HCJ 6698/95

1. Aadel Ka'adan

2. Iman Ka'adan

v.

1. Israel Land Administration

2. Ministry of Construction and Housing

3. Tel-Eron Local Council

4. The Jewish Agency for Israel

5. Katzir, a Cooperative Society for Communal Settlement in Samaria Ltd.

6. Israel Farmers Association

The Supreme Court Sitting as the High Court of Justice

[March 8, 2000]

Before President A. Barak, Justices T. Or, M. Cheshin, Y. Kedmi, I. Zamir

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

Facts: The State of Israel, through the Israel Lands Administration, allocated land in the Eron valley region to the Jewish Agency for Israel. The Jewish Agency, through a cooperative society, set up the settlement of Katzir on this land. The objectives of the Jewish Agency for Israel include the settlement of Jews throughout the land of Israel. For its part, the cooperative society will only grant membership to Jews. Petitioners, a couple with two daughters, are Arabs. They requested to live in the settlement of Katzir. According to petitioners, their request was immediately denied by reason of their being Arabs, since the land was allocated for the exclusive establishment of a Jewish settlement.

Held: The Court held that the principle of equality is one of the foundational principles of the State of Israel. It applies to all actions of every government authority. The Court held that the policy constituted unlawful discrimination on the basis of nationality. The Court held that the fact that the settlement was built through the Jewish Agency for Israel could not legitimize such discrimination.

Justice Y. Kedmi in a separate opinion was of the view that only a declaratory judgment regarding the status and weight of the value of equality with regard to the allocation of state land was warranted along with the clarification that the judgment is forward-looking and does not provide grounds to re-examine acts performed in the past.

For petitioners—Neta Ziv, Dan Yakir

For respondents 1 & 2—Uzi Fogelman

For respondent 3—Ilan Porat

For respondent 4—Dr. Amnon Goldenberg, Aharon Sarig, Moti Arad;

For respondents 5 & 6—Gad Shteilman, Yehudah Torgeman.

Basic laws cited:

Basic Law: Israel Lands, s. 1.

Basic Law: Human Dignity and Liberty, ss. 1, 8.

Basic Law: Freedom of Occupation, s. 4.

Legislation cited:

Law of Return 5710-1950.

World Zionist Organization -- Jewish Agency (Status) Law, 5722-1952, s. 8(b).

Israel Land Administration Law, 5720-1960, s. 3.

Draft legislation cited:

Draft Proposal for Basic Law: National Lands, *Hatzaot Hok* 5719-1959 at 272 in 27 *Divrei Knesset* (5719-1959).

Draft Proposal for the Israel Land Administration Law, 5720-1960 (*Hatzaot Hok* 34).

Israeli cases cited:

[1] CA 55/67 *Kaplan v. State of Israel*, IsrSC 21(2) 718.

[2] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa*, IsrSC 42(2) 309.

[3] HCJ 869/92 *Zwilli v. Chairman of the Central Elections Committee for the Thirteenth Knesset*, IsrSC 46(2) 692.

[4] CA 105/92 *Re'em Engineers and Contractors Ltd. V. The Municipality of Nazareth-Illit*, IsrSC 47(5) 189.

[5] HCJ 7111/95 *Center for Local Government v. Knesset*, IsrSC 50(3) 485.

[6] HCJ 114/78 *Burkan v. Minister of Finance*, IsrSC 32(2) 800.

[7] HCJ 1703/92 *C.A.L. Cargo Airlines Ltd. v. The Prime Minister*, IsrSC 52(4) 193.

[8] EA 2/88 *Ben-Shalom v. The Twelfth Knesset's Central Elections Committee*, IsrSC 43(4) 221.

[9] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, IsrSC 42(2) 221.

[10] HCJ 840/79 *Israeli Contractors and Builders Center v. The Government of Israel*, IsrSC 34(3) 729.

[11] HCJ 262/62 *Peretz v. Chairman, Members of the Local Council and Residents of Kfar Shmaryahu* IsrSC 16 2101.

[12] LCA 5817/95 *Rosenberg v. Ministry of Construction and Housing*, IsrSC 50(1) 221.

[13] HCJ 5023/91 *Poraz v. Minister of Construction and Housing*, IsrSC 46(2) 793.

[14] HCJ 392/72 *Berger v. Regional Committee for Planning and Construction, Haifa Region*, IsrSC 27(2) 764.

[15] HCJ 4541/94 *Miller v. Minister of Defence*, IsrSC 49(4) 94.

[16] HCJ 2671/98 *Israel Women's Network v. Minister of Labour*, IsrSC 52(3) 630.

[17] HCJ 73/53 *Kol Ha'Am Company Ltd. v. Minister of the Interior*, IsrSC 7 871.

[18] HCJ 7128/96 *Temple Mount Faithful Movement v. The Government of Israel*, IsrSC 51(2) 509.

[19] HCJ 5016/96 *Horev v. Minister of Transportation*, [1997] IsrSC 51(4) 1; [1997] IsrLR 149.

[20] HCJ 528/88 *Avitan v. Israel Land Administration*, IsrSC 43(4) 297.

[21] HCJ 1000/92 *Bavli v. Great Rabbinate Court of Jerusalem*, IsrSC 48(2) 221.

[22] HCJ 453/94 *Israel Women's Network v. The Government of Israel*, IsrSC 48(5) 501.

[23] EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset*, IsrSC 19(3) 365.

[24] LCA 7504/95 *Yaasin v. Party Registrar*, IsrSC 50(2) 45.

[25] LCA 2316/ 96 *Isaacson v. Party Registrar*, IsrSC 50(2) 529.

[26] HCJ 175/71 *Abu-Ghosh/Kiryat Yearim Music Festival v. Minister of Education and Culture*, IsrSC 25(2) 821.

[27] HCJ 200/83 *Wathad v. Minister of Finance*, IsrSC 38(3) 113.

[28] EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, IsrSC 39(2) 225.

[29] HCJ 4212/91 *Beth Rivkah National-Religious High School for Girls v. The Jewish Agency for Israel*, IsrSC 47(2) 661.

American cases cited:

[30] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[31] *Burton v. Willmington Parking Authority*, 365 U.S. 721 (1961).

Canadian cases cited:

[32] *Eldridge v. B.C. (A.G.)* [1997] 3 S.C.R. 624.

Israeli books cited:

[33] Y. Weisman *Property Law* 216-217 (3rd ed. 1993).

[34] I. Zamir, *Administrative Power* 236-37 (1996).

[35] Y. Dotan, *Administrative Guidelines* 315-16 (1996).

Israeli articles cited:

[36] R. Alterman, 'Who Will Sing the Praises of the Israel Lands? An Examination of the Justification for the Continued Local Ownership of Land,' 21 *Iyunei Mishpat* at 535 (1998).

[37] Barak-Erez, 'An Acre Here, an Acre There'--Israel Land Administration in the Vise of Interest Groups, 21 *Iyunei Mishpat* 613, 620 (1998).

[38] E. Benvinisti, "Separate But Equal" in the Allocation of State Lands for Housing, 21 *Iyunei Mishpat* 769 (1998.

Non-Israeli articles cited:

[39] D. Days, Brown Blues: Rethinking the Integrative Ideals, 34 *Wm. & Mary L. Rev*. 53 (1992).

[40] M. Tein The Devaluation of Non-White Community in Remedies for Subsidized Housing Discrimination, 140 *U. Pa. L. Rev.* 1463 (1992)

Jewish Law Sources Cited:

[41] *Genesis*, 1:27.

[42] *Leviticus* 24:22.

[43] Babylonian Talmud, Tractate *Ketubboth*, 33a.

[44] Babylonian Talmud, Tractate *Babba Kamma* 83b.

Other:

[45] Proclamation of Independence of the State of Israel.

[46] Universal Declaration of Human Rights.

[47] Covenant on Civil and Political Rights (1966).

[48] European Convention on Human Rights.

JUDGMENT

President A. Barak

The State of Israel has allocated land to the Jewish Agency for Israel. The Jewish Agency, in turn, has established a communal settlement on that land. The settlement was established through a cooperative society. In accordance with its objectives the Jewish Agency deals with the settlement of Jews in the State of Israel. The cooperative society, for its part, in fact accepts only Jews as members. The result in this situation is that an Arab cannot build his home on state lands allocated to the Agency. Under these conditions – and taking into account the circumstances of the case -- is the State's decision to allocate lands to the Agency unlawful, due to prohibited discrimination against Arabs? That is the question before us in this petition.

The Facts

1. The State of Israel is the owner of lands in the Eron valley region. On some of these lands it is in the process of establishing a large urban settlement called Harish. In another area, some distance from Harish, two adjacent hills were settled that together constitute the settlement of Katzir. On one of these hilltops, called "The Central Hill", the State (the Ministry of Construction and Housing: respondent no. 2) established a neighborhood. The State constructed the residential units. These units were allocated to the public at large, in accordance with the customary rules of the Ministry of Construction and Housing. Both Jews and Arabs are entitled to purchase residential units in this neighborhood. The area located on the second hilltop (known as the "Western Hill") was allocated for development to the Jewish Agency for Israel; respondent no. 4 (hereinafter; The Jewish Agency) by the State of Israel (the Israel Land Administration: respondent no. 1. Hereinafter: "the Administration") -- within the framework of a "licensing agreement". The Agreement, drawn up in 1986, is for a term of seven years. It is extended periodically. The last agreement, dated September 1, 1993, was to remain in force until the year 2000.

2. The Jewish Agency decided to establish a rural-communal settlement on the land it received from the State (on the Western Hill). It established (in 1982), the Katzir Communal Settlement [hereinafter: "the Communal Settlement"]. The Jewish Agency invested considerable sums in it, in the form of infrastructure and

buildings. Katzir is a cooperative society for communal settlement (respondent no. 5: hereinafter the Katzir Cooperative Society). It was formed (in 1981) with the assistance of the Israel Farmers Association (respondent no. 6). The goals of the Katzir Cooperative Society are, *inter alia*, to establish, maintain and manage a rural communal settlement, set up on the basis of the organization of its members as a community that institutes cooperation among its members. The cooperative society numbers more than 250 families. These families built their homes in Katzir, leading their lives in a communal and cooperative framework, as defined in the Society's bylaws. These bylaws stipulate, *inter alia*, that only a person who, *inter alia*, "has completed [the] compulsory military service in accordance with the Security Service Law [Consolidated Version]-1959, or has been discharged from compulsory service under that same law, or whose military service was postponed in accordance with that law" (chapter C, s. 6e of the regulations, as amended on 8.2.82.) may be admitted to the Society. In point of fact, Arabs are not admitted as members of the Cooperative Society.

3. From a municipal standpoint, the Katzir Communal Settlement is managed by a local committee. It is within the jurisdiction of the Tel-Eron Local Council (respondent no. 3). The urban settlement of Harish is also within that Council's jurisdiction.

4. The petitioners are a couple with two daughters. They are Arabs currently living in an Arab settlement. They sought – and continue to seek -- to live in a place where there exists a quality of life and a standard of living different from the one in which they currently live. The petitioner approached (in April, 1995) the Katzir Cooperative Society and requested information regarding his options for purchasing a house or lot in the Katzir Communal Settlement. According to the petitioner's claim, he was told on the spot that, as he was an Arab, he would not be accepted to the Communal Settlement given that the lands upon which the Communal Settlement was built were designated exclusively for Jews. As a result, (on April 7, 1995) the Association for Civil Rights in Israel, approached the Local Council of Tel-Eron on the petitioners' behalf, and filed a complaint about the response the petitioners were given. The Council replied, (on July 16, 1995), that the procedures governing acceptance to the Communal Settlement are under the control of the Cooperative Society, and that the petitioners were free to purchase a residential unit in the urban settlement of Harish. The

Association for Civil Rights in Israel subsequently filed a complaint with the Minister of Construction and Housing and the Director of the Administration. Their complaints were not responded to as of the date of the filing of this petition.

5. Upon the filing of the petition, (on October 30, 1995), an order nisi was granted. The respondents were requested to show cause as to:

> "1. Why they (the Administration, the Ministry of Construction and Housing and the Local Council)or one of them, do not offer lots for independent building in the Katzir settlement, by way of tender, or by any other alternative manner, which would maintain equality of opportunity between all those interested in settling in the settlement; and
>
> 2. Why they do not amend their policy or their decision whereby lots for independent building in the Katzir settlement are allocated only after receiving approval (from the Jewish Agency and the Katzir Cooperative Society – A. B.) of acceptance of a candidate for residence in the Cooperative Society as a member (in the Cooperative Society – A.B.) and why they should not adopt all the steps demanded by such an amendment; and
>
> 3. Why they do not enable the petitioners to directly purchase from (the Administration, the Ministry of Construction and Housing or from the Local Authority – A.B.) a lot for personal construction in the Katzir Settlement, on which they can build a home for themselves and their children."

The petition was heard, (on October 13, 1996), before a panel of three (Justices Goldberg, Kedmi and Zamir). The panel decided that, in light of the issues raised by the petition, the presiding panel should be expanded. The judges convened for oral arguments (on March 19, 1997) and we decided to hear the parties' claims by way of written summations. Upon completion of the first round of summations, (on February 17, 1998), I recommended to the parties that an effort be made to find a practical solution to the petitioners' problem. I noted that such a solution may be found within the framework of the Harish Urban Settlement or the Katzir Communal Settlement, with the

petitioners submitting their candidacy to the Cooperative Society. Mr. Bar-Sela was appointed as a mediator. His efforts failed. The petitioners notified us of this, (on December 17, 1998), and requested that the Court rule on the merits of their petition.

The Petitioners' Claims

6. The petitioners' principal claim is directed against the policy according to which settlements are established which are intended exclusively for Jews. They claim that establishing settlements in such a manner, as well as allocating land on the basis of nationality or religion (whether directly or by way of allocation to entities whose operation is based on these criteria) violates the principle of equality and therefore cannot be upheld. Their primary arguments, on this issue, are directed at the Administration. They argue that the Administration breaches its obligation to act as a fiduciary for all Israeli citizens and residents and to treat them equally in its allocation of State land to entities (such as the Jewish Agency, the Farmer's Association and the Katzir Cooperative Society) which make use of the land in a discriminatory and unequal manner.

7. The Petitioners are not disregarding the Jewish component in the identity of the State of Israel, nor do they disregard Israel's settlement history. Their petition is forward-looking. They submit that the Jewish component in the identity of the State carries determinative weight only in matters that are fundamental to the Jewish essence of the State -- such as the Law of Return 5710-1950. Additionally, the petitioners do not completely negate the right of a closed community to establish unique criteria for accepting new members -- provided that the community in question is truly distinct, with clearly defined characteristics, displaying a high degree of solidarity and cooperation between its members. It is the petitioners' contention that such characteristics do not exist in the Katzir Communal Settlement.

The Respondents' Claims

8. The respondents raise two preliminary claims. First, they claim that the petition was filed after a prolonged delay, as the land upon which the Communal Settlement is situated was allocated to the Jewish Agency many years ago, and since that time the respondents have invested considerable investments in its development and infrastructure. The respondents also argue that the change in the existing situation, sought by the petitioners today, would also lead to

a serious encroachment on their autonomy, and interference with the social-settlement fabric that the society's members have chosen. In this regard, the respondents go on to claim that if the petitioners desire to alter the existing situation, they have the option of waiting until September 1, 2000, at which time the existing development license is scheduled to expire. Therefore, the petition suffers from both delay and prematurity. An additional preliminary claim raised by the Katzir Cooperative Society relates to the fact that the petitioners failed to actually apply for membership in the Cooperative Society. Their application was therefore never evaluated on its merits, and was consequently never rejected. In light of the above, the Cooperative Society claims that the petition was filed prematurely. Furthermore, the Cooperative Society claims that it has the autonomous authority to decide whether to accept or reject any of the candidates for membership, and that the authority to review the exercise of this discretion, lies only with the general court system, and not with the High Court of Justice.

9. Substantively, respondents 1 and 2 (the Administration and the Ministry of Construction and Housing) claim that they acted lawfully in allocating the land to the Jewish Agency, in reliance on the World Zionist Organization -- Jewish Agency (Status) Law, 5722-1952 [hereinafter: "the Status of the Jewish Agency Law"], and the "Covenant between the Government of Israel and the Jewish Agency for Israel" dated 28.6.79 (*Yalkut Pirsumim* 5737-1979 2565 at 2172 [hereinafter: "the Covenant"], the Covenant replaced the prior Covenant of 1954) and that given the specific circumstances of the case, and in view of the restrictive language characterizing the order nisi issued, the Court is not required to conduct an in-depth examination of the general constitutional issues raised by the petitioners by way of their specific petition.

10. The Jewish Agency clarifies that it has set itself the goal to settle Jews all over the country in general, and in border areas and areas with sparse Jewish population in particular. This goal, the Agency asserts, is along with the other goals it has set itself a legitimate goal, anchored in the Status of the Agency Law and the provisions of the Covenant, and is consistent with the State of Israel's very existence as a Jewish and democratic state. As such, it argues, granting the present petition would effectively signal the end of the extensive settlement enterprise operated by the Agency since the turn of the century. It would also constitute a violation of the Agency's

freedom of association, and essentially thwart one of the fundamental purposes at the core of the Agency's existence. Furthermore: no one disputes the petitioners' (or any other person's) right to establish a new settlement or join an existing one; however, this does not mean that the petitioners may demand to settle in a settlement established by the Jewish Agency and to benefit, directly, or indirectly, from the Jewish Agency's investment. In this matter, it goes on to claim that the Supreme Court has in the past recognized the authority to allocate residential land to an identifiable segment of the population, whether on the basis of nationality or any other basis.

11. For their part, the Farmers Association and the Cooperative Society emphasize the national goals underlying the establishment of a communal settlement in the Eron River specifically. These respondents, too, do not contest the right of Israeli Arabs to live on state lands and enjoy full equality. Rather, they hold that there is no place for mixed communal settlements against the will of residents of the settlements.

The Preliminary Claims

12. I will first deal with the preliminary claims presented by the respondents. The argument regarding the petitioners' delay in bringing their petition must be dismissed, as the petitioners were not late in submitting their application. They applied to the Katzir Cooperative Society during the registration period. When it was made clear to them that as Arabs they would not be accepted as members of the Society they turned to this Court. It is true, the policy that underlies the respondents' action is not new, but this does not preclude its examination by the Court. This is certainly true—as per the petitioners' submission—in all that relates to the future. Nor can it be said that the petition is premature due to the petitioners' failure to apply for membership formally. As can be seen from the factual foundation laid out before us, it is uncontested that had the petitioners applied for membership to the Katzir Cooperative Society their request would have been denied. Under these circumstances, there is no point in submitting a completely futile application. Nor did the mediation process produce any results. We will therefore proceed to examine the merits of the petition before us.

The Questions before Us:

13. The legal question before us is whether the State (through the Israel Land Administration) acted lawfully in allocating the lands on

which the Katzir Communal Settlement was established to the Jewish Agency, given that on these lands -- which were leased to a cooperative society that did not accept Arabs as members -- the petitioner (or any other Arab) cannot build his home. In light of the question's complexity, it is appropriate to divide the question into two sub-questions: First, would the State (the Ministry of Construction and Housing and the Israel Land Administration) have acted lawfully had it itself directly formulated a policy whereby licenses or tenancies on state land were allocated to the Katzir Communal Settlement, which limits its memberships to Jews? If such a policy is found to be unlawful, we must then turn to the second sub-question: Are the State's actions no longer unlawful if it itself does not operate directly within the bounds of the Katzir Communal Settlement, but rather, as is in fact the case, it allocates rights in the land to the Jewish Agency which, in turn, contracts with the Katzir Cooperative Society? We will begin by addressing the first sub-question.

The State Allocates Land to a Rural Communal Settlement that does Not Accept Arab Members

14. Was the State of Israel permitted to establish a policy according to which it would directly issue land use permits for the purpose of the establishment of the Katzir Communal Settlement, designated exclusively for Jews? Answering this question requires us to turn to the normative framework applicable to the allocation of state lands. The starting point in this respect is the Basic Law: Israel Lands. This Basic Law (s. 1) provides that:

> The ownership of Israel lands, which are lands in Israel belonging to the State, the Development Authority or the Jewish National Fund, shall not be transferred, whether by sale or by another manner.

We are only concerned with Israel lands that are state lands, and our discussion will be confined to these lands alone. Israel lands are administered by the Israel Land Administration. (Israel Land Administration Law, 5720-1960). Policy respecting the land is formulated by the Israel Land Council (Israel Land Administration Law s. 3).

15. In establishing the Administration's policy, the Council must strive towards the realization of the purposes which are at the foundation of the Administration's authority, and which determine the scope of its discretion. These purposes, like those underlying the

establishment of any statutory authority, are of two types: specific purposes, which flow directly from the statute regulating the authority's powers, and general purposes, which extend like a normative umbrella over all statutes. We shall first examine the specific purposes and then turn to the general purposes.

The Administration's Activities: Specific Purposes

16. Examination of the specific purposes underlying the Israel Land Administration's authority reveals a complex picture: the laws regulating Israel lands are premised on the desire to create a uniform and coordinated administration of the totality of the lands. It has been written in relation to this topic that:

> ". . .A striking feature is the legislature's trend of ensuring that the land policy governing all future acts and transactions pertaining to Israeli state lands, the lands of the Development Authority, and of the Jewish National Fund, will be a coordinated national policy, which will be subject to the principles set forth in this law on the one hand, and which will be established in accordance with these principles by a government-appointed council, on the other hand; and also to ensure that the performance of such acts and transactions, in accordance with the policy formulated, is henceforth centralized under one, single administration; an administration appointed by the government and operating under the supervision of said council, and whose actions are subject, as a consequence of the government's duty to report its actions, to the review of the Knesset." (CA 55/67 *Kaplan v. State of Israel* [1] at 727; see also Y. Weisman Property Law 216-217 (3rd ed. 1993) [33]; R. Alterman, 'Who Will Sing the Praises of the Israel Lands? An Examination of the Justification for the Continued Local Ownership of Land' [36] at 535; see also Draft Proposal for Basic Law: National Lands, *Hatzaot Hok* 5719-1959 at 272, in 27 *Divrei Knesset* (5719-1959), at 2940, 2952).

It will be noted that beyond the centralization of powers relating to lands administration, the laws do not include a definition of the purposes and objectives for which the centralized authority will be employed. The Israel Land Administration Law, 5720-1960 does not

define the specific objectives and purposes of the Administration. All that is said in the statute in this regard is that:

The Government shall establish an Israel Land Administration [hereinafter: "the Administration"] to administer Israel lands.

This arrangement has been the subject of much critique. It has been characterized as an act of "lazy legislation," inconsistent with the rule of law and one which further poses a threat to proper government. (See I. Zamir, *Administrative Power* 236-37 (1996) [34]; see also Y. Dotan, *Administrative Guidelines* 315-16 (1996) [35]; see Barak-Erez, 'An Acre Here, an Acre There'--Israel Land Administration in the Vise of Interest Groups [37] at 620.

17. In light of the statute's silence on the matter, we must turn to sources external to it and examine the specific purposes underlying it. In this context, we will initially refer to the draft proposal for the Israel Land Administration Law, 5720-1960 (*Hatzaot Hok* 34). The explanatory notes state:

> "According to the Covenant about to be concluded between the State of Israel and the Jewish National Fund, with the approval of the World Zionist Federation, the government will establish the Israel Land Administration as well as a council which shall formulate the land policy of the administration, approve budget proposals for the administration and supervise its activities. The proposed law will grant the Israel Land Administration and the Israel Lands Council the legal status necessary to discharge their functions under the Covenant. The Administration will form part of the governmental framework."

Section 4 of the said Covenant, (signed on November 28, 1961 and published in *Yalkut Pirsumim* 1456 at p.1597) stipulates:

> "Israel lands shall be administered in accordance with the law, meaning, in conformity with the principle that land may only be transferred by lease, in a manner conforming to the land policy formulated by the Council that was established under section 9. The Council shall formulate land policy with the goal of strengthening the absorption potential of the land and preventing the concentration of land in the hands of private individuals. In addition, the lands of the Jewish National Fund will

> be administered in accordance with the memorandum and articles of association of the Jewish National Fund."

18. As to the specific objectives and purposes of the Administration, we may further refer to Government Decision No. 489, dated May 23, 1965 (section 3 of the decision) which established that:

> "It is incumbent upon the planning authorities promptly to complete a national plan for the designation, use and utilization of state lands, which will give expression to the government's policies, including the policy of population dispersal, the defense policy, the preservation of agricultural land, and the allocation of areas for vegetation and recreation and open areas for public use, as well as the maintenance of land reserves for national and public purposes."

This government decision was submitted to the Council prior to its adoption by the government, and was adopted by the Council, without any amendments (on May 17, 1965). (See Weisman, *supra* [33] at 243-44, n. 2.) The Israel Lands Council also ratified the key elements of the Administration's policy in Decision No. 202, of March 28, 1978, which established that:

> ". . . The Israel Land Administration is the exclusive body managing Israel lands, in accordance with the land policy determined by the Council. Both in accordance with the Covenant between the Israeli Government and the Jewish National Fund, and by statute, the Israel Land Administration is the single and authorized body for managing Israel lands. The policy of the Council shall be dictated by the need to preserve the land as a national asset and by the aim of bringing about appropriate dispersal of the population throughout the land."

19. We see, therefore, that the specific purposes underlying the Administration's authority relate to the maintenance of Israel lands under state ownership, and the centralization of their administration and development under the auspices of one statutory body. This is in order to prevent the transfer of land ownership to unwanted entities, to implement security policies, and to allow for the execution of national projects such as the absorption of immigrants, the dispersion of the population, and agricultural settlement. The legislation also

contains specific purposes intended to facilitate planning, while setting aside land reserves for national needs and allocating open areas for public needs. This is necessary to enable implementation of planning schemes and to prevent speculative trade in state land. (See also Weisman *supra* [33] at 216-18.) It should also be noted that to the extent that the specific statutory purposes are explicitly set out in the statute or clearly stem from it, a judge is required to give them expression. To the extent that these specific purposes are not explicit and do not clearly stem from the statute—as is the case here—it is incumbent upon the Court to learn about the specific purposes not only from the law itself but also from external sources, such as legislative history, the essence of the issue, the essence of the authorized power and the general values of the legal system. Indeed, in formulating the specific purposes – to the extent that they do not stem explicitly and clearly from the statute – it must be insisted upon that those purposes are consistent with the totality of the values of the system.

The Administration's Activities: the General Purpose of Equality

20. Alongside the specific purposes underlying the Administration's authority and discretion, there are overarching, general purposes that extend as a normative umbrella over all Israeli legislation. These general purposes reflect the basic values of Israeli law and society. They are an expression of the fact that each piece of legislation is an integral part of a comprehensive legal system. The basic foundations of this system "permeate" every piece of legislation, and constitute its general purpose. (See HCJ 953/87 *Poraz v. Mayor of Tel-Aviv/Jaffa* [2] at 328 [hereinafter: "the *Poraz* case"]; HCJ 869/92 *Zwilli v. Chairman of The Central Elections Committee for the Thirteenth Knesset* [hereinafter: "the *Zwilli* case"] [3]; CA 105/92 *Re'em Engineers and Contractors v. Municipality of Nazareth-Illit* [4] at 198.) These fundamental principles also reflect the State of Israel's character as a Jewish and democratic state. Among these principles the principle of equality is relevant to our issues.

Equality as a Fundamental Principle

21. Equality is one of the State of Israel's fundamental values. Every authority in Israel—and first and foremost the government, its authorities and employees—is required to treat all individuals in the State equally. (See I. Zamir & M. Sobel, Equality Before the Law, 5 *Mishpat U'Memshal* 165 (1999)). This is dictated by the Jewish and

democratic character of the State; it derives from the principle of the rule of law in the State. It is given expression, *inter alia*, in our Proclamation of Independence [42] which establishes that:

> "The State of Israel will . . . ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or gender. . ."

Indeed, the State must honor and protect every individual's fundamental right to equality. Equality lies at the very foundation of social co-existence. It is the "beginning of all beginnings." (Justice Cheshin in HCJ 7111/95 *Center for Local Government v. The Knesset* [5] at 501). It is "one of the central pillars of the democratic regime. It is critical for the social contract at the core of our social structure." (*Zwilli* [3] at 707). It constitutes a basic constitutional principle, intertwined with, and incorporated into, all of our basic legal concepts, constituting an indivisible part of them (Justice Shamgar in HCJ 114/78 *Burkan v. Minister of Finance* [6], at 806). I referred to this in one of the cases where I stated:

> "Indeed, equality is a basic principle of every democratic society, 'to which the law of every democratic country, for reasons of justice and fairness, aspires.' (President Agranat in FH 10/69). . . The individual integrates into society and does his part to help build it, knowing that others too are doing the same. The need to ensure equality is natural to man. It is based on considerations of justice and fairness. A person who seeks for his right be recognized must in turn recognize the right of others to seek similar recognition. The need to ensure equality is critical to society and the social contract upon which it is founded. Equality protects the regime from arbitrariness. In fact, no element is more destructive to society than the feeling of its sons and daughters that they are being treated unequally. The feeling that one is being treated unequally is of the most difficult to bear. It weakens the forces that unite society. It harms the person's sense of self." (The *Poraz* case [2] at 332)

In a similar vein, Justice Cheshin wrote:

> "The claim that one is being discriminated against shall always be heeded, as it is at the foundation of

> foundations. The principle of equality is rooted in a deep need within us, within each of us—it can perhaps be said that it is part of man's nature and one of his needs: in man but not only in him—that we not be detrimentally discriminated against, that we be afforded equality, from God above, and from man at the very least…. Discrimination, (real or imagined) leads to feelings-of-oppression and frustration; feelings-of-oppression and frustration lead to jealousy, and when jealousy arrives, intelligence is lost. . . We are prepared to bear the burdens, the hardships and the suffering if we know that our fellow man – who is equal to us – is like us and with us; but we will, rise up and refuse to resign ourselves where our fellow man --—who is equal to us—receives what we do not. (HCJ 1703/92 *C.A.L. Cargo Airlines v. The Prime Minister* [7] at 203-04.)"

As such, "equality of rights and obligations for all citizens of the State of Israel is part of the essence and character of the State of Israel" (Vice-President M. Elon in EA 2/88 *Ben-Shalom v. The Twelfth Knesset's Central Elections Committee* [8], at 272, see also his decision in HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [9].)

22. The State's duty to operate with equality applies to each and every one of its actions. It certainly applies where an administrative authority operates in the realm of public law. In a long list of judgments, the Supreme Court has repeatedly emphasized the obligation of administrative authorities to treat all individuals equally. (See Zamir & Sobel, *supra* [38]). The principle of equality is also applicable where the State acts within the realm of private law. Therefore, it applies to contractual relations entered into by the State. (See HCJ 840/79 *Israeli Contractors' and Builders' Center v. Government of Israel* [10], at 746). Indeed, at the basis of our stance is the approach that the State and its authorities are public fiduciaries. "Governmental authorities derive their authority from the public, which elected them in an egalitarian manner, therefore they too must exercise their authority over the public in an egalitarian manner." (Zamir & Sobel *supra* [38], at 176). Justice Sussman, (in HCJ 262/62 *Peretz v. Chairman, Members of the Local Council and Residents of Kfar Shmaryahu* [11], at 2115). Justice Sussman also discussed this, noting:

> "While the private citizen is entitled to 'discriminate' between one person and another and choose those he will deal with, even if his reasons and motivations are unreasonable, the discrimination by a public authority is prohibited. The reason is that when administrating its assets, or when performing its functions, the authority assumed the role of a fiduciary vis-à-vis the public, and as such, the authority must treat equals equally, and when it violates this fundamental principle and unlawfully discriminates against a citizen, then those are grounds for the intervention of this Court: it is of no consequence whether the use itself or the action itself belong in the realm of private law or public law. The role of fiduciary vis-à-vis the citizen and the obligations that stem from this stem from the law and, as such, are subject to supervision and review in this Court."(HCJ 262/62, *Peretz v. Chairman, Members of the Local Council and Residents of Kfar Shmaryahu* [11] at 2115).

23. The State's obligation to act in accordance with the principle of equality applies to all of its actions. As such, it also applies to the allocation of state land. Indeed, the Israel Land Administration holds state lands "by way of trust, and is therefore subject to all of the duties owed by a trustee. Since the Administration is -- both theoretically and practically -- the state itself, it is subject to all of the obligations applicable to a public authority." (Justice Cheshin in LCA 5817/95 *Rosenberg v. Ministry of Construction and Housing* [12], at 231). Therefore, decisions of the Israel Lands Council which come together to form the policy respecting the allocation of land must respect the principle of equality. President Shamgar discussed this, noting:

> "Public lands must be administered in accordance with government criteria—the adoption of such criteria is incumbent upon public authorities in all of their dealings, and, all the more so, when the matter relates to property belonging to the public as a whole. Translation of these criteria to behavioral norms points, inter alia, to the need to act with fairness and equality and in accordance with the norms of proper administration." (HCJ 5023/91 *Poraz v. Minister of Construction and Housing* [13] at p. 801)

Thus, the principle of equality establishes that the state may not discriminate among individuals when deciding on the allocation of state lands to them.

24. Equality is a complex concept. Its scope is unsettled. With that, all agree that equality prohibits different treatment on grounds of religion or nationality. This prohibition appears in international declarations and conventions. (See, e.g., The Universal Declaration of Human Rights (1948) [43], the Covenant on Civil and Political Rights (1966) [44] and the European Convention of Human Rights [45].) It is accepted in most modern constitutions. It was given expression in our own Proclamation of Independence [42], which established that the State of Israel shall "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or gender." This Court further ruled – in the words of Justice Shamgar -- that "the rule according to which one does not discriminate between people on grounds of . . . nationality . . . religion is a fundamental constitutional principle, interspersed and interlaced with our fundamental legal perceptions and constituting an inseparable part of them." (HCJ 114/78 *Burkan v. Minister of Finance supra* [6] at 806). Justice Berinson expressed this well, noting:

> "When we were exiled from our country and cast out from our land, we fell victim to the nations among whom we dwelled and in each generation we tasted the bitter taste of persecution, oppression and discrimination, just for being Jews—whose 'laws are diverse from all people.' Having learnt from our own bitter, miserable experience, which permeated deep into our awareness and national and human consciousness, one can expect that we will not follow the wayward ways of these nations and with the renewal of our independence in the State of Israel, it is our responsibility to avoid even the slightest hint of discrimination and unequal treatment toward any non-Jewish, law abiding, person who lives among us, whose desire it is to live with us in his own way according to his religion and beliefs. The hatred of strangers carries a double curse: it destroys the divine image of the hater and causes harm to the hated, through no fault of his own. We must act humanely and with tolerance towards

> all people created in the image of God, and ensure the great principle of equality between all people in rights and duties. (HCJ 392/72 *Berger v. Regional Committee for Planning and Construction, Haifa Region* [14] at 771).

The practical translation of these fundamental understandings as to equality is that the (general) purpose of all legislation is to guarantee equality to all persons, without discrimination on the basis of religion or nationality. Dissimilar treatment on the basis of religion or nationality is "suspect" treatment and is therefore prima facie discriminatory treatment. (Compare HCJ 4541/94 *Miller v. Minister of Defence* [15] at 136-37; HCJ 2671/98 *Israel Women's Network v. Minister of Labour* [16], at 659.) We state that the treatment is prima facie discriminatory, for there may be circumstances -- such as in affirmative action (according to the approach that views affirmative action as a realization of the principle of equality and not an exception to it: see the view of Justice Mazza in the *Miller* case *supra* [15]) -- in which different treatment on the basis of religion or nationality is not deemed discriminatory. Additionally, dissimilar treatment on the basis of religion or nationality may at times be lawful. This is the case, for example, when explicit and clear language of a statute sets out specific purposes that lead to discriminatory treatment and, in balancing between the specific purposes of the statute and the general purpose of equality, the specific purposes prevail. We will now move on to the balance between specific statutory purposes and general purposes.

25. In solidifying the purpose of a statute, both the specific and the general legislative purposes must be considered. Often, these purposes all lead in one direction and reinforce each other. Occasionally, however, contradictions arise between these purposes. Thus, for example, there may be contradictions between specific purposes which seek to realize social objectives, and general purposes which seek to ensure human rights. When such a conflict occurs, a (fundamental and horizontal) balance between the conflicting purposes must be achieved. This court has taken this approach since the *Kol Ha'am* case. (HCJ 73/53 *Kol Ha'am Company Ltd. v. Minister of the Interior* [17]). In that case, it was held that in balancing the specific purposes at the core of the legislation being discussed, which related to the preservation of public peace and security, against the general purpose relating to

freedom of expression, preference would be given to the specific purpose (public peace) only if there was a near certainty that allowing for the realization of the general purpose (freedom of expression) would cause concrete, severe, and serious harm to the possibility of realizing the specific purpose (public peace). Ever since that decision, this Court has adopted similar "balancing formulas," in a long line of conflicts between special and general purposes. (See HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [18]; HCJ 5016/96 *Horev v. Minister of Transportation* [19]). It is a good question whether this particular balancing formula should be employed in the conflict between the general purposes and the specific purposes in this instance as well? Would it not be more appropriate to turn to a different balancing formula, such as that of the reasonable possibility? Does the issue of equality not require a spectrum of balancing formulas, depending on the specific substantive violation of equality? There is no need to address these issues in the framework of the petition before us, for, as we shall see, in this petition there is not any conflict between the general and specific purposes of the statute. We therefore leave this matter for further examination at a later date. We shall now proceed to examine the circumstances of the case before us. Prior to doing so, two comments need to be made. First, we are dealing here with the underlying purpose of the Basic Law: Israel Land Administration. Under ordinary circumstances after the purpose has been established – and in the framework of examining the lawfulness of the Administration's actions -- the proportionality of the means used to realize the statute's purpose must also be examined. This issue does not arise in the case before us, and we will not expand upon it; second, in special situations -- where the specific purposes are explicit or clearly implied in the statute, it is not sufficient that the balancing formula enables the determination of the specific purpose at the foundation of the authorizing law. We must also examine the constitutionality of those purposes, and this from the perspective of the basic laws relating to human rights (the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation) and the limitation clause (s. 8 of the Basic Law: Human Dignity and Liberty; and s. 4 of the Basic Law: Freedom of Occupation). This question does not arise here at all, as the issue of the constitutionality of the Israel Land Administration Law has not been raised. The only issue this Court has been asked to determine is, whether the decision of the Israel Land Administration, in all that relates to the allocation

of land for the establishment of the communal settlement of Katzir for Jews exclusively, was within the parameters of the authority granted to the Administration in the Israel Land Administration Law.

From the General to the Specific

26. The State accepts that when it established the urban settlement of Harish, and an additional neighborhood on the Central Hill of Katzir (via the Ministry of Construction and Housing), the land allocated was "for the public at large, in accordance with the accepted norms of the Ministry of Construction and Housing." This allocation was done in an equal manner, with no distinction between Arab and Jew. Indeed, the State noted in its response "we do not disagree with the petitioners that the eligibility to live in the municipality of Tel-Eron, at the present time and in the future, is the same as in any other municipality, with provision of the opportunity to purchase apartments being offered to the general public. This is with the exception of the area of the cooperative society, where acceptance to the society is conditioned upon the processes that exist in every cooperative society in accordance with its bylaws." But in what way is the communal settlement in question different from the urban settlement? No answer to this question was provided in the response briefs of the State (the Israel Land Administration and the Ministry of Construction and Housing) other than to note that the land was allocated to the Jewish Agency, which operates as the agent of the Jewish People in the Diaspora. Our concern now is not with the Jewish Agency, but with the State of Israel. The question we ask therefore is whether the State (meaning the Administration) is permitted to establish that it will itself allocate directly to the Katzir communal settlement, situated within the borders of the Tel-Eron municipality, land intended exclusively for Jews,? Such allocation violates the petitioners' right to equal treatment, as it entails unequal treatment based on nationality. What are the specific purposes whose realization lawfully encroaches upon the principle of equality? We have not heard any answer to this question from the State.

27. A response to these claims has been provided by the Jewish Agency, the Farmers Association and the Katzir Communal Society. In their response, they claim that the Jewish settlement is a "link in a chain of outposts, intended to preserve Israel's expanses for the Jewish people" (as stated in the founding declaration of the communal settlement) and that the settlement is consistent with the purposes they have delineated for themselves, which is the

settlement of Jews throughout the country as a whole, and in rural areas and in areas where the Jewish population is sparse in particular; population dispersal; and increase of Israel's security thereby. In a specific context, the Farmers Association argues that Arab residents may encounter difficulties in fulfilling their duties of guarding the settlement, which has been exposed in the past to various terrorist actions. Moreover, the respondents argue that the presence of Arab residents in the settlement may cause Jewish residents to leave, turning a settlement that was intended to be a Jewish settlement into an Arab settlement.

28. These responses raise difficult and complex general questions. These have significance as to both the past and the future. However, we do not need to address them in the petition before us. This petition does not deal with the totality of Jewish settlement in all of its aspects, and this petition is not concerned with the full spectrum of the Jewish Agency's activities. The petition before us is concerned with a specific communal settlement, whose establishment does not raise the entire spectrum of difficulties that the Jewish Agency and the Farmers Association have raised. Indeed, respondents do not contest petitioners' right to reside in the Eron valley region. They do not deny the existence of "mixed" settlements, be they urban or rural, where Jews and Arabs live in the same settlement, the same neighborhood or the same apartment building. Moreover, respondents do not dispute the petitioners' right to live in Katzir itself, in the neighborhood built by the Ministry of Construction and Housing, together with the neighborhood's other residents, Jewish and Arab as one, under the auspices of the same local council, maintaining common educational and social frameworks. It is therefore inexplicable – and no factual basis has been laid before as – as to why in particular the residence of the petitioners in a communal settlement, located approximately two kilometers away from the neighborhood built by the Ministry of Construction and Housing, would justify violating the principle of equality.

29. My conclusion is therefore the following: A decision by the Administration to directly allocate land in Tel-Eron for the establishment of an exclusively Jewish neighborhood would have violated the (general) purpose of the Administration's authority—which is the realization of equality. Such a decision would not have realized the special purposes of the Israel Land Administration Law

that under the circumstances – and according to the appropriate balancing formula – would have prevailed. Therefore, such a decision, had it been adopted by the Israel Land Administration, would have been unlawful. The Jewish Agency and the Farmers Association raised two fundamental arguments counter to this conclusion, to which we now turn.

30. Their first argument is this: since the Administration is equally prepared to allocate land for the establishment of an exclusively Arab communal settlement, its decision to allocate land for the establishment of the exclusively Jewish communal settlement of Katzir does not violate the principle of equality. Their contention, in its legal garb, is that treatment which is separate but equal amounts to equal treatment. It is well known that this argument was raised in the 1950's in the United States, regarding the United States' educational policy that provided separate education for white students and African-American students. Addressing that policy's constitutionality, the United States Supreme Court held (in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) [30]) that a "separate but equal" policy is "inherently unequal." At the core of this approach is the notion that separation conveys an affront to a minority group that is excluded, sharpens the difference between it and others, and cements feelings of social inferiority. This view was expressed in section 3 of the International Convention for the Elimination of all Types of Racial Discrimination. Over the years, much has been written on the subject, emphasizing that occasionally, separate treatment may be considered equal, or in the alternative, that separate treatment may be justified, despite the violation of equality. This is especially so, *inter alia*, when it is the minority group itself that initiates the separate but equal treatment, seeking to preserve its culture and lifestyle and hoping to prevent "forced assimilation." (as noted by Justice Shamgar in *Burkan* [6], at 808; E. Benvinisti, "Separate But Equal" in the Allocation of State Lands for Housing, 21 *Iyunei Mishpat* 769 (1998); and D. Days, Brown Blues: Rethinking the Integrative Ideals, 34 *Wm. & Mary L. Rev*. 53 (1992); M. Tein The Devaluation of Non-White Community in Remedies for Subsidized Housing Discrimination, 140 *U. Pa. L. Rev.* 1463 (1992)). Indeed, I am prepared to assume -- without ruling on the matter -- that there are situations in which treatment that is separate but equal is lawful. This Court's decision in the *Avitan* Case (HCJ 528/88 *Avitan v. Israel Land Administration* [20]) illustrates this point. In that case, the Israel Land Administration decided to

lease out land exclusively for Bedouins, within the framework of a policy of helping Bedouins transition to permanent housing. A Jewish petitioner's request to lease this land was denied by the Administration. His petition against the Israel Land Administration was denied. In explaining the court's position Justice Or noted:

> "It is a matter of the Bedouins who, for many years, have lived nomadic lives, and whose attempts to settle in permanent locations were unsuccessful, often involving violations of the law, until it came to be in the State's interest to assist them, and thereby also achieve important public objectives. The way of life and lifestyle of nomads lacking permanent, organized settlements, with all that it entails, is what makes the Bedouins a distinct group that the respondents consider worthy of assistance and encouragement, and special, positively discriminating, treatment, and not the fact that they are Arabs." (**Ibid**. at p. 304).

Such a situation -- in which separate treatment may be considered lawful -- does not present itself here, and this is for two reasons: **First**, in point of fact, there has been no request for the establishment of an exclusively Arab communal settlement. In actuality, the State of Israel only allocates land for Jewish communal settlements. The result ("the effect") of the separation policy, as practiced today, is discriminatory, even if the motive for the separation is not the desire to discriminate. The existence of discrimination is determined, *inter alia*, by the effect of the decision or policy, and the effect of the policy in the case before us is discriminatory. (Compare HCJ 1000/92 *Bavli v. Great Rabbinate of Jerusalem* [21], at 241; as well as Justice Mazza in HCJ 453/94 *Israel Women's Network v. The Government of Israel* [22]); thus, the policy of the Administration today, in practice, grants Arabs treatment that is separate but not equal. **Second**, there are no characteristics distinguishing those Jews seeking to build their homes in a communal settlement through the Katzir Cooperative Society that would justify the State allocating land exclusively for Jewish settlement. The communal settlement of Katzir is open to all Jews per se (subject to the conditions that appear in the Cooperative Society's bylaws, the contents of which are not known to us). In any event, the residents of the settlement are by no means a "distinct group," (in the words of Justice Or in *Avitan* [20]). Quite the opposite is true: Any Jew in Israel, as one of the many residents, who desires

to pursue a communal rural life is apparently eligible for acceptance to the Cooperative Society. As such, the Society can be said to serve the vast majority of the Israeli public. No defining feature characterizes the residents of the settlement, with the exception of their nationality, which, in the circumstances before us, is a discriminatory criterion. Indeed, most of the considerations presented to us by the Jewish Agency, are based on the same "suspect" classification of national origin, and their entire goal is none other than to advance Jewish settlement in the area. Indeed, the combination of the unequal consequence of the policy and unequal considerations driving it, together form a critical "mass" of inequality, a "mass" that can by no means be cancelled out or mitigated by the respondents' fundamental readiness to allocate land for a separate Arab rural communal settlement. We therefore dismiss their claim that, in the circumstances before us, there is no violation of the principle of equality.

31. The second fundamental argument raised by the respondents is as follows: They claim that, even if the Israel Land Administration had directly allocated land for the establishment of an exclusively Jewish settlement, it would have been lawful, as this would realize the values of the State of Israel as a Jewish State. These values have constitutional status, (see the Basic Law: Human Dignity and Liberty, s. 1), and as such, suffice to provide a legal basis for the Administration's decision. This argument raises many important questions. We need not rule on most of them. There are two reasons for this: First, to the extent that this claim comes to say that the values of the State of Israel as a Jewish State (which constitute a general purpose at the foundation of the law) conflict with the principle of equality, the answer is that such a conflict does not exist. Indeed, we do not accept the approach that the values of the State of Israel, as a Jewish state, would justify—on the level of a general purpose—discrimination by the State between its citizens, on the basis of religion or nationality. The Basic Law: Human Dignity and Liberty (s. 1) provides that:

> "The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."

The values of the State of Israel as a Jewish and democratic state, *inter alia*, anchor the right of the Jewish people to stand on its own in

their sovereign state, as declared by the Proclamation of Independence [42]:

> "The Land of Israel was the birthplace of the Jewish People. Here their spiritual, political, and religious identity was forged. Here they first attained statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books."

Indeed, the return of the Jewish people to their historic homeland is derived from the values of the State of Israel as both a Jewish and democratic state. (See EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [23]), at 385). From these values -- each separately and from their amalgamation -- several conclusions arise. Hebrew, for instance, is necessarily the principal language of the State, and its primary holidays will reflect the national renewal of the Jewish nation. Jewish heritage constitutes a central component of Israel's religious and cultural heritage, and a number of other conclusions are implicit, but need not be expanded upon at present. However, the values of the State of Israel as a Jewish and democratic state do not, by any means, suggest that the State will discriminate between its citizens. Both Jews and non-Jews are citizens with equal rights and duties in the State of Israel. "The State -- is the state of the Jews; the regime that exists in it -- is an enlightened democracy, which grants rights to all citizens, Jews as non-Jews alike." (Justice D. Levin in EA 2/88 *Ben-Shalom v. the Twelfth Knesset's Central Elections Committee.* [8], at 231). I discussed this issue in one of the cases, noting:

> "In the State of Israel, as a Jewish and democratic state, every person—irrespective of his religion, beliefs or nationality—will enjoy full human rights." (LCA 7504/95 *Yaasin v. Party Registrar* [24], at 70).

My colleague Justice M. Cheshin noted in another case:

> "It is incumbent upon us to remember and to know—how could we forget—that the Jewish people have never had – never had nor does it have now -- any state other than the State of Israel, the state of the Jews. And yet, within the State itself, all citizens have equal rights." (LCA 2316/96 *Isaacson v. Party Registrar* (hereinafter: "the *Isaacson* case") [25] at 549).

Moreover: not only do the values of the State of Israel as a Jewish state not dictate discrimination on the basis of religion and nationality, they in fact proscribe such discrimination, and demand equality between religions and nationalities. (See HCJ 392/72 *supra*. [14], at 771; HCJ 175/71 *Abu-Gosh-Kiryat Yearim Music Festival v. Minister of Education and Culture* [26]): "The principle of equality and prohibition of discrimination, embodied in the Biblical commandment 'You shall have one law, it shall be for the stranger, as for one of your own country' (*Leviticus* 24:22) [39], that has been construed by the Sages as requiring a law which is equal for all of you' (Babylonian Talmud, Tractate *Ketubboth*, 33a [40]; *Babba Kamma* 83b[41]) is a rule that has been sanctified in the law of Israel since we became a nation." (Justice Türkel in HCJ 200/83 *Wathad v. Minister of Finance* [27] at 119).

Justice Elon stated that "one of Judaism's established foundations is the idea that man was created in the Lord's image. (Genesis, 1:27)[38]. Thus begins the Torah of Israel, and from this Jewish law derive basic principles as to the value of human life – each person as they are -- in their equality and their love." (EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset* [28] at 298). Indeed, "the Jewish people established the Jewish State, this is the beginning and from here we shall continue the journey." (Justice Cheshin in the *Isaacson* Case [25], at 548). The Jewish State having been established, it treats all its citizens equally. The State of Israel is a Jewish state in which various minorities, including the Arab minority, live. Each of the minorities living in Israel enjoys complete equality of rights. It is true, members of the Jewish nation were granted a special key to enter (see the Law of Return-5710-1950), but once a person has lawfully entered the home, he enjoys equal rights with all other household members. This was expressed in the Proclamation of Independence [42], which calls upon "the Arab inhabitants of the State of Israel to preserve the peace and take part in the building of the State on the basis of full and equal citizenship." There is, therefore, no contradiction between the values of the State of Israel as a Jewish and democratic state and between the absolute equality of all of its citizens. The opposite is true: equality of rights for all people in Israel, be their religion whatever it may be and be their nationality whatever it may be, is derived from the values of the State of Israel as a Jewish and democratic state. As such, the second fundamental argument brought before us, inasmuch

as it relates to the general purpose at the base of the statute, must be dismissed.

32. Another aspect of the argument as to the values of the State of Israel as a Jewish State pertains to the influence of these values on the formation of the special purposes of the statute. We do not deny that the State of Israel's values as a Jewish state may come together to form special purposes on different levels of abstraction. As we have seen, in the circumstances before us (see para. 26-28) there are no such special purposes that prevail. As such, this aspect of the claim must also be dismissed.

Interim Summary

33. We have therefore reached the conclusion that had the land for the establishment of the Katzir communal settlement been allocated by the State directly, the State would have been duty-bound to act with equality towards all those requesting the right to build a house there. The significance of this is that, every person in Israel, regardless of nationality, would have been eligible to compete for the right to build a house in the Katzir communal settlement. As is known, however, the State of Israel does not directly allocate land for the building of houses in the communal settlement of Katzir. Direct allocation by the State took place in the urban settlement there and, in that case, the State acted with equality. Whilst with respect to the communal settlement, the State allocated land -- within the framework of a "licensing agreement" -- to the Jewish Agency, which, in turn, assisted –through the Israel Farmers Association -- in turning the land over to the Katzir Cooperative Society, which extends membership exclusively to Jews. Did the State of Israel violate its duty to act in accordance with the principle of equality in transferring the land (via the licensing agreement) to the Jewish Agency? We can "split" this question into two sub-questions. First, would the State have breached its obligation to provide equal treatment had it allocated the lands (via the licensing agreement) to any third body (that is not the Jewish Agency) that used the land in a discriminatory manner? If the answer to that question is affirmative, then a second question must be addressed, namely: can it not be said that the State's duty to act in accordance with the principle of equality is not violated if the land is transferred specifically to the Jewish Agency? We shall now proceed to examine these two questions.

Transfer of Land to any Third Party which Contracts Exclusively with Jews

34. The State's duty to respect equality in allocating rights in land is violated by the transfer of land to a third party that itself discriminates in the allocation of land on the basis of nationality or religion. The State cannot escape its legal obligation to respect the principle of equality by using a third party that adopts a discriminatory policy. What the State cannot do directly, it cannot do indirectly. And note that we are not dealing with the question of whether by virtue of having been granted rights in state lands the third party in question is equally bound not to discriminate between Jews and Arabs. (See *Burton v. Willmington Parking Authority,* 365 U.S. 483 (1961) [31]; *Eldridge v. B.C. (A.G.)* [1997] 3 S.C.R. 624 [32]). That question does not arise in this case, as it goes beyond the parameters of the petition. The question before us is whether the State itself violates its obligation to act with equality when a third party to which state lands have been transferred adopts a policy of allocating land to Jews exclusively. Our answer to this question is in the affirmative.

The Transfer of Land to the Jewish Agency

35. In the petitions before us the State allocated land to the Jewish Agency which, in turn, transferred it to a body that allocates land exclusively to Jews. Under these circumstances, can the State be said to have discharged its obligation to act in accordance with the principle of equality, and is no longer to be seen as violating this principle? The answer to this question is no. The Status of the Agency Law and the Covenant between the Israeli Government and the Jewish Agency do not grant a permit to the State to discriminate among its citizens. (See the Status of the Agency Law, s.8 (b), the Covenant, s. 2). Indeed, the Status of the Agency Law is "at its foundation, only declaratory. It does not confer governmental powers, nor does it delegate them." (Vice-President Elon in HCJ 4212/91 *Beth Rivkah, National-Religious High School for Girls v. The Jewish Agency for Israel* [29], at 668: hereinafter the Beth Rivkah case). The Jewish Agency fulfils important functions. As provided by the Covenant, it operates "on the basis of a program, to which the Government agrees in advance." (See the Covenant, s. 3). Such a program, to which the State is a party, must not be discriminatory. State action that is discriminatory in its circumstances, if carried out toward any third party, does not lose its

discriminatory character simply because it was carried out through the Jewish Agency.

36. Of course, the Jewish Agency's unique status in the State of Israel, as well as its contribution to the development of the State and its role in realizing the Jewish facets of our Jewish and democratic state are not to be overlooked. The Status of the Agency Law 5713-1952 provides that the Jewish Agency "operates in the State of Israel in the areas of its choosing, subject to the Government's consent" (Section 2a), that the World Zionist Organization and the Jewish Agency "work perseveringly as previously on immigration absorption, and orchestrate absorption and settlement projects in the State" (Section 3), that the State of Israel recognizes the Jewish Agency as the authorized agent that will continue to operate "for the development and settlement of the country, the absorption of immigrants from the Diaspora and the coordination of the activities in Israel of Jewish institutions and organizations active in these fields" (Section 4 and on). The Covenant, which was signed between the State of Israel and the Jewish Agency in 1979, also gives expression to the special status and the important mission of the Jewish Agency. In the *Beth Rivkah* case [29], this Court cited at length the provisions of the Jewish Agency Law and those of the Covenant, and noted (Vice-President Elon at 667) that "the essence of the Agency Status Law is in the expression it gives to the historical connection between the Jewish people and the State of Israel." This status has found expression throughout the country for decades: Prior to the establishment of the State, en route to the establishment of the State, and subsequent to the establishment of the State, until this very day. The Jewish Agency fulfilled a most important role in the realization of the Zionist dream, the ingathering of the exiles, and the blossoming of the land. And it has yet to complete the task designated to it. It still serves as a "voluntary body," (HCJ 4212/91, *supra* [29] at 670), an agent of the Jewish people in the development of the State as a Jewish and democratic state.

37. The petitioner's counsel does not dispute the important role played by the Jewish Agency in the history of the State of Israel, nor does he criticize the policy adopted over many years with respect to the establishment of Jewish settlements throughout the country. The petitioner states as follows in the petition:

> "This petition is primarily forward-looking. It is not our intention to examine anew the long-standing policy by

> virtue of which (with the assistance of settlement organizations) settlements – kibbutzim, moshavim, and outposts -- were established in which, almost always, only Jewish residents lived and live. The petitioners are not focusing their claims on the legitimacy of the policy practiced in this area in the period prior to the establishment of the State and during the years since its establishment. Nor do they dispute the decisive role played by the Jewish Agency in the settling of Jews throughout the country during the course of this century."

Not only is this petition forward-looking, but it also focuses solely on the communal settlement of Katzir, in the circumstances as they were brought before us. By the nature of things, there exist different kinds of settlements, including kibbutzim, moshavim, and outposts. Different types of settlements may give rise to various difficulties. We did not hear any arguments regarding the different types of settlements and will consequently not adopt any position regarding them. Moreover, there may be special factors to be considered apart from the type of settlement in question, such as factors of national security, which may have significance. No arguments were made regarding any of these factors, and we shall therefore express no opinion on their significance. In addition, we must keep in mind that we are taking the first step on a difficult and sensitive path. It is therefore appropriate that we step heel to toe so that we do not stumble and fall but rather advance carefully from case to case, according to the circumstances of each case. However, even if the road before us is long, it is important that we always bear in mind, not only whence we came, but also to where we are headed.

38. What arises from all of the above as regards the case before us? We have held that the State may not discriminate directly on the basis of religion or nationality in allocating state land. From this it follows that the State is also not permitted to discriminate indirectly on the basis of religion or nationality in the allocation of land. Consequently, the State cannot enable such discrimination by transferring land to the Jewish Agency. There is nothing in the Status of the Agency Law 5713-1952 or in the Covenant between the Government of Israel and the Jewish Agency, which legitimizes such discrimination in the allocation of land. Indeed, according to section 3 of the Covenant, the Jewish Agency operates "on the basis of a

program, to which the Government agrees in advance." However, according to section 8(b) of the Status of the Agency Law, the cooperation between the State of Israel and the Jewish Agency must be "in accordance with the laws of the State." It is clear that according to this section, and in accordance with basic principles, a plan for cooperation between the State and the Jewish Agency cannot be a discriminatory plan. Discrimination does not lose its discriminatory character, even if it is being carried out through the Jewish Agency, and therefore is not permitted to the State.

The Remedy

39. What remedy, then, are the petitioners entitled to? The answer is by no means simple. The petition, as the petitioners have said, is forward-looking. However, it cannot be forgotten that the State allocated the land on which the communal settlement of Katzir was established according to an agreement that was made in 1986. The agreement was drawn up with the knowledge that the Jewish Agency would invest resources in land development in accordance with its founding documents, in other words, in order to set up a Jewish settlement. And indeed, on the basis of this agreement and in accordance with the founding documents of the Jewish Agency, the Jewish Agency invested resources in the establishment of the communal settlement of Katzir. It was for this purpose that it contracted with the Katzir Cooperative Society. Furthermore, the residents of the communal settlement purchased homes and went to live there, in reliance upon the situation as it existed at the time. All of these factors pose serious difficulties from the perspective of the Agency, the Cooperative Society and residents of the settlement, not only from a social perspective, but also from a legal perspective. For it must be remembered that the decision is being rendered today, approximately fourteen years after the allocation, and after the residents and the Jewish Agency itself acted on the basis of expectations which were accepted at that time and place. All of these create difficulties for the State and may also impose restrictions on the State from a legal perspective. We too cannot ignore these difficulties.

40. In this situation, out of a desire to take all of these factors and difficulties into account, and in order to reach an appropriate balance, we have decided to make the order nisi absolute, in the following manner:

A. We declare that the State was not permitted, by law, to allocate state land to the Jewish Agency, for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews.

B. It is incumbent upon the State to consider the petitioners' request to purchase for themselves a parcel of land in the settlement of Katzir for the purpose of building their home, and this on the basis of the principle of equality, and taking into consideration factors relevant to the matter--including the factors which relate to the Agency and the current residents of Katzir –and including the legal difficulties entailed in this matter. On the basis of these considerations, the State must decide, with appropriate speed, whether it can enable the petitioners, within the framework of the law, to build a house for themselves within the bounds of the Katzir communal settlement.

Justice T. Or

I agree.

Justice I. Zamir

I agree.

Justice M. Cheshin

In the allocation of public resources among individuals in Israeli society, the petitioners were discriminated against and are therefore entitled to the remedy to which one who was discriminated against would be entitled. For this reason, I agree with the ruling of my colleague, President Barak.

Justice Y. Kedmi

Opening Comments

1. I concur with President Barak's fundamental approach regarding the position of the value of equality among the values of the State of Israel and the implications this has for the allocation of state lands. I also agree with the President's position according to which the application of the value of equality cannot be circumvented, in the present context, by allocating state lands to the Jewish Agency; which in itself is permitted to

limit the sector of the population that will benefit from its activities, it being a Jewish Zionist settlement institution.

This fundamental approach does not—to the best of my understanding—prevent us from balancing between the value of equality and other values, including the value of national security. This value speaks of ensuring the existence of the State of Israel as a Jewish and democratic state; and in circumstances in which this is justified – and taking into consideration its location and the purpose of the establishment of a settlement that is located on national land – has the power to gnaw at and even override the value of equality (hereinafter: "the opening for balancing").

In the early days of the State, the scope and proportions of said "opening for balancing" were relatively wide, in light of the significant weight that other values had – including the value of national security—in the special circumstances that existed at the time. However, as the State continued to develop, and as the perils that stood in the path to its establishment as a Jewish and democratic state lost some of their force, so too did this opening become narrower. Today, the proportions of this opening are particularly narrow and restricted; and such a balancing will be necessary only in rare circumstances. Unfortunately, we have not yet attained rest and tranquility; and so long as we don't reach that point, there will not – it appears – be any escape from leaving remnants of the opening intact.

From the General to the Specific

2. Against the backdrop of the existence of the opening for balancing, -- in my view -- past allocations of state lands are shielded from re-examination and retroactive adjustment. First, for the reason that they benefit from a presumption according to which: if they did entail a violation of the principle of equality, it is to be seen as having been necessitated by the demands of competing critical interests. The subject of the petition-meaning: the decision to establish a communal settlement

in Katzir, whose population is limited to veterans of the Israeli Defense Force—was taken about eighteen years ago; I have found nothing in the material presented before us that justifies undermining the force of said presumption. In my view, it is not sufficient that the location of the communal settlement at issue is topographically close to an urban settlement for which there are no population restrictions, to establish that restrictions of this type in a communal settlement were not necessary at the time—in view of the circumstances that existed at that time—by the balance between the value of equality and other critical values.

And second, in light of the innovation in this judgment, both in terms of the power of the value of equality in all that relates to utilization of national lands generally and in terms of its application in regard to the allocation of such lands to the Jewish Agency in particular. By its nature -- and especially with respect to the allocation of state lands to the Jewish Agency – such an innovation does not operate retroactively.

It is for these two reasons that it is appropriate – in my view -- to satisfy ourselves in the case before us with a declaratory judgment regarding the status and weight of the value of equality with regard to the allocation of state land, as detailed in the President's opinion; and this, while making it clear that the judgment is forward-looking and does not provide grounds for re-examining acts performed in the past.

Decided by majority opinion, (in opposition to the dissenting opinion of Justice Y. Kedmi) to make the order *nisi* absolute, as stated in paragraph 40 of the President's judgment.

March 8, 2000.

1 Adar B 5760