that in the circumstances of a specific case it was not possible to appoint a woman rests with the appointing minister. This burden is not a light one. In order to discharge it, the appointing minister must show that he examined the possibility of appointing a suitable female candidate, but discovered that, in the circumstances of the case, this was impossible. Even his duty to make such an examination is not simple. In order to discharge it, the minister must adopt reasonable measures to locate a suitable female candidate. The scope of these measures depends on the type of appointment in question. When he must appoint a director from among the employees of his ministry, the examination

must encompass all the female employees in his ministry who *prima facie* have the basic qualifications required. If he must choose the candidate from among the general public, his examination must encompass those sectors of the population where a suitable female candidate is likely to be found. This does not mean that the minister must seek, at any cost, to locate an unknown female candidate who has the necessary qualifications. But he also will not have done his duty by making a 'formal' search for any female candidate. In order to do his duty properly, he must adopt reasonable measures designed to lead to the discovery and appointment of a suitable female candidate. For this purpose, it is not impossible that the Minister will seek assistance not only from his assistants and advisors, but also from external public bodies (such as business guilds, professional associations and societies, trades unions, the universities, women's organizations, etc.) and of professional authorities (such as the Adviser on the Status of Women in the Prime Minister's Office), who have in their possession the relevant information which he needs and who may recommend candidates with the qualifications required for the various appointment.

The appointments under consideration

31. In the appointments under consideration, did the Ministers (or, where relevant, the Government) discharge their duty under s. 18A(b)? I regret that I must answer this question in the negative.

It should be pointed out that in the case of the appointment of the directors at the 'Refineries' this question was not really in dispute. These appointments were made by a joint decision of the Minister of Finance and the Minister of Energy and Infrastructure. From the affidavits in reply submitted on behalf of the Ministers, it transpires that the proposal to appoint Mr Kashuv and Mr Wagner were made by the Minister of Energy and Infrastructure, and the Minister of Finance supported that proposal. Thus it is stated in the affidavits that prior to the decision about the appointment of the said directors, neither Minister making the appointment gave any thought to complying with his duty to prefer the appointment of women. This was true even with regard to the Minister of Finance; for even if we assume that in this matter the Minister acted in accordance with the procedure that he outlined for his assistant, in view of the defect in this procedure, which I have already discussed, even if he followed these precisely he would not have discharged his duty. This is also true of the Minister of Energy and Infrastructure, since the supplementary affidavit submitted on his behalf (by the Director-General of the Ministry)

includes an express admission that prior to the said appointment the Minister did not examine a list of suitable female, for — so it was alleged — such a list (now in his possession) did not yet exist. A similar admission is implied also in the first affidavit submitted on behalf of the Minister of Energy and Infrastructure by the head of the Planning and Economy Administration in his Ministry. In this affidavit, it will be remembered, the considerations that led the Minister to propose the candidacy of Mr Kashuv and Mr Wagner are listed. Although this affidavit does indeed say that the Minister is aware of the need to propose a female candidate for membership on the board of directors of the 'Refineries', this was said with regard to the future; in other words, before filling the two remaining vacant positions on that board of directors, the Minister was indeed considering the appointment of a woman (note: the appointment of a *woman* and not the appointment of *women*). The simple and clear conclusion to be drawn from the affidavits in reply is that the Minister of Finance and the Minister of Energy and Infrastructure decided on the appointment of two new male directors to the board of directors of a Government corporation whose members were all men, without thinking about discharging the duty imposed on them, under s. 18A(b), to prefer the appointment of women.

32. The conclusion about the non-compliance with the provision of s. 18A(b) is inescapable also with regard to the appointment of Mr Haiek as a member of the board of the Ports and Railways Authority.

The persons involved in this appointment were the Minister of Industry and Trade, who chose Mr Haiek as his candidate for this position, the Minister of Transport, who submitted the proposed appointment to the Government, and the Government which decided to make the appointment. The facts before us do not show that the Minister of Transport or the Government thought about their duty to prefer the appointment of a woman. The Minister of Industry and Trade — as can be seen from his affidavit in reply — thought that since he was only able to recommend the appointment of one candidate, who was supposed to be chosen from among the employees of his Ministry, it was sufficient for him to choose the person who, in his opinion, was 'the best and most suitable candidate for the job from among the employees of the Ministry'. According to this criterion, the Minister thought it was natural for him to choose Mr Haiek. So although the Minister did not disagree with the petitioner's argument that the twenty-five women on the senior staff of his Ministry also had good qualifications, his affidavit does not say that he considered the candidacy of any of them. On the contrary, his affidavit shows

that in his opinion he did not have any duty to consider any other female candidates. I cannot sanction such an approach. I am albeit prepared to accept as a fact that special and extensive knowledge of Mr Haiek with regard to the activity of the Ports and Railways Authority was an important and objective factor in his selection. But in my opinion the Minister was not entitled to decide the outcome of the selection before he examined whether among the senior employees of his Ministry there was a female candidate who was well qualified for carrying out the job under discussion. It is insufficient that the Minister assumed, or even knew, that no female worker in his Ministry could compete with Mr Haiek, in so far as the scope and depth of his knowledge of the Authority's activities were concerned. Had he examined the matter, he might have found that the excellent professional qualifications of a female candidate (even if her knowledge of the Authority's activities was not equal to that of Mr Haiek) made her, on the whole, a candidate whose chances of filling the position successfully were not smaller.

As stated, the Minister of Industry and Trade had a duty to make an examination, and without doing this the Minister did not have the authority to complete the proceeding of selecting his candidate. With regard to the representative of his Ministry on the board of the Authority, his decision was of decisive importance. Nonetheless, it must be emphasized that the duty to ascertain, at the proper time, whether such an examination had indeed been made was the duty also of the Minister of Transport, when he was required to submit his proposal for the appointment of Mr Haiek for the decision of the Government, and it was also the duty of the Government, before it decided to support the proposal and approve the appointment.

The defect and the remedy

33. Under s. 18A(b), the Ministers were obliged to prefer the appointment of a woman for each of the jobs. The evidence shows that not even with regard to one of the jobs was the possibility of appointing a woman considered at all. Since we are concerned with a disregard for a consideration that the law gives express preference, the inescapable conclusion is that the Ministers' decisions are clearly and manifestly unlawful.

What should become of the appointments made on the basis of these decisions? The petitioner's position is that the appointments are unlawful and therefore should be set aside. Counsel for respondents 1-6, who related to this in her alternative argument, did not dispute that the defect in the decisions does indeed give rise to a basis for setting them aside. Nonetheless, she argued that

in the circumstances of the case the court should content itself merely with granting declarative relief, whose purpose should be to apprise the Government and the Ministers of their mistake and to direct them with regard to the methods of implementing the provision of s. 18A(b) in the future. The three reasons that she gave in support of this position (already mentioned in para. 12, *supra*) were, it will be remembered, the following: first, that we are speaking of a new and innovative provision of law, and the failure to implement it in the present cases should be attributed to the error of the Ministers and their not being sufficiently aware of the nature and scope of the duty imposed on them; secondly, that the candidates who were appointed are qualified and suitable, and therefore there is no harm to the public in allowing their appointments to stand; and third, that setting the appointments aside retrospectively would harm each of the candidates appointed, and would violate the principle that 'one should not remedy an injustice with an injustice'.

34. In my opinion, the law in this dispute supports the petitioner. We are dealing with administrative decisions, made at the most senior level (by the competent Ministers, and in one of the cases by the whole Government), with complete disregard for the existence of an express statutory provision. It is true that we are speaking of a new statutory provision which introduces an innovative norm, but it is impossible not to comprehend the importance of the purpose that the said law is intended to achieve: *de facto* equality for women in the economic sector which is wholly under the control of the Government. It follows that even the innovation in the criterion of affirmative action does not lessen the seriousness of the failure to act in accordance with the law. Perhaps the opposite is the case, for the adoption of precisely this special measure should have alerted the Ministers to the degree of importance and the degree of urgency with which the legislator viewed the need to correct the injustices of discrimination against women. Hence, there is no significance to the argument that the defective decisions were the result of an oversight. On the contrary, if further proof is required of the essentiality of enforcing this law, the alleged lack of awareness of the Ministers to act in accordance with its binding provision provides the necessary proof. Furthermore, the approach underlying the procedure laid down by the Minister of Finance following the passage of the Appointments Law, and the affidavits in reply that were submitted in these petitions merely strengthen the impression that the nature of the obligation imposed on the Ministers under section 18A(b) has not yet been properly understood. We have already discussed the danger in upholding the status quo, and there are genuine grounds for apprehension that any concession with

regard to complying with the binding provision of the law will encourage this negative trend. It follows that the court has a duty to take a firm stand and enforce the realization of the new norm.

It follows automatically that the second reasons of counsel for respondents 1-6, that allowing the appointments to stand will not harm the public, must also be rejected. There is no need to bring further evidence to show that non-compliance with the law harms the public interest; the fact that the candidates who were appointed are, in themselves, worthy and qualified persons does not detract from the harm to the public interest from holding selection and appointment proceedings tainted by illegality. Moreover, the statute's stated objective is that, to the extent that circumstances allow, the Ministers are obliged to prefer the appointment of a woman. The appointments that were made did not realize this purpose; even in retrospect, the respondents failed to produce any evidence that even if the appointment proceedings had been held in accordance with the binding provision of the law, the results (or some of them) would not have changed, because of the impossibility of appointing a woman to one of the positions.

35. We are left with the argument that setting aside the appointments will harm the candidates who were appointed and who have already assumed their new positions.

The significance of the rule that 'one should not remedy an injustice with an injustice' (in the words of Justice Berinson in HCJ 292/61 *Rehovot Packing House Ltd v. Minister of Agriculture* [13], at p. 31 {107}), on which the respondents rest their case, is apparently that even if there was a defect in an administrative act, the act will not be set aside if this harms innocent third parties. It appears that, in the past, this court tended to regard this rule as decisive, and the question of the justice of setting aside an administrative act was considered, in several cases, in this perspective (see the decision of Justice Malz in HCJ 199/86 *Amir Publishing Co. Ltd v. Minister of Tourism* [14], and the references cited at p. 531). But this approach, which attributes decisive weight to this rule, is no longer accepted. The law currently holds that the possibility of harming innocent parties should be taken into account (according to its proper weight in the specific case) within the framework of a balance of all the relevant considerations. The standard for the balance derives from the weight of each of the conflicting considerations in the circumstances of the specific case. The accepted tendency — particularly when dealing with an administrative act that suffers from a serious defect — is to set aside the

administrative act, while trying to restrict, in so far as possible, the damage to third parties who relied on it in good faith. President Shamgar considered the balancing considerations in such a case in HCJ 5023/91 *Poraz v. Minister of Building* [15], where it was decided to set aside a flawed administrative decision, while leaving some of its results untouched. The following are his remarks, at pp. 804-805:

> 'As has been explained, the importance of the trend not to ratify improper acts is that it prevents any benefit being derived from an improper act and prevents the creation of a feeling among the public that the power to circumvent or evade the proper procedures prevails, *de facto*, over the duty to uphold them.
>
> In a case like this, we must balance between the objective of maintaining proper executive administrative and preventing abuse of authority and the desire not to harm an innocent party, who completed his act before the proceedings began.
>
> The second objective of recognizing an act carried out in good faith prevents the undesirable result of remedying one injustice with another injustice towards someone who did no wrong.'

Another example is the case of HCJ 2994/90 *Poraz v. Government of Israel* [16], where an order was made, setting aside the Emergency (Emergency Plans for Building Residential Units) Regulations, 5750-1990, but important considerations were found to suspend the effect of the order so that the parties who acted in good faith on the basis of the regulations could prepare themselves, and also so that the Knesset should have time to consider new legislation that would validate the acts already carried out (see the remarks of Justice S. Levin, *ibid.*, at p. 323).

In this context we should also remember the case of HCJ 2918/93 *Kiryat Gat Municipality v. State of Israel* [17]: when the decision of the Government to reclassify development towns and development areas was set aside because it was contrary to the provisions of the Development Towns and Areas Law, 5748-1988, the justices were divided in their opinions as to whether there were reasons justifying a suspension of the effect of the order that set the decision aside. I thought, in a minority opinion, that suspending the effect of the order was 'not an option available to the court, when the order dealt with putting an end to an arrangement which had been held to be tainted by clear and manifest illegality' (*ibid.*, at p. 845), and in any case, the circumstances of that case did not warrant a suspension of the effect of the order. But my esteemed

colleagues (Justice Goldberg and Justice Dorner) held that the immediate setting aside of the Government's decision might harm towns that had relied on it. We therefore held, by a majority, to suspend the effect of the order for a period of four months. This is not the place to discuss the details of that disagreement (see, in this respect, what is stated in Professor Barak's book, *supra*, at pp. 746-748). But I will point out that even Justice Dorner, who joined the majority on this matter, argued forcefully, at p. 848, that 'the first and principal interest that the court will take into account in exercising its discretion with regard to determining the results of the violation and the resulting remedies, if the interest of upholding the rule of law; the more substantial and serious the breach of the law, the more the weight of this interest increases.' Moreover, 'only in exceptional circumstances will the court not order the immediate setting aside of an administrative act tainted by a material defect.'

With respect, it seems to me that even according to this approach the appointments in the petitions before us cannot stand; what is more, the respondents' request is not to suspend the effect of the annulment for a limited period (which, under the circumstances, appears reasonable), but to leave the defective appointments as they are. I am not ignorant of the fact that setting aside the appointments will harm each of the directors, and this harm is certainly regrettable. But the main interest under discussion is the practical implementation of the provision of s. 18A of the Government Corporations Law's requirements, the special importance of which has been discussed at length. This important interest tips the scales.

36. The inescapable result, in my opinion, is therefore that in both petitions an order absolute should be made, setting aside the appointments that were made and ordering the relevant Ministers to begin the appointment proceedings anew, in the course of which the binding provision of s. 18A(b) of the Government Corporations Law will be upheld. I will reemphasize that not even the slightest fault was found with any of the directors whose appointments are being set aside. Therefore our judgment will not bar any of them from being appointed as a director in a Government corporation. It is also possible that in the new appointment proceedings — when the provisions of the law are upheld — one of them may be reappointed to the same position to which he was appointed in the previous proceeding. In order to prevent any disturbance to the proper and uninterrupted activity of the board of directors of the 'Refineries' and the board of the Ports and Railways Authority, I think it

appropriate and correct, in the circumstances, to rule that the order absolute made in the petitions shall come into effect on 31 December 1994.

In my opinion, we should find the State liable for the costs of the petitioners, in both petitions, for a total amount of 10,000 NIS.

Justice I. Zamir:

I agree. Nonetheless, I see no need, in reaching the result reached by my colleague, Justice Mazza, to rely on the Basic Law: Human Dignity and Liberty.

The principle of equality has deep roots in Israeli law. It has always been accepted as one of the basic values of the State. The Declaration of the Establishment of the State clearly states this. And the courts relied on this Declaration and on other sources in order to determine that the principle of equality is a guiding rule in the construction of laws. This is true in general and this is true of the equality of the sexes, which also is enshrined, *inter alia*, in the Declaration of the Establishment of the State. Here, for example, are remarks made, on the subject of sexual equality, by Justice Barak in *Poraz v. Mayor of Tel-Aviv-Jaffa* [6], at p. 331:

> 'Among the fundamental values of our legal system, the value of equality is accepted and recognized.'

And at p. 333:

> '… we must presume that by enacting the Religious Services Law and the Regulations, the parliamentary and subordinate legislators wanted to uphold the principle of equality… We must interpret this authority in a way that the power of subordinate legislation may not be exercised in a way that undermines the principle of equality.'

These are matters that are well-known, and Justice Mazza has elucidated them very well. It follows that we merely have to apply them to the case before us, for the purpose of the interpretation of s. 18A of the Government Corporations Law.

Indeed, the principle of equality, as a rule of construction, receives powerful expression in the Basic Law: Human Dignity and Liberty. Section 1 of this Basic Law states:

> 'Basic human rights in Israel are founded on the recognition of the worth of man, the sanctity of his life and his being free, and they shall be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel.'

This section states, *inter alia*, that laws, in so far as they relate to basic human rights, shall be construed in the spirit of the principles found in the Declaration of the Establishment of the State of Israel, including the principle of equality. But this is merely an impressive declaration which in fact says nothing new, for we have long since acted in this way.

My colleague, Justice Mazza, says more than this. He states, albeit not decisively, that the principle of equality is enshrined in the Basic Law: Human Dignity and Liberty 'as part of the value of human dignity', which is one of the rights enshrined in this Basic Law, and therefore the Basic Law has had the effect of elevating the principle of equality to a 'constitutional, super-legislative normative status' (see paras. 22 and 24 of his opinion). This is a far-reaching statement. What does it mean that the Basic Law: Human Dignity and Liberty elevated the principle of equality to a super-legislative status? As stated, this has no real practical effect in so far as the construction of the law or the implementation of the law are concerned, for this was the law even prior to and without the Basic Law. It follows that this has only one practical significance: that from now on, the court can use the principle of equality for constitutional review of laws. In other words, the court can use it as a basis for setting aside a new law that is inconsistent with the principle of equality. It is questionable whether this is really the intention of the law.

In case-law since the enactment of the Basic Law: Human Dignity and Liberty, various *obiter dicta* can be found that see many aspects in the Basic Law. This is particularly so with regard to the right to dignity. The same is true of legal literature. Some see in human dignity the principle of equality, some see in it the freedom of speech, and some see in it other basic rights that are not mentioned in the Basic Law. Someone compiling these statements could receive the impression that human dignity is, seemingly, the whole law in a nutshell, and that it is possible to apply to it the saying of the rabbis: 'Study it from every aspect, for everything is in it'.

I would like to warn myself, in this context, against making *obiter dicta* that find their way in-between the lines of judgments, on such a fundamental and basic matter, without thorough discussion of the matter itself as a necessary part of the judgment. I believe that if it is not necessary, it is better

not to commit oneself until the need arises. Let us cross that bridge when we come to it, in the sense of 'do not raise or disturb it until it is required'.

In this case, I think that there is no need to say that the principle of equality is a basic right enshrined in the Basic Law: Human Dignity and Liberty, as part of the right of dignity, and that it therefore has super-legislative status. Time will tell whether this is the case. For the time being, it is sufficient that s. 18A of the Government Corporations Law provides the right of equality, in the sense of affirmative action, and the court merely construes and applies this section in the way long since accepted by it.

On this basis, I agree with the opinion of my colleague, Justice Mazza.

Justice Y. Kedmi

1. *Introduction*

Regrettably I cannot agree with the conclusion reached by my learned colleague, Justice Mazza, in his illuminating judgment, even though the principles set out there, *per se*, are acceptable to me.

I have two reservations with regard to my colleague's decision, which have ramifications on the outcome that he reached. The first refers to the manner of implementing the duty incumbent upon Ministers who appoint directors under the provisions of s. 18A of the Government Corporations Law (hereafter — the law); the second refers to the ramifications of non-compliance with the said duty, in the special circumstances of the case that was argued before us.

Below I shall discuss each of the two reservations separately.

2. *Section 18A of the law — the duty incumbent upon ministers*

a. *General*

(1) The apparently 'operative' provision in sub-section (b) of s. 18A of the law embodies the essence and meaning of the obligation prescribed in sub-section (a) of that section; for the present case, the reservation 'to the extent that circumstances allow' (hereafter —the reservation) is important — and decisive.

(2) Sub-section (b) does not speak of a 'transition period' at the end of which it will 'expire'. In my opinion, sub-section (b) presents a 'permanent provision', which remains valid at all times and with respect to every board of directors on which the duty prescribed in sub-section (a) has not been fulfilled.

b. *'Proper Expression'*

(1) I accept in this respect the position of my colleague, that — as stated in para. 27 of his opinion — this expression has a flexible meaning, adapting itself to 'the special circumstances of the case'. In other words, 'we are not speaking of fixing equal quotas, or any quotas at all… but we are speaking of giving proportional representation to each of the sexes, and the proper degree thereof should be determined in accordance with the character, the purposes and the special needs of the corporation… and according to the distribution of the candidates…' etc..

(2) In this situation, the aforesaid sub-section (a) establishes a 'relative duty' to guarantee 'proper expression', subject to the *special circumstances* of each corporation; and the determination whether there is 'proper expression' as stated, on this or that board of directors, is within the discretion of the appointing minister.

(3) In my view, the minister must act in the context under discussion here in two stages: in the first stage, he must examine whether, on the board of directors under discussion, there is no 'proper expression' of the representation of members of both sexes as stated in the sub-section; and only where his answer is negative, he must examine whether 'in the circumstances of the case' — subject to the reservation stated in sub-section (b) — he is able to appoint a suitable director of the sex that is not 'properly' represented on the board of directors at that time.

c. *'To the extent that circumstances allow'*

(1) Everyone agrees that this expression provides a reservation with respect to the duty of appointment set out in sub-section (a). In my opinion, we are talking about a reservation that relates both to the requirements of the job and to the qualifications of the candidates. Therefore, even where the appointing Minister reaches a conclusion that the composition of the board of directors does not reflect 'proper expression' of the representation of both sexes, someone of the sex that is not properly represented will not be preferred, *if* in the circumstances of the case *the position requires qualifications which that person does not have,* whereas a candidate of the other sex *does* have them.

(2) In this situation, the crux of the matter lies in locating the candidates. The position that I find to be implied by the arguments of the petitioner is that the party making the appointment must act in *every possible way* in order to locate candidates of the under-represented sex, in all sectors of the population;

whereas in my opinion, it is sufficient, in this context, for him to act *reasonably*.

For this reason, as a rule, the minister may in my opinion content himself by examining lists of candidates — of both sexes — from among *the employees of his ministry,* whose sphere of activity is related to that of the corporation concerned (including workers as stated who are employed in bodies connected with the ministry's activities). He is not obliged to apply to 'external' parties and to make every possible effort specifically to locate 'women employees', outside the ministry, even if it is possible to appoint to that position someone who is not 'an employee of the ministry'. The appointing Minister is required to act in this respect with 'reasonable diligence' and no more; as long as his activity lies within the bounds of reasonableness, the appointment will not be tainted with illegality because he did not locate this or that woman candidate.

The duty incumbent upon the minister is not to remedy the 'absence of proper representation' in every possible way and in the shortest time possible; it is to act reasonably to ensure equality in the selection process between the two sexes, while preferring 'equal' candidates of the sex that is not properly represented — all of which to a reasonable degree and while ensuring that following the principle of equality to remedy the situation does not occur at the expense of the degree of suitability of the candidate for the special requirements of the job.

d. *Interim summary*

(1) Section 18A of the law requires a minister who appoints a director of a Government corporation to consider the following two issues: first, he must examine whether the specific board of directors gives 'proper expression' to the representation of members of both sexes (in the relative sense outlined above); second, in a case where there is no such 'proper expression', he is bound to prefer the candidate of the sex that is not properly represented 'to the extent that circumstances allow' (in the sense outlined above).

(2) In order to comply with his second obligation, the minister must ensure two things: first, that lists of candidates (of both sexes) who are located with 'reasonable' action in the circumstances (as distinct from making *every effort* to guarantee that no 'possible' candidate whatsoever is 'omitted') are prepared and submitted to him. Second, where there is no obstacle for reasons of *personal qualifications and the requirements of the position* — and only in

such a case — preference shall be given to the candidate of the sex that is not 'properly' represented on the board of directors.

(3) As stated, I do not think that adopting the principle of 'affirmative action', as it is expressed in sub-section (b), requires that it be implemented in the extreme sense of 'taking every possible step' to locate candidates of the 'discriminated' sex. For this reason, it should not be said that pointing to any 'possible' step that was not taken is sufficient in order to undermine the legality of a selection of someone of the other sex.

With regard to the preference of a person of the 'discriminated' sex, it is, in my opinion, correct to examine and review the decision of the appointing minister — just as with regard to the existence of the absence of 'proper expression' of the representation of members of the two sexes (as stated in sub-section (a)), and with regard to the location of a candidate from members of the sex that is not properly represented (for the purpose of complying with the duty of preference required by the provision of sub-section (b)) — with the criterion of 'reasonableness', as distinct from 'putting oneself in the minister's place' as was implied, as I understood it, by the arguments of the petitioner; and there will be grounds for the intervention of this court only where we are talking of a gross and extreme deviation from that criterion.

(4) Adopting another standard in the context under discussion here — as is implied by the arguments of the petitioner — will lead, naturally, to a far-reaching restriction of the discretion given to the appointing minister with regard to the selection of the ideal and qualified director, whereas, in my opinion, the language of the reservation set out in sub-section (b) dictates the giving of 'preference' — also with regard to the duty of 'affirmative action' — *to the requirements of the position and the qualifications of the candidates*.

With all respect to the legitimate aspiration of the petitioner to attain 'absolute equality' in the number of directors of the two sexes in Government corporations as soon as possible, we should not forget that the legislator did not prescribe in this respect a mechanical-formal criterion of a quota, nor did he impose on the appointing ministers an 'absolute' duty of affirmative action at any price. The central consideration in the appointment of directors remains — as it was and as it must be — an objective consideration of the requirements of the position and the qualifications of the candidate; this consideration — as expressed in the reservation set out in sub-section 18A(b) of the law — must stand, in the final analysis, above all other considerations.

This court examines the *reasonableness of the performance* of the appointing minister and does not put itself in his place. One should not regard him — as is implied by the petitioner's arguments — as someone who must 'be in the forefront' of the struggle that underlies the petition.

3. *HCJ 453/94 — a director for the Ports and Railways Authority*

a. The reply of the Minister of Industry and Trade in this matter seems to me sufficient to obviate our intervention in the appointment of Mr Haiek on the grounds of non-compliance with the duty prescribed in s. 18A of the law. The Minister here is responsible for appointing *only one director* to the board of directors. Naturally, therefore, his scope of choice is very limited, and the qualifications of the candidate — as the representative of the Ministry of Industry and Trade — has decisive weight, which restricts the duty of 'preference' set out in the aforesaid section 18A.

b. The questions that need to be addressed in this respect are the following: did the Minister consider the fact that there was not proper representation of women on the board of directors of the Authority? If so, did he comply with the 'duty of preference' set out in the aforesaid s. 18A?

c. In my opinion, the answer to both questions is in the affirmative:

(1) The Minister was aware that women were not represented at all on the board of directors, and that therefore the duty of preference applied here.

(2) In the circumstances, one cannot say that the Minister failed to comply with the duty of 'preference' in the appointment because he 'contented himself' with examining the candidacy of the senior women employees of his Ministry 'only', and did not contact external parties in order to locate candidates who were 'foreign' to the Ministry and the Minister.

(3) The special qualifications required of a director in this case were what tipped the scales in favour of the appointment; and this consideration, as stated, is the decisive consideration underlying the reservation prescribed in sub-section (b).

d. In this situation, I do not think that we should intervene in this matter, since the proceeding followed by the Minister and the consideration which led him to decide the question of the selection of the candidate are not — in the special circumstances of this appointment — beyond the scope of reasonableness.

e. To remove doubt, I would like to emphasize once again: even if it is possible that an effort to find women candidates outside the framework of the

relevant Ministry would have found a candidate comparable to the male candidate who was appointed — I would not, in the circumstances of the case, regard as beyond the scope of reasonableness the fact that the Minister contented himself with women candidates from inside the Ministry; in any event, in this special case, women candidates 'foreign' to the Ministry are *ab initio* less qualified to be the *sole director on behalf of the Ministry.*

4. *HCJ 454/94 — Two directors for Oil Refineries Ltd*

a. According to the material before us, the Minister of Energy and Infrastructure was aware of the lack of appropriate representation for women on the board of directors under discussion, as was his duty under sub-section (a) of s. 18A of the law. However — and it appears that everyone agrees on this — he did not take the reasonable steps required to prepare a list of women candidates, and therefore, naturally the qualifications of such women candidates was not examined.

In this situation, one cannot rely on the reservation 'to the extent that circumstances allow', and the appointment of the two directors is indeed flawed because of the non-compliance with the duty prescribed in s. 18A of the law.

b. The question which troubled me was whether, in the circumstances of the case, cancellation of the appointment is a necessary result of the said flaw, in view of the following two considerations: first, what weight should be attached in this context to the special qualifications of the two directors, who were appointed by the Minister on the basis of their many years of experience? Second, what weight should be attached to the personal injustice that each of the two directors who were appointed will suffer as a result of the appointment being set aside?

c. With respect to the weight that should be attached to the qualifications of the directors who were appointed:

(1) Objectively, the candidates fulfil the requirements of the position and the qualifications, and according to the material before us no-one doubts that this was a proper choice, that befits the requirements and expectations of a director in that organization.

(2) The defect in the appointment is not a defect of 'lack of authority', but a defect arising from non-compliance with a 'duty of preference' that exists in a sphere which is 'external' to the objective sphere that determines the appointment authority.

(3) In this situation, it appears to me that we do not have a 'duty' to set the appointment aside — in the sense of 'let justice take its course!' — and the matter is subject to our discretion, and the considerations of aptitude for the position and the personal injustice have very considerable weight.

d. With regard to the personal injustice, I do not think much need be said to demonstrate the nature and force of the injury that each of the two respected directors will suffer personally. Nor was this disguised from us in the responses both of them made to the petition.

I think that we should not allow such an injustice, except in a case where it is unavoidable; but in my opinion, this is not the situation in the case before us.

e. (1) The petitioner did not take the trouble of submitting to us a list of women candidates whose qualifications are 'equal' — in every respect — to the qualifications of the two directors who were appointed, nor did it argue before us that it is able to locate such candidates. On the contrary, the petitioner does not even deny the possibility that, after the Minister does his duty and orders a list of candidates to be prepared, the two directors who have already been selected may be selected a second time, both because of the requirements of the position and the special qualifications required to fill it, and because of , first, due to the positions' specific requirements, and also because of the lack of women candidates who are 'equal' to the two who were selected.

By the way, I would like to point out in this context that, in my opinion, wherever the Minister acts on the basis of a list of men/women candidates and there are persons who have complaints about it, the persons with complaints have the burden to show that the criteria used by the Minister in making the list are not reasonable; where it is argued that the selection of the candidates was not made by carrying out the duty of preference in a reasonable manner — those making this claim must prove their claim, whereas the Minister merely needs to give his reasons. In the final analysis, here too the Minister is presumed to have acted properly.

(2) We are being asked to set aside the appointments of the two directors merely because of the defect that no examination was made of the (vague) possibility that, had had a list of women candidates been prepared, and had their qualifications been equal to those of the persons selected, women *might* have been chosen; this defect has absolutely nothing to do with the

qualifications of the two appointees and their objective *special and exceptional* suitability for filling the positions for which they were selected.

(3) In this situation, the decisive considerations, in my opinion, are the absolutely objective suitability of the qualifications of the two persons who were selected on the basis of their past experience and the special requirements of the position, and the consideration of the personal injustice that will be suffered by each of them as a result of setting the appointments aside.

f. I have not, of course, ignored the argument that if the appointments are not set aside, what is the point in finding that the Minister did not carry out his duty under s. 18A of the law. In my opinion, it is sufficient in this case to make this determination in order to instil the relatively new provision of the law in the minds of all those who are concerned; but the defect in the manner of applying it, *in itself*, does not justify — in the special circumstances of this case — taking the harsh and radical step of setting aside an appointment when no-one contests its quality, and when the real possibility of the existence of equal women candidates has not been proved.

5. *Conclusion*

In view of all the aforesaid, in my opinion:

a. The petition in HCJ 453/94 should be dismissed.

b. The petition in HCJ 454/94 should be granted in part by pointing out the defect in the selection process and bringing the matter to the Minister's attention; but the appointments should not be set aside.

c. There is no justification for finding the State liable for the petitioner's costs.

Petition granted by majority opinion (Justice E. Mazza and Justice I. Zamir), Justice Y. Kedmi dissenting.

1 November 1994.