CJ 1067/08

Noar KeHalacha Association
and another
v.
1. Ministry of Education
2. Immanuel Local Council
3. Independent Education Centre

The Supreme Court sitting as the High Court of Justice
[6 August 2009]
Before Justices E.E. Levy, E. Arbel, H. Melcer

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

Facts: The Beit Yaakov Girls' School in Immanuel is a recognized unofficial school that operates under a licence from the Ministry of Education and is subsidized by the state. In 2007 changes were made to the school, and a new 'Hassidic track' was introduced alongside the 'general track.' These tracks were completely separate from one another, and the new 'Hassidic track' was housed in a separate wing of the school, with a separate playground, a separate teachers' room, a wall separating the two tracks and a different uniform from the one worn by girls in the 'general track.' Thus the school was effectively split into two schools.

An investigation carried out on behalf of the third respondent found that 73% of the girls in the new school (the 'Hassidic track') were of Ashkenazi origin (i.e., their families came from northern European countries), whereas only 27% were of Oriental or Sephardic origin (i.e., their families came from Middle-Eastern or North African countries). In the old school (the 'general track') only 23% of the girls were of Ashkenazi origin. Nonetheless, the investigation found no evidence that there were any girls who were refused admission into the Hassidic track.

The third respondent ordered the school to remove the physical separations between the two tracks and to eliminate the separate uniforms. However the school did not comply.

Held: The physical separation and differentiation of the two tracks was discriminatory and the school was ordered to remove the physical barriers and

eliminate any indication of discrimination in the school. The Ministry of Education was ordered to ensure that the order was complied with, failing which, it should consider cancelling the school's licence and subsidy.

Petition granted.

Legislation cited:

Basic Law: Human Dignity and Liberty.

Budget Principles Law, 5745-1985, ss. 3A(i), 3A(j).

Compulsory Education Law, 5709-1949, ss. 1, 7.

Special Cultural Schools Law, 5768-2008.

State Education (Recognized Schools) Regulations, 5714-1953, r. 9.

State Education Law, 5713-1953, ss. 1(b), 2, 3, 11.

Student Rights Law, 5761-2000, ss. 1, 3, 5, 16(a), 16(b).

Supervision of Schools Law, 5729-1969, ss. 3, 12(a), 15, 28, 30, 31, 32(a1).

Israeli Supreme Court cases cited:

[1] HCJ 421/77 *Nir v. Beer-Yaakov Local Council* [1978] IsrSC 32(2) 253.

[2] HCJ 4363/00 *Upper Poria Board v. Minister of Education* [2002] IsrSC 56(4) 203.

[3] HCJ 4805/07 *Israel Religious Action Centre v. Ministry of Education* (unreported decision of 27 July 2008).

[4] FH 16/61 *Registrar of Companies v. Kardosh* [1962] IsrSC 16(2) 1209; **IsrSJ 4 32**.

[5] HCJ 10296/02 *Secondary School Teachers Organization v. Minister of Education* [2005] IsrSC 59(3) 224.

[6] HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [1996] IsrSC 50(3) 2.

[7] HCJ 2599/00 *Yated v. Ministry of Education* [2002] IsrSC 56(5) 834; **[2002-3] IsrLR 57**.

[8] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* **[2006] (1) IsrLR 105**.

[9] HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* **[2005] (2) IsrLR 335**.

[10] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.

[11] HCJ 8437/99 *Habad Kindergarten Network in the Holy Land v. Minister of Education* [2000] IsrSC 54(3) 69.

[12] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* **[2005] (1) IsrLR 340**.

[13] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; **IsrSJ 8 13**.

[14] HCJ 114/78 *Burkan v. Minister of Finance* [1978] IsrSC 32(2) 800.

[15] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.

[16] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (unreported).

[17] HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] IsrSC 54(1) 258.

[18] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.

[19] HCJ 727/00 *Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [2002] IsrSC 56(2) 79.

[20] HCJ 59/88 *Tzaban v. Minister of Finance* [1988] IsrSC 42(4) 705.

[21] HCJ 11020/05 *Panim For Jewish Renaissance v. Minister of Education, Culture and Sport* (unreported decision of 16 July 2006).

[22] HCJ 6051/95 *Recanat v. National Labour Court* [1997] IsrSC 51(3) 289.

[23] HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 358; **[2004] IsrLR 1**.

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

[25] HCJ 2481/93 *Dayan v. Wilk, Jerusalem District Commissioner of Police* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**.

[26] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.

[27] HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [2001] IsrSC 55(4) 267.

[28] HCJ 4298/93 *Jabarin v. Minister of Education* [1994] IsrSC 48(5) 199.

[29] HCJ 3094/93 *Movement for Quality Government in Israel v. Government of Israel* [1993] IsrSC 47(5) 404; **IsrSJ 10 258**.

[30] HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [1998] IsrSC 52(5) 167.

[31] HCJ 7111/95 *Local Government Centre v. Knesset* [1996] IsrSC 50(3) 485.

[32] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.

[33] HCJ 10203/03 *National Assembly Ltd v. Attorney-General* (unreported decision of 20 August 2008).

[34] HCJ 200/83 *Wathad v. Minister of Finance* [1984] IsrSC 38(3) 113.

[35] HCJ 1/98 *Cabel v. Prime Minister of Israel* [1999] IsrSC 53(2) 241.
[36] HCJ 3261/93 *Manning v. Minister of Justice* [1993] IsrSC 47(3) 282.
[37] HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; **[2004] IsrLR 53**.
[38] HCJ 10808/04 *Movement for Quality Government in Israel v. Minister of Education and Culture* (unreported decision of 11 July 2006).

Israeli District Court cases cited:

[39] AP (Jer) 1320/03 *Alkaslasi v. Upper Beitar Municipality* [2003] IsrDC 641.

American cases cited:

[40] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[41] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[42] *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Jewish law sources cited:

[43] Rabbi Ovadia Yosef, *Responsa Yehaveh Daat* 4, 4 and 5, 6; *Yabia Omer* 2, 6.
[44] Rabbi Tzvi Hirsch ben Yaakov Ashkenazi, *Responsa Hacham Tzvi*, 33.
[45] Exodus, 19, 3.
[46] Midrash *Sechel Tov* (Buber edition), Exodus, Introduction.

For the petitioners — A. HaCohen, Y. Avraham.
For the first respondent — S. Shmueli.
For the second respondent — O. Barchash-Rubowitz, R. Arbiv.
For the third respondent — M. Janovsky.

JUDGMENT

Justice E.E. Levy

Background

1. The Beit Yaakov Girls Primary School in the town of Immanuel is a 'recognized unofficial' institution for Jewish religious education. The Independent Education Centre, which is the third respondent in the petition, is the organization that operates and manages the school. The first respondent, the Ministry of Education, is the body that supervises, on behalf of the state,

the functioning and activity of the third respondent and its educational institutions.

2. At the end of the 5767 academic year in 2007, it was decided to make several changes to the school's building and educational programme, and in practice an additional school was erected alongside the existing school. In the course of these changes, the school building was split into two by erecting partitions, and separate entrances were made. The playground was also divided into two, by means of a cloth curtain and a separation fence. The teachers' room was also made separate. A new wing was built on the third floor of the school building, solely for the use of the pupils of the new school. There are claims that the school hours were changed so that the students' breaks in the two schools would not overlap. Moreover, the school uniform, which has been worn at the school since it was founded, was changed in order to distinguish the students of the new school from their counterparts in the old one.

While the parties dispute the purpose of the aforesaid changes, no one can deny their outcome – a separation between most of the girls whose families are of Ashkenazi origin and their counterparts whose families are of Sephardic origin. With regard to the factors that led to the aforesaid change, some of the inhabitants of the town believe that the aforesaid separation was made because of a continuing tension between the Ashkenazi population and the Sephardic population in the town, and some feel that the school, by taking this action, has created an ethnic split, in order to discriminate against and victimize the Sephardic students and their parents.

3. As a result, after several telephone calls, counsel for the parents of some of the Sephardic students wrote on 12 Elul 5767 (26 August 2007) to the Ministry of Education, asking it to exercise its powers to prevent the continued discrimination against the students. When the Ministry of Education did not answer her letter, counsel for the parents wrote a second time with a request to remedy the situation and to deal with the persons responsible. The petitioners, through their counsel, also wrote to the Ministry of Education with a request for clarifications regarding the separation process that was introduced in the school, as well as with regard to the scope of supervision of this process.

4. Following this, the director-general of the Ministry of Education, Mrs Shlomit Amichai, wrote to the Independent Education Centre with a request to cancel the separation in the school and to act to return matters to the original position. Moreover, Mrs Amichai stipulated a date by which her instructions should be carried out, and added that if the Independent Education Centre did

not comply with the aforesaid date, she would consider cancelling the school's licence. When the date passed, Mrs Amichai Advocate Mordechai Bas, who had held office in the past as legal adviser to the State Comptroller's Office, to examine the complaints made against the management of the school. Advocate Bas especially examined whether on the basis of a licence to run one institution, the school was running two separate schools, and whether the separation between the students as described above was the result of ethic discrimination.

In the report describing the examination that he made, Advocate Bas described the demographic changes that had occurred in Immanuel — including the influx into the town of new inhabitants, most of whom are of Sephardic origin — and he surveyed the effects of these developments on the town's population in general, and on the Beit Yaakov Girls School in particular. He found that the initiative to separate the school's students came from parents belonging to a specific group within the town, most of whom were parents of students of Ashkenazi origin. Advocate Bas added that many Ashkenazi families that follow the Hassidic way of life did not want to expose their daughters to the modern way of life, which, in their opinion, includes unbecoming speech and conduct that is inconsistent with the strict laws of modesty that they follow. Therefore, Hassidic parents requested that their daughters should be separated from their counterparts, because of the concern that they would be exposed to content that in their opinion is unbecoming. When the parents approached the Independent Education Centre, it insisted that the segregationist group should remain within the existing school, in a new 'Hassidic track' that it would open alongside the 'general track,' rather than setting up a separate school. The Independent Education Centre also insisted, according to Advocate Bas's report, that the two tracks should be under joint management, and that the pedagogic environment — including the teachers' room, the study programme, the hours of study and the times of the breaks — should also be the same for all the students of the school. However, despite the instructions of the Independent Education Centre, Advocate Bas's examination of what was being done in the school during the 5768 (2007-2008) academic year found, as I have already described, a different reality: the school was split into two, and this split found expression, *inter alia*, in the uniform that was adopted, the management of the school and the segregation that was introduced in the playground and even the teachers' room. It should be emphasized that despite Advocate Bas's finding that the split was made without the approval of the Independent Education Centre and in defiance of its instructions, the Independent Education Centre confirmed in a letter to the

Ministry of Education on 11 Tishrei 5768 (23 September 2007) that it knew of the process of segregation and had not taken any practical steps in order to stop it (respondents' exhibit 2, at page 8).

With regard to the question of the motive for the segregation between the students, Advocate Bas said that, to the best of his understanding, this was a result of the level of strictness of the members of the Hassidic community in conducting a religious lifestyle as compared with that of the members of the Sephardic community in the town. Advocate Bas summarized his findings as follows:

> 'Indeed, the Beit Yaakov Girls' School in Immanuel has *de facto* been split, improperly and contrary to the provisions of the law and proper administrative practice, into two schools, but this split, with all of its negative aspects, was not done with an intention of discriminating against students because of their ethnic background and in practice there is no such discrimination. I arrived at this conclusion even though I am aware of the quantitative aspect of the ethnic separation between the two schools, i.e., that in the old school the percentage of girls who are from Ashkenazi families is approximately 23%, whereas in the new school they make up approximately 73%.
>
> My conclusion that the school has indeed been divided into two separate schools, and has not merely introduced a new 'Hassidic' track, as the Independent Education Centre claims, is based on the situation, as I saw it when I visited the school, and on what I heard from the headmistress of the old school.
>
> My additional conclusion that this split is not based on ethnic discrimination is based on documents that I saw, and on the impression that I formed after speaking to parents in both schools and the complainants when I met with them. I gave particular weight to the claim of the Independent Education Centre, the headmistress of the old school and the parents who initiated the split, that no parent who wanted or wants to register their daughters in the new school, and who was or is prepared to accept the conditions for doing so, has been refused. Not only was there no evidence to refute this claim, but even the complainants did not deny that it was factually true. If there is no refusal, where is the discrimination?' (respondents' exhibit 2, at page 1).

In view of all of the aforesaid, the sole recommendation of Advocate Bass was that the Ministry of Education should take enforcement action against the initiators and perpetrators of the split, but solely for a breach of the duties of reporting a split of a school.

5. While this was happening, the petitioners filed their petition in this court. An order *nisi* was issued on 11 Tammuz 5768 (14 July 2008), and this was amended on 12 Tammuz 5768 (15 July 2008). This ordered the respondents to show cause why the Ministry of Education should not exercise real and effective supervision over the schools for which the Independent Education Centre was responsible, and why it should not make the support given to the institutions established by it or associated with it conditional upon compliance with the provisions of the law concerning the prohibition of discrimination. In addition, we ordered the respondents to show cause why it should not be held that 'all of the students currently attending the Beit Yaakov School in Immanuel are entitled to continue to attend the school as one institution, and not subject to a screening policy that was mainly based on an improper ethnic segregation,' as stated in the order.

The position of the third respondent — the Independent Education Centre

6. In a memorandum that was attached to its preliminary reply, the Independent Education Centre outlined the events that preceded the split of the school. It was explained that in view of the successful attempt in the past, when two educational institutions were set up for boys in the town, it was the inhabitants of Immanuel, from every sector, that asked for an additional school to be set up for girls, despite the contrary opinion of the Independent Education Centre and the headmistress of the original school. According to the Independent Education Centre, it was the parents of the Sephardic students who promoted the idea of the new school, and even formed a team 'whose purpose was to assist in setting up the Sephardic school. The team met several times, but after a while the representatives of the parents of the Oriental communities announced that for various reasons they were not capable of setting up the additional school' (p. 4 of the memorandum). The attempt to set up the new school was ultimately successful because of the efforts of the Hassidic community. The Independent Education Centre goes on to say in its reply:

> 'The founding of the school was well-known in the town, and following this, parents from the boys' school and other parents who knew of the success of the boys' school did indeed approach the school and ask that their daughters should be given the

> strictly Orthodox education and lifestyle and spiritual guidance that would be provided in it.
>
> The result was that girls from all ethnic backgrounds and groups, who wish to be educated with the lifestyle and spiritual guidance of the school, were registered. In practice more than 35% of the students currently studying in the school are of Oriental origin' (*ibid*., at p. 5).

Notwithstanding, already on the date of filing the preliminary reply, the headmistress of the school, Mrs Stern, was 'in practice the headmistress of both wings of the school, and there was complete cooperation in the operation of the two wings, including joint meetings of the staff, and there is no separation between the wings' (*ibid*.).

Following Advocate Bas's examination of the matter, the Independent Education Centre changed its position, and in its written reply of 19 August 2008, it claimed that a new school had not been established within the framework of the existing school, but only a new track — a 'Hassidic track.' It was also alleged that the fact that the Ministry of Education appointed a special examiner to examine the allegations of discrimination showed that the school was still being supervised properly. Finally the Independent Education Centre said that in view of the uproar in the town, it was essential that the Ministry of Education should recognize the two wings in the school, but it undertook that apart from the physical division between the two wings, all additional indications of separation would be removed and steps would be taken to return matters to their original position, including the use of a joint teaching staff, identical study programs and books, identical uniform and joint breaks. Thus all that would distinguish the two wings would be the strictly Orthodox spirit that determined the customs and lifestyle according to which each wing was supposed to conduct itself (*ibid*., at p. 6).

The position of the first respondent — the Ministry of Education

In a supplementary statement, the Ministry of Education clarified that it accepted the position of the external examiner, Advocate Bas, with regard to the failure of the school to comply with the reporting duties that bound it, including the split of the institution, and it added that 'it [the breach of the reporting duty] is capable of justifying the cancellation of the existing licence of the Beit Yaakov school' (p. 4 of the supplementary statement of 7 Tammuz 5768 (10 July 2008)). The Ministry of Education added that 'the establishment and operation of the new separate school were done in a flagrant

violation of the law, complete disregard for the provisions of the Supervision of Schools Law, a violation of the guidelines of the Ministry of Education and a serious infraction of the terms of the existing school's licence' (*ibid*.).

With regard to the issue of ethnic discrimination, the Ministry of Education thought that in the absence of clear criteria with regard to the principles underlying the division of the school, the burden of allaying the *prima facie* concern that the basis for separating the students was ethnic discrimination rested with the Independent Education Centre, especially in view of the unequal numerical division in the number of the students of the different ethnic backgrounds in the two wings, as discussed in the report of Advocate Bas.

The Ministry of Education went on to clarify that Mrs Amichai wrote once again to the Independent Education Centre with a demand that it remove any indication of a segregation between the parts of the school and that it unite the management both from an organizational viewpoint and with regard to staff. The Independent Education Centre was also asked to send the Ministry of Education, as required by law, notices regarding the registration dates for the academic year for the whole target population, and in so far as it was interested in setting up a separate educational track, it should send a plan setting out the characteristics of the new track, with the criteria for participation and admission requirements. It was clarified that if the Independent Education Centre did not comply with these conditions, it would consider the possibility of cancelling the school's licence and reducing the amount of economic support given to it.

The agreement reached between the respondents

7. When the Independent Education Centre refused to comply with the instructions of the Ministry of Education, after lengthy discussions between the persons in charge of the two organizations and their counsel, the representatives of the Independent Education Centre were summoned to a hearing before Mrs Amichai and the representatives of the ministry. During the hearing it was agreed between the respondents that the school would have two tracks, a Hassidic one and a general one, which would be approved by the Ministry of Education, and the students would have a right to choose between them when admitted to the school, on condition that they committed themselves to the religious way of life practised in the track that they chose. The Independent Education Centre even sent a proposed draft set of regulations for the Hassidic track for the approval of the Ministry of Education. This, together with an appendix that was intended to be read only by the parents of the students, contained the following clauses:

> '(a) The prayers and the studies in the school are conducted in the holy language (Ashkenazi pronunciation). In order to make it easier for girls who are not accustomed to pray at home with this pronunciation, the parents will ensure that even at home the students will become accustomed to pray as they do at school.
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> (b) The spiritual authority for the Hassidic track will be Rabbi Barlev, who will guide the students of the school in matters of conduct and Jewish law. The parents undertake not to allow a situation in which there will be a conflict between the spiritual authority practised in their homes and the one adopted by the school.
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> (c) For reasons of modesty, the girls will not be allowed to ride bicycles outside the home.
>
> (d) The parents shall ensure that the friends that their daughters meet in the afternoon will only be from homes that accord with the spirit of "Beit Yaakov" education in every respect.
>
> (e) The parents shall act with regard to clothing in accordance with the determination of the Rabbinical Committee on Matters of Clothing at the Rabbinical Court of Rabbi Vozner.
>
> (f) No radio shall be played in the home at all. No computer that can play films of any kind shall be allowed in the home. Obviously no connection to the Internet shall be allowed.
>
> (g) The girls should not be taken to hotels or any kind of holiday resorts. They should not visit the homes of relatives or friends who do not observe the Torah and the commandments.'

This proposed set of regulations was presented to us in the Ministry of Education's reply of 20 Av 5768 (21 August 2008). In view of the comments of the court, and in view of Mrs Amichai's letter in which she made it clear that she did not accept the proposed set of regulations, the Independent Education Centre submitted a revised version. The revised version omitted the provision that the students should pray with Ashkenazi pronunciation, and the duty to dress 'in accordance with the decision of Rabbi Vozner' — a rabbi who adopts a particularly strict approach to the prohibitions of immodesty — was replaced with the decision of the 'committee of rabbis whose authority is binding in independent education institutions for Beit Yaakov schools.' In its supplementary statement, the Ministry of Education clarified that it was

satisfied with the wording of the amended regulations, and it thereby gave its approval to their being two tracks in the school.

However, a later inspection conducted by the Ministry of Education showed that the reality of the segregation continued, and therefore Mrs Amichai once again demanded, for the third time, that the Independent Education Centre should remove any physical separation in the school, take action to combine the teachers' room, and stop any act that involved any discrimination against any sector of the population. In addition, the Ministry of Education emphasized that if there was any claim of discrimination in the procedure of registration for a particular track, a student who was refused or encountered a difficulty in being admitted was entitled to write to the appeals committee, which would examine the claims of discrimination on their merits. Following Mrs Amichai's demands, the Independent Education Centre once again demanded that the school should remove any physical barrier — including the plaster wall — that separated the different wings of the school. The Independent Education Centre also demanded that the teachers' room should be combined, the use of a standard uniform by all of the students should be reintroduced and any other action that distinguished between students in the different tracks should be stopped.

The petitioners' arguments

8. The petitioners stand by their claim of entrenched discrimination that continues to characterize the school. This discrimination is not affected by the adoption of one set of regulations or another. It was argued that the amended regulations are merely a series of linguistic changes that disguise the flagrant ethnic preference with hollow statements, when in practice there is no change in the situation of the girls in the school. Their physical and ideological segregation continues, and thus, *inter alia*, the standard uniform worn in the two tracks is significantly different; the policy whereby the school gates and playgrounds are separate still exists, and the plaster wall that was built following the segregation, which separates the two parts of the school, has not been removed. The petitioners further argued that they are required to pay an additional monthly payment in order that their daughters may study in the Hassidic track, and bureaucratic difficulties are placed in the way of Sephardic parents who wish to register their daughters in that track. It was emphasized that despite the repeated demands of the respondents to stop the segregation, the school has refused to return the school to its original position in a manner acceptable to everyone. Finally, the petitioners emphasize that the

segregation and its characteristics have left the Sephardic students and their parents feeling ostracized and humiliated.

Deliberations

The normative framework

9. It is a matter of first principles that children and teenagers in the State of Israel are entitled to free education, by virtue of section 7 of the Compulsory Education Law, 5709-1949:

> 'Duty to provide free compulsory education
>
> 7. (a) The state has a duty to provide compulsory education under this law.
>
> (b) The availability of official education institutions for providing compulsory education under this law for children and teenagers who live within the borders of a certain local education authority, is the joint responsibility of the state and that local education authority.'

At the same time, every parent has a duty to ensure his children are educated in accordance with the Compulsory Education Law, and the state, together with the local authorities, has a duty to allocate resources for the existence, management and supervision of the education system (HCJ 421/77 *Nir v. Beer-Yaakov Local Council* [1], at p. 263; HCJ 4363/00 *Upper Poria Board v. Minister of Education* [2], at p. 214; HCJ 4805/07 *Israel Religious Action Centre v. Ministry of Education* [3], at para. 53 of the opinion of Justice Procaccia).

Education services in Israel are provided today through official schools — i.e., state education — and in addition, 'alongside the official schools, there are recognized schools that are not run by the state. These schools seek to give their students an education that is consistent with the ethical outlooks that the schools is seeking to foster' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 1). These are the 'recognized unofficial schools' (s. 1(b) of the State Education Law, 5713-1953), which, together with the 'exempt schools' that are not relevant to this case, constitute the majority of the schools in Israel that are not state schools.

The state may recognize an unofficial school, provided that it operates under a licence (s. 3 of the Supervision of Schools Law, 5729-1969). Granting a licence depends upon compliance with certain conditions, including physical, pedagogic, financial and sanitary conditions. An institution that is given a

licence receives a budget from the state in an amount determined by the Minister of Education, and it is subject to the supervision of the ministry (s. 11 of the State Education Law, and ss. 30 and 31 of the Supervision of Schools Law).

With regard to the scope of the Ministry of Education's authority with regard to independent schools, this court has held in the past that 'Recognized unofficial schools, even though they do not operate within the framework of state education, are subject to the supervision of the public authority in several respects' (*Upper Poria Board v. Minister of Education* [2], at p. 216). For this purpose, the State Education (Recognized Schools) Regulations, 5714-1953, define the conditions in which a school will be declared a recognized unofficial school, and the Supervision of Schools Law regulates the ways in which they will be established, how they operate and how they are supervised. Thus, s. 28 of the Supervision of Schools Law provides:

> 'Supervision of schools
>
> 28. (a) The Minister of Education and Culture may give a licence holder the instructions that are required, in the Minister's opinion, in order to ensure that the education provided in the school will be based on the principles set out in section 2 of the State Education Law, 5713-1953.
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> (b) The study programme, textbooks, other books, study aids and scholastic achievements of the school shall be subject to the supervision of the Minister of Education and Culture and shall conform to the general rules in force at that type of school.
>
> (c) The director-general shall approve, from time to time, in view of the type and character of the school, the tuition fees of the school and the arrangements for collecting them.

10. The court has recognized the authority of the Ministry of Education to determine policy in the different types of school. It has held that 'the basic areas of supervision relate first and foremost to ensuring an education in the spirit of the ethical principles that characterize state education. The

supervision also encompasses administrative matters, such as financial administration, including the amounts of tuition fees and how they are collected' (*Upper Poria Board v. Minister of Education* [2], at p. 218). It follows that the supervisory powers of the Ministry of Education with regard to the activities of recognized unofficial schools are broad, and they are also accompanied by a sanction in the form of cancelling the licence for operating the school (s. 15 of the Supervision of Schools Law) and a reduction in, or even a end to, the contribution to the school's budget, if the school refuses to comply with the instructions of the Ministry of Education (*ibid*. [2], at p. 216). Despite the aforesaid, 'the manner of exercising the supervision and its scope are matters that are subject to the discretion of the public authority, which is responsible for determining priorities for all of its duties, in view of its resources' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 81 of the opinion of Justice Procaccia). Indeed —

> 'The administrative authority is given discretion so that it will have freedom to act in carrying out its wide variety of duties, the circumstances of which change from day to day and cannot be determined with precision in advance. This freedom allows the authority to consider the circumstances of each case that comes before it and to find the appropriate solution for it' (FH 16/61 *Registrar of Companies v. Kardosh* [4], at p. 1215 {para. 5}).

12. In view of the independent character of the recognized unofficial schools and the scope of discretion given to them, this court has on several occasions been called upon to consider questions concerning recognized unofficial schools. *Inter alia*, it has considered the legality of a policy of charging payments for funding the schools as well as the relevance of the core curriculum to these schools (*Upper Poria Board v. Minister of Education* [2], at p. 215; HCJ 10296/02 *Secondary School Teachers Organization v. Minister of Education* [5], at p. 235; *Israel Religious Action Centre v. Ministry of Education* [3], at para. 62). Within this context, no one disputes that schools of every kind are bound by the basic rights of the individual. Basic rights constitute the cornerstone of our legal system and democracy, just as giving an education to the younger generation is a cornerstone for nurturing participation in Israeli society and passing on the values of the State of Israel (HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [6], at p. 24). These two foundations — basic rights and providing an education — lie at the heart of the right to education, which was enshrined in s. 3 of the Students' Rights Law, 5761-2000, which provides that:

'Right to education

3. Every child and teenager in the State of Israel is entitled to education in accordance with the provisions of every law.

The court said of this in HCJ 2599/00 *Yated v. Ministry of Education* [7], at p. 841 {65-66}:

> 'The right to education has recently been recognized as one of the basic human rights… The right to education has also been recognized as a basic right by case law… Notwithstanding, the question whether the right to education is included in the right to human dignity, within the meaning thereof in ss. 2 and 4 of the Basic Law: Human Dignity and Liberty, has not yet been decided.'

Justice Procaccia also stressed that:

> 'The decisive importance of the right to education derives from the fact that education is essential for realizing human rights as an individual and for exhausting one's personal autonomy; it develops his personality and abilities, and gives him the ability to compete and a possibility of realizing equal opportunities in the society in which he lives in childhood and adulthood' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 51 of her opinion; see also *Upper Poria Board v. Minister of Education* [2], at p. 213; HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [8]).

This court has discussed in the past the many aspects of the right to education that are enshrined in case law, international law and Israeli legislation (see *Yated v. Ministry of Education* [7], at p. 841 {65-66}; Y. Rabin, *The Right to Education* (2002), at p. 301). It has been written that 'The basic right to education, as created by statute, international law and case law, stands on its own, and is not necessarily related to the right to human dignity provided in the Basic Law: Human Dignity and Liberty' (*Yated v. Ministry of Education* [7], at p. 843 {66-67}). The right to education has been recognized as having a negative element, which is expressed, *inter alia*, in the prohibition of violating a person's right to education except in accordance with the provisions stipulated in this regard in the law (ss. 1 and 3 of the Student Rights Law), and it has also been recognized as having a positive element, which is reflected in the duty that the right imposes on the state to provide free education (see Y. Rabin, 'The Many Faces of the Right to Education,' in D.

Barak-Erez & A.M. Gross, *Exploring Social Rights* (2007) 265, at p. 267; Compulsory Education Law; *Yated v. Ministry of Education* [7], at p. 848 {71-72}; cf. HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [9], at para. 12 of the opinion of President Barak. It has also been said that:

> 'The right to education affects other basic human rights, such as the freedom of expression and the freedom of occupation; realization of the right to education is intended to achieve social purposes. Education constitutes a link between the different and varied sectors of society and an essential means of bridging between them to build a harmonious social fabric. Education is an important means of furthering free democratic values. It is an essential condition for the individual's self-realization and for the existence of a proper social life' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 51).

13. In view of the inseparable connection between a person's education and his identity, the right to education is not limited to instilling knowledge or the acquisition of pragmatic tools to solve various problems. This can be seen in s. 2 of the State Education Law, which I have chosen to cite in full despite its length:

'Purposes of state education

> 2. The purposes of state education are:
>
> (1) To educate a person to love his fellow man, to love his people and to love his country, to be a loyal citizen of the State of Israel, who respects his parents and family, his heritage, his cultural identity and his language;
>
> (2) To teach the principles in the Declaration of the Establishment of the State of Israel and the values of the State of Israel as a Jewish and democratic state and to develop an attitude of respect for human rights, basic freedoms, democratic values, observance of the law, the culture and beliefs of others, and also to teach an aspiration for peace and tolerance in relations between individuals and between peoples;

(3) To teach the history of the land of Israel and the State of Israel;

(4) To teach Jewish law, the history of the Jewish people, Jewish heritage and Jewish tradition, to instil awareness of the memory of the Holocaust and Jewish Martyrdom, and respect for them;

(5) To develop children's personalities, their creativity and their different talents, to extend their cultural horizons and expose them to artistic experiences, all of which in order to realize all of their potential as human beings who have a high-quality and meaningful life;

(6) To give children knowledge in the various spheres of knowledge and science, the various forms of human art throughout history, and the basic skills that they will require in their lives as adult human beings in a free society, and to encourage physical activity and a leisure culture;

(7) To strengthen the ability to make critical judgments, to foster intellectual curiosity, independent thinking and initiative, and to develop an appreciation for and awareness of changes and innovations;

(8) To give equal opportunities to every boy and girl, to allow them to develop in their own way and to create an atmosphere that encourages and supports differences;

(9) To nurture involvement in Israeli social life, willingness to accept office and discharge it with diligence and responsibility, a desire to help others, a contribution to society, volunteering and a striving towards social justice in the State of Israel;

(10) To develop an attitude of respect and responsibility for the natural environment and an attachment to the land, its scenery, and animal and plant life;

(11) To be familiar with the language, culture, history, heritage and special tradition of the Arab population and of other population groups in the State of Israel, and to recognize the equal rights of all citizens of Israel;

(12) To teach recognition of the sanctity of life and to instil a consciousness of safety and caution, including road safety.

Thus we see that the purposes of education concern the world of content from which the student originates and his culture, they concern his heritage and lifestyle, and the schools should balance the need to impart tools and skills, with which a student can go out into the world and realize his potential, against the cultural, ethical and national need to develop the character of the child and educate him in the light of his national identity and the heritage of his ancestors. As Justice Or wrote in one case: 'We are speaking of one of the most important functions of the government and the state' (HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [6], at p. 24). The right to education, therefore, is not limited to the mere establishment of a school, but extends to the character of the school and the content that is learned in it.

14. The right to denominational education has found expression in legislature since the earliest days of education in Israel. Thus, along with the founding of the state education system, the state recognized the need of various sectors of the population to teach their children in the spirit of their special culture, religious belief and community affiliation. The right of the community to denominational education — education that is consistent with its special outlook on life — reflects the right of every citizen to study in a school that suits his outlook on life (cf. HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [10], at p. 412). Within this framework, unofficial schools were recognized by the Compulsory Education Law, and the importance of a variety of schools was incorporated in s. 3 of the State Education Law:

State education from 1953

3. From the academic year 5714 (1953-4) onwards, state education will be introduced in every official school; religious state education will be introduced in an official school that in the 5713 (1952-3) academic year was a part of the Mizrahi stream or the Agudat Yisrael stream or the religious part of the workers' stream.

The right of various sectors to education that is consistent with their beliefs was recognized as a central component of the general right to education, within the framework of the right to choose the character and content of the education (Rabin, 'The Many Faces of the Right to Education,' *supra*, at p. 273). Concerning the importance of variety in schools, it was said in *Upper Poria Board v. Minister of Education* [2] that:

> 'The right of a person to choose a private school for his child instead of the state school has been recognized in Israel and around the world, in both international law and domestic law. The private education system seeks to create special educational frameworks that satisfy the needs of certain sectors of the population that wish to give their children education of a special character as an addition to the basic academic programme studied in all educational institutions. Preserving academic autonomy in private education is an important value that should be respected within the context of the protection of the human right to self-realization, subject to ensuring the preservation of the basic educational values as defined in the State Education Law' (*ibid*. [2], at p. 221; see also HCJ 8437/99 *Habad Kindergarten Network in the Holy Land v. Minister of Education* [11], at p. 81).

Within the framework of the recognition of the right to education, the right of students to equality in education has also been recognized (Rabin, 'The Many Faces of the Right to Education,' *supra*, at p. 277). It has been held that the right of a community to denominational education is not sufficient to reduce the state's obligations to outline an equal policy, to supervise its implementation and to determine the core curriculum as stated in the law:

> 'In view of the special weight of education in determining the appearance of the individual and society, the state has a duty not only to enforce and supervise the implementation of compulsory education in all sectors, but also to regulate directly the essential

> content of the education and the basic values that are imparted through it in all the schools' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 53 of the opinion of Justice Procaccia).

This court has discussed in the past the need to preserve the core curriculum, which constitutes the cornerstone of education in Israel, and it is based on foundations of equality:

> 'The core curriculum is intended to expose every student in Israel, whoever he is, and irrespective of the social group to which he belongs, to basic academic content of a general, national and universal nature. This content is the nucleus that is common to and unites all of the different streams in Israeli society, and which constitutes a "common denominator for all students on a conceptual-content-ethical level and for intellectual and educational skills"' (*ibid*. [3], at para. 31; see also *Secondary School Teachers Organization v. Minister of Education* [5], at p. 236).

The recognized unofficial schools have therefore received legislative recognition, as well as being subject to supervision. The operation and budgeting of these schools is subject to the discretion of the Ministry of Education (see s. 11 of the State Education Law; *Habad Kindergarten Network in the Holy Land v. Minister of Education* [11], at p. 81). Notwithstanding, the right to denominational education in itself has not yet been recognized as a positive right and the Ministry of Education has not been required to take active steps to realize it. When a community establishes an independent school, it bears the main burden of managing and funding it:

> 'The recognized (unofficial) schools are not like the official schools, since in the case of the former the state does not have these direct obligations: it does not have the direct obligation to provide education to children being educated in them nor does it have a direct obligation to fund the running of those schools. Recognized (unofficial) schools are run by private bodies; they also have the main responsibility for what is done in them and they are liable for the expenses of running them' (*Habad Kindergarten Network in the Holy Land v. Minister of Education* [11], at p. 82).

15. From all of the aforesaid it can be seen that within the framework of the right to denominational education, members of a certain community may establish and operate a school that is consistent with their beliefs. The state may recognize the school, even though it is not obliged to do so, and contribute to its funding, all of which in accordance with the provisions of the law.

However, the right to denominational education, like any right, is not absolute. Indeed, 'human rights are the rights of a person as a part of society. It is possible to restrict human rights in order to realize social goals. Only when these goals are realized is it possible to have human rights' (HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [12], at para. 11 of the opinion of President Barak). Thus, when two basic rights conflict, the court is required to examine the nature and scope of the aforesaid rights, and to strike a balance between them in a manner that expresses the freedom of the individual and protects the public interest. In our case, the right to denominational education conflicts with the right to equality.

The right to equality

16. This court, from its earliest days, has discussed the importance of the principle of equality in our legal system. Thus Justice Landau emphasized the 'basic principle of everyone being equal before the law' (HCJ 98/69 *Bergman v. Minister of Finance* [13], at p. 697 {17}), and this was reiterated by Justice Shamgar when he said that 'the rule that one may not discriminate against someone because of his ethnic origin, sex, nationality, community, country of origin, religion, belief or social status is a basic constitutional principle, which is part of the fabric of our basic legal ethos and constitutes an integral part thereof' (HCJ 114/78 *Burkan v. Minister of Finance* [14], at p. 806; see also HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [15], at p. 331). The principle of equality has also found a place in the debate on rights (HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [16], at para. 26 of the opinion of President A. Barak and the references cited there). It has been written that 'it constitutes a basic constitutional value, which is part of the fabric of our basic legal outlooks and constitutes an integral part thereof' (HCJ 6698/95 *Kadan v. Israel Land Administration* [17], at p. 273); see also *Movement for Quality Government in Israel v. Knesset* [16], at para. 40 of the opinion of President A. Barak). More than once this court has emphasized the destructive results of an unequal treatment of equals, for both the individual and society:

> 'Indeed, there is no force more destructive to society than the feeling of its members that they are being treated unequally. The feeling of inequality is one of the most painful feelings. It undermines the forces that unite society. It destroys a person's individual identity' (*Poraz v. Mayor of Tel-Aviv-Jaffa* [15], at p. 332).

Justice M. Cheshin emphasized:

> '… We shall always hear a claim of discrimination, which is the most fundamental of issues. The principle of discrimination is based on the deep need that is innate to us, to every one of us — perhaps we should say, in the inclination and necessity in man: in man, but not only in man — that we are not discriminated against, that we are treated equally, by God above and at least by man… (Real or seeming) discrimination leads to a feeling of unfairness and frustration, the feeling of unfairness and frustration lead to envy, and when envy comes, reason is lost' (HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [18], at p. 203).

17. In the past, this court has considered the status of the principle of equality in the education system, and it has been said on this subject that —

> 'The purposes of state education originally included the value of equality. Implementing the value of equality in education is reflected, *inter alia*, in strengthening the aspiration of giving equal opportunities to students in education without economic, social and cultural gaps perpetuating significant differences in the education and professional qualifications that are acquired' (*Upper Poria Board v. Minister of Education* [2], at p. 218).

The principle of equality is therefore a cornerstone of our legal system, without which it is not possible to have a proper education system. This outlook has found expression in legislation, and s. 5 of the Student Rights Law provides a criminal sanction where a school, or a person acting on its behalf, acts in a discriminatory manner:

Prohibition of discrimination

5. (a) A local education authority, school or person acting on their behalf shall not discriminate against a student on ethnic grounds, for reasons of socio-economic background, or for reasons of political opinion, whether of the child or of his parents, in any one of the following:

(1) Registration, acceptance or expulsion from a school;

(2) Determining separate study programmes and advancement tracks in the same school;

(3) Having separate classes in the same school;

(4) Students' rights and duties, including disciplinary rules and their implementation.

(b) Whoever transgresses the provisions of this section is liable to a year's imprisonment or a fine, as stated in section 61(a)(3) of the Penal Law, 5737-1977.

18. With regard to the allocation of state resources, case law has emphasized, on more than one occasion, that 'allocating state money for various public purposes is always subject to the principle of equality… treating individuals or institutions differently, when there is no relevant difference between them, constitutes improper discrimination and gives rise to a ground for judicial intervention' (HCJ 727/00 *Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [19], at p. 88; see also HCJ 59/88 *Tzaban v. Minister of Finance* [20], at p. 706; *Israel Religious Action Centre v. Ministry of Education* [3], at paras. 71-72). Notwithstanding, Justice E. Arbel added:

> 'The principle of equality governs all fields of law and also applies to the distribution of budgets and subsidies by the authority. Many rules have been determined with regard to the application of the principle of equality in distributing budgets and subsidies. The essence of these rules is that the distribution of budgets and subsidies by the state should be done while

> upholding the principles of equality and reasonableness and while determining clear and transparent criteria for the distribution of the money. The authority that distributes the budget should consider only relevant considerations, and it may not discriminate between groups that do not differ from one another in any relevant way. Notwithstanding, it has been emphasized that equality does not mean identity. Sometimes, for the purpose of achieving real and genuine equality, the authority should distinguish between groups on the basis of the relevant difference between them' (HCJ 11020/05 *Panim For Jewish Renaissance v. Minister of Education, Culture and Sport* [21], at para. 8).

However, it has been held on several occasions in the past that equal treatment does not mean identical treatment. Indeed, 'it is clear that when an authority is ordered to act with equality, we are dealing with substantive equality, and not merely with formal equality. Sometimes, in order to achieve substantive equality we should act differently towards different individuals' (*Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [19], at page 89, and see the references cited there). The principle of substantive equality 'is based on a criterion of relevance in the sense that there is no basis for distinguishing between persons or between issues on grounds that are not relevant, when it is possible to distinguish between them on grounds that are relevant' (HCJ 6051/95 *Recanat v. National Labour Court* [22], at p. 312; HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [23], at p. 365 {9-10}). The meaning of substantive equality was discussed by President Agranat in one case:

> 'In this context, the concept of "equality" therefore means "relevant equality", and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in the aforesaid position. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being, for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 *Boronovski v. Chief Rabbis* [24], at p. 35).

Balancing rights — the right to equality in education

19. It is true that when the right to denominational education meets the principle of equality, there is an inherent difficulty in reconciling the two in a manner that upholds them to the fullest extent. Consequently —

> '… a constitutional process is required to restrict the protection given to constitutional rights, so that they are only protected to a partial extent. This restriction is based on the recognition that it is impossible to protect all of the rights to the fullest extent… Therefore an act of constitutional balancing is required' (HCJ 2481/93 *Dayan v. Wilk, Jerusalem District Commissioner of Police* [25]).

As we have said:

> '… the principle of equality does not rule out different laws for different people. The principle of equality demands that the existence of a law that makes distinctions is justified by the type and nature of the matter. The principle of equality assumes the existence of objective reasons that justify a difference' (HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [26], at p. 236).

It follows that when a certain school has determined characteristics by means of which a sector of the population will be distinguished, this policy should be examined in accordance with its concrete characteristics, as well as its actual results. Within this framework, the actions of the school making the distinction should be examined in the light of the purposes of the education and the basic values of the legal system. If the distinction serves the purpose — namely the right to denominational education — in a relevant manner, it will be a permitted distinction. If the distinction serves the purposes in a manner that is not relevant — namely in a manner whose characteristics, purpose or results create a distinction that is, in the circumstances of the case, *irrelevant* — this will constitute prohibited discrimination.

Indeed, not every special characteristic — whether it is a difference in culture, religion, custom or ideology — can justify discrimination. The characteristic needs to be an inherent part of the outlook of the educational institution that seeks to impart the values of a particular denomination, it should be relevant to the purpose of the distinction, and it should be a characteristic without which it will be difficult to maintain the denominational education system according to its own criteria. It is the court that will determine whether a certain denomination has been distinguished justly — in

order to allow a certain denomination to live freely in its community — or whether the case is one of prohibited discrimination whose whole purpose is to exclude people who are different and isolate them from proper society.

20. As we have said, recognized unofficial schools are entitled to determine cultural characteristics according to which the students in the school will conduct themselves. These characteristics should represent the belief and culture of the denomination in whose spirit the school was founded and is operated, and they should reflect the lifestyle and outlook of the denomination. But where the school rules — or the rules of the track within the school — are designed solely in order to prevent the admission of one group or another into a certain educational framework — we are dealing with improper discrimination.

21. Indeed, there are those who believe — and this is what the external examiner, Advocate Bas, said — that there are behavioural, cultural and community characteristics that discriminate against a certain denomination, but constitute an inherent part of the religious outlook of various denominations. In other words, in a conflict between the two rights — the right to denominational education and the right to equality — there are characteristics that are required for the purpose of preserving the world of values of the one right, while conflicting with the other right. For this purpose we need to seek a balance between the conflicting rights.

When we seek to find the constitutional balance, 'we are dealing with a balance that is required between a violation of one liberty and a violation of the other. The balance is a horizontal one. It determines restrictions that will allow each liberty to be upheld in its essentials' (HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [27], at page 277). In our endeavour to strike the aforesaid balance, we seek for the outcome that gives expression to the conflicting rights in a state of coexistence:

> 'We are concerned with two human rights of equal standing, and the balance between them must therefore find expression in a reciprocal waiver whereby each right must make a concession to the other in order to allow the coexistence of both. The protection of the law does not extend to either of the rights in its entirety. Each right suffers restrictions of time, place and manner in order to allow the substantive realization of the other right' (*Dayan v. Wilk, Jerusalem District Commissioner of Police* [25], at page 480 {353}).

In our case, the legislature recognized the existence of denominational schools and even established conditions for them, by requiring that they obtain a licence for regulating and subsidizing them. Along with the recognition of this right, the legislature enshrined the rights of students to be treated equally and not to be discriminated against (s. 5 of the Student Rights Law). It has been said in the past with regard to this balance that:

> 'The accepted premise in Israel, like that in other democratic countries, is that the aforesaid tension should be resolved by respecting the autonomy of the family to choose the type of education that it desires for its children, while at the same time recognizing the authority — and sometimes the duty — of the state to intervene in this autonomy in order to protect the best interests and rights of the child, and to achieve a general social purpose by creating a common denominator of basic educational values that unites all the members of society' (*Israel Religious Action Centre v. Ministry of Education* [3], at para. 55).

22. Indeed, the right of communities to operate educational frameworks that are consistent with their outlook has been recognized by law, but these schools are conditional upon 'minimum requirements that the state determines, subject to a respect for human rights and basic liberties, in order to realize the possibility of every individual taking a *de facto* part in society' (*ibid*. [3], at para. 56). Thus, in another case, the funding of recognized unofficial schools was made conditional upon adopting the state core curriculum, which establishes an equal standard for academic requirements in Israeli schools (*Secondary School Teachers Organization v. Minister of Education* [5], at p. 239; *Israel Religious Action Centre v. Ministry of Education* [3], at para. 55 of the opinion of Justice Procaccia). It was held that 'the subsidizing of schools that do not satisfy the conditions enshrined in the law and that do not realize the goals of state education is *ultra vires* and a violation of the duty of trust that the public authority owes to the public from which it derives its authority' (*Secondary School Teachers Organization v. Minister of Education* [5], at p. 236).

23. How does the aforesaid balance apply to the manner in which a school is run and to the rules of conduct that it demands? A preliminary answer to this question can be found in the remarks of Vice-President Barak in a case where the court was called upon to consider the question of the head covering of a student who was a girl of Arab ethnicity. This cultural symbol deviated from the uniform dress code that was the practice in the St. Joseph's Greek

Catholic Secondary School, and it was therefore prohibited. Following a petition that the student filed in this court, it was held that:

> 'We should consider the reasons underlying the requirement of a uniform dress and conduct code. Indeed, were these reasons based on uniformity as an independent value, I would be prepared to hold that the petitioner's freedom of religion overrides them. [In our case], we are satisfied that the requirement of a uniform dress and conduct code is based on educational considerations relating to the character and nature of the school as a school of a religious community. The uniformity of dress and conduct provides the common denominator that allows all the students… to have a joint lifestyle in the school, which is based on religious and ethnic pluralism. Undermining the uniform dress and conduct code will undermine the character of the school and it special quality, and ultimately it will undermine its special framework and the (moderate) religious outlook that prevails in the school' (HCJ 4298/93 *Jabarin v. Minister of Education* [28], at p. 202).

In another case, the Administrative Court (the honourable Justice B. Okon) considered the application of the principle of equality in admissions to private schools that are included among the exempt schools (AP (Jer) 1320/03 *Alkaslasi v. Upper Beitar Municipality* [39], at p. 655). It was held that 'The Prohibition of Discrimination Law sets a clear standard that requires the application of equal criteria, and it imposes them on private organizations, including schools… [The Ministry of Education] cannot grant an exemption to schools that do not satisfy the requirements of this law' (*ibid*. [39], at p. 657). And if this is the case with regard to exempt schools, it is clear that the Ministry of Education is not permitted to allow discrimination in schools that benefit from the state budget.

The Ministry of Education, in its supplementary statement, also characterized the line that separates the relevant from the discriminatory in a case where there are separate academic tracks:

> 'A separate track does not mean an absolute separation in all spheres of education and during all study times between the students who study in it and the other students in the school; it should only relate to those study times during the week during which the special material or the specific content of that separate track is taught, and not to all the other hours of study in the school, nor to breaks, the uniform, the staff, the management and

> the other separate characteristics adopted in this regard' (p. 5 of the supplementary notice of 7 Tammuz 5768 (10 July 2008)).

24. From all of the aforesaid it can be seen that a school may have a special track in which the religious practices and outlook of a certain denomination are taught. The school may also determine relevant rules of conduct for students in the track, for the purpose of integrating the academic content studied in it. However, the school should allow each student who satisfies the *relevant* basic conditions and who seeks to adopt the lifestyle that accompanies them to study in the track that he wants. Above all, it is clear that the denominational affiliation of a student should not be a relevant condition for admitting him to a certain track, and creating segregation within one school — by separating the students at all times of the day, introducing a different uniform, separating the teachers' room and charging extra tuition — is not a relevant measure for the purpose of student education. The school may distinguish between students in different tracks solely for the purpose of studying *content that is unique to those tracks only*, but the regular studies and the rules of the school should be the same for everyone studying in the school throughout the study hours.

I should also emphasize that a policy of 'equal separation' cannot atone for improper discrimination where there is any, as this court said in another case:

> 'A policy of "separate but equal" is inherently unequal. This approach is based on the outlook that separation implies an insult to a minority group that is excluded, emphasizes the difference between it and the others and perpetuates feelings of social inferiority' (*Kadan v. Israel Land Administration* [17], at p. 279).

25. The Ministry of Education has the authority to supervise the balance discussed above. It should protect the rights that require balancing and deal strictly with those who violate that balance. Admittedly, the Ministry of Education's power to cancel the licence of a school is a discretionary power (section 15 of the Supervision of Schools Law), but it is a well-known rule that the authority should exercise its power reasonably, and this court has held in the past that 'a discretionary power becomes a non-discretionary power when the factual circumstances are such that the basic values of our constitutional and legal system make a failure to exercise the power unreasonable in a way that goes to the heart of the matter' (HCJ 3094/93 *Movement for Quality Government in Israel v. Government of Israel* [29], at p. 421 {282} and the references cited there). A *gradual* process of remedying

the defect is unacceptable, and the Ministry of Education should take effective and unequivocal steps to eradicate discrimination and return the school to the path of the constitutional balance.

From general principles to the specific case

26. It is easy to determine that in the case before us the purpose of the rules — some of which found their place in the wording of the separate regulations for the Hassidic track, and some of which were applied *de facto* without official regulations — as the examination report of Advocate Bas showed, was simply this: the separation of girls of the Hassidic denomination from their Sephardic counterparts. This determination is based mainly on the outcome test, which shows that *de facto* two wings were operated within the school. These wings — which were initially intended to be two separate schools and were subsequently run as two wings — were characterized by a division of the population that was not coincidental, and it clearly shows the discriminatory intentions of the initiators of the separation, to such an extent that 'it can be said to speak for itself' (Vice-President M. Cheshin in HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [30], at p. 178).

This discrimination is also clearly reflected in the regulations that were submitted for the approval of the director-general of the Ministry of Education, some of which were cited above. A study of the various regulations shows that we are not dealing with a 'track whose purpose is the study of the Hassidic way of life,' but with an attempt to separate different sectors of the population on an ethnic basis, under the cloak of a cultural difference. The preference of students from a certain ethnic group in admissions to the Hassidic track, while placing bureaucratic difficulties in the path of parents of students from another ethnic group who want to register their daughters for the track, seriously undermines the right to equality. The same is true with regard to the school's requirement that parents of the students should act in accordance with the lifestyle practised in the school, and the request — which was rightly excluded from the regulations — that the prayers should be recited solely in accordance with the Ashkenazi pronunciation. All of these merely serve an improper purpose, which is to exclude from the Hassidic track students from the Sephardic community, solely because of their origin.

The characteristics of the discrimination in this case can also be seen in the atmosphere that has enveloped this case from the outset and that is discernible in the respondents' conduct. In other words, the main discrimination in this case was discussed above, but it is also reflected in the fact that the

Independent Education Centre and the school did everything that they could in order to satisfy the requirements of the Ministry of Education on an institutional level, but they did not really implement their solutions. In practice, their undertakings had little effect on the lifestyle in the school, and in this regard it has been said that: 'It should be remembered that discrimination always — and maybe today more than in the past — conceals itself and goes underground, but achieves its goals by using valid arguments. Improper discrimination is not always discussed openly' (*Alkaslasi v. Upper Beitar Municipality* [39], at p. 652).

27. With regard to the Ministry of Education, in view of its authority and responsibility to supervise the school, and in view of the *continuing* violation of the right to equality on the part of the school, it is clear that the ministry should have taken all the steps available to it in order to eradicate the discrimination and return the policy of the school to the framework of the constitutional balance. When the Independent Education Centre and the school failed to comply with the instructions of the Ministry of Education, it should have exercised its powers to cancel the school's licence and stop its subsidy, and I have said in the past that 'one should not turn a blind eye to a continuing situation of *ultra vires*, and an administrative authority should not be allowed to adopt a policy of procrastination in remedying what is wrong' (*Secondary School Teachers Organization v. Minister of Education* [5], at p. 238).

28. Indeed, this case reflects a harsh reality of the extent to which the recognized unofficial education stream respects the rights to equality of the individuals studying in its institutions. I can only express regret at the fact that various denominations avail themselves of the right to denominational education in order to deepen discrimination in Israeli society. In view of the many aspects of this case and the uncomfortable feelings of everyone involved in it, I can only hope that ultimately the inhabitants of the town will once again live together and send their daughters to a proper school that will teach them, *inter alia*, the value of tolerance for other human beings.

The relief

29. The Beit Yaakov School and the Independent Education Centre have therefore violated the right of the Sephardic students to equality, and thus they have departed from the constitutional balance between the rights relevant to this case. The Ministry of Education acted *ultra vires* when it failed to exercise the means available to it for the purpose of preventing the aforesaid discrimination.

I shall therefore propose to my colleagues that we make the order *nisi* absolute, and we order the Independent Education Centre to remove any indication, both formal and substantive, of the phenomenon of discrimination that exists in the school. We also order the Ministry of Education, in so far as it finds that the Independent Education Centre does not comply with this order, to take all the legal steps to remedy the situation, including the cancellation of the school's licence and stopping its subsidy.

Finally, I propose that the respondents should pay the costs of the legal fees of counsel for the petitioners — the first respondent in a sum of NIS 15,000 and the third respondent in a sum of NIS 60,000.

Justice E. Arbel

I agree with the opinion of my colleague Justice E.E. Levy, and with his reasoning.

We are dealing with a petition concerning an act of discrimination in a school that was carried out by creating two separate wings that split the student body into an Ashkenazi group and a Sephardic one. In order to formalize the segregation, regulations were prepared for the approval of the director-general of the Ministry of Education, together with additional rules that would be implemented informally. The petitioners spoke of the feelings of rejection and humiliation experienced by the Sephardic girls and their parents as a result of their being segregated from the girls of Ashkenazi origin.

The prohibition of discrimination, which is the opposite of equality, lies at the heart of the case before us. As has been said on several occasions in our case law, and also by my colleagues here, the principle of equality and the prohibition of discrimination are basic principles in our law in general and in the field of education in particular. A different treatment of equals, discrimination and segregation mean the adoption of an arbitrary double standard that has no justification. The segregation completely undermines interpersonal relations. The feeling of discrimination leads to the destruction of the fabric of human relationships (see HCJ 7111/95 *Local Government Centre v. Knesset* [31], at p. 503).

It is important to emphasize that the right of a community to denominational education on the basis of religious differences does not release it from the obligation of equality (see s. 5 of the Student Rights Law, 5761-2000). Although as a rule a certain sector of the population may impose demands on religious issues in order to realize purposes relating to religious

education of the kind that it espouses, these requirements should not be confused with requirements that are based on ethnic backgrounds, nor should we be misled by the religious-ideological cloak with which it is disguised.

In the case before us, the original requirement of using the Ashkenazi pronunciation during prayers — a requirement that was ultimately removed — creates a difficulty of forcing a girl to pray with a pronunciation that is different from the one used at home and in the synagogue to which her family belongs. The character of this requirement blatantly reveals the true intention underlying the basis for the separation between the tracks and the basis for the regulations that were drafted. But in addition to this clause, it is difficult to accept the demand for an Ashkenazi religious authority that will apply to the whole lifestyle of the students and their parents, without any exception and without any consideration for the ethnic group from which the student originates. One may ask: it is conceivable to expect the parents of a student from the Sephardic community to act in accordance with Ashkenazi religious practices when there may be cases where even the strictest of Sephardic rabbis have ruled differently? Admittedly the school is a denominational one, but one might expect a minimal level of tolerance for others, which in this case means a girl from another ethnic background, when this does not materially affect the religious standard required by the school. Therefore, this broad and unqualified requirement in the regulations also shows, in my opinion, the true intention that underlies it, namely a separation between ethnic groups and not between different standards of religiosity. I should point out in closing that the question of the legitimacy of the various requirements made by schools of the parents of students (as distinct from the students themselves) is complex and deserves a thorough examination, but this is not the proper place for that.

The Ministry of Education is responsible for the school and the way in which it is run, and it should first and foremost ensure a policy of equality and supervise its implementation. The Ministry of Education should therefore employ all the means at its disposal, and act without fear to eradicate the phenomenon of discrimination.

Therefore, as aforesaid, I agree with my colleague's opinion and the result that he reached.

Justice H. Melcer

1. I concur with the opinion of the presiding justice in this case, my colleague Justice E.E. Levy, and with the remarks of my colleague Justice E.

Arbel. Notwithstanding, in view of the importance of the matter, I would like to add a few remarks and emphasize several points.

2. My colleagues discussed how the discrimination directed in this case at the students of Sephardic origin (who were mostly placed in the 'general' track) in relation to the students of Ashkenazi origin (who were placed in the 'Hassidic' track) and the segregation that was *de facto* introduced in the school violate *the right to education and the right to equality* of the victims of the discrimination.

The *right to education* has a constitutional basis, which can be deduced from the basic outlooks of our legal system, but whether it is enshrined as a super-legislative constitutional right is unclear (see HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [6], *per* Justice T. Or; Justices Tz. Tal and D. Dorner reserved judgment). Notwithstanding, there is a view that the right to education can be derived from the provisions of the Basic Law: Human Dignity and Liberty, but even those who hold this view maintain that its recognition as a super-legislative constitutional right is indirect (see Y. Rabin, *The Right to Education* (2002), at pp. 376-387; Y.M. Edrey, 'Human Rights and Social Rights,' *Berinson Book* (vol. 2, 2000) 45, at p. 87).

The *right to equality* has, of course, been recognized since HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [16] as a part of the right to human dignity in so far as this right is integrally bound up with human dignity (*ibid.* [16], at para. 33).

It seems to me that the case before us falls within this framework, but it can also be said that alongside the violation of *the right to education and the right to equality* as such, there is also a direct violation of an express constitutional right, which is enshrined in the Basic Law: Human Dignity and Liberty, namely the *right to dignity*. I will discuss this immediately below.

3. The Basic Law: Human Dignity and Liberty, which is based, *inter alia*, on the recognition of the importance of man and the fact that he is a free agent, protects, *inter alia*, the dignity of man as a human being. Within this context, humiliation is a blatant violation of dignity. Indeed, Justice D. Dorner held in HCJ 4541/94 *Miller v. Minister of Defence* [32], at pp. 132-133 {223-225} that:

> 'Notwithstanding, there can be no doubt that the purpose of the Basic Law was to protect people from degradation. The degradation of a human being violates his dignity. There is no reasonable way of construing the right to dignity, as stated in the

> Basic Law, such that the degradation of a human being will not be considered a violation of that right' (*ibid*. [32], at p. 132 {223}).

In our case, the humiliation arises from the fact that the classification into study tracks was done *de facto* against a background of ethnic origin (based on the pseudo-religious ground that we will refute later). Justice Dorner went on to explain in *Miller v. Minister of Defence* [32] that:

> 'Such discrimination is based on attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature. This, of course, involves a profound humiliation of the victim of the discrimination' (*ibid.* [32], at p. 132 {224}).

This is because it —

> '… sends a message that the group to which he belongs is inferior, and this creates a perception of the inferiority of the men and women in the group. This creates a vicious cycle that perpetuates the discrimination. The perception of inferiority, which is based on the biological or racial difference, causes discrimination, and the discrimination strengthens the deprecating stereotypes of the inferiority of the victim of discrimination. Therefore the main element in discrimination because of sex, race or the like is the degradation of the victim' (*ibid.* [32], at p. 133 {224-225}).

In passing we should add that a similar (and more far-reaching) outlook is expressed by Dr Orit Kamir, in her analysis of the relationship between the value of equality and the value of dignity (see, O. Kamir, *Human Dignity — Feminism in Israel: A Social and Legal Analysis* (2007), at p. 54). According to Dr Kamir's approach, whereas the Aristotelian concept of equality ('equality means equal treatment of equals and different treatment of those who are different according to the extent of their difference' — see *Miller v. Minister of Defence* [32], at p. 133 {225}) assumes the existing social structure, accepts it and compares the rights of individuals within it, without recognizing the basic discrimination that characterizes it, the outlook of *equal human dignity* determines that all human beings are equal partners, by definition, in the absolute value from which their basic rights are derived (see Kamir, *Human Dignity — Feminism in Israel: A Social and Legal Analysis*, *supra*, at p. 55). Dr Kamir also distinguishes between human dignity and the

dignity of human existence. Human dignity is the essence of the human nature of a person and it includes his 'physical, conscious and emotional existence in basic security and welfare as well as the autonomy to self-definition and development' (*ibid*., at p. 52). By contrast, the —

> '... dignity of human existence' 'attributes a value to *the special human potential of each individual according to his free definition*. It does not relate to the basic human element that is common to all human beings, but actually to the complex aggregate that characterizes every such human individual. The dignity of human existence is the basic ethical dimension of the human sphere, which includes the characteristics of every individual, his qualities, skills, abilities, tendencies and ambitions' (*ibid.*, at p. 53; emphasis added).

According to this distinction, Dr Kamir is of the opinion that discrimination against groups should be defined in terms of equal human dignity — human dignity and the dignity of human existence — and we ought to fight for the rights of individuals who belong to groups that are discriminated against for the sake of this equality (*ibid.*, at p. 57). It may be possible to deduce from this approach that in the circumstances of the case before us, even if we do not say that the students here suffered a violation of their human dignity, as can be seen from the arguments of the third respondent (and this seems doubtful to me), in any case at least a violation of their 'dignity of human existence' occurred in this case.

4. Justice Dorner's opinion, which was cited above, relied in *Miller v. Minister of Defence* [32], *inter alia*, on what was said in the famous judgment of the Supreme Court of the United States in *Brown v. Board of Education of Topeka* [40], which gave rise to questions that are to some extent similar to those that arise in our case. *Brown v. Board of Education of Topeka* [40] rejected the doctrine that was previously accepted in American law with regard to 'separate but equal' education.

With regard to the effect of separate education, the Chief Justice of the Supreme Court of the United States, Earl Warren, said on behalf of the whole court:

> 'We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal,

> deprive the children of the minority group of equal educational opportunities? We believe that it does…
>
> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone' (*ibid.* [40], at p. 691).

In view of the aforesaid, the Supreme Court of the United States held unanimously as follows:

> 'We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal' (*ibid.* [40], at p. 691).

The facts and the aforementioned American case (which was based on the right to equality that is enshrined in the Fourteenth Amendment of the United States Constitution, on the ground of inferiority and humiliation, which is more similar to the value of protecting dignity in Israel in the sense presented above) have as noted a certain similarity to the facts before us on the question of segregation, since in the reply to the petition it was also implied that it is supposedly possible to have equality despite the separation between the tracks, and that this does not constitute ethnic discrimination.

Despite the huge importance of *Brown v. Board of Education of Topeka* [40] in the United States and the revolution that it brought about there, which led to the end of racial discrimination in education in the United States (see A. Gotfeld, '*Brown v. Board of Education in Topeka* and its Place in American History,' in D. Gotwein and M. Mautner (eds.) *Law and History* (1999)), *it was not the final word on the subject*. It gave rise to a variety of new and additional questions both with regard to the ways in which it should be implemented, and with regard to the right of minority communities to preserve their special character in a multi-cultural environment (see the fascinating book: J.M. Balkin (ed.), *What Brown v. Board of Education Should have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (2001); 'Symposium: Brown at Fifty: Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa,' 117 *Harv. L. Rev.* 1378 (2004); D. Gibton, 'Awaiting *Mizrahi v. Board of Education of Topi-Gan* (unconsidered): A Critical and Comparative Analysis of the Position of Israel's Supreme Court on Integration

in the Israeli School System,' 28(2) *Tel-Aviv University Law Review (Iyyunei Mishpat)* 473 (2004)). A vague echo of some of these questions can also be found in the case before us, and we shall discuss them in paragraph 6 below. But before we discuss that, we should explain the significance of the fact that this case involves, in our opinion, a direct violation of a basic constitution right (the right to dignity), which is expressly enshrined as aforesaid in the Basic Law: Human Dignity and Liberty.

5. The significance is that incorporation in the Basic Law has ramifications on both the definition and the scope of the right (which as a constitutional right is interpreted broadly, and according to some opinions should be 'balanced' horizontally against other constitutional rights of equal importance and status), and on the conditions in which it is permitted, if at all, to violate it by virtue of the 'limitations clause' (see *Miller v. Minister of Defence* [32], at p. 133 {224-225}; HCJ 10203/03 *National Assembly Ltd v. Attorney-General* [33]). Here, not only is there *no such law* (or express authorization therein) that allows a violation of the right, which is the first condition that needs to be satisfied in order to implement the 'limitations clause' in s. 8 of the Basic Law: Human Dignity and Liberty, but *there are several laws that establish the right and expressly prohibit ethnic discrimination of the kind under consideration in the petition*. We will set out these laws and their relevant provisions below:

(a) The Student Rights Law, 5761-2000 (hereafter — the Student Rights Law):

Section 5 of the Student Rights Law states:

> Prohibition of discrimination
>
> 5. (a) A local education authority, *school* or person acting on their behalf *shall not discriminate against a student on ethnic grounds*, for reasons of socio-economic background, or for reasons of political opinion, whether of the child or of his parents, in any one of the following:
>
> (1) Registration, acceptance or expulsion from a school;
>
> (2) Determining separate study programmes and advancement tracks in the same school;

(3) Having separate classes in the same school;

(4) Students' rights and duties, including disciplinary rules and their implementation.'

(emphases added).

The meaning of the terms 'school' and 'recognized school' in the Student Rights Law follows the definition of these terms in the Compulsory Education Law, 5709-1949. If we refer to the Compulsory Education Law, we see that according to the definitions in s. 1 of that law, a 'recognized school' also means 'any other school that the minister has declared, in a declaration published in *Reshumot*, to be a recognized school for the purpose of this law' (hereafter: a 'recognized unofficial school'). In the petition before us, there is no dispute that the Beit Yaakov Girls Primary School in Immanuel is a recognized unofficial school.

Section 16(a) of the Student Rights Law further provides that 'The provisions of this law shall apply to every recognized school.' Section 16(b) of that law states: 'A recognized unofficial school shall be subject to the provisions of this law, except for sections 6, 7 and 13, but the minister may order, with the approval of the committee and after considering the character of the school, that all or some of the provisions of the aforesaid sections shall apply to it.' *It follows from the aforesaid that section 5 of the aforementioned Student Rights Law applies to the Beit Yaakov Girls Primary School, which is the subject of the petition before us*.

The minutes of the meetings held by the Education, Culture and Sport Committee of the Knesset in the course of preparing the draft law (which was tabled by MK Silvan Shalom) — prior to its second and third readings — give an insight into the background underlying s. 5 of the Student Rights Law.

Thus, for example, MK Zevulun Orlev, the chairman of the committee, said with regard to the question of the special nature of the various schools:

> 'We are not seeking to cancel the tracks and the special characteristics. All that we want is that *within each framework there will be no discrimination*. MK Silvan Shalom did not intend in this law to cancel the status of any track in education. *I want there to be no discrimination in any track*.'

> (See the minutes of the second meeting of the subcommittee of the Education, Culture and Sport Committee of the Fifteenth Knesset of 23 May 2000, at page 24; emphases added).

In another meeting MK Silvan Shalom explained the provision as follows:

> '… I am referring to the ethnicism (*sic*) that is introduced here for ethnic reasons. *Usually religious discrimination is ethnic; it is within the religious track, but for ethnic reasons…*'
>
> (See the minutes of meeting no. 113 of the Education and Culture Committee of the Fifteenth Knesset, at p. 6 (19 June 2000); emphasis added).

In summarizing the issue in the Knesset after the law passed its third reading, MK Silvan Shalom said the following:

> 'The prohibition of discrimination: *From today it is not permitted to discriminate between one student and another for the purpose of admissions, on ethnic grounds or because of social or economic background.* It will also be prohibited to refuse admission to a student because of the political beliefs of the parents of the child himself. Admittedly there is a possibility of discrimination in other situations, but they are appropriate situations, such as when a boy or girl wishes to learn in a single-sex school. If that is the character of the school, that is how it should be. If there is a situation in which a child who does not observe the Torah and the commandments wishes to be admitted tomorrow to an Orthodox religious school, he will not be permitted to do so. If a Jewish or an Arab child wishes to be admitted to an Orthodox Jewish school or a religious Arab school, or in a certain kind of Jewish school or a certain kind of Muslim school, the student will not be able to say that the refusal is discrimination.'

(See: *Knesset Proceedings* 5761, at pp. 1271, 1274; emphasis added).

Thus we see that s. 5 of the Student Rights Law was intended, *inter alia*, to prevent situations in which discrimination is based on ethnicity, such as the one that occurred in the Beit Yaakov School in Immanuel. Therefore all we can do is to give effect to the proper purpose underlying the aforesaid s. 5.

(b) The Prohibition of Discrimination in Products, Services and Entrance to Places of Entertainment and Public Places, 5761-2000 (hereafter: 'the Prohibition of Discrimination in Products and Services Law'):

The Prohibition of Discrimination in Products and Services Law defines 'public service' as follows:

> 'Transport, communications, energy, *education*, culture, entertainment, tourism and financial services, which are intended for the use of the public'
>
> (emphasis added).

Section 3(a) of the Discrimination in Products and Services Law states as follows:

> 'Prohibition of discrimination
>
> 3. (a) Anyone whose occupation is the supply of a product or a *public service* or the running of a public place *shall not discriminate in supplying* the product or *the public service*, in allowing entry into the public place or providing a service in the public place *on account of* race, religion or religious group, nationality, *country of origin*, sex, sexual orientation, beliefs, political affiliation, personal status or parenthood.'
>
> (emphases added).

For the implementation of the aforesaid provisions, see: AP (Jer) 1320/03 *Alkaslasi v. Upper Beitar Municipality* [39].

It follows from the aforesaid that the constitutional right to the protection of dignity, which was directly violated here as a result of the humiliation involved in the ethnic discrimination directed in this case at the students of Oriental origin can only be remedied by eliminating the discrimination. In this context it should be emphasized that, as we have said, the relevant laws do not allow any violation of this kind (on the contrary, they *expressly prohibit it*). Moreover, the other conditions of the limitations clause (which we saw no need to address in this case) are also not satisfied in the circumstances.

6. How therefore does the third respondent try to justify its conduct? It argues that the separation was on a *religious* basis and not an *ethnic* one (see para. 15 of its statement of reply). Thereby it is trying to avail itself of the 'freedom of religion' exception, which in its opinion extends to conduct of this kind, or the exception that allows a cultural minority community to have its own educational autonomy. In the United States, an argument of this kind was accepted in the past, with regard to the Amish sect, on the basis of the right to freedom of religion, but in the United States that right is enshrined in the First

Amendment to the United States Constitution (see *Wisconsin v. Yoder* [41]). Here I should point out that the aforesaid judgment has been criticised in legal literature. See: W. Kymlica, *Citizenship, Community and Culture* (1989); W. Kymlica and R. Cohen-Almagor, 'Ethnic-Cultural Minorities in Liberal Democracies,' *Basic Issues in Israeli Democracy* (1999) 187; Rabin, *The Right to Education*, at pp. 159, 231-235, which also refers to a previous judgment of the United States Supreme Court in *Prince v. Massachusetts* [42] (which was considered in *Wisconsin v. Yoder* [41]).

Moreover, it would appear that the reliance on 'religious grounds' for the *de facto* separation is merely a disguise for discrimination, and even disguised discrimination is unacceptable (see the remarks of Justice J. Türkel in HCJ 200/83 *Wathad v. Minister of Finance* [34], at pp. 121-122; the majority opinion *per* Justice M. Cheshin in HCJ 1/98 *Cabel v. Prime Minister of Israel* [35], at pp. 259-260).

Furthermore, in Israeli law the right to freedom of religion has not yet achieved the status of a super-legislative constitutional right, even though Prof. A. Barak in his book *Legal Interpretation* (vol. 3, *Constitutional Interpretation*) (hereafter: 'Barak, *Constitutional Interpretation*') originally expressed the opinion that this right is also derived from 'human dignity' and the purpose clause in the Basic Law: Human Dignity and Liberty (*ibid*., at p. 430; see also his remarks in HCJ 3261/93 *Manning v. Minister of Justice* [36], at p. 286 and in HCJ 4298/93 *Jabarin v. Minister of Education* [28], at p. 203, where he expresses himself more moderately. See also the opinion of Justice A. Procaccia in HCJ 10356/02 *Hass v. IDF Commander in West Bank* [37]. For a different opinion, see H. Sommer, 'The Unlisted Rights — On the Scope of the Constitutional Revolution,' 28 *Hebrew Univ. L. Rev. (Mishpatim)* 257 (1997), at pp. 325-326).

According to some authorities, a horizontal balance should not be made with such a right, in so far as it is not super-legislative (if that is indeed its status), against the constitutional right of the protection of dignity, since the latter is higher than the former in the constitutional hierarchy (for other opinions on this issue, on which I too would reserve judgment at this stage, see HCJ 2481/93 *Dayan v. Wilk, Jerusalem District Commissioner of Police* [25], at pp. 473-478, *per* Vice-President A. Barak, and the separate opinion of Justice S. Levin, *ibid.* [25], at p. 486; Barak, *Constitutional Interpretation*, at pp. 215-249; A. Barak, 'Freedom of Information and the Court,' 3 *Ono Academic College Yearbook in Memory of Haim H. Cohn* 95 (2003), at pp. 100-101; Sommer, 'The Unlisted Rights — On the Scope of the Constitutional

Revolution,' *supra*, at pp. 334-337; R. Segev, *Weighing Values and Balancing Interests* (2008), at pp. 129-213).

Whatever the outlook is with regard to the aforesaid question that I presented, modern literature in this field holds that cultural practices should be *subjected* to the criterion of dignity. See M. Dan-Cohen, 'Defending Dignity' in *Harmful Thoughts: Essays on Law, Self and Morality*, 150 (2002). For different and additional outlooks on this issue, see G. Gontovnik, 'The Right to Culture in a Liberal Society and in the State of Israel,' 27(1) *Tel-Aviv University Law Review (Iyyunei Mishpat)* 23 (2003); R. Gordon, '"Saturday Morning, a Beautiful Day" — The Struggle of Women in the Orthodox Community for Participation in the Synagogue and Religious Rituals,' *Studies in Law, Gender and Feminism* (D. Erez-Barak, ed., 2007) 143); R. Cohen-Almagor and M. Zambotti, 'Liberalism, Tolerance and Multiculturalism: The Bounds of Liberal Intervention in Affairs of Minority Cultures,' in K. Wojciechowski and J.C. Joerden (eds.), *Ethical Liberalism in Contemporary Societies* (2009), at pp. 79-98.

The most up-to-date and comprehensive Israeli research in the aforesaid field has been carried out by Prof. Menachem Mautner in his new book *Law and Culture in Israel at the Beginning of the Twenty-First Century* (2008). There (at pp. 385-423) he proposes two innovative models for resolving the question of the extent of consideration that should be given to minority cultural practices: one model that is based on human rights law and another model that is based on the concept of 'man.' In both models, the element of dignity, as Prof. Mautner interprets it, has a central role. This is how he explains the proper criterion for considering minority cultural practices:

> 'Since we have adopted the duty to treat human beings with dignity as a justification for non-intervention in their cultures, then we should say that if we find a group whose culture is not based on treating human beings with dignity, the validity of the group's claim that non-intervention in its culture is justified is undermined, and an opening is created for intervention in its cultural practices, in order to restore dignity to the human beings living in that culture. This is because it would be an internal contradiction if we were to allow a group to block intervention in its practices on the ground of the need to treat human beings with dignity, while the practices themselves are based on a lack of dignity for human beings' (*ibid*., at pp. 411-412).

This outcome of eradicating ethnic discrimination (even if disguised), because of the violation of the dignity of the students studying in the special cultural framework to which the Beit Yaakov Girls' School in Immanuel belongs, is required in the case before us by the aforesaid models and also by the provisions of s. 5 of the Student Rights Law. As stated above, this section makes the proper distinction and provides that a student should not be the subject of ethnic discrimination in each of the cases *involving education* that are listed there. On the other hand, it is clear that it is possible to hold separate prayers and religious rituals in schools of the kind discussed in the petition in accordance with the customs and rites of the different communities (see, in this regard, Rabbi Ovadia Yosef, *Responsa Yehaveh Daat* 4, 4 and 5, 6; *Yabia Omer* 2, 6 [43]); see Rabbi Binyamin Lau, *MiMaran ad Maran* (2005), at pp. 202-219). On this point it should be noted that already in the eighteenth century a similar issue was considered (cf. Rabbi Tzvi Hirsch ben Yaakov Ashkenazi, *Responsa Hacham Tzvi*, 33 (1712). With regard to the students' uniform, I agree with the minority opinion of Vice-President Justice A. Barak in *Jabarin v. Minister of Education* [28], but in view of the extensive discussion that has recently taken place in international case law and comparative law on this question, I think that there is no need at this stage to make any firm determination on this matter.

Now that we have considered the relevant constitutional issues, let us turn to the perspective of administrative law.

7. In the field of administrative law, there are two questions that arise in this context, on the assumption that the prohibition of discrimination has been violated:

(a) What is the fate of the licence given to the school?

(b) Should the state continue funding the school?

Let us consider these issues briefly in their proper order.

The fate of the licence given to the school

8. The Supervision of Schools Law, 5729-1969, prohibits the opening or running of a school without a licence. The Supervision of Schools Law also regulates the conditions for granting a licence. In our case, it is possible to find provisions in the Supervision of Schools Law that allow the director-general of the Ministry of Education to exercise discretion with regard to the fate of the licence of the Beit Yaakov Girls' School in Immanuel, which is a school that is subject to the Supervision of Schools Law, since it is a school in which more

than ten students study or are educated on a regular basis and it provides primary education (see s. 12(a) of the law).

Section 32(a1) of the Supervision of Schools Law provides that if the director-general of the Ministry of Education is of the opinion that the prohibition of discrimination provided in s. 5 of the Student Rights Law has been violated, he may order the school in writing to close, after he has asked the licence holder in writing to remedy the situation within a reasonable time and after he has warned him that a failure to comply with the demand will result in an order being made to close the school. Here the word 'may' has become a duty, as has been explained (in another context) by the presiding justice, my colleague Justice E.E. Levy, unless the school expressly undertakes to comply with the provisions of the aforesaid s. 5 and *de facto* carries out its undertaking.

Section 30 of the Supervision of Schools Law allows the director-general of the Ministry of Education, or whomsoever it appointed for this purpose, as well as the health authority, to enter a school and its premises at any reasonable time in order to ascertain whether the provisions of the Supervision of Schools Law, the regulations enacted thereunder and the terms of the licence have been observed, and they may demand that the licence holder, or the headmaster of the school, shall provide any information that they need in order to carry out their duties under the aforesaid law.

It seems therefore that the current statute law allows the Ministry of Education to exercise all of its powers with regard to the licence of the Beit Yaakov Girls' School in Immanuel. No more need be said on this subject.

Making the continued funding of the school conditional on the immediate cessation of the discriminatory policy

9. Section 11 of the State Education Law, 5713-1953, provides:

> 'The Minister may determine, in regulations, arrangements and conditions for declaring unofficial schools to be recognized schools, for introducing the core curriculum therein, for their management, supervision and state subsidy of their budgets, if the minister decides upon a subsidy and to the extent that he so decides.'

It would appear that this section, together with the regulations that were enacted under the State Education Law (the State Education (Recognized Schools) Regulations, 5714-1953) and the general powers that exist with regard to subsidies and funding, allow the director-general of the Ministry of

Education to consider the question of the continued subsidizing of a school that adopts a discriminatory practice (see also r. 9 of the aforesaid regulations).

This is the place to point out that even the provisions of ss. 3A(i) and 3A(j) of the Budget Principles Law, 5745-1985, which paved the way for subsidizing and determining the character and status of strictly Orthodox Jewish education through the corporations of the Independent Education Centre and the Maayan Israel Torah Education Centre, cannot save the third respondent from the continued funding of the school being made conditional upon the immediate cessation of the discriminatory policy. Admittedly it has been held that the arrangement incorporated in the aforesaid provisions of the statute sought to equate the budgetary status of the schools of the aforesaid corporations with the status of the official schools that the state has the duty of maintaining (see HCJ 10808/04 *Movement for Quality Government in Israel v. Minister of Education and Culture* [38]), but the reasoning there was based, *inter alia*, on the fact that the subsidy should be given in accordance with objective, uniform and equal criteria like those *for all children in Israel*. Just as for *all children in Israel* it is inconceivable that the state will provide funding for ethnic discrimination, so too there is an *inherent condition* in the funding of the third respondent's schools that it ensures that the prohibition of discrimination is not violated. This is the place to point out that the Special Cultural Schools Law, 5768-2008, is also not relevant to this case, since without discussing its substance and details, it applies to a 'special cultural school,' which is a school in which students study in the ninth to twelfth grades (whereas in our case we are dealing with students in a primary school), that has been recognized as such for the 'special cultural group' in it, as defined in the aforesaid law.

10. In conclusion, for these reasons, as well as the reasons cited by my colleagues, I agree that the order *nisi* issued in the petition should be made absolute.

In closing, I think it is superfluous to mention that the school that is the focus of the petition is called 'Beit Yaakov.' This name is derived from the well-known verse in the Book of Exodus, 19, 3 [45], which speaks of the giving of the Torah at Mount Sinai. The verse says: '... thus you shall say to the house of Jacob (Heb. *Beit Yaakov*), and speak to the children of Israel.' Rabbi Shlomo Yitzhaki (Rashi) explains: 'Thus you shall say — in this language and in this order: to the house of Jacob (*Beit Yaakov*) — these are the

women... and tell the children of Israel — the men.' From this we can see two things:

(a) The Torah was given to women first (see: A. Weinroth, *Feminism and Judaism* (2001), at p. 58).

(b) In this verse, a distinction was only made between *Beit Yaakov* and the children of Israel, and it follows that any other or additional distinction, including in a school that bears the name *Beit Yaakov*, involves prohibited and improper discrimination.

We should remember and remind ourselves that *the approach is that all the children of Jacob are equal*. The Midrash states:

> 'Rabbi Yehoshua of Sachnin said in the name of Rabbi Levy: the names of the tribes are not given everywhere in the same order, but sometimes one order is used, and at other times another order is used, so that people will not say that because they are superior the names of the sons of the mistresses (i.e., Leah and Rachel) were given first, and the names of the sons of the maid-servants (i.e., Zilpah and Bilhah) were given afterwards, thereby teaching you that they are all equal.'

(Midrash *Sechel Tov* (Buber edition), Exodus, Introduction [46]).

Petition granted.

16 Av 5769.
6 August 2009.