HCJ 11163/03

Supreme Monitoring Committee for Arab Affairs in Israel and others

v.

Prime Minister of Israel

The Supreme Court sitting as the High Court of Justice
[27 February 2006]
Before President A. Barak, Vice-President Emeritus M. Cheshin and Justices D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, S. Joubran

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

Facts: The government adopted a decision to establish 'national priority areas' in outlying parts of the country. These areas were defined in a map that was attached to the government decision. The towns and residents of these areas were given benefits, including in the field of education. The petitioners attacked the legality of the government decision on the ground of discrimination, since hardly any Arab towns were included in the national priority areas. The respondent argued that the criterion for determining the national priority areas was purely geographic, that there was no intention to discriminate against Arab towns and that there were simply very few Arab towns in the most outlying parts of the country in the north and south. The respondent also argued that other measures had been adopted to improve education in Arab towns.

Held: (President Barak) The government decision should be set aside because it was discriminatory in its result. Discrimination may occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. The discriminatory outcome is sufficient to set aside the government decision.
(Vice-President M. Cheshin) The decision to create 'national priority areas' is in essence a primary arrangement. Primary arrangements can only be made by the legislative branch, the Knesset, and not by the executive branch, the government. Therefore the creation of the 'national priority areas' was *ultra vires*.

Petition granted.

Legislation cited:

Basic Law: Freedom of Occupation, s. 2.
Basic Law: Human Dignity and Liberty, ss. 1A, 8.
Basic Law: the Government, 5728-1968, s. 29.
Basic Law: the Government, 5752-1992, s. 40.
Basic Law: the Government, 5761-2001, ss. 1, 3, 32.
Basic Law: the Knesset, ss. 1, 4, 5.
Budget Principles Law, 5745-1985, s. 40(a).
Compulsory Tenders Law, 5752-1992, s. 3A(a)(3).
Council of Higher Education Law, 5718-1958, s. 25B.
Development Towns and Areas Law, 5748-1988, ss. 1, 3, 4(a), 5, 6, 7, 8, 9, 10, 12, 13-18.
Encouragement of Capital Investments Law, 5719-1959, s. 40D.
Encouragement of Research and Development in Industry Law, 5744-1984, s. 28(c).
Free Manufacturing Areas in Israel Law, 5754-1994, ss. 18, 19.
Government and Justice Arrangements Ordinance, 5708-1948, s. 7(a).
Natural Disaster Victims Compensation Law, 5749-1989.
Palestine Order in Council, 1922-1947, art. 5.
State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals) Law, 5759-1999, s. 4(2).
Student Rights Law, 5761-2000.
Transition Law, 5709-1949, s. 1.

Israeli Supreme Court cases cited:

[1] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; **IsrSJ 8 13**.
[2] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.
[3] HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [2003] IsrSC 57(3) 31.
[4] HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [1998] IsrSC 52(5) 167.
[5] HCJ 7111/95 *Local Government Centre v. Knesset* [1996] IsrSC 50(3) 485.
[6] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.
[7] HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social Affairs* [1998] IsrSC 52(3) 630.
[8] HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] IsrSC 54(1) 258.
[9] EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2003] IsrSC 57(4) 1.

[10] HCJ 2599/00 *Yated, Children with Down Syndrome Parents Society v. Ministry of Education* [2002] IsrSC 56(5) 834.
[11] HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [1996] IsrSC 50(3) 2.
[12] HCJ 421/77 *Nir v. Be'er Yaakov Local Council* [1978] IsrSC 32(2) 253.
[13] HCJ 7374/01 *A v. Director-General of Ministry of Education* [2003] IsrSC 57(6) 529.
[14] HCJ 4363/00 *Upper Poria Board v. Minister of Education* [2002] IsrSC 56(4) 203.
[15] HCJ 7351/03 *Rishon LeZion Municipal Parents Committee v. Minister of Education* (not yet reported in Hebrew); **[2005] (2) IsrLR 1.**
[16] HCJ 693/03 *Marciano v. Minister of Finance* (not yet reported).
[17] HCJ 727/00 *Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [2002] IsrSC 56(2) 79.
[18] HCJ 59/88 *Tzaban v. Minister of Finance* [1988] IsrSC 42(4) 705.
[19] HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [2000] IsrSC 54(2) 164.
[20] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[21] HCJ 3792/95 *National Youth Theatre v. Minister of Science and Arts* [1997] IsrSC 51(4) 258.
[22] HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [1994] IsrSC 48(5) 749; **[1992-4] IsrLR 478**.
[23] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.
[24] HCJ 1000/92 *Bavli v. Great Rabbinical Court* [1994] IsrSC 48(2) 221.
[25] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; **IsrSJ 10 136**.
[26] HCJ 453/94 *Israel Women's Network v. Government of Israel* [1994] IsrSC 48(5) 501; **[1992-4] IsrLR 425**.
[27] HCJ 2814/97 *Supreme Education Monitoring Committee v. Ministry of Education* [2000] IsrSC 54(3) 233.
[28] HCJ 6488/02 *National Board of Heads of Arab Local Councils in Israel v. Committee of Directors-General* (not yet reported).
[29] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
[30] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[31] HCJ 2313/95 *Contact Linsen (Israel) Ltd v. Minister of Health* [1996] IsrSC 50(4) 397.
[32] CA 4275/94 *Tel-Aviv Stock Exchange Ltd v. A.T. Management of Torah Literature Database Ltd* [1996] IsrSC 50(5) 485.

[33] HCJ 2918/93 *Kiryat Gat Municipality v. State of Israel* [1993] IsrSC 47(5) 832.
[34] HCJ 154/98 *New General Federation of Workers v. State of Israel* [1998] IsrSC 52(5) 111.
[35] HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [2003] IsrSC 57(6) 212; **[2002-3] IsrLR 225**.
[36] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
[37] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(5) 481; **[1998-9] IsrLR 139**.
[38] HCJ 5128/94 *Federman v. Minister of Police* [1994] IsrSC 48(5) 647.
[39] HCJ 8600/04 *Shimoni v. Prime Minister* (unreported).
[40] HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998-9] IsrLR 567**.
[41] HCJ 5062/97 *Association of Insurance Appraisers in Israel v. State of Israel* [2001] IsrSC 55(1) 181.
[42] HCJ 2632/94 *Degania A v. Minister of Agriculture* [1996] IsrSC 50(2) 715.
[43] HCJ 5018/91 *Gadot Petrochemical Industries Ltd v. Government of Israel* [1993] IsrSC 47(2) 773.
[44] HCJ 35/62 *Bachar v. Minister of Defence* [1962] IsrSC 16 806.
[45] HCJ 313/63 *Haramati v. Director of Property Tax* [1964] IsrSC 18(2) 356.
[46] HCJ 381/91 *Gross v. Ministry of Education and Culture* [1992] IsrSC 46(1) 53.
[47] LCA 5768/94 *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables Ltd* [1998] IsrSC 52(4) 289.
[48] CA 167/47 *Minkovitch v. Fisztner* [1948] IsrSC 2 39.
[49] CA 108/59 *Pritzker v. Niv Ltd (in liquidation)* [1960] IsrSC 14 1545.
[50] BAA 663/90 *A v. Bar Association Tel-Aviv District Committee* [1993] IsrSC 47(3) 397.
[51] CA 3798/94 *A v. B* [1996] IsrSC 50(3) 133; **[1995-6] IsrLR 243**.
[52] CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [1998] IsrSC 52(3) 1.
[53] HCJ 5503/94 *Segal v. Knesset Speaker* [1997] IsrSC 51(4) 529.
[54] LCA 7678/98 *Benefits Officer v. Doctori* (not yet reported).
[55] LCA 6339/97 *Roker v. Salomon* [2001] IsrSC 55(1) 199.
[56] HCJ 6845/00 *Niv v. National Labour Court* [2002] IsrSC 56(6) 663.
[57] HCJ 7351/95 *Nevuani v. Minister of Religious Affairs* [1996] IsrSC 50(4) 89.
[58] HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [2000] IsrSC 54(1) 49.
[59] HCJ 606/78 *Awib v. Minister of Defence* [1979] IsrSC 33(2) 113.

[60] HCJ 302/72 *Hilo v. Government of Israel* [1973] IsrSC 27(2) 169.
[61] HCJ 287/91 *Cargal Ltd v. Investment Centre Administration* [1992] IsrSC 46(2) 852.
[62] HCJ 222/68 *National Groups Registered Society v. Minister of Police* [1970] IsrSC 24(2) 141.
[63] HCJ 4885/03 *Israel Poultry Farmers Association v. Government of Israel* [2005] IsrSC 59(2) 14; **[2004] IsrLR 383**.
[64] HCJ 6971/98 *Paritzky v. Government of Israel* [1999] IsrSC 53(1) 763.
[65] CA 733/95 *Arpal Aluminium Ltd v. Klil Industries Ltd* [1997] IsrSC 51(3) 577.
[66] HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of National Infrastructure* [2002] IsrSC 56(6) 25.
[67] CrimA 53/54 *Eshed Temporary Transport Centre v. Attorney-General* [1954] IsrSC 8 785.
[68] HCJ 1539/05 *Mashlat Law Institute for the Study of Terror and Assistance of Terror Victims v. Prime Minister* (not yet reported).
[69] HCJ 144/50 *Sheib v. Minister of Defence* [1951] IsrSC 5 399; **IsrSJ 1 1.**
[70] HCJ 113/52 *Sachs v. Minister of Trade and Industry* [1952] IsrSC 6 696.
[71] HCJ 2740/96 *Chancy v. Diamond Supervisor* [1997] IsrSC 51(4) 491.
[72] HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 746.
[73] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; **IsrSJ 10 1**.
[74] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.
[75] HCJ 8569/96 *Federation of Working and Studying Youth v. Minister of Education* [1998] IsrSC 52(1) 597.
[76] HCJ 363/71 *Dagan Flour Mill Ltd v. Minister of Trade and Industry* [1972] IsrSC 26(1) 292.
[77] HCJ 198/82 *Munitz v. Bank of Israel* [1982] IsrSC 36(3) 466.
[78] HCJ 366/81 *Association of Tour Bus Operators v. Minister of Finance* [1983] IsrSC 37(2) 115.
[79] HCJ 49/83 *United Dairies Ltd v. Milk Board* [1983] IsrSC 37(4) 516.
[80] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.
[81] HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [1994] IsrSC 48(5) 441.
[82] HCJ 28/94 *Zarfati v. Minister of Health* [1995] IsrSC 49(3) 804.
[83] HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 358; **[2004] IsrLR 1**.
[84] HCJ 6671/03 *Abu-Ghanem v. Ministry of Education* [2005] IsrSC 59(5) 577.

[85] HCJ 869/92 *Zvilli v. Chairman of Central Elections Committee for Thirteenth Knesset* [1992] IsrSC 46(2) 692.

Canadian cases cited:

[86] *Re Language Rights under Section 23 of the Manitoba Act, 1870* (1985) 19 D.L.R. (4th.) 1 (S.C.C.).

Jewish law sources cited:

[87] Malachi 2, 10.

For the petitioners — H. Jabareen.
For the respondent — D. Briskman, R. Kedar.

JUDGMENT

President A. Barak

The government of Israel decided to define national priority areas in Israel. The residents in these areas receive benefits in various fields that are regulated by the government, including the field of education. The question before us is whether this government decision — in so far as it concerns the benefits in the field of education — should be set aside for discriminating against the Arab residents of the State of Israel.

National priority areas

1. For many years government ministries have had the practice of granting benefits to various towns on the basis of the determination that they are located in 'national priority areas.' The basis for these benefits was introduced in a government decision on 24 January 1993 with regard to a reclassification of development towns and development areas. The government decided that 'the premise for determining national priority areas is the government policy of population distribution, changing national priorities and absorbing immigration in these areas' (para. a.1 of the decision). The decision determined two different classifications of national priority areas — 'national priority area A' and 'national priority area B' — and these were demarcated on a map that was attached to the decision. In national priority area A the maximum benefits are given in all fields, whereas in national priority area B benefits are given which are smaller or at most equal to those given in national priority area A. It was also decided that the

government would not give any town or area greater benefits than those given in national priority area A, and that any change in the national priority areas would require government approval. And indeed, over the years, several government decisions that made changes to the national priority areas were adopted.

2. An additional government decision with regard to the national priority areas was adopted several years later on 15 February 1998. This was decision no. 3292 (hereafter — decision no. 3292). This decision revised the map of national priority areas and the list of towns included in the national priority areas A and B (para. b of the decision). It was decided to cancel the classification of towns that were defined with a separate permanent status to their surrounding area and to make them conform to the existing status of that area (para. c of the decision). Notwithstanding, it was decided that a list of towns (Carmiel, Upper Nazareth, Kiryat Gat, Kiryat Malachi, Migdal HaEmek and Acre) would continue to receive benefits in the field of education like those given in national priority area A, for a period of two years. A similar town-oriented status was also given to several towns for the purpose of benefits granted by other government ministries. It was also decided to give benefits, like those given in national priority area A by the Ministry of Education, to towns in the Druze and Circassian sectors (para. f of the decision). Together with all of these, the government decided that the Ministry of Education should formulate a plan for dealing on a town-oriented basis with towns requiring support and strengthening in education, and for towns in the Arab sector, and that the resources saved as a result of the changes in the classification of towns in the priority areas would be used as a budgetary source for financing this plan (para. e of the decision). Following government decision no. 3292, the original petition was filed in this court.

The original petition

3. The original petition was filed on 5 May 1998 by three organizations that are active in advancing the rights of the Arab sector in Israel: the Supreme Monitoring Committee for Arab Affairs in Israel; the Supreme Monitoring Committee for Arab Educational Affairs in Israel and Adalah Legal Centre for Arab Minority Rights in Israel (HCJ 2773/98). The petition argued that decision no. 3292 should be set aside. The petition included several parts and sought several alternative forms of relief. The joint basis for all of these was that the government decision is not lawful for several reasons: *first*, it was argued that the government did not have any power to adopt — by means of a government decision — a norm of such significant

scope and application. This matter fell only within the jurisdiction of the Knesset. *Second*, it was argued that the decision that was adopted, even if it was *intra vires*, was unlawful, since it was tainted with discrimination. According to the petitioners, the government decision did not rely on any criteria whatsoever for classifying the towns, and it ignored the main purpose underlying the classification of the towns, which is the strengthening of weak towns with a low socio-economic status. The petitioners sought to highlight the claim of discrimination by means of the following figures: decision no. 3292 classified seventeen towns from an area without national priority as a national priority area A, without giving a single Arab town a priority classification. The decision transferred eleven towns from national priority area B to national priority area A, without including among them a single Arab town. By contrast, the list of towns that lost a status of a national priority area included 14 Arab towns (out of a total of 34 towns). In addition, the government granted entitlement to benefits in the field of education to many towns, without including the Arab sector in the arrangement, even though this sector is most in need of assistance in this field. According to the petitioners, the criteria for determining the national priority areas were neither clear nor consistent, and in any case they were not applied in an equal manner. In so far as the criterion was geographic, Arab towns near Jewish towns were excluded from the priority areas; in so far as the criterion was socio-economic, many Arab towns whose socio-economic status is very low were excluded from the priority areas, whereas Jewish towns whose status is far better were included in it. In the petitioners' opinion, the geographic criterion should be applied to all the towns that are adjacent to one another, both Arab and Jewish; where the government decided to give a specific town an individual status as if it were included in a national priority — for alleged socio-economic reasons — this status ought to be given first and foremost to towns from the Arab sector whose position in this respect is especially difficult. Several preliminary hearings were held in that petition. It was subsequently heard before an extended panel of seven justices, and an order *nisi* was issued.

Government decision no. 2288

4. On 14 July 2002, while the petition was pending, the government adopted a new decision with regard to national priority areas. This was decision no. 2288 (hereafter — decision no. 2288). This decision replaced decision no. 3292. At the beginning of the decision, the government declared that —

> 'We are deciding to determine the national priority areas and towns in the Negev, Galilee, Jerusalem and Judaea, Samaria and Gaza. In these areas a variety of benefits and incentives will be given in order to further their advancement, reduce the gaps in the standard of development and standard of living between the national priority towns and all other towns in Israel, encourage the next generation to settle in the national priority towns, encourage the settlement of new immigrants and of longstanding citizens in the national priority towns, while implementing government policy with regard to the planned distribution of the population throughout the territory of the state.'

The decision discussed the aid and incentives in several fields: industry, agriculture, tourism, education and housing. For the first time a separate classification of towns was provided for each of the types of aid and incentives, and for the various government ministries. With regard to the aid in education, the government announced that:

> 'The aid in the field of education is intended to improve the standard of achievement of students in the national priority areas with the aim of reducing gaps and creating a high quality and equal education system, in view of the fact that the level of education constitutes a main factor in the creation of a socio-economic spectrum of opportunities.'

With regard to the classification of the towns for the purpose of the benefits in the field of education, it was decided that —

> 'The map of the national priority areas, for the purpose of benefits from all ministries, which was determined in government decision no. 3292 of 15 February 1998, shall remain in force as a framework for providing aid and incentives in the field of education' (para. d.1 of the decision).

An inter-ministerial committee was also appointed to formulate recommendations with regard to the towns that had a temporary status of a priority area and with regard to including additional towns in the national priority area in the field of education.

5. In view of government decision no. 2288 and its ramifications for the petition, the panel decided on 2 December 2003 that the petition should be cancelled, a new petition should be filed in accordance with the revised legal position and that an order *nisi* would be made in it. So on 22 December 2003 the petitioners filed an amended petition, which is the petition that is before

us. In the petition, the petitioners again argue that decision no. 3292 should be set aside. The petitioners clarify that even though decision no. 3292 was replaced by decision no. 2288, the later decision refers in the matter of determining the national priority areas in the field of education to decision 3292, so that the factual basis remains unchanged. The amended petition was made up of three parts. The *first* part concerns the setting aside of decision no. 3292, which determined the priority areas in a manner that it excludes — so it is argued — Arab towns that satisfy the geographic criteria according to which the areas were determined. In the *second* part the petitioners requested that eleven Arab towns, which were not classified as a national priority area A, should have an identical status to the status given to the Jewish towns of Upper Nazareth and Migdal HaEmek, which are close to them from a geographic viewpoint and are higher than them on the socio-economic scale. In the *third* part of the petition, we were asked to add the towns of the Arab sector to the towns that receive benefits in the field of education as national priority areas A. An order *nisi* was made with regard to the three parts of the petition (on 6 January 2004). Later, a fourth *part* was added to the petition, with the consent of the respondents, in which the petitioners sought to add the seven recognized Bedouin towns in the Negev to the list of towns that are entitled to benefits in the field of education as a national priority area A. It was decided (on 12 March 2004) to make an order *nisi* also with regard to this relief.

The petitioners' claims

6. In the amended petition, the petitioners once again argue that the method of classifying the towns for the national priority areas, which grants extensive benefits by virtue of government decisions, is improper because it does not rely on primary legislation. It is argued *that* the government does not have any authority to adopt decisions in such a complex and fundamental matter as determining national priority areas. This matter should be regulated in a primary arrangement in the primary legislation of the Knesset, just like any arrangement that grants personal payments to the individual. The petitioners further argue that the government decision has no equal, open, clear and written criteria. The criteria on which the classification is based are unclear; sometimes they are geographic and sometimes they are socio-economic. The drawing of the map was done arbitrarily and it has itself become a criterion in the opinion of the respondent. By giving an individual status to towns, a socio-economic criterion was taken into account, and sometimes also a political criterion, but once again there are no clear written criteria and no weight was given to the socio-economic position of the Arab

towns. In any case, it is difficult to find a connection between the criteria stated by the respondent and the manner of implementing them *de facto*, especially with regard to towns from the Arab sector. Thus, for example, whether the criterion is geographic or the criterion is socio-economic, it is not clear why the Arab towns close to Upper Nazareth and Migdal HaEmek were not given similar benefits in the field of education. The petitioners argue that government decision no. 3292 is discriminatory and unlawful, since it distinguishes unjustifiably between Jewish towns and non-Jewish towns, and especially with regard to Arab towns. According to the petitioners, a study of the map of national priority areas for the purpose of the benefits in education shows that of the 491 towns with a status national priority area A according to the map, only four towns are Arab towns, and all of these are small towns. The decision gives a status of national priority area A to 36 additional towns, which include not even one Arab town. In the field of education it was decided to give a status of national priority areas to eight additional towns, and these also do not include even one Arab town. The result that emerges from all this is that for the purpose of the benefits in education, 535 towns in total have been given a status of national priority area A, and these include only four small Arab towns. According to the petitioners, this result is discriminatory. The benefits in education should be universal and independent of ethnicity. The discrimination is starker in view of the fact that the respondent gave the benefits to certain sectors (the orthodox Jewish sector, the Druze and Circassian sectors) while it excluded the Arab sector. The result indicates discrimination on the basis of ethnicity. The respondent argued on more than one occasion that the basis for the benefits in education, and especially in adding the towns on a pinpoint basis, is socio-economic. This principle should have been applied to the Arab towns as well. This is especially true in view of the reduced socio-economic position of most of the Arab towns in the country, which is not in dispute. This is even more true with regard to the recognized Bedouin towns. Benefits in the field of education should be given on the basis of principles of distributive justice that require the consideration and implementation of socio-economic criteria for all of the population in an equal manner. In the current case, not including the Arab towns in the classification of the national priority areas for education is discriminatory and tainted by extreme unreasonableness.

The position of the respondent

7. At the beginning of his reply, the respondent sought to clarify that the decision in force at this time is decision no. 2288 and not decision no. 3292 which preceded it. Therefore the respondent argues that there is no basis for

considering arguments concerning a decision of the government that has been cancelled and the relief sought for this is no longer relevant. Moreover, in so far as the petition addresses the discrimination between Arab towns and nearby Jewish towns (such as Upper Nazareth and Migdal HaEmek) that received an individual status of a national priority area for education (the second part of the petition), the specific status given in the past to those towns, within the framework of decision no. 2288 and its implementation, was for a fixed transition period and has been cancelled. The respondent pointed out that in the field of education, at present, the status of the towns has been determined entirely on the basis of the geographic test, in accordance with the map of national priority areas (except for the towns in the Druze and Circassian sectors). The significance of this is that the claim of discrimination is no longer relevant, and the petition should be denied.

8. On the question of authority, the respondent argues that the government does have the authority to determine national priority areas by virtue of its residual authority in s. 32 of the Basic Law: the Government. The determination of the national priority areas is merely a basis for giving benefits and incentives, and since no other authority has any power under the law in this regard, these matters are within the general authority of the government. According to the respondent, there is also no basis for the argument that the determination of national priority areas is not based on criteria and is arbitrary. The map of the national priority areas is based mainly on geographic criteria. National priority area A is located in the areas that are most distant from the centre of the country and from employment centres; national priority area B is located in areas that are closer to the centre of the country and to employment centres; the remaining areas of the country are not located in any national priority area at all. It is argued that the logic underlying the geographic distribution assumes that the spectrum of opportunities for the citizen in outlying areas is narrower in many respects that what is available in the centre of the country, and that the cost of living in these areas is higher than in the other areas of the country. According to the respondent:

> 'Determining the national priority areas was intended to encourage settlement and to assist residents in remote areas from a geographic viewpoint or in areas of security importance, where successive governments of Israel, according to their fundamental policies, have been interested in encouraging settlement. The national priority areas were not intended to improve the position of towns in distress according to socio-economic factors, as the

> petitioners claim, and the socio-economic consideration was not a decisive factor in determining the national priority areas. The precise demarcation of the map of priority areas was prepared mainly in accordance with a map of natural districts and areas, in which the demarcation was also influenced by the topography and the location of roads' (para. 11 of the reply).

The respondent argues, with regard to the claim of discrimination, that there was no deliberate intention to exclude the petitioners, and certainly not on the basis of ethnicity, as they claim. A town that is situated within an area that has been declared to be a national priority area will receive benefits whether it is a Jewish town or an Arab town. A town that is not situated in the aforesaid geographic area will not receive benefits, whether it is a Jewish town or an Arab town. Since the criterion is solely geographic, there is no basis for the claim of discrimination, since the distinction is based solely on geographic location. The small number of Arab towns that are included in the national priority area can be attributed, so it is argued, to the geographic distribution 'of the Arab towns that are not situated in the Upper Galilee or in the Southern Negev.' Indeed, in the northern outlying area which is defined as national priority area A there are relatively few Arab towns, but 'there is no basis for the argument that the line passes in a manner that is intended to discriminate between the Jewish sector and the Arab sector' (para. 45 of the reply). From a practical viewpoint, the respondent points out, the geographic line that separates national priority area A from national priority area B passes mainly (more than 70%) along the boundary lines of the towns near this line, and only in a few points does the line cross open areas.

9. The respondent objects to the petitioners' demand that the towns of the Arab sector and the Bedouin sectors should be added to the list of towns that receive benefits. The respondent clarifies that even in the field of education the national priority areas were not determined in accordance with socio-economic criteria but in accordance with geographic criteria. Notwithstanding, the government decided to give benefits on an individual basis to several Druze and Circassian towns, but only to these towns. These sectors need considerable strengthening in education in order to reduce gaps that have accumulated over many years. The benefits given to these sectors are merely affirmative action, which is a part of the overall policy of the government in dealing with these sectors. The respondent makes clear that there is no practical possibility of introducing affirmative action on a sweeping basis and at the same time for all the sectors that require it. Therefore granting the petitioners' demand to make their status equal to the

status of the Druze and Circassian towns will make it necessary to take away the benefits from the Druze and Circassian towns and to harm them unfairly. Notwithstanding, the government is acting in other ways to promote education in the Arab sector and the Bedouin sector. Over the years, several commissions were established and these made various recommendations on the subject. In addition the government decided (on 22 October 2000) to take action in the form of a multi-year plan to develop and promote the Arab sector socio-economically, including in the field of education. In consequence of this decision, the Ministry of Education formulated the Homesh plan whose purpose is to create equal opportunities in the Arab and Druze sector, to increase the number of persons entitled to a matriculation certificate, to strengthen basic learning skills, to strengthen the special education system, etc.. Implementation of the plan began in the 2000 academic year with a total budget of NIS 250 million over five years, in addition to all the resources allocated to the Arab and Druze education system. To complete the picture, the respondent mentioned the report of the Public Commission for Examining the Budgeting System in Israeli Elementary Education, which was headed by Dr Shimon Shoshani (hereafter — the Shoshani report) which was submitted to the Minister of Education on 22 August 2002. The report recommended that a uniform and common budgeting index should be fixed for all the educational institutions and for all the students in Israel, in accordance with equitable criteria, that would be based on a series of variables, including the education of the parents, country of origin, geographic distance from the centre of the country and living in a national priority area and within range of hostile borders. The respondent added that implementing the budgeting system in accordance with the Shoshani report will result in a significance improvement in the Arab sector. The hours of teaching in the Arab sector will increase by 70,000 hours per year, which are 80% of the extra teaching hours that were designated for all students in Israel; the teaching hours in the Arab sector would increase by approximately 30%, whereas in the Jewish sector they would increase by only 5%. The report itself, according to the reply, was implemented for official elementary schools starting in the 2003-2004 academic year. Thus we see, according to the respondent, that there is no basis for adding the towns of the Arab and Bedouin sector — which are addressed in the third and fourth parts of the petition — to those entitled to a status of national priority areas, since the handling of their socio-economic status and their need for educational advancement is being dealt with within other frameworks and in

a proper manner. In summary, it is argued, the petition should be denied in its entirety.

The scope of the dispute

10. We ought first to state the scope of the dispute, as it appears to us from a study of the material and from hearing the parties: *first*, we accept the position of the petitioners that decision no. 3292 is still of relevance, even though it has been cancelled from a formal viewpoint. Decision no. 2288 — which according to everyone is the valid decision at the present — refers with regard to benefits in education to the map of national priority areas that was determined in decision no. 3292. It is therefore not possible to separate the two government decisions with regard to the petitioners' claim that the determination of the national priority areas in the field of education is unlawful. *Second*, it cannot be denied that decision no. 2288 changed the position that prevailed at the time of filing the original petition. Whereas the petitions focused their arguments in the original petition on the absence of a clear and uniform criterion for determining the national priority areas within the framework of decision no. 3292, with regard to decision no. 2288 it is certain — both from its content and from the respondent's position — that the criterion adopted by it is a single clear criterion, namely the geographic criterion. This criterion was also adopted, according to the respondent, with regard to determining the national priority areas in the field of education. Notwithstanding the reference to decision no. 3292, the actual determination of the national priority areas as of the present, including in the field of education, is done by virtue of decision no. 2288. *Third*, we accept the respondent's position that in the current position the second part of the petition has become redundant. Admittedly, the essence of this part revolves around the argument of discrimination that decision no. 3292 made between towns, such as Upper Nazareth and Migdal HaEmek, that were granted the status of a national priority area on an individual basis, even though they did not satisfy the geographic criterion, and nearby Arab towns that were not granted this status. But the respondent said that this individual status of the Jewish towns was cancelled and no longer exists, and therefore there is no basis to the claim of discrimination at the present. The temporary position that prevailed until the government policy was changed may have significance for the purpose of the relief, but there is now no longer any need to consider the claim of discrimination.

11. In view of the aforesaid, three main issues remain relevant: *first*, is the government competent to determine an arrangement of national priority

areas, by virtue of s. 32 of the Basic Law: the Government? *Second*, is the map of national priority areas for the purposes of education that was determined by the government (in decisions nos. 3292 and 2288) discriminatory on the basis of ethnicity, and therefore void? *Third*, should the towns of the Arab and Bedouin sector be given a status of towns in the national priority area A with regard to education, in the same manner that has been adopted with regard to the Druze and Circassian towns? The first question is addressed in the opinion of my colleague the vice-president, Justice M. Cheshin. I agree with his remarks. I will therefore concentrate my remarks on the other two questions.

Is the government decision regarding the determination of national priority areas in education discriminatory?

12. On one side, the respondent argues before us that the whole purpose of determining national priority areas in the field of education is to compensate the outlying areas for their remoteness from the centre of the country, and therefore the relevant consideration that is taken into account is the geographic consideration. According to the respondent, this consideration is not discriminatory. On the other side we have the petitioners, who argue that the actual demarcation of the geographic line, as it has been determined, discriminates against the Arab sector. The geographic line determined by the government leads to a result in which the towns that are entitled to national priority in the field of education, which number approximately 500, include only four small Arab towns. Who is right?

The principle of equality

13. The principle of equality is one of the most basic principles of the State of Israel. The right to equality is one of the most important human rights. It is the 'heart and soul of our whole constitutional regime' (*per* Justice M. Landau in HCJ 98/69 *Bergman v. Minister of Finance* [1], at p. 698 {18}). Indeed, 'it is well known that equality is one of the basic values of the state. It is the basis of social existence. It is one of the cornerstones of democracy' (see HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2], at p. 415; HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [3], at p. 39). It is one of the most fundamental principles for the interpretation and implementation of statutes (HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [4], at p. 177). A violation of equality is 'the worst thing of all' (*per* Justice M. Cheshin in HCJ 7111/95 *Local Government Centre v. Knesset* [5], at p. 503). Discrimination

is one of the worst evils that can befall a human being and human rights. It may lead to humiliation and a violation of human dignity (HCJ 4541/94 *Miller v. Minister of Defence* [6], at p. 132 {224-225}). This is certainly the case where the discrimination is on the basis of a person's religion or race. Such a 'generic' discrimination '… inflicts a mortal blow on human dignity' (*per* Justice M. Cheshin in HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social Affairs* [7], at pp. 658-659; see also *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2], at p. 414, and A. Barak, *A Judge in a Democracy* (2004), at p. 142).

14. The principle of equality applies to all spheres of government activity. Notwithstanding, it is of special importance with regard to the duty of the government to treat the Jewish citizens of the state and non-Jewish citizens equally. This duty of equality for all the citizens of the State of Israel, whether Arab or Jewish, is one of the foundations that make the State of Israel a Jewish and democratic state. As I have said elsewhere:

> 'We do not accept the approach that the values of the State of Israel as a Jewish state justify… discrimination by the state between the citizens of the state… The values of the State of Israel as a Jewish and democratic state do not imply at all that the state should act in a manner that discriminates between its citizens. Jews and non-Jews are citizens with equal rights and obligations in the State of Israel' (see HCJ 6698/95 *Kadan v. Israel Land Administration* [8], at pp. 280-281).

Moreover:

> 'Not only do the values of the State of Israel as a Jewish state not require discrimination on the basis of religion and race in Israel, but these values themselves prohibit discrimination and require equality between religions and races' (*ibid.* [8], at p. 281).

I added that 'the State of Israel is a Jewish state in which there are minorities, including the Arab minority. Each member of the minorities that live in Israel enjoys complete equality of rights' (*ibid*. [8], at p. 282, and EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [9], at p. 23).

15. A violation of equality is always serious. It is much more serious when it harms the right to education. Indeed, the right to education is a basic right in our law, a right that is given to everyone. This is 'one of the basic human rights' (HCJ 2599/00 *Yated, Children with Down Syndrome Parents*

Society v. Ministry of Education [10]). The right to education finds expression in the constitutions of many democratic countries, and in international conventions. It has rightly been said that:

> 'Education is a social device of an importance that cannot be overestimated. It is one of the most important functions of the government and the state. Education is essential for the existence of a free, living and functioning democracy. It constitutes an essential basis for the self-realization of every person. It is essential for the success and prosperity of every individual. It is essential for the existence of a society in which people live and act in order to improve their welfare and thereby contribute to the welfare of the whole community… Education is, without doubt, an important instrument for ensuring the rights and liberties of every individual and the realization of his basic political rights, including the freedom of expression and the right to vote and to stand for office' (*per* Justice T. Or in HCJ 1554/95 *Shoharei Gilat Society v. Minister of Education* [11], at p. 24).

The right to education is not limited to the right of the individual to choose the education that he wants. It sometimes also includes the obligation of the state to allow the individual — every individual — to receive basic education on an equal basis (see and cf. HCJ 421/77 *Nir v. Be'er Yaakov Local Council* [12], at p. 265). It has already been said that:

> 'The right to education is a basic right that is recognized in the countries of the world and in Israel. The recognition was expressed already at the very founding of the state in the Declaration of Independence and in the first education laws that were enacted shortly after the state was founded. Alongside the right to education, there is another converse aspect, a duty for every child to be educated. This duty is imposed on the individual, and at the same time the public authority has a duty to provide education and to give it at no cost to the whole public' (*per* Justice A. Procaccia in HCJ 7374/01 *A v. Director-General of Ministry of Education* [13]; see also the Student Rights Law, 5761-2000; *Shoharei Gilat Society v. Minister of Education* [11]; HCJ 4363/00 *Upper Poria Board v. Minister of Education* [14]; HCJ 7351/03 *Rishon LeZion Municipal Parents*

Committee v. Minister of Education [15]; for further discussion, see Y. Rabin, *The Right to Education* (2002), at p. 65).

An additional reflection of the exalted status of this basic right can be found in an interpretive presumption to the effect that the statute should be interpreted in a manner that upholds the right to education rather than interpret it in a way that denies it (HCJ 693/03 *Marciano v. Minister of Finance* [16]).

Determining the national priority areas in the field of education

16. Against this normative background, the question that arises is whether the government decision to determine national priority areas with regard to the benefits given in the field of education satisfies the requirements of equality, or whether it is discriminatory. Our answer to this question is that from the figures brought before us we have been persuaded that the government decision concerning the determination of the national priority areas is not consistent with the principle of equality, since its consequences lead to an improper discrimination against members of the Arab sector in realizing their right to education, and this results in its being unlawful.

17. As a premise for examining this petition we are prepared to assume that the consideration underlying the determination of the national priority areas was mainly geographic. It was intended to distinguish between areas that are geographically close to the centre of the country and outlying areas that are distant from it. According to the government decision, priority in the field of education should be given to those towns that are situated in the outlying areas. This position was expressed in the respondent's reply (of 28 March 2004), according to which the relatively low number of Arab towns in the national priority areas —

> '… derives from the geographic location of the Arab towns that are not situated in the Upper Galilee or in the southern Negev and not from any racial consideration. Indeed, in the northern outlying areas of the State of Israel, which is defined as a national priority area A for education, there are relatively few Arab towns. Notwithstanding, there is absolutely no basis for the claim that the line was drawn in a manner that was intended to discriminate between the Jewish sector and the Arab sector…' (para. 30 of the reply).

Our premise is therefore that the geographic consideration alone is what formed the basis for determining the national priority areas. There is nothing in the material before us that directly indicates that the actual choice of the

geographic criterion or the manner of drawing the geographic line were done in order to discriminate against members of the Arab population. It should be emphasized that this premise of ours, according to which the manner of demarcating the national priority areas for the purpose of the benefits in education was done in accordance with criteria of geographic remoteness from the centre of the country, without any intention of discrimination between various sectors of the population, is not self-evident in the circumstances of the case. This is because the respondent did not present to the court any figures or clarifications to explain how the government determined the geographic borderline that separates the outlying areas from the centre of the country, national priority area A from national priority area B and national priority area B from the areas without priority, and to justify giving preference to the persons in one area and not in another area. Apart from the declaration that the criterion is one of geographic remoteness, we have not found in the material before us any explanation or formula that explains what constitutes the centre of the country, and what distance from the centre justifies benefits, particularly in the field of education. The government also had before it figures concerning the various sectors in Israeli society to which the towns in the outlying areas belong. In the absence of an explanation or formula, there is a considerable difficulty in accepting the position of the respondent according to which geographic remoteness was the only consideration taken into account is demarcating the areas (see and cf. HCJ 727/00 *Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [17], at p. 90). Moreover, the absence of any explanation or formula that were used to determination the geographic remoteness of national priority areas for the purpose of the benefits in education gives rise to a question as to whether any weight, or sufficient weight, was given to the consideration of upholding the principle of equality in general and equality in education in particular (see and cf. HCJ 59/88 *Tzaban v. Minister of Finance* [18], at p. 706; see also HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [19], at p. 172; *Committee of Heads of Arab Local Councils in Israel v. Minister of Building and Housing* [17], at p. 89; HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [20]; HCJ 3792/95 *National Youth Theatre v. Minister of Science and Arts* [21], at p. 282). But even if we assume that the government decision was made after considering all the relevant factors, and there was no intention to distinguish between various sectors of the population, decision no. 2288 is still tainted by discrimination that goes to the heart of the legality of that decision.

18. Indeed, prohibited discrimination may also occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient. When the implementation of the norm created by the authority, which may have been formulated without any discriminatory intent, leads to a result that is unequal and discriminatory, the norm is likely to be set aside because of the discrimination that taints it. Discrimination is not determined solely according to the thought and intention of the creator of the discriminatory norm. It is determined also in accordance with the effect that it has *de facto* (HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [22], at p. 764 {493-494}). 'The principle of equality looks to the outcome; no matter how pure and unsullied the intention of a person may be, if the outcome following from his act is a discriminatory one, his act shall be set aside as if it had never been done' (*per* Justice M. Cheshin in *Israel Women's Network v. Minister of Labour and Social Affairs* [7], at p. 654). The test for the existence of discrimination is an objective test that focuses on the outcome of realizing the norm that is under scrutiny. It is not limited to the subjective thinking of the creator of the norm. The question is not whether there is an intention to discriminate against one group or another. The question is what is the final outcome that is created in the social context. I discussed this in one case:

> 'The question does not only address the motive of the persons making the decision; the question also addreses the result of the decision. The decision is improper not only when the motive is to violate equality but also when the motive is otherwise, but equality is violated *de facto*' (*Poraz v. Mayor of Tel-Aviv-Jaffa* [20], at pp. 333-334. See also HCJFH 4191/97 *Recanat v. National Labour Court* [23], at p. 348).

In another case I wrote:

> 'The presence or absence of discrimination is determined, *inter alia*, on the basis of the effect that the legislation achieves *de facto*… Consequently, a law that is couched in "neutral" language may be discriminatory if its effect is discriminatory. Indeed, discrimination may be unintentional… Even if the purpose of the legal norm is not to create discrimination, if discrimination is created *de facto*, the norm is tainted by discrimination… Discrimination may be "latent" and "systemic," in the sense that it is not evident "on the face of" the

> norm, but it derives from the "effect" of the norm' (HCJ 1000/92 *Bavli v. Great Rabbinical Court* [24], at pp. 241-242; see also *Kadan v. Israel Land Administration* [8], at pp. 279-280).

This was also discussed by Justice G. Bach with regard to sexual discrimination between workers, when he said:

> 'I am prepared to assume that the employers of the petitioner had no intention to discriminate against her and against the other women workers when they signed the employment code. But the intention of the respondent is not the final word on the question that we are required to decide, since the test for examining whether discrimination exists or not is objective rather than subjective. The motive for creating a difference between men and women is not the decisive issue in this matter, and in order to determine whether discrimination is present we must examine the final outcome, as it can be seen in the social context' (HCJ 104/87 *Nevo v. National Labour Court* [25], at p. 759 {149}).

Similar remarks were made by Justice E. Mazza with regard to discrimination against women:

> 'Searching for the causes of discrimination against women in any sector, when its existence as a social reality in that sector is proved by statistical evidence, is of secondary importance; for in general it is possible to assume that discrimination against women in any sphere — particularly when their promotion does not depend merely on the qualifications of the candidates but also on decisions made at organizational power centres — is a result of a deep-rooted consensus which many upright people act upon without being aware of the impropriety in their behaviour. But the absence of discriminatory intent is irrelevant; for the problem is the phenomenon of discrimination against women, as a proven fact, and discrimination is wrong even when there is no intention to discriminate' (HCJ 453/94 *Israel Women's Network v. Government of Israel* [26], at p. 524 {450}).

19. In our case, the way in which the government demarcated the national priority areas in education achieved a discriminatory result, whether it was an intentional result or not. The geographic demarcation along the lines that were chosen led to a result in which the 500 towns that received the status of a national priority area for the purpose of benefits in education included only

four small Arab towns. This numerical proportion in no way corresponds to the size of the Arab sector in the population as a whole and its geographic distribution in Israel. Admittedly, Arab towns are apparently not concentrated in the most outlying areas of the Galilee and the Negev. It follows that, *prima facie*, the geographic criterion excludes these towns not because they belong to the Arab sector but because of their physical location. But the practical result of using the geographic criterion, with the boundaries that were chosen, is that the map of the national priority areas in education is *de facto* a map of Jewish towns only. The great disparity between the number of Jewish towns with the status of a national priority area in the field of education and the number of Arab towns with a similar status indicates a discriminatory result. As my colleague Vice-President M. Cheshin said in a similar context, 'this disparity can be said to speak for itself' (*Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [4], at p. 178). It is impossible to allow this result. This is a discriminatory result that cannot stand. This is a result that Israeli democracy cannot tolerate. The effect of the government's decision is that it discriminates against the members of the Arab sector in the field of education. Indeed —

> 'Such discrimination, especially if it is systemic, may seriously harm not only a particular person or a particular group, but also the fabric of society and the feeling of partnership that is a condition for proper coexistence' (*per* Justice I. Zamir in *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [19], at pp. 170-171).

Even on the assumption that the respondent had clear reasons when he decided upon the geographic lines that distinguish between national priority areas and other areas, it is not possible to ignore the result arising from these demarcation lines. If a slightly different line had been chosen, which still satisfies the purpose of 'compensating' the outlying areas for their distance from the centre of the country, this line could have included more Arab towns and thus achieved a more equal result. This was not done. The geographic line that was chosen leads to a discriminatory result.

20. It should be noted that whether something in the circumstances of the case has a discriminatory effect is not a question of arithmetic but a question of substance. The government decision addresses one of the most basic of fundamental rights — the right to education. Its outcome is tainted by one of the most 'suspect' distinctions of all — a distinction on the basis of ethnicity and race. It is to be expected that government policy in this field will promote

equality between Jews and Arabs. This is required by the Jewish and democratic values of the State of Israel. It could have been assumed that a policy of giving preference to outlying areas in the field of education would be done on an equal basis and would also promote real equality between Jews and Arabs. This is not the result of the government's policy. In order to emphasize the gap that has been created as a result of the government's policy in the field of education, we can repeat the figures that were presented before us (in appendix 5 filed by the petitioner) with regard to the significance of the status of a national priority area in education. A town that is included in a national priority area A is entitled to significant benefits, including a 75% contribution towards teachers' studies; a full contribution towards travel expenses for teachers' studies; an 80% contribution towards rent for teachers; payment of the teacher's contribution towards study funds; a full contribution towards teachers' travel expenses during sabbaticals; an exemption from tuition fees for pre-school children; a contribution towards matriculation examination fees; an increased balancing grant to the local authorities; an allocation of additional tuition hours in accordance with pedagogic needs; full funding for installing computer systems in schools (subject to approval of plans); an additional budget that takes account of the special needs of schools that have six grades of classes; preference in scholarships for students; a grant of NIS 100,000 to each community centre for the benefit of new population groups. By contrast, we were presented with serious figures concerning the poor socio-economic position in the Arab sector: thus, as of the year 2002, approximately half of the Arab towns were in the two lowest groups according to the reports of the Central Statistics Bureau. Approximately 94% of Arab towns were in the four lowest groups (of the ten existing groups). Significant differences can be found in a range of additional parameters, including the number of students in the twelfth grade, the number of students who drop out in the ninth to eleventh grades and the number of students entitled to a matriculation certificate who satisfy the minimum requirements of the universities. The state commission of enquiry that examined the clashes between the security forces and Israeli citizens in October 2000, which was chaired by his honour Justice Emeritus T. Or, in its report that was published in the year 2003, said in this context that —

> 'The discrimination against Arab schools continued until the end of the 1990s in many respects: the number of students per teacher, the number of students in a class, the number of official classes, sports facilities, laboratories, the number of computers per student, etc.. The establishment of compulsory-age

> kindergartens, and subsequently pre-compulsory-age education for children aged 3 and 4, special education, special needs classes, enrichment programmes, professional education are all far behind these services in the Jewish sector' (*ibid*., at p. 48; also see and cf. HCJ 2814/97 *Supreme Education Monitoring Committee v. Ministry of Education* [27]).

We learned of similar matters from the respondent himself, within the framework of the explanation concerning the new budgeting system in the Shoshani report.

21. In this situation, and in view of the figures that have been discussed, our conclusion is that if there is a desire to give compensation in the field of education to outlying areas as compared with central areas, we cannot accept a result in which only four small Arab towns receive the benefits of a national priority area in education, when no less than 500 Jewish towns are receiving these benefits. This is the case in general, and this is especially the case when the Arab sector is so far behind in the field of education. Indeed, 'the exclusion of Arab towns from socio-economic programmes, whose purpose is specific and different, constitutes improper discrimination' (*per* Justice D. Dorner in HCJ 6488/02 *National Board of Heads of Arab Local Councils in Israel v. Committee of Directors-General* [28]). Public resources — especially resources that are allocated to remedy a socio-economic injustice — should be allocated equally and fairly in view of the purpose for which they were allocated and the different needs of members of society to receive the resources. Our conclusion is therefore that in the circumstances of the case before us the principle of equality has been violated.

22. This determination that the principle of equality has been violated is not the bottom line with regard to the legality of the government's decision. The decision, even if it is discriminatory, may turn out to be lawful, if it satisfies the criteria set out in the Basic Law: Human Dignity and Liberty. Indeed, whenever administrative power is exercised in violation of basic human rights it should always be exercised in the spirit of the Basic Laws (*Miller v. Minister of Defence* [6], at p. 138 {231}; HCJ 5016/96 *Horev v. Minister of Transport* [29]). Even when a violation of equality has been proved, we should therefore examine whether the violation satisfies the requirements of the limitations clause in s. 8 of the Basic Law, namely whether the decision befits the values of the State of Israel, whether it is intended for a proper purpose and whether the violation of equality is not excessive. There may therefore be permitted discrimination (see HCJ

3434/96 *Hoffnung v. Knesset Speaker* [30], at p. 76). Indeed, the right to equality, like all other human rights, is not an 'absolute' right. It is of a 'relative' nature. This relativity is reflected in the possibility of violating it lawfully, if the conditions of the limitations clause are satisfied. In this regard, the respondent did not argue, and therefore he obviously did not prove, that the conditions of the limitations clause are satisfied. The respondent did not argue or prove that the manner in which the national priority areas were demarcated was necessary in order to promote proper purposes and values that befit the Jewish values and the democratic values of the state. He did not argue or prove that the violation is proportionate. As my colleague, Vice-President M. Cheshin has shown, the violation is not enshrined in statute or based upon an express authorization in statute. Indeed, according to the facts presented before us, and in the absence of any explanation on the part of the respondent for choosing the geographic line or the formula for demarcating the priority areas, there is no basis for determining that the government's decision satisfies the requirements of the limitations clause in the Basic Law.

23. Thus our conclusion is that in view of the figures that were brought before us and the law that applies in this regard, the government's decision no. 2288 cannot stand, since it leads to a result that discriminates between the Jewish sector and the Arab sector. If the government did indeed think that the distance from the centre of the country results in undesirable disparities in the field of education, then this is true not only with regard to Jewish towns but also with regard to Arab towns. But the result whereby the towns that are considered to be outlying areas for the purposes of education are almost entirely Jewish towns necessarily indicates a discriminatory outcome. What is *prima facie* a relevant difference — the geographic distance from the centre of the country — becomes an irrelevant and discriminatory difference as a result of the aforesaid policy. No explanation whatsoever was given for the discriminatory arrangement that might have been capable of convincing us that the policy, despite its being discriminatory, is lawful in accordance with the criteria of the Basic Laws. The conclusion is therefore that this policy of the government, as expressed in decision no. 2288, is discriminatory and unlawful.

Not including the Arab and Bedouin towns among the towns that are entitled to the benefits of a national priority area in education

24. An additional argument made by the petitioners, in the third and fourth parts of their petition, is that apart from the discriminatory result in

determining the national priority areas on a geographic basis, the government decision is tainted by another discrimination, which is that the benefits given to the national priority areas in education are not given to all the Arab and Bedouin towns, as was done at least with regard to some of the Druze and Circassian towns. The argument in this respect is therefore unrelated to the map of national priority areas, but addresses the discretion of the government to decide that certain towns that are not included in a geographic area that has been declared to be a national priority area should nonetheless receive the benefits in the field of education as if they were in a national priority area. The state, in its reply as aforesaid, does not deny the special needs of the Arab sector in this respect at all, but it rejects the claim by means of two arguments: *first*, it argues that the resources of the government are limited and therefore giving the benefit to the Arab sector would means that other sectors in need, such as the Druze and Circassian sector, would lose the benefit; *second*, it argues that the government is taking action in order to correct the failures and problems in the field of education in the Arab sector that does not involve the national priority areas. This policy makes the claim of discrimination baseless.

25. Within the framework of this petition there is no reason for us to order the towns of the Arab and Bedouin sectors to be given a status of national priority areas in the field of education. This is for two main reasons. *First*, this relief of giving a specific status to the towns of the Arab and Bedouin sectors was requested by the petitioners as an alternative relief, in the third and fourth parts of their petition. Since we have seen fit to accept the petition and grant the first and main relief that the petitioners sought — a determination that the government decisions that classify the national priority areas in education are void — there is no basis for considering the alternative reliefs sought by the petitioners. *Second*, even if we addressed the arguments on their merits, we would not be able to grant the petitioners the desired relief. The petitioners have the burden of showing that the Arab and Bedouin sectors have ultimately been discriminated against in the field of benefits in education, as compared with other sectors, such as the Druze and Circassian sectors. This claim was not proved and sufficient figures were not presented to support it. For this reason we saw no reason to intervene in the respondent's decision in this manner. Naturally, the petitioner still has the right to file a separate petition in this regard, which should include all of the figures required for this purpose.

The relief

26. Our conclusion is therefore that there was a defect in government decision no. 2288 concerning the determination of the national priority areas in the field of education. This defect has two aspects: *first*, the aforesaid government decision is unlawful, since in a matter of this kind the government does not have the power to make an arrangement that is in essence and character a primary arrangement, which falls within the sole jurisdiction of the Knesset. *Second*, the aforesaid government decision is unlawful since it discriminates in a prohibited manner between Jews and Arabs, and this discrimination violates the right to equality to a disproportionate degree. What is the proper relief in a situation of this kind? Indeed, in view of the seriousness of the defects that tainted the government decision we are compelled to decide that government decision no. 2288, in so far as it relates to the determination of the national priority areas in education, should be declared void. The defects that occurred in this decision are serious defects of *ultra vires* and the unlawful exercise of discretion. This decision cannot therefore be left as it is, and it should be declared void.

27. Notwithstanding it should be recognized that a declaration of voidance in the circumstances of this case gives rise to difficulties that are not simple with regard to the date on which the declaration of voidance should come into effect. We should not ignore the serious result that will be caused if the declaration of voidance comes into effect immediately. The determination of the national priority areas has a wide-ranging normative significance and we should seek to avoid a situation in which there is a 'legislative void' in a matter that is so important and that has such wide-ranging national implications (cf. *Re Language Rights under Section 23 of the Manitoba Act, 1870* [86]). We should avoid harming an important public interest (see and cf. HCJ 2313/95 *Contact Linsen (Israel) Ltd v. Minister of Health* [31]; CA 4275/94 *Tel-Aviv Stock Exchange Ltd v. A.T. Management of Torah Literature Database Ltd* [32]), which in our case is the stability of regulating national policy in the field of education. Moreover, many parties have naturally relied on the existing position that is based on the national priority areas in the field of education, and if the declaration of voidance comes into immediate effect this may harm them excessively (see HCJ 2918/93 *Kiryat Gat Municipality v. State of Israel* [33]; HCJ 154/98 *New General Federation of Workers v. State of Israel* [34]). Moreover, any decision concerning an alternative comprehensive arrangement regarding national priority, of the type considered in the petitions before us, requires not only Knesset legislation but a fundamental study of a whole range of factors of wide-ranging significance, both in the field of education and in other fields. A

study of this kind needs a suitable period of time during which it can be considered by the legislature (see, for example, HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [35]). Finally it should be remembered that government decision no. 2288 does not stand alone, but is connected with government decision no. 3292 and even refers to it. Declaring the decision void with immediate effect may create normative uncertainty with regard to the relationship between the various government decisions and the normative position after the more recent decision among them is declared void.

28. Indeed, the proper relief in circumstances of this kind is therefore to suspend the declaration of voidance (in this regard, see Y. Mersel, 'Suspending a Declaration of Voidance,' 9 *Mishpat uMimshal* (2006) 39). In view of the serious defect that occurred in the government decision, there is no alternative to declaring it void, but in view of the ramifications of an immediate voidance of a government decision of this kind, it should be held that the declaration of voidance is suspended for a certain period of time. This has been done in the past in this court when a government decision was set aside with regard to national priority areas (see *Kiryat Gat Municipality v. State of Israel* [33], in the majority opinion); we also held that the consequences of a declaration of voidance should be suspended in other contexts (see, for example, HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [36]; HCJ 3267/97 *Rubinstein v. Minister of Defence* [37]). Notwithstanding, the length of this period should be determined with a view to the nature of the matter, which involves not only an *ultra vires* act of the government but in particular serious and unjustified discrimination specifically in the field of education. The length of the suspension should also take into account the need for a reasonable period of time to determine an alternative legal and constitutional arrangement in place of the arrangement that is being set aside. Against this background, and in view of all of the circumstances of the case, we determine that the declaration that government decision no. 2288 is void, in so far as it concerns the field of education, shall come into effect twelve months after the date of giving this judgment.

29. In concluding, it should be noted that our judgment naturally relates only to the scope of the dispute in the petitions before us, which as aforesaid concerns government decision no. 2288 only in so far as it relates to the field of education. Notwithstanding, our judgment is based not only on the determination that there was a defect of improper and unjustified discrimination in the result of the government plan in this field, but also on

the determination that an arrangement of this kind cannot be made in a government decision but must be a primary arrangement of the Knesset, all of which as stated in the opinion of our colleague, Vice-President M. Cheshin. There is consequently no doubt that this normative determination has a possible ramification not only on determining national priority areas in the field of education, which is the subject of the case before us, but also on determining national priority areas in other fields that were regulated in government decision no. 2288. We should therefore expect that any alternative arrangement that is made, in view of this judgment, will result in an overall amendment of the issue of determining national priority areas, not merely in the field of education but also in other fields.

Therefore we are making the order *nisi* absolute, in the sense that government decision no. 2288 — in so far as it relates to the field of education — is set aside as of twelve months from the date of this judgment.

Vice-President Emeritus M. Cheshin

I agree with the opinion of my colleague President Barak. His approach is my approach and his conclusions are my conclusions. I would nonetheless like to address the petitioners' claim that the government was not entitled or competent to determine national priority areas by virtue of its residual power under s. 32 of the Basic Law: the Government, 5761-2001.

Scope of the dispute

2. The government decided to determine national priority areas and to give various material benefits — pecuniary benefits and benefits with a pecuniary value — to the residents of those areas. Was the government competent to do what it did? Everyone agrees that the government does not have authority to do something that the Knesset has not allowed it to do, first and foremost in a law of the Knesset. Everyone also agrees that there is no provision of law in the statute book that authorizes and permits the government to establish national priority areas like those that it established in its decision. This leads to the question: in the absence of a provision of statute that authorizes it to set up national priority areas, is the government entitled to set up these areas by virtue of the residual power given to it in the provisions of s. 32 of the Basic Law: the Government, 5761-2001? Let us recall that s. 32 of the Basic Law: the Government, 5761-2001, says the following:

'Residual powers of the government

32. The government is competent to do on behalf of the state, subject to any law, any act whose performance is not delegated by law to another authority.'

3. The petitioners claim that the power provided in the provisions of s. 32 of the Basic Law: the Government, 5761-2001, does not include a power for the government to order the establishment of national priority areas in the manner in which it did this. The reason for this is that the decision to establish national priority areas is a decision that concerns a wide-ranging policy, a policy that has an effect — directly and indirectly — on the whole state, and as such the provisions of s. 32 of the Basic Law are too narrow to contain it. The government was not competent — and it is still not competent— to make a decision of such a kind without the Knesset, the primary legislator, addressing the issue and authorizing it to do so. The decision to establish national priority areas, so the petitioners claim, is a decision that falls into the category of 'primary arrangements,' namely those arrangements that require an enabling law of the Knesset, and there is no law of the Knesset in this case. The respondents reply that this is not so. The decision to establish national priority areas is an executive decision. It is a decision of the kind that the government, as the executive branch of the state, is required to make — and which it does make — on a regular basis in the course of its everyday and routine activity. As such, this decision falls within the residual power of the government as authorized in s. 32 of the Basic Law: the Government. The respondents agree, of course — for how could they do otherwise — that we are speaking of a decision whose ramifications are wide-ranging, but according to them the decision goes no further than the executive decisions that the government makes from time to time on a routine basis, decisions that the government is required and authorized to make as a tool for effective and proper government in Israel, for the benefit of all the inhabitants. This is the case in general, and especially when no other authority in the state is competent to make a decision like the one made by the government.

4. The dispute between the parties therefore concerns the question of where the borderline lies between the powers of the Knesset and the government. The question is whether the government strayed from its own sphere of operations into the Knesset's sphere of operations — according to the petitioner — or whether, in its decision to establish national priority

areas, the government was operating in its own sphere of operations by virtue of the power that it acquired under s. 32 of the Basic Law: the Government?

Difficulties arising from section 32 of the Basic Law: the Government, 5761-2001

5. The provisions of s. 32 of the Basic Law: the Government, 5761-2001, were carried over from earlier provisions of statute. The original version was in art. 5 of the Palestine Order in Council, 1922-1947, from which it passed into s. 29 of the Basic Law: the Government, 5728-1968, and from there into s. 40 of the Basic Law: the Government, 5752-1992. Section 32 of the Basic Law: the Government, 5761-2001, follows on from s. 40 of the Basic Law: the Government, 5752-1992, and the wording of the aforesaid sections 29, 40 and 32 is identical. This provision of law, in its different versions, has been the subject of interpretation and clarification in case law and legal literature, but we shall only speak of the main issues that concern our case.

6. According to s. 1 of the Basic Law: the Government, 5761-2001: 'The government is the executive branch of the state.' This is the 'nature' of the government, as the title of section 1 says, and everyone agrees that the government is charged with managing the affairs of the state. In general, according to the principle of the rule of law and administrative legality accepted in Israel, the Knesset determines in statute the functions of the government and the scope of its powers, and the government is entitled and competent to act solely and exclusively within the scope of those powers that it acquired in statute. But the scope of the activity for which the government is responsible is very broad indeed. It is not possible to regulate in statute every activity that it needs to carry out, and as a result the government is required, on a routine basis, to act and operate in areas which the Knesset has not addressed and therefore has not regulated in statute. This was discussed by President Shamgar in HCJ 5128/94 *Federman v. Minister of Police* [38], where he said (at p. 651):

> 'The government is the executive branch of the state… Various pieces of legislation give the government or one of its ministers defined powers. But the powers given to the government are broader than those specified in the individual statutes. It is not possible to cover all the possible fields of operation of the executive branch by means of a provision of statute. The duty of the government as the executive branch incorporates many spheres of activity in which it is required to act, even though

> there is no express statute that gives details of its powers in the aforesaid sphere.'

But since the basic principles of the system of government that prevails in Israel — which are the principle of the rule of law and the principle of administrative legality — each prevent the government from doing what it has not been authorized to do in statute, and in order not to leave the government without the power to act where it needs to act, the Knesset enacted s. 32 of the Basic Law: the Government, 5761-2001, which is the provision that authorizes the government to act in a 'residual' capacity, i.e., even without express and specific authority in statute. The purpose of the provision and the reasons for enacting it were discussed by Prof. I. Zamir in his book *Administrative Authority* (vol. 1, 1996), at p. 334:

> 'In practice, the scope of the functions for which the government is responsible is far broader than the scope of the powers that statute gives the government and ministers in express language. Many of the government's functions, some of which are basic functions of every government, are not mentioned at all in statute. This position is to a large extent dictated by the realities of life. The legislature is unable, and therefore does not seek, to regulate all the spheres of the government's activity, which are very wide-ranging, and to determine expressly in every sphere the necessary powers. The result is that the government is engaged on a daily basis in a very wide range of actions that have no express basis in statute…
>
> How is this position consistent with the principle of administrative legality? The answer is provided by s. 29 [today, s. 32] of the Basic Law: the Government…'

In his article, 'Administrative Authority,' 1 *Mishpat uMimshal* (1992) 81, at pp. 113, 115, Prof. Zamir expands on this issue, and we shall cite some of his remarks in that article:

> 'Government activity that has no basis in statute conflicts with the principle of administrative legality. A broad loophole in the application of the principle of administrative legality vis-à-vis the government might undermine the effect of the principle vis-à-vis other administrative authorities. Moreover, government activity that is not regulated by statute tends to depart from the constraints of proper administration, and even the court has difficulty in scrutinizing it. *Prima facie*, it may be deduced from

> this that such activity is improper and prohibited. But such a conclusion is inconsistent with the needs of reality and common sense. Consequently, the need arises to find a solution to the problem in a manner that accepts the realities of life, while finding a middle road between reality and the principle of administrative legality.
>
> …
>
> … It would appear that the problem was finally resolved in 1968, by means of s. 29 of the Basic Law: the Government.'

7. Section 32 of the Basic Law: the Government, 5761-2001, was therefore intended to build a constitutional bridge between the principles of administrative legality and the rule of law and the daily needs of the state, in order to allow the government to realize properly its role as the executive branch of the state. Thus, ever since the government acquired a residual power to manage the affairs of the state in an express statute — and what is more, in a Basic Law — we have known two things: *first*, the government may make use of those 'residual areas' even when there is no express authorization in a special law of the Knesset, and *second*, when taking action in those 'residual areas,' the government is acting by virtue of and in accordance with an authorization of a law of the Knesset. Thus the principle of administrative legality is completely satisfied in its formal sense, i.e., that government activity — all government activity — is done, and should be done, in accordance with an express statute. As for the rule of law in its substantive sense, we shall discuss this in our remarks below.

8. Section 32 of the Basic Law: the Government, 5761-2001, gives the government very broad power to act beyond the limits of statute: to do acts and to carry out operations that statute has not regulated expressly and in detail. In the past, the question was asked whether the provisions of s. 29 of the Basic Law: the Government, 5728-1968, only provided that the government could act as the competent organ of state in the absence of a provision of statute empowering another organ, or whether it authorized the government to act on behalf of the state in general. It was decided that the latter interpretation was the correct one, and rightly so. Everyone agrees, therefore, that s. 32 of the Basic Law: the Government, 5761-2001, constitutes an independent source of authority for doing acts which the government wishes to do but which are not regulated in a law of the Knesset. See, for example, HCJ 8600/04 *Shimoni v. Prime Minister* [39], at paras. 9-12 of the opinion of President Barak; Zamir, 'Administrative Authority,' *supra*,

at pp. 115-116; M. Cohen, *General Powers of the Executive Branch* (2002), at p. 174, and cf. *ibid.*, at p. 230. In the spirit of this important case law ruling, we all agree that the residual power of the government is a power that is necessary and essential for its proper and effective functioning. Thus, and only thus, can the executive branch operate properly and effectively; thus, and only thus, can it run the state.

9. We all agree therefore that the provisions of s. 32 of the Basic Law: the Government, 5761-2001, are essential. But even if we recognize the great importance of this provision of statute, we cannot escape the fear that it involves a danger — a considerable danger — of a violation of the principle of the rule of law and the democratic system. Thus we see, like in the case of any provision of statute that authorizes an executive authority to do certain acts, the government may slip and overstep the boundaries of the residual power given to it; and if this is true as a rule, it is particularly true when we consider the all-embracing wording of the provisions of s. 32. The truth is that in the various laws of the Knesset we will find many powers that are given to the executive branch — to ministers in the government and to other officials — but when we consider the scope of the power given to the government as residual power, and when we consider the exalted status of the government, there are considerable grounds for the fear that the damage which may result from the government overstepping its residual power is damage that may harm the democratic fabric of the state. Indeed, we cannot avoid the conclusion that the provision of statute that gives the government such broad power to act without a special authorization or approval from the Knesset may to no small degree blur the boundaries that separate the legislative branch and the executive branch, and at the same time it gives the government — so it may be argued — greater power than the power that it should be given in a democracy that is based on the doctrine of the separation of powers. Admittedly, the government is acting by virtue of statute, by virtue of the provisions of s. 32; but this power that was given to it in statute is so broad and so unlimited that it can be said that the rule of law in its substantive sense may suffer a mortal blow.

10. What, then, should we do so that what is good and necessary is not harmed or damaged by what is pernicious and bad? How should we establish the limits of the provisions of s. 32 of the Basic Law: the Government, 5761-2001, and reduce the risk that may arise from its improper use? How should we resolve the conflict between these two forces that pull in opposite directions — on the one hand, the force that seeks to extend the residual powers of the government in order to allow it to control and manage the

affairs of the state with maximum effectiveness, and, on the other hand, the power that warns us and urges us to act to reduce the power of the government, because of the fear that too broad a power will undermine the principle of the rule of law and the democratic fabric of the decentralization of power and the separation of powers? The answer to all these questions will be found in restrictions that have been placed on the residual power of the government. With regard to these, we should distinguish between 'internal restrictions' and 'external restrictions.' 'Internal restrictions' are those restrictions that are expressly provided in the provisions of s. 32, whereas 'external restrictions' are restrictions that are required by the basic principles of the system of government and the legal system in Israel, and mainly by the position of the government as the executive branch alongside the Knesset as the legislative branch. Let us begin our remarks with the internal restrictions and afterwards we can turn to the external restrictions, which are the main ones in this case.

'Internal restrictions' on the power of the government

11. The provisions of s. 32 of the Basic Law: the Government, 5761-2001, contain two restrictions on the residual power of the government. One restriction provides that the residual power of the government is 'subject to any law,' and a second restriction provides that the residual power of the government enables it to do an act 'whose performance is not delegated by law to another authority.' These two restrictions are what make the power of the government under s. 32 a 'residual' power; they are what classify this power of the government as residual. It might be argued that the second restriction — the existence of another competent authority under the law — is already included in the first restriction (the restriction of 'subject to any law'), but whether or not this is the case, for our purposes we are not required to distinguish between the two restrictions, and we shall indeed not distinguish between them. See and cf. Cohen, *General Powers of the Executive Branch* (2002), *supra*, at pp. 178-181; Zamir, *Administrative Authority*, *supra*, at pp. 336-338.

12. The power of the government according to s. 32 is a 'residual' power — that is its description and that is its essence and content — and the government may make use of it only when the legislature has left a 'void.' This is the case, for example, where the legislature has not called upon a competent authority to do a certain act. See HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [40], at p. 832 {585-586}. But when the legislature has its say, there is then no void — or the void has been

filled — and the residual power, in the manner of a 'residual' power, is not created at all or it evaporates into nothingness. In the words of Justice Goldberg in *Kiryat Gat Municipality v. State of Israel* [33], at p. 844):

> '… When there is a law that creates an arrangement, the power of the government yields to it, and it may not create an alternative arrangement. If there was a legal void, it existed until the enactment of the law that created the arrangement. From that moment onwards, the void was filled, and the government no longer had any residual power in that same matter…'

13. Indeed, '… where there is legislation that addresses a certain issue, general administrative powers do not apply' (*Federman v. Minister of Police* [38], at p. 652). The reason for this is obvious: if the government is permitted to act where the Knesset has empowered another authority to act, the rule of law will be seriously harmed, the doctrine of the separation of powers and the decentralization of power will be undermined and the authority of the Knesset will be unlawfully diminished. In the words of Justice Goldberg in *Kiryat Gat Municipality v. State of Israel* [33]:

> 'An extension of the power of the government that will allow such a situation blurs the boundaries between the executive branch and the legislative branch and undermines the very nature of the constitutional system in Israel, which is based on the distribution of powers between the organs of government' (*ibid*. [33], at p. 844).

A law that dictates a certain mode of operation obliges the government to act in the manner stipulated in the law, and it consequently prevents it from creating an 'alternative track' that is based on its residual power (HCJ 5062/97 *Association of Insurance Appraisers in Israel v. State of Israel* [41], at p. 190). Indeed —

> 'The government may not determine an arrangement that will replace an existing statutory arrangement. It is not entitled to replace the statutory arrangement with another, alternative arrangement that was designed and formulated by it' (HCJ 2632/94 *Degania A v. Minister of Agriculture* [42], at p. 729).

Cf. also HCJ 5018/91 *Gadot Petrochemical Industries Ltd v. Government of Israel* [43], at p. 786; and see also the position of Justice Haim Cohn in HCJ 35/62 *Bachar v. Minister of Defence* [44], at p. 809, and in HCJ 313/63 *Haramati v. Director of Property Tax* [45], at p. 361; but cf. the position of

the court (*per* Justice Malz) in HCJ 381/91 *Gross v. Ministry of Education and Culture* [46], at p. 57.

14. Where the legislature has regulated a certain area of life expressly and specifically, it is clear that the government will not have any residual power. For if there is any meaning to the concept 'subject to any law' or the concept that the power is 'residual,' this is that meaning. If the government acts without permission in the same field that has been regulated by the legislator, not only can its activity not be called 'residual,' but it is activity that is contrary to the law. Thus, for example, Justice Goldberg told us the following in *Kiryat Gat Municipality v. State of Israel* [33]:

> 'The proviso in s. 29 [of the Basic Law: the Government, 5728-1968, which is now s. 32 of the Basic Law: the Government, 5761-2001] that the government is competent to act "subject to any law," does not merely tell us that the acts of the government should not conflict with any law or violate any law, but also that when there is a law that creates an arrangement, the power of the government yields, and it does not have an ability to create an alternative arrangement' (*ibid*. [33], at p. 844).

In *Association of Insurance Appraisers in Israel v. State of Israel* [41], Justice Or was called upon to interpret the Natural Disaster Victims Compensation Law, 5749-1989, and in his analysis of that law he held that the expression 'subject to any law' tells us that before it exercises its residual power, the government has the duty first to exhaust the procedures in the statute. In his words:

> 'Only after the question of the implementation of the statute has been considered, all the relevant considerations and reasons have been examined and considered objectively and reasonably, and after this procedure it is found that a natural disaster should not be declared — then, and only then, will the proviso of "subject to any law," which is in s. 40 of the Basic Law: the Government [5752-1992, which is today s. 32 of the Basic Law: the Government, 5761-2001], not prevent the government from resorting, by virtue of its residual power, to another track, in order to consider whether to compensate the victims of a natural disaster on that track' (*ibid*. [41], at pp. 191-192).

Thus Justice Or held that there is nothing that prevents the payment of compensation outside the Natural Disaster Victims Compensation Law, since the statute does not contain a negative arrangement. We should mention in

this context that, in the opinion of Justice Dorner, the word 'law' in the expression 'subject to any law' includes not only legislation but also case law, and from this it follows that:

> 'The proviso in s. 29 [today, s. 32] of the Basic Law: the Government, which makes the general powers of the government subject to the law, prevents it not only from acting contrary to a provision of statute, but also prohibits it from harming the rights of the individual' (*Kiryat Gat Municipality v. State of Israel* [33], at p. 847).

This outlook is in essence shared by Prof. Zamir, but in his opinion 'the legal source for human rights in Israel lies in the rules of common law that were absorbed in Israel' (Zamir, 'Administrative Authority,' *supra*, at pp. 116-117; see also Zamir, *Administrative Authority*, *supra*, at p. 337).

15. An arrangement in statute that prevents the government from having residual power does not merely include a positive arrangement but also a negative arrangement (cf. LCA 5768/94 *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables Ltd* [47]). We should also say that we have known for some time that sometimes 'there are cases where the silence of the legislature is more significant that its words, or at least as significant as its words, and if it refrains from determining a law, where it needed to do so or could have done so, then its silence speaks for itself and tells us clearly what was its position on the question under consideration' (*per* Justice Silberg in CA 167/47 *Minkovitch v. Fisztner* [48], at pp. 42-43). Thus, where the silence of the legislature is 'deliberate silence,' this silence speaks to us; in other words, where the legislature chose deliberately to refrain from making a certain arrangement, we are consequently not dealing with a lacuna, and the silence of the law encompasses it in a certain negative arrangement. See CA 108/59 *Pritzker v. Niv Ltd (in liquidation)* [49], at p. 1549; BAA 663/90 *A v. Bar Association Tel-Aviv District Committee* [50], at p. 404. In the words of President Barak in *Shimoni v. Prime Minister* [39], at para. 12: 'Only when the silence of a particular statute in a certain sphere cannot be interpreted as a negative arrangement is it permitted to make use, in that sphere, of the provisions of s. 32 of the Basic Law: the Government.' In our case this question of a negative arrangement asserts itself most forcefully, and later in our remarks below we will address this question further.

16. The rule is therefore that the government is not competent to exercise residual power — or to be more precise, residual power, in as much as it is

'residual,' does not come into being — where the legislature has regulated or has deliberately refrained from regulating a certain course of action. The question of what the law is in each specific case is a question of the interpretation of the arrangement and how it integrates into the legal system as a whole, with its general principles.

'External restrictions' on the power of the government

17. Up to this point we have discussed two restrictions on the residual power of the government, which is the power provided in s. 32 of the Basic Law: the Government, 5761-2001. We called these restrictions 'internal restrictions,' since they are restrictions that are stipulated in the provision of statute that gives the government the residual power and they are an integral part of that power. The question is whether, apart from these two restrictions that were imposed on its residual power, the government is entitled and competent to act as it wishes and pleases (subject, of course, to the prevailing rules of administrative law)? Do only those two restrictions stipulated by the legislature in s. 32 limit the government when it acts by virtue of its residual power? Our answer to this question is a most definite no. The provisions of s. 32 do not exist in a vacuum, and the methods of interpreting them are not found solely in the section itself. The provisions of s. 32 are a limb of the body of Israeli law, and its scope of application shall be determined while taking into account everything around it, above it, beneath it and alongside it: basic principles, doctrines and the other rules and sub-rules that permeate Israeli law and run through the length and breadth of the legal system. Israeli law, like the laws of all nations — both in the present and in the past — is replete with basic principles, doctrines, premises, customs and outlooks that are all an integral part of the legal system and the rules in it. And if we understand the law in this way — and this is indeed how we should understand it — it logically follows that before we can thoroughly understand a certain provision of statute, we are obliged to examine it and to scrutinize it very well against the background of the legal system as a whole. In CA 3798/94 *A v. B* [51], at p. 182 {307}, I spoke of the relationship between morality and law, and this *inter alia* is what I said:

> 'Morality and its imperatives are like a lake of pure water, and the law and its imperatives are like water lilies, spread over the surface of the water and drawing life and strength from the water. Morality nourishes the law at the roots and it surrounds the law.'

The same is true of the relationship between the provisions of statute and the basic principles and doctrines of the law. As we elaborated in CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [52], at pp. 73-74:

> 'It is customary to say that the interpretation of statute begins with the words of the statute. This statement is of course correct when we wish to comprehend fully the words of the statute and how they relate to one another. But we are the persons who are doing our best to interpret the statute, and we are not a *tabula rasa*. Before we approach the statute we must ask: who are we? And the answer to this question is that we are those values, those principles, that morality, those proper outlooks on life. Thus it transpires that we start the interpretive voyage — whether consciously or unconsciously — with those values and principles and doctrines, the foundation upon which the law is based, and our path continues onward from them. We cannot "understand" a statute unless we examine it with the analytical tools that we carry with us, and these analytical tools are what will guide us.'

Similarly I said in HCJ 5503/94 *Segal v. Knesset Speaker* [53], at p. 562:

> 'When we approach a statute of the Knesset, we do not come empty-handed. We come with a weight of language, linguistic definitions and meanings, social customs and morality, consensuses and first principles, justice and equity, principles and doctrines in our knapsack. Our minds and hearts have been trained in the skill of interpretation, consciously and unconsciously. When we approach the art of interpretation, we do not equip ourselves merely with a dictionary. We also have the Bible and our heritage, our love of mankind and our innate need to be free. This is how we approach a statute of the Knesset, equipped with all these work tools, and we do our best to interpret the text.'

See also LCA 7678/98 *Benefits Officer v. Doctori* [54], at para. 18 of the judgment.

We will commit a serious error if we ignore these basic principles and doctrines. Even though on the face of it they might be regarded as 'external' to the positive legal system, in reality they form the backbone that supports and protects the law; they support the legal system and the legal system is based on them. Law is replete with them even though they are not enshrined

in an express provision of statute. They are present in every sphere of law and they encompass all the provisions of statute, including, of course, the provisions of s. 32 of the Basic Law, 5761-2001. And in encompassing the provisions of s. 32, all those principles demarcate the areas to which the power given in the section applies and they define its scope.

18. Indeed, the legal system — every legal system, including the Israeli legal system — is built on basic principles that comprise the genetic code of the norms that prevail in that system. The basic principles lie at the heart of every norm in the law. They include, for example, the principles of good faith, integrity, fairness and the like (LCA 6339/97 *Roker v. Salomon* [55], at pp. 269-270; *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables Ltd* [47]); they include the basic human rights: human dignity, liberty, equality, free will and property rights (*Israel Women's Network v. Minister of Labour and Social Affairs* [7], at p. 650; HCJ 6845/00 *Niv v. National Labour Court* [56], at p. 683); in the same way, 'the democratic principle — as such — permeates the whole of the legal system in Israel, and adds itself to the genetic code of all the binding norms in Israeli law' (HCJ 7351/95 *Nevuani v. Minister of Religious Affairs* [57], at p. 121; *Rubinstein v. Minister of Defence* [37], at p. 529 {201}). All these principles make up the law, and in the interpretation of statute they present themselves before the interpreter and demand that he gives them the place of honour that they deserve. This is the case with every provision of statute, and it is also the case with the provisions of s. 32 of the Basic Law: the Government, 5761-2001.

19. The residual power of the government under s. 32 of the Basic Law: the Government, 5761-2001, was not intended to free itself of the restraints of the basic principles. On the contrary, in the absence of any other provision — and there is no other provision — we should interpret the residual power of the government as a power that is subject to the basic principles of the legal system. Section 32 regards itself as subject to the restraints of the basic principles of the legal system, and it is compatible with them. Moreover, the section is designed to further these principles, and this purpose is compatible with it. It follows from this that there are acts and activities that the government will not be competent to do simply because they conflict with the basic principles of the legal system, including the basic constitutional outlooks on which our legal system is based. As President Shamgar told us in *Federman v. Minister of Police* [38], at p. 652:

> 'There are actions that are not within the jurisdiction or power of the government, since exercising these without legal authorization is contrary to basic normative outlooks that derive from the character of our system of government.'

Indeed, we can presume that both s. 32 and its historical precursors in the Basic Laws were intended to be consistent with the basic constitutional outlooks in Israel, and that these basic outlooks are a basis for their existence and a part of the genetic code of which they are made. As President Barak said in *Shimoni v. Prime Minister* [39], at para. 14:

> 'The purpose of this provision was not to undermine the basic principles of the constitutional system in the State of Israel. On the contrary, this provision was intended to realize these basic principles and it should be interpreted in the light of them… Section 32 of the Basic Law: the Government should not be interpreted in a manner that undermines the principles of the separation of powers, the independence of the judiciary, the substantive rule of law and human rights. Section 32 of the Basic Law: the Government should find its proper place within the framework of the comprehensive constitutional outlook that can be seen from the Basic Laws as a whole, and it should realize "basic normative outlooks that derive from the character of our system of government" … In this way we will achieve the proper balance between the practical need to ensure that the executive branch has a general power in order to realize its functions and the ethical need to ensure that this power is consistent with the comprehensive fabric of our constitutional outlook.'

20. In the context of the case before us, it has been held — and this case law rule is universally accepted — that the government is not authorized, by virtue of its residual power under the provisions of s. 32, to violate the basic rights of the individual. These rights are an integral part of the law, and a violation of them can be effected solely by means of a statute of the Knesset. Each of the basic rights 'is part and parcel of every statute' (HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [58], at p. 96); 'Its force and importance are like the force and importance of statute,' and 'only express and unambiguous language in statute is capable of restricting or limiting…' a right of this kind (*ibid*.). Moreover —

> 'The "residual" power of the government is not a source of power that violates the liberty of the individual. The "residual" power of the government gives it power to act where there is an "administrative void"… Such an "administrative void" does not exist in the case before us, since it is "filled" with the general principle concerning the liberty of the individual. A violation of this liberty requires a special provision' (*per* President Barak in *Public Committee Against Torture v. Government of Israel* [40], at p. 832 {585-586}).

Indeed, the basic freedoms that are a part of the genetic makeup of the law can be found in every norm in the law even though they are not mentioned in statute, and it follows from this that the government is not authorized to violate them unless it has been expressly authorized to do so by the Knesset. This was discussed by President Shamgar in *Federman v. Minister of Police* [38], at p. 652:

> 'There are actions that are not within the jurisdiction or power of the government, since exercising these without legal authorization conflicts with basic normative outlooks that derive from the character of our system of government. This is the case with regard to basic rights that are a part of our positive law, whether they have been included in a Basic Law or whether this has not yet been done. Thus, for example, the government will not have power to close a newspaper on the basis of an administrative decision, unless there is an express provision of statute that regulates a matter of this kind, even if a Basic Law that defines the freedom of speech has not yet been enacted; such an act would be contrary to our basic outlooks concerning the liberties of human beings which are inherent in our system of government and which can only be restricted by statute… This means that the basic right of freedom of speech, which is a part of our positive law, creates a restriction that restrains the executive branch and does not allow it to avoid the prohibition against violating the freedom granted by it without authorization in law.'

See also *Shimoni v. Prime Minister* [39], at para. 17; Zamir, *Administrative Authority*, at p. 337; *Kiryat Gat Municipality v. State of Israel* [33], at p. 847; Cohen, *General Powers of the Executive Branch*, at pp. 275 *et seq*.. This case law ruling, we should point out, was further strengthened by

the enactment of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, which are the Basic Laws that gave the rights provided in them a supreme status, and also went on to provide expressly that the rights provided in them may only be violated by statute or 'by virtue of an express authorization' in statute. Thus we see that not only have the basic rights that are included in the aforesaid two Basic Laws become statutory 'law,' and therefore the principle of 'subject to any law' provided in s. 32 applies directly to them, but it also states expressly in the Basic Laws that a violation of those rights requires *express* authorization in statute. It is clear that the general language of the provisions of s. 32 of the Basic Law: the Government, 5761-2001, does not amount to an express authorization of this kind, and therefore it does not allow the government to violate basic rights that the Basic Laws address. See the remarks of Prof. Baruch Bracha in his article 'Constitutional Human Rights and Administrative Law,' *Itzchak Zamir Book on Law, Government and Society* (2005) 161, at p. 190. See also *Kiryat Gat Municipality v. State of Israel* [33], at p. 847, *per* Justice Dorner; Zamir, 'Administrative Authority,' *supra*, at pp. 116-118.

Limits of residual power — the government as the executive branch

21. Alongside the basic rights of the individual, one of the basic principles on which the legal system in Israel is based — one of the most supreme principles — is the principle of the separation of powers and the decentralization of power. Let us now turn to this principle and its various derivatives.

22. There are three main branches of government in Israel: the Knesset, the government and the judicial system. We are currently concerned with the first two branches, and it is these that we will address. The Knesset is 'the house of elected representatives of the state' (s. 1 of the Basic Law: the Knesset), it is the 'legislature' (s. 1 of the Transition Law, 5709-1949), it is the 'legislative branch' (s. 7(a) of the Government and Justice Arrangements Ordinance, 5708-1948). As for the government, according to s. 1 of the Basic Law: the Government, 5761-2001, 'it is the executive branch of the state.' It need not be said that the concepts of 'house of elected representatives,' 'legislature' and 'legislative branch,' which are descriptions of the Knesset, and similarly 'executive branch,' which describes the government, cannot in themselves tell us the scope of the powers of the Knesset and the government and the boundary that separates the one from the other. Indeed, in order to examine the scope and the limits of the powers of the Knesset and the government — and within the scope of the powers of the government, to

define the limits of the residual power — we need to examine and understand the basic principles that form the basis for the system of constitutional law that exists in Israel, since only in this way will we be able to read the map of the division of powers properly. These basic principles are, first and foremost, the principle of the rule of law (in the substantive sense of the concept) and the principle of the decentralization of power and the separation of powers. Within this framework, we recognize the supreme status of the Knesset and the subordination of the government to the Knesset and the laws of the Knesset.

23. The boundaries of the government's power are determined with a view to its being an 'executive' authority that is subordinate to the legislative branch, and it is from this perspective that its residual power should also be examined. In determining the activities that fall within the residual powers of the government, we should, of course, consider the activities that according to our accepted constitutional tradition are regarded as activities that are in the government's sphere of operations. Thus, for example, it is agreed that the government has the power to manage the foreign affairs of the state (see *Federman v. Minister of Police* [38]); matters involving the preservation of state security and matters ancillary thereto (HCJ 606/78 *Awib v. Minister of Defence* [59]; HCJ 302/72 *Hilo v. Government of Israel* [60]; HCJ 287/91 *Cargal Ltd v. Investment Centre Administration* [61], etc.; see also, for example: HCJ 222/68 *National Groups Registered Society v. Minister of Police* [62]; Bracha, 'Constitutional Human Rights and Administrative Law,' *supra*, at pp. 174-175). The main point for our current purposes is that the residual power of the government only exists for the purpose of realizing its power as an executive authority within the field of 'executive' activity. Since the government is the 'executive branch,' the purpose of s. 32 of the Basic Law: the Government, 5761-2001, is to give it the tools to carry out its role as the executive branch, and its power should be interpreted and preserved within the scope of this purpose. The Basic Law sought to give the government tools to realize its powers as an *executive* authority, and the limits of the residual power should be determined, almost automatically, by the limits of executive power. Thus, where the boundaries of executive powers are determined, there too, in most cases, the boundaries of the residual power will be determined within the framework of the external limitations. The boundary of the residual power is therefore the boundary of executive power, and the government is not permitted to cross that boundary and trespass into an area that was not originally allocated to it. This was discussed by President Barak in *Shimoni v. Prime Minister* [39], at para. 15:

> 'Residual power operates within the limits of the government's powers as the executive branch. It should be regarded as a tool to realize the stipulation of the Basic Law: the Government that the government is the executive branch of the state. No use should be made of it in order to turn the government into an organ that is competent to act in areas that fall outside the limits of the executive branch.'

24. Against the background of these basic principles that we have discussed, let us look closer at our case, and try to examine the external framework for the residual power of the government. In other words, let us make our best efforts to translate the basic constitutional concepts that we have mentioned — especially the power of the Knesset as the legislative branch and the power of the government as the executive branch — into legal norms with legal significance, and apply these norms to the question of the government's residual power. Let us study the limits of executive power and from this we will know the limits of the residual power.

The rule of law, the separation of powers and the decentralization of power

25. The principle of the rule of law in Israel instructs us with regard to the system of the separation of powers and the decentralization of power: the legislature should exercise legislative power; the executive should exercise executive power; the judiciary should exercise judicial power. At the same time there should be mutual checks between the branches of state and a balance of their powers and authority. In the words of Professors Rubinstein and Medina in their book, *The Constitutional Law of the State of Israel*, at pp. 127-128:

> 'The separation of powers is expressed in two basic characteristics: one is the division of power between the various authorities. Legislative power, namely the power to determine fundamental social issues and to make general arrangements, is given to the legislative branch; the power to implement the general arrangements is given to the executive branch; and the power to decide disputes with regard to the exercising of power by the other branches is given to the judicial branch… A second basic characteristic of the principle of the separation of powers is the mutual supervision between the powers and determining mechanisms for balancing between them.'

This delicate and complex formula of the decentralization of power and mutual supervision is what empowers the three branches of government and determines the relations between them. This is what creates and preserves the rule of law and democracy, and undermining this is likely to endanger the whole system of government. We recently discussed the delicate balance between the three branches of government and the great danger inherent in a breach of this balance in HCJ 4885/03 *Israel Poultry Farmers Association v. Government of Israel* [63]:

> 'The essence of the formula is this: each of the three branches involved in government has its own sphere, in which it has sole power — the legislative sphere, the executive sphere and the judicial sphere. At the same time, each branch counterbalances the other two branches and is counterbalanced by the other two branches, so that no branch encroaches upon another and no branch seizes control of the sphere of the other two branches. The branches are therefore separate from one another, but also connected to one another. We are speaking of a kind of roundabout with three seats. The art of statesmanship is to maintain one's balance, and for the roundabout to rotate gently for the benefit of all. However, when one of the powers tries to exert its authority excessively, or when one of the riders on the roundabout upsets the balance, arrangements are undermined and the whole system of government is shaken.'

26. The purpose of the principle of the separation of powers and the decentralization of power is obvious: it is to decentralize the powers of government and to give them to different bodies and thereby prevent a 'concentration of power in one body, something which is characteristic of a dictatorial system of government' (HCJ 6971/98 *Paritzky v. Government of Israel* [64], at p. 790). Indeed, experience has taught us that where both legislative power and executive power are entrusted to one authority, there is no liberty, there are no human rights, democracy dissipates and tyranny prevails. We were taught this by no other than the author of the doctrine of the separation of powers, Baron de Montesquieu, in his book *De l'esprit des lois (On the Spirit of Laws*):

> 'Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre

> que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.
>
> …
>
> Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers.'
>
> 'When legislative power is united with executive power in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise that this monarch or senate will enact tyrannical laws to be executed in a tyrannical manner.
>
> …
>
> All would be lost, were the same man or the same body, whether of nobles or of the people, to exercise these three powers — that of enacting laws, that of executing public resolutions, and that of trying crimes and the cases of individuals' (*ibid*., book 11, ch. 6; translated by the editor).

The essence of the principle of the separation of powers can therefore be found mainly in the decentralization of powers that are divided among different authorities, in the guarantee that a single entity will not have powers that are too great and thereby become a dictatorial leader, and in upholding the principle that the authorities that hold the various powers will be separate from one another. Thus we know that the three branches that hold separate powers may not enter the realm — or to be more precise, the palace — of the others. Each power should operate and act solely within the scope of the authority that has been given to it in the law (and in the constitution) and it may not trespass into the realm given to the other powers. The legislature shall not engage in executive or judicial acts; the executive shall not engage in legislative and judicial acts; the judiciary shall not engage in legislative and executive acts. We discussed some of these issues in *Paritzky v. Government of Israel* [64], where we said, at p. 790:

> 'The combination of words "separation of powers" does not indicate the full content of the expression. The essence of this principles does not lie in the "separation of powers," i.e. the separation between the branches for the sake of separation, but

> in the decentralization of power and authority between different and separate branches. The essence lies in the legislature engaging solely in legislative acts and not in executive and judicial ones, the executive engaging solely in executive acts and not in legislative and judicial ones and the judiciary engaging solely in judicial acts and not in legislative and executive ones.'

We went on to say (*ibid*. [64], at p. 807):

> 'The legislature is intended for passing legislation; the executive is intended for executive action; the court is intended for judicial activity. Where one of these three trespasses into the realm of another — without express authority in a law — the balance that alone can sustain proper government and administrative arrangements is undermined. This is the case when the executive authority engages in legislative activity and the same is true where the legislative authority seeks to block the path to the courts…'

Indeed, the principle of the decentralization of power is what lies at the heart of the democratic system of law that prevails in Israel.

> 'The brain of democracy is made up of three lobes: the legislative lobe, the executive lobe and the judicial lobe. The brain — with its three lobes — is what controls the body, gives the body vitality and shapes its life. If one of these three lobes is paralyzed, democracy vanishes and is no more' (CA 733/95 *Arpal Aluminium Ltd v. Klil Industries Ltd* [65], at p. 630).

Now that we have said this, we should add that in reality, as we all know, the principle of the separation of powers and the decentralization of power is not observed and upheld completely and absolutely. Real life is not like life in a closed laboratory, and there are cases where the powers intermingle. But this truth cannot detract from the essence that we are obliged to consider at all times, namely the division of powers and authority between the branches of government.

27. The principle of the *separation of powers* tells us therefore that there are powers that are separated from one another, and together with the principle of the *decentralization of power* we see that functions and powers are divided between various organs. In our case, functions are divided between the legislature and the executive: the legislature legislates — i.e., it

determines general arrangements according to which members of society act — and the executive branch implements and executes these. Moreover, the principle of decentralization tells us that it is prohibited to cross the boundaries between the branches. Each branch has been permitted to act in the realm allocated to it and it is prohibited from acting in the realm of the other branches. For our purposes, the legislature should not implement or execute statute, whereas the executive branch should not legislate.

The rule of law, the separation of powers and the decentralization of power: primary arrangements (continued)

28. The basic approach that lies at the heart of the constitutional system in Israel tells us that the legislative branch — the Knesset — is the organ that stands at the top of the pyramid of the branches of government that determine the norms that prevail in Israel, and that the government and its agencies have the function of implementing the norms determined by the Knesset. In the language of the law, it is said that the Knesset is competent to determine, in statutes, 'primary arrangements' — arrangements that determine the main norms and the criteria for implementing them — whereas the government is in principle only competent to determine, in various types of regulations and actions, 'secondary arrangements.' In other words, the government and its agencies are not competent to determine 'primary arrangements' other than at the behest of the legislature, by virtue of a law of the Knesset. This basic outlook, which derives from the principle of the rule of law (in its substantive sense), has been well established and clarified in case law and scholarly literature. Thus, for example, we were taught many years ago by our great teacher of administrative law, Prof. Yitzhak Hans Klinghoffer, in his article 'The Rule of Law and Subordinate Legislation,' *Hed HaMishpat* (1957) 202, at p. 203:

> '… Every administrative act, whether it is an act of subordinate legislation or an individual act, should be determined, from the viewpoint of the content of all its main parts, by a norm that takes the form of statute. In this sense, it is possible to say that in a state where the rule of law prevails, the power to determine primary arrangements is given to the legislature, whereas the organs of the administration may determine secondary arrangements only, within the framework of the law.'

This basic principle has become established in case law, and the courts have again and again made clear that the Knesset is the source for enacting 'primary arrangements' that determine the way of life in the state, and the

executive authority — the government and its agencies — has the power to determine secondary arrangements only. Thus, for example, President Barak tells us in *Rubinstein v. Minister of Defence* [37], at p. 502 {164}:

> 'A basic rule of public law in Israel provides that where a government act is enshrined in a regulation or an administrative provision, it is desirable that the general policy and fundamental criteria underlying the act should be enshrined in primary legislation by virtue of which the regulation was enacted or the administrative order was made. In more "technical" language, the basic rule provides that "primary arrangements" that establish the general policy and the guiding principles should be determined in a law of the Knesset, whereas the regulations or the administrative orders should only determine "secondary arrangements".'

Justice Or added in HCJ 244/00 *New Dialogue Society for Democratic Dialogue v. Minister of National Infrastructure* [66], at p. 56:

> 'It has been established in case law that for reasons of the separation of powers, the rule of law and democracy (in its formal-representative sense and its substantive sense), it is proper that the determination of general and fundamental policy — the one that constitutes the primary arrangement — whose effect on the lives of individuals in society is great, should be made in primary legislation, whereas the methods of realizing and implementing the policy may be determined in subordinate legislation by the authorities.'

This, then, is the principle of primary arrangements, the principle that tells us that the main norms should be determined by the legislature, the Knesset, and not by the executive branch, the government. Indeed, we have known for a long time that 'there is no legislator other than the legislature, and it alone has the power to pass acts of legislation' (CrimA 53/54 *Eshed Temporary Transport Centre v. Attorney-General* [67], at p. 819), and 'when we say legislation, we are referring not only to the formal act of creating statute, but to the fact that primary arrangements should be determined specifically by the legislature' (*Paritzky v. Government of Israel* [64], at p. 790).

Indeed, the court has held, time and again, that the principle of the rule of law in a democracy teaches us 'that primary arrangements must be determined in primary legislation. Secondary legislation should carry out the arrangements prescribed in statutes' (*Paritzky v. Government of Israel* [64], at

p. 777). 'It is desirable… that the primary legislator should determine the primary arrangements, and leave to the secondary legislator the determination of the secondary arrangements' (*Horev v. Minister of Transport* [29], at pp. 75-76 {233}). See also, for example, HCJ 1539/05 *Mashlat Law Institute for the Study of Terror and Assistance of Terror Victims v. Prime Minister* [68], at para. 4 of the judgment; HCJ 144/50 *Sheib v. Minister of Defence* [69], at p. 411; HCJ 113/52 *Sachs v. Minister of Trade and Industry* [70], at p. 702; A. Barak, *Legal Interpretation* (vol. 2, 1993), at p. 528; I. Zamir, 'Guidelines of the Attorney-General — Subordinate Legislation: Practice and Guidelines,' 11 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1986) 329, at p. 345, etc..

29. This basic approach, according to which primary arrangements are made by the primary legislature, which is elected by the people, whereas the executive branch, the government, is only supposed to determine secondary arrangements, is part and parcel of the principle of the rule of law. As the court said in HCJ 2740/96 *Chancy v. Diamond Supervisor* [71], at p. 504:

> 'The principle of the rule of law in its substantive sense tells us that "primary arrangements" should find their place in a statute of the Knesset, and that regulations are only intended, in principle, to implement statutes. This is the pillar of fire and this is the pillar of cloud that guide us on the road night and day, and we shall follow them.'

The principle of the rule of law in the substantive sense is the source for all the principles that are the basis of democracy: the separation of powers and the decentralization of power; protection of human rights, etc.. These principles are interconnected with one another — in reality, they are manifestations of the same basic principle — and they are all intended solely to prevent a concentration of power in the hands of one person or a small group of persons, and to protect the individual against the arbitrariness of the government and the administration. Each of these principles that we have listed, whether on its own or together with the other principles, tell us that primary arrangements must be determined specifically by the primary legislator, the Knesset, and that the government should only have power to determine secondary arrangements.

30. The meticulous and precise implementation of the rule of law requires primary arrangements to be determined solely in primary legislation. The legislature may not waive its powers in favour of the executive and

administrative branch. In the words of Prof. Klinghoffer, in his article 'The Rule of Law and Subordinate Legislation,' *supra*, at p. 203:

> '… The rule of law also does not allow the legislature to waive its power to determine primary arrangements in favour of the administration, i.e., to transfer this power to it. Any delegation of the aforesaid power to the administrative branch is contrary to the rule of law. Where the rule of law prevails, the legislature is not free to choose between two paths, i.e., to restrict the administration by enacting primary arrangements itself, or to authorize the administration to do this legislative work in its stead; it is obliged to determine these arrangements on its own. The principle of the rule of law demands that every administrative act should be enshrined, in so far as its main and important characteristics are concerned, in primary arrangements that are determined in a formal statute, and that determining those arrangements should be in the exclusive jurisdiction of the legislature and should not be delegated to administrative authorities.'

But an absolute separation of this kind between the legislature, which enacts primary legislation, and the executive, which executes and implements them, only exists in Utopia, since —

> 'The complexity of life in modern society leaves the legislature with no choice other than to transfer some of its powers to the executive branch, mostly by delegating to the government and those who act on its behalf the power of enacting regulations that contain primary arrangements (*praeter legem* regulations)' (*Paritzky v. Government of Israel* [64], at p. 790; see also *Rubinstein v. Minister of Defence* [37], at pp. 504-505 {166-167}).

We are therefore witnesses to a phenomenon, which is commonly known, that the Knesset authorizes the executive branch on a frequent basis to determine primary arrangements in various matters. And the more complex our lives become, the more the legislature delegates the power to make primary arrangements to the executive branch. But, even if we have become accustomed against our will to this undesirable phenomenon — 'undesirable' in that it undermines the important principle of the separation of powers and the decentralization of power — the power of the executive branch in all these cases must be enshrined in a law of the Knesset, and apart from in

exceptional cases (such as traffic regulations, for example) the legislature directs the executive branch as to how to exercise its power. This phenomenon as a whole and the problems that it creates were discussed by President Barak in *Rubinstein v. Minister of Defence* [37], and this is what he said (at pp. 504-505 {168}):

> '… primary legislation, which empowers the executive branch to carry out legislative or administrative acts, should determine the primary arrangements within whose scope the executive branch will operate.
>
> > "If the Knesset is the 'legislative branch,' then only an authorization for subordinate legislation that implements the principles and basic criteria (the primary arrangements) that were prescribed in the primary legislation is consistent with this principle"…
>
> By contrast, if the primary legislation authorizes the subordinate legislator to determine primary arrangements, without any directive or guidance, this constitutes a violation of the principle of the separation of powers. "When the Knesset divests itself of the mantle of legislator and entrusts it to the public administration, the legislature seriously violates the principle of the separation of powers"…'.

31. The essence of the matter is that the principle of the primary arrangements and the principle of the separation of powers and the decentralization of power are both, in practice, merely different aspects of the same basic outlook. And the basic outlook that nourishes both of these at their roots is merely this, that primary arrangements are supposed to be determined in a statute of the Knesset — specifically in a statute — whereas the executive branch, the government, is not authorized to determine primary arrangements by virtue of its own authority unless it has been permitted to do so in statute. We should also say that notwithstanding the fact that the principle of the separation of powers and the decentralization of power applies with equal strength, *prima facie*, to both the legislative and the executive branches, in principle 'the essence of the principle of the separation of powers seeks to limit the power of the executive branch' (Rubinstein and Medina, *The Constitutional Law of the State of Israel*, at p. 159). The reason for this is that unlike its two colleagues, the role of the executive branch is to

execute and implement the law and to ensure that citizens comply with norms of conduct.

The principle of primary arrangements as a corollary of the democratic principle

32. Moreover, the requirement that primary arrangements should be determined in a statute of the Knesset — specifically in a statute of the Knesset — is necessitated by the system of government in Israel, which is a system of representative democracy. This was discussed by Justice Beinisch in *Israel Poultry Farmers Association v. Government of Israel* [63] (at para. 10 of her opinion):

> 'The approach according to which the fundamental decisions and norms that bind citizens should be adopted both formally and substantively by the legislature and not by the executive is based not merely on the principle of the separation of powers but is derived from the very concept of democracy and from the representative democracy practised in Israel.'

And as the court said in *Nevuani v. Minister of Religious Affairs* [57], at p. 121:

> '... The democratic principle — as such — permeates the whole legal system in Israel, and it combines with the genetic code of all the binding norms in Israeli law. The genetic force of the democratic principle is not, admittedly, equal in each norm, but there is no norm that is completely devoid of it. In each case we are required to examine the force of the democratic principle, and to decide whether it prevails over other principles and interests that compete with it, or whether it yields to them, even if only in part.'

See also *Yediot Aharonot Ltd v. Kraus* [52], at pp. 72-74.

Indeed, Israel is a democracy. This is stated ceremoniously by the Basic Law: Human Dignity and Liberty, in s. 1A, and by the Basic Law: Freedom of Occupation, in s. 2. Even though a bystander might imagine sometimes that the government is the supreme organ of state, rather than the Knesset (see, for example, the discussion of the 'arrangements laws' in *Israel Poultry Farmers Association v. Government of Israel* [63]), let us not be deceived and permit ourselves to be misled by this erroneous impression. The Knesset is the house of elected representatives of the state; it is the supreme legislative branch, and the government is the executive branch; the Knesset is elected in general and free elections and has the confidence of the people (ss. 4 and 5 of

the Basic Law: the Knesset), whereas the government holds office only by virtue of the confidence of the Knesset (s. 3 of the Basic Law: the Government). Since the Knesset was elected by all the citizens of the state, it represents the citizens and acts as their spokesman. When we realize this, we will also realize that the Knesset alone has the power to decide the basic issues of the state, i.e., to determine primary arrangements for leading the state and its inhabitants. The citizen placed his confidence in the Knesset and thereby authorized it to determine his lifestyle. As President Barak told us in *Rubinstein v. Minister of Defence* [37], at p. 508 {173}:

> 'Democracy means the rule of the people. In a representative democracy, the people choose its representatives, who act within the framework of parliament… The major decisions concerning the policy of the state and the needs of society should be made by the elected representatives of the people. This body was chosen by the people to enact its laws, and it therefore enjoys social legitimacy in its activity of this kind… Indeed, one of the aspects of democracy is the outlook that the fundamental and substantive decisions concerning the lives of the citizens should be made by the body that was elected by the people to make these decisions.'

It follows from this that (*ibid*. [37], at p. 510 {175}):

> 'Thus from the democratic character of the political system it follows that subordinate legislation and administrative directives of the executive branch should have both a formal and a substantive basis in primary legislation, the creation of the primary legislator. The legislature should not transfer the decisive and difficult decisions to the executive branch without giving it instructions. Even if it is directly elected by the people… its function — as its name tells us — is an executive one.'

In other words, the Knesset was chosen by the people to decide basic issues of the state, and we will not find that it is entitled to shirk its authority and transfer it to the government. If it subjects its will to the will of the government, if it yields to the will of the government, then the Knesset will betray its role and the confidence that the people have placed in it. This was discussed by Prof. Zamir in his article 'Administrative Legislation: The Price of Efficiency,' 4 *Hebrew Univ. L. Rev. (Mishpatim)* 63 (1972), at p. 80:

> 'The Knesset can and should fulfil its central role, without which there is almost no reason for its existence, and this is the role of determining the general principles by means of statute. If the legislature shirks this role for any reason, it will fail to carry out its function, undermine its very existence, and what is worse, it will undermine the basis of the democratic nature of the system of government. A political system in which the legislative branch transfers the function of legislating, in the sense of determining general principles, to the public administration will remain a democracy only in name and appearance, but not in practice.'

See also A. Barak, 'Parliament and the Supreme Court — A Look to the Future,' 45 *HaPraklit* 5 (2000), at p. 7:

> 'The supremacy of the Knesset implies that the decisions that are important and fundamental to the nature of the system of government will be made by the Knesset and not by the other branches. This is a unique power of the Knesset. This power is accompanied by a duty. The Knesset itself is liable to realize this power, and it may not... transfer this power to another.'

33. Thus we see that the democratic principle also leads to the conclusion that the power to determine primary arrangements belongs to the Knesset, and that the Knesset should not transfer any of this power to the executive branch, at least not without directing it how to act and what path to follow.

Returning to the provisions of s. 32 of the Basic Law: the Government, 5761-2001, and the limits of residual power

34. Section 32 of the Basic Law: the Government, 5761-2001, is a provision of law that presents the interpreter with quite a few problems and difficulties. Interpreting it literally as it appears at first glance may lead the interpreter to very far-reaching conclusions. It may appear that not only did the government acquire by means of s. 32 a very broad power to act outside the framework of statute — a power that can be described as a limitless power — but also the provision itself does not contain any strict criteria, or any criteria at all, for exercising the power in practice. It may follow from this, one might say, that the government is authorized to make any arrangement that it wishes, provided that the primary legislature, the Knesset, has not addressed that matter and has not determined another arrangement as it sees fit. It need not be said that in the absence of any guide, and under the pressures of everyday life, the government and those acting on its behalf are

likely to be drawn into making that power into a basis for activities that by their very nature were not entrusted, nor should they be entrusted, to the executive branch. In the words of Prof. Bracha in his article 'Constitutional Human Rights and Administrative Law,' *supra*, at p. 175:

> 'Since the scope of the authority granted in s. 32 is not clear, there is great danger that resorting to it may constitute a source for an unnecessary broadening of the powers of the executive branch, as well as its trespassing into the realm of the other branches, the legislative branch and the judicial branch.'

We should cast off this interpretation of the law as an undesirable interpretation. We cannot accept that in such a manner — almost with unlimited authority — the Knesset delegated to the executive branch some of the legislative power entrusted only to it; that the Knesset in this way cast off the power of legislation and transferred it to the government. A separate question is whether the basic principles in a democracy, in which the doctrine of the separation of powers and the decentralization of power prevails, as in Israel, do not fundamentally rule out any power of the legislature to transfer primary legislative power to the government, at least in matters of primary arrangements. But there is no need for us to trouble ourselves with this weighty constitutional question. Let us content ourselves therefore by saying that the interpretation that we mentioned above is unacceptable. The provisions of s. 32 have another interpretation, and this is an interpretation that combines what is good with what is advantageous and brings reality close to the ideal. This other interpretation is the interpretation that is acceptable to us.

35. All streams lead to the sea, and all the basic principles in democracy and in Israel law — and in particular the principle of the rule of law in its substantive sense together with the secondary principles derived from it — lead to the conclusion that primary arrangements were entrusted to the primary legislature, to it and to no other, which also excludes the executive branch. There are two main reasons for this fundamental principle. *First*, it is to protect in so far as possible the liberties of the individual against executive arbitrariness. This is to say that 'the requirement that primary legislation should determine the primary arrangements, whereas subordinate legislation or administrative orders should deal only with executive arrangements, is based on the need to protect the liberty of the individual' (*Rubinstein v. Minister of Defence* [37], at p. 514 {180}). *Second*, it is to determine the limits of the power of the executive branch in its relations with the legislative

branch. In other words, the legislative branch, which is the branch that the citizens of the state elected as their representatives, is the one that should speak for them. It is the one that should determine what may and what may not be done in society and in the state — it, and no other. Once we realize all this, it follows that we will also realize that the residual power that the government acquired in the provisions of s. 32 of the Basic Law: the Government, 5761-2001, which is a small part of all the powers of the government, does not by its very nature contain the power to give the government authority to determine primary arrangements. If we give another interpretation to the provisions of s. 32 — an interpretation that the residual power contains the power to determine primary arrangements — that interpretation will conflict directly with the basic principles of which we have spoken and undermine the principle of the rule of law in its substantive sense, and it may deal a mortal blow to the rights of the individual. Indeed, this other interpretation — the interpretation with which we do not agree — may be argued by some to be consistent with the principle of legality in its narrow and restricted sense. But the power that the government will acquire in accordance with that interpretation is such broad and unlimited power that the fear — and it a considerable fear — of harm to the rule of law will be sufficient to reject that interpretation. As Knesset Member Prof. Klinghoffer said, when he explained his opposition to the enactment of the provisions of s. 32 (at that time — s. 29):

> 'The serious nature of this arrangement lies in the fact that it is in total conflict with the principle of the rule of law… The rule of law does not mean that it is sufficient for every official act to have a formal basis in statute. If this was the case, then there would be no reason to oppose section 29 [now section 32], since it will create the so-called "residual" power of the government and serve as a basis for it. But this meaning is not the accepted meaning of the rule of law. It would drain the idea of the rule of law of any content. Even in dictatorships there are laws, but they give the dictator an unlimited authority to do whatever he wishes. Is that called a state where the rule of law prevails?' (Knesset session of 6 August 1968, *Divrei HaKnesset*, vol. 52, at p. 3101).

Indeed, we in the court have also discussed the dangers inherent in s. 32, and we have said that the broad power that the government acquired under this section to determine arrangements that are not mentioned in statute gives rise to difficult questions regarding the rule of law (*Shimoni v. Prime Minister*

[39], at para. 12). There can only be one single conclusion that is implied by all of the above: the provisions of s. 32 are not capable of authorizing the government to determine primary arrangements.

36. The essence of the matter is that s. 32 of the Basic Law: the Government, 5761-2001, ought to be subservient to the basic principles of the law. For our current purposes we can say that it does not have the power to authorize the government to determine primary arrangements that are entrusted — according to the principles of the system of government in Israel — solely to the legislative branch, which is the Knesset.

The difference between a primary arrangement and a secondary arrangement

37. Now that we know that the residual power of the government pursuant to s. 32 of the Basic Law: the Government does not include a power to determine primary arrangements and that the determination of primary arrangements is the sole prerogative of the Knesset, whereas the government only has power to determine secondary or executive arrangements, there still remains the question of which criterion we should adopt to determine what is a primary arrangement. How do we distinguish between a primary arrangement and a secondary arrangement? The answer to this question is not at all simple, and the boundary between primary arrangements and secondary arrangements can sometimes be somewhat vague. Indeed, there are arrangements with regard to which everyone will agree that they are primary arrangements or secondary arrangements. We all agree, for example, that obligations that the state imposes on the individual — an obligation to pay tax, an obligation to serve in the army and other similar obligations — are all primary arrangements. By contrast, deciding upon forms that the individual is obliged to complete in order to implement a certain law is a secondary arrangement. But the main issue is the grey area between these two extremes, and the grey area, unfortunately, is a very broad area. It can be said of this area that the determination of the question of the distinction should be made in each case by addressing the nature and substance of this issue under discussion, the background of the basic principles upon which the legal system is based, and by using common sense and our logical faculties. Indeed, when we say that primary arrangements are those arrangements that by their very nature should be determined by the Knesset, and that the nature of the arrangements and the circumstances of the case will determine the matter, we are resorting in some degree to a tautology. As the court said in *Paritzky v. Government of Israel* [64], at p. 790:

> 'Primary arrangements are those arrangements which, because they relate to norms of conduct that apply to the whole public or to basic issues in our lives, we expect the primary legislator to determine in statute… This definition of primary arrangements is a somewhat circular definition, and the identification of these primary arrangements will be made when the matter arises and on a case by case basis.'

At the same time, once we know that the starting point for the voyage of interpretation and deliberation is found in the basic principles that shape the legal system in Israel — the rule of law (in its substantive sense), the principle of the separation of powers and the decentralization of power, the rights of the individual, etc. — we shall also know that we can make use of these substantive principles to solve the difficulty. Therefore we can say that the substance of the arrangement, its social ramifications and the degree to which it violates the liberty of the individual all affect the determination whether we are dealing with a primary arrangement or a secondary arrangement. In the words of Justice Naor in HCJ 1437/02 *Association for Civil Rights in Israel v. Minister of Public Security* [72], at p. 760:

> 'The distinction between a primary arrangement and a secondary one is not straightforward. The nature of the arrangement, its social ramifications, the degree to which it violates the liberty of the individual — all of these affect the scope of the primary arrangement and the degree of detail required of it; even in a modern democracy it is difficult to uphold the doctrine of primary arrangements fully.'

The formulae for determining the scope of a primary arrangement vary, and there is no reason for us to go into them at length. All of this and more was discussed by my colleague President Barak in *Rubinstein v. Minister of Defence* [37], and whoever studies that judgment will understand the matter. See *ibid*. [37], at pp. 515-517 {182-185}.

38. The answer to the question whether a certain activity of the government constitutes a primary arrangement or not will therefore be found in the circumstances of each individual case, while taking into account the nature and substance of the matter and relying, of course, on good common sense and logic. Thus, *inter alia*, we should examine the degree to which the arrangement affects the public in Israel, and it is clear that an action that is designed to have a limited and specific purpose and is close in nature to executive powers should not be treated in the same way as an action that is

capable of affecting a whole sector of the public, or even society as a whole, and which is close to a primary arrangement according to its definition (cf. *Rubinstein v. Minister of Defence* [37], at pp. 523, 529 {193, 202}; HCJ 910/86 *Ressler v. Minister of Defence* [73], at p. 505). Let us therefore examine the purpose of the act to see whether it is designed for a purpose that is a subject of disagreement among the public — a purpose that may arouse the anger and dissatisfaction of parts of the people — or whether it is supported by a broad public consensus (*Rubinstein v. Minister of Defence* [37], at pp. 527-528 {198-201}); the cost of the act will also affect its nature, and it is clear that an act whose financial significance is minimal cannot be treated in the same way as the transfer of tens of millions of sheqels from the public purse to a certain sector (cf. s. 40(a) of the Budget Principles Law, 5745-1985).

39. The extent of the legislature's involvement in an act and its effect on it will also shed light on the question whether an arrangement is a primary one or a secondary one. Thus, for example, we should examine if we are dealing with acts that were intended to ensure the implementation of a statute that is in the advanced stages of legislation, or whether the act requires the approval of the Knesset or its committees (*Shimoni v. Prime Minister* [39], at para. 4 of my opinion). The circumstances of the case will also affect the nature of the arrangement. Thus, for example, we cannot ignore the stage at which the matter is brought before the court — whether it is before the event or after the event — since scrutiny and guidance before an event are not the same as scrutiny and guidance after an event (*Shimoni v. Prime Minister* [39], *ibid.*). The question of how urgent an activity is should be examined: are we speaking of an urgent act that the government is required to carry out as the executive branch of the state, or of a long-term policy decision that the Knesset can and should consider? Weight should be given to the degree of public reliance on a government promise, etc.. The list of considerations, it need not be said, is not a closed list. The decision, as aforesaid, should be made in accordance with common sense and logic, provided that we are guided by the basic principles of the rule of law and the other principles of which we spoke above.

Is a transfer of money from the state budget a primary arrangement?

40. Now that we know that the provisions of s. 32 of the Basic Law: the Government, 5761-2001, do not contain the power to authorize the government to determine primary arrangements in law, let us turn to look at our own case, and let us ask whether the government is permitted, by virtue

of the state budget and according to its residual power in s. 32 — according to these alone since there is no specific law that authorizes it in this regard — to determine an arrangement according to which money from the state treasury will be allocated for certain purposes or for certain sectors of the population. If we compare the state to a body, then the budget is the blood that flows through the arteries and veins of the body, it is the elixir of life that allows the body to live and function. The blood flows throughout the body and is what allows the limbs to function, each according to its role, and the whole body to live and move. The question that arises, therefore, is the following: according to the wording and provisions of s. 32 — subject to every law and in the absence of any other authority that is authorized to carry out the act — is the government authorized, on behalf of the state, to allocate money from the state budget as it wishes and without any limit, merely by relying on what is stated in the annual budget law? Do the budget law and its residual power — in the absence of a specific law that allows it to expend budget money for various purposes — combine to make the government the sole arbiter and authority with regard to the ways of allocating the budget money?

41. In the past, the court has expressed criticism of the undesirable practice that has taken root in the activity of Israeli governments, whereby the government allocates huge budgets for certain purposes or for certain sectors of the population without a law that is designated for this purpose, without clear criteria being determined by the legislature, and without the Knesset, in its capacity as legislator, considering these transfers of money, ordering them or at least approving them. We compared these huge expenses to benefits that the government allocates for persons in need under an express and detailed statute, and *inter alia* this is what we said in HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at p. 202:

> 'If you study the matter, you will see that the National Insurance Institute (for example) will not pay a person in need a few hundred sheqels without that person satisfying detailed and precise tests that the law provides. Moreover, an examination is made for each individual payment, there are reviews, and every decision and every payment are subject to the scrutiny of the various courts in accordance with rules that have been determined in advance and in detail. All of this is the case with regard to subsistence payments. But when it comes to granting huge amounts, the tests are only general and vague tests: the government policy is what will decide the matter — a policy

> that was not formulated in the furnace of a substantive, specific and detailed statute — and for which there was no proper scrutiny, *ab initio*, of the legislature and the people.'

In the same vein, we said in HCJ 8569/96 *Federation of Working and Studying Youth v. Minister of Education* [75], at p. 620:

> 'A person must take infinite pains and produce a significant number of documents, certificates and approvals to the authorities before he will be entitled to a state loan for housing. A person must make considerable efforts, he must run here and there to prove his personal status before he becomes entitled to a reduction for a payment that everyone has to make. He must do all this merely for subsistence. But when it comes to granting huge sums, civil servants are so easygoing. Can we reconcile ourselves to this serious phenomenon that has today been revealed to us?'

The same occurred recently, in *Shimoni v. Prime Minister* [39], where we discussed the congenital defect inherent in granting money by virtue of the government's residual power, without any provision of statute providing primary arrangements for the distribution of that money (*ibid*. [39], at para. 2 of my opinion):

> 'A disturbing question is whether the government is competent to give grants, benefits and support where the power to do all this is based only on the budget law and the residual power of the government in accordance with s. 32 of the Basic Law: the Government, 5761-2001. How can the government acquire such wide-ranging power to grant rivers of money, as a matter of policy, without the Knesset, the legislature, examining, checking, scrutinizing and approving the allocation of that money in a specific, explicit and detailed statute? Indeed, it is a disturbing question. We all know that payments that the government and public authorities make to an individual in accordance with statute are given only when exacting and extremely detailed requirements are satisfied by the individual, yet here grants, support and benefits worth millions are paid out in accordance with a decision that was not scrutinized by the Knesset on its merits. We have also discussed this in the past.'

Also see and cf.: *Bachar v. Minister of Defence* [44], at p. 809; *Gross v. Ministry of Education and Culture* [46], at p. 57; Z. Falk, 'The State Budget and Administrative Authority,' 19 *HaPraklit* 32 (1963).

42. It is true that in the past we have on more than one occasion encountered cases in which the government gave budgetary grants or benefits to various parties even without authorization in statute, and the court not only did not prevent those transfers of money but even went on to determine 'rules and principles for guiding the state when distributing grants, and in addition to these, principles for its intervention where there was a departure from those rules and principles' (*C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at p. 202). Thus, for example, we held that an act of allocating money was subject to the principles of administrative law, in which the duty to act with good faith, fairness and integrity, in a proper and just manner, according to relevant considerations, equally and without discrimination. See, for example, *Association of Insurance Appraisers in Israel v. State of Israel* [41]; HCJ 363/71 *Dagan Flour Mill Ltd v. Minister of Trade and Industry* [76], at p. 298; HCJ 198/82 *Munitz v. Bank of Israel* [77], at p. 470; HCJ 366/81 *Association of Tour Bus Operators v. Minister of Finance* [78], at p. 118; HCJ 49/83 *United Dairies Ltd v. Milk Board* [79], at p. 524; *C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at pp. 203-204; etc.. My colleague President Barak based his opinion in this case on these principles, and I agree entirely with his remarks. All of these rules, principles and doctrines revolve around the way in which the government acts within the scope of its authority, the way in which it implements a matter which everyone agrees the government is competent to consider and to do. But our case here does not concern methods of implementation; it concerns the question whether the government is competent, in principle, to do what it did in its decisions.

To remove doubt and to prevent misunderstandings, we should add that these spheres are not unrelated to one another. They are nourished by one another and affect each other. In other words, the question of authority is not completely separate from the question of discretion. Thus, for example, giving grants by virtue of the residual power to specific projects or certain sectors of the population may harm, and *de facto* does harm, the expectations of other project promoters or sectors of the population that do not receive grants. The state budget is limited, and it is the way of the world that resources do not cover needs. A good imagination is unnecessary in order to know and understand that giving grants to one sector — preferring that sector to other sectors — is tantamount to harming other sectors. See and cf. Rubinstein and Medina, *The Constitutional Law of the State of Israel* (fifth

edition, 1996), at pp. 785 *et seq*.; *C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at p. 216; HCJ 1030/99 *Oron v. Knesset Speaker* [80], at p. 658; HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [81], at p. 471; HCJ 28/94 *Zarfati v. Minister of Health* [82], at p. 817. Thus, all grants of money are intended for implementing a policy that seems right to the party giving the grant; all grants of money mean, expressly or by implication, a preference of one person or project over another person or project, and it may involve, intentionally or unintentionally, an unlawful preference, which is discrimination. And if we are speaking of a large injection of money, the question of preference — even if it is a preference without any impropriety — will enter into the question of authority by osmosis. In the language of numbers we can say this: giving 100 sheqels is the prerogative of the administration; giving one hundred million sheqels is the prerogative of the legislature.

43. Our case therefore is an attempt — and it is not an easy matter — to draw the line and distinguish between those matters that fall within the purview of the administration and are subject to the accepted rules of administrative law, and matters that are in the realm of the legislature because they are primary arrangements. As a premise we can say that a distribution of money by the government — in accordance with the budget law, of course — without the Knesset having considered that distribution expressly and specifically can only mean that the government, rather than the Knesset, has determined a primary arrangement for such distribution. Since we know that the government does not have the power to determine primary arrangements unless it has been authorized to do so by statute, we will know that such a distribution of money is not within its power even if it is intended for a proper purpose. This, however, is not the position in every case, and each case will require consideration on its own. But we can say that —

> 'If the budget law gives the government authority to expend a certain number of billions of sheqels, without there being a specific and detailed law that stipulates specific conditions, qualifications and policies — i.e., without the Knesset enacting a law that determines primary arrangements — the act is tantamount to a delegation of legislative power from the Knesset to the government. This cannot be allowed in a democracy that is built on the principle of the decentralization of power' (*Shimoni v. Prime Minister* [39], at para. 3 of my opinion).

Turning from general principles to the specific case — introduction

44. After all of this theoretical discussion, let us take a look at our case, at those government decisions that established national priority areas in Israel, namely government decision no. 3292 and government decision no. 2288. First, let us consider the government decisions themselves, and of these the more important and material one for our case is decision no. 2288.

45. A study of the documents will show us that the decision to establish a certain area as a national priority area is a decision of great significance, since it gives rise to many different benefits, in many different areas of life, to the residents and towns inside those areas. Thus, *inter alia*, the residents of a national priority area are entitled to benefits in housing and rent, including aid and reductions in buying real estate and plots of land; the education system in the area is entitled to benefits and incentives, including reductions in the payment of tuition fees in kindergartens, a subsidy of school buses, special budgets for schools, giving special incentives to teachers who teach in them, and even giving scholarships to students who live and study in the area; the residents are entitled to benefits in the field of welfare, including incentives and grants to persons of certain professions who choose to move their homes to the area; business owners who choose to operate in the area, and similarly the residents of the area are entitled to tax concessions (concessions that grant them, of course, an advantage over other businesses that do not receive those concessions); the business owners and residents in the area are also entitled to benefits in the field of employment and to preferential treatment for government purchasing; local authorities are entitled to development budgets and aid from the government; and there are many other benefits. Let us cite some of the remarks that were made at the beginning of government decision no. 2228 of 14 July 2002, which speak for themselves:

> ‘2228. **National Priority Areas**
>
> It was decided (18 votes in favour):
>
> To determine the national priority areas and towns in the Negev, Galilee, Jerusalem, Judaea, Samaria and Gaza. In these areas a variety of benefits and incentives will be given in order to further their advancement, reduce the gaps in the standard of development and standard of living between the national priority towns and all the other towns in Israel, encourage the next generation to settle in the national priority towns, encourage the settlement of new immigrants and of longstanding citizens in the national priority towns, while implementing the government

policy with regard to the planned distribution of the population throughout the territory of the state.

The aid and incentives to encourage investment of capital in industry are intended to promote development of a production capacity and the improvement of human capital in national priority areas by means of private initiative, to act as an instrument for creating stable and flourishing places of employment, while reducing the environmental damage and making effective use of national infrastructures. In addition, where possible, the aid is intended to strengthen the cooperation between local authorities by means of common management of industrial areas in national priority areas.

The aid and incentives to encourage capital investments in agriculture are intended to promote development of agricultural exports, development of products that are major import replacements, effective use of natural conditions, economic capability, technical knowledge and professional experience that are involved in the agricultural sector, all of which while promoting the agricultural sector as a pioneer and a contributor to security and social welfare.

The aid and incentives to encourage capital investments in tourism are intended to develop tourism as a major sector of the state economy, which contributes towards improving the balance of payments and creates places of employment in peripheral areas.

The aid in the field of education is intended to improve the standard of achievement of students in the national priority areas with the aim of reducing gaps and creating a qualitative and equal education system, in view of the fact that the level of education constitutes a leading variable in creating a socio-economic spectrum of opportunities.

The incentives and benefits in the field of housing are intended to strengthen the socio-economic basis of the national priority towns, to help the second generation, new immigrants and long-standing citizens to buy an apartment and make their homes in national priority towns and to promote the policy of the government with regard to a planned distribution of the population throughout the country.'

If we look at the government decision to establish national priority areas and the benefits that the residents and towns in those areas are supposed to receive, even someone who is not blessed with a fertile imagination will know that we are dealing with a decision that is very far-reaching. It is a decision whose importance can hardly be exaggerated. Its ramifications are substantial and its influence extends far and wide.

46. In addition to the government decision, let us look at the statute book and we will see that there is no express substantive law that provides a power to make such decisions. The question is therefore whether the government was competent to make the decisions that it did by virtue of its residual power in s. 32 of the Basic Law: the Government, 5761-2001? We will recall that the aforesaid s. 32 tells us:

'Residual powers of the government

> 32. The government is competent to do on behalf of the state, subject to any law, any act whose performance is not delegated by law to another authority.'

In order to examine this question, let us follow the path that we have outlined in our opinion. Let us first examine the 'internal restrictions' upon the creation of residual power — these are the restrictions provided in the actual provisions of s. 32 — and thereafter let us turn to consider those 'external restrictions' whereby basic principles and doctrines in the legal system prevent the creation of residual power.

Turning from general principles to the specific case — 'the internal restrictions'

47. According to the provisions of s. 32 of the Basic Law: the Government, 5761-2001, the government has (residual) power to do on behalf of the state any act — and 'act' is agreed by everyone to include making various kinds of normative arrangements — subject to the following two restrictions: *first*, it is 'subject to any law,' and *second*, doing the act 'is not delegated by law to another authority.' We called these restrictions 'internal restrictions.' The meaning of this is, as we have seen, that where there is a 'law' that regulates a certain activity or a certain sphere of life, then that activity or sphere of life, *prima facie*, falls outside the scope of the residual power acquired by the government. This is also the case with regard to a negative arrangement that surrounds that law. In our case, there is a relevant statute, which is the Development Towns and Areas Law, 5748-1988, and the question that arises is whether the activity that the government decisions address — the establishment of national priority areas and giving

various benefits to residents and towns in those areas — is identical or similar to actions under the Development Towns and Areas Law. For if the activity in both cases is the same or similar, then it can be said that there is a 'law' that regulates the matter, and it follows from this that the government does not have (residual) power to do that activity because of the restriction of 'subject to any law' (and because of the additional restriction that there is another authority that has jurisdiction). In order to examine this, we should examine the arrangements that the government determined in its decisions and the arrangements that were provided in the Development Towns and Areas Law, and then we should compare the two and reach a conclusion as to whether the arrangements determined by the government are indeed inconsistent with the arrangements provided in the Development Towns and Areas Law.

48. We have reviewed the government decisions in our remarks above, and now let us turn to examine the Development Towns and Areas Law. The Development Towns and Areas Law was enacted by the Knesset in 1988 and it contains twenty-four sections. The purpose of the law, as stated in s. 1, is 'to encourage the settlement, development and socio-economic promotion of development towns and areas and their inhabitants,' and the essence of the law is to provide detailed arrangements for giving benefits to development towns. A 'development town,' according to the definition in s. 3 of the law, is an area that a ministerial committee, which is made up of twelve members (s. 4(a) of the law), has declared to be a development town, because of the distance between it and population centres in the centre of the country, the aim of encouraging a spread of the population and the purpose of promoting its economic and social strength, its quality of services and the state of security in the area. The law itself gives details of benefits that will be given to development towns in several walks of life and in accordance with criteria that are provided therein, including grants to local authorities (s. 5); reductions in municipal property tax for residents (s. 6); priority for investment plans (s. 7); tax concessions (s. 8); housing grants and benefits (ss. 9 and 10); grants for new immigrant families (s. 12); benefits in education in kindergartens, infant day care, primary and secondary schools, higher education, technological education and informal education (ss. 13-18), etc..

49. There is no need for major research in order to understand and realize that the arrangements provided in the Development Towns and Areas Law, on the one hand, and the arrangements determined by the government in its decision to establish national priority areas, on the other, are very similar

indeed — so similar, in fact, that they are almost identical. In examining both theory and practice, both arrangements are alternatives to one another, since they seek to cover the same walk of life, namely special areas in Israel. The government decision calls these special areas national priority areas, whereas in the Development Towns and Areas Law they are called 'development towns and areas.' But the difference in the names should not deceive us. The description is different but the essence is the same.

50. Were the Development Towns and Areas Law a living and breathing law and were the law implemented, even in part, then the government would not be competent — by virtue of its residual power — to make the decisions that it made to establish national priority areas. In other words, since the arrangements in the law and the arrangements in the national priority areas seek to cover exactly the same ground, then in view of the arrangements in the law, the government would not have any residual power in this sphere of life. But the Development Towns and Areas Law has been, since the day it came into the world, a theory that has never been put into practice. Notwithstanding the fact that the law is on the statute book as a valid law, the government has not taken the trouble to implement it, and by paving a route that bypasses the law — supposedly by means of its power in s. 29 of the Basic Law: the Government, 5728-1968, which is s. 32 of the current Basic Law — it has seen fit to ignore the law's existence utterly. The bypass route lay in decisions of the government or ministerial committees to grant various benefits to towns that they classified as development towns under those decisions, so that hundreds of towns received various benefits by virtue of decisions that were made from time to time. After it transpired that confusion reigned in this area of benefits, and this led to inequality and to a waste of state resources, the government decided, once again purportedly by virtue of its residual power, to correct the situation that had been created, and it established national priority areas — national priority area A and national priority area B — where the residents and the towns were supposed to be entitled to benefits that would be given by various government ministries. These national priority areas are the national priority areas before us; they were established in place of the arrangement that was determined by the Knesset in the Development Towns and Areas Law.

51. Against this background, the Kiryat-Gat Municipality filed a petition in which it argued that once the Development Towns and Areas Law was enacted, the government no longer had 'residual' power to determine an alternative arrangement to the arrangement provided in the law. The court granted the petition, and this gave rise to the case law rule in *Kiryat Gat*

Municipality v. State of Israel [33], a ruling that we have discussed extensively in our remarks above. This is what the court held in that case, *per* Justice Goldberg (*ibid*. [33], at p. 844):

> 'A comparison of the law with the government decision reveals that both of them deal with the very same material: the distribution of population, the advancement and development of towns that will be classified as development towns and areas, by giving benefits and incentives. The government decision was merely intended to create a "parallel track" to achieve the same goal in with a different conception and criteria to those provided in the law. A proof of the "friction" between the two can be seen in the statement in the government decision that "these decisions shall not be regarded as decisions for the purpose of the Development Towns and Areas Law, 5748-1988"; in the statement that the inter-ministerial committee would also deal with "making the adjustments to the required legislation and subordinate legislation"; in the government decision of 31 August 1993 to postpone the commencement of the law by three years; and in the content of the draft law that was tabled as a result, which seeks to postpone the commencement of the law and to give the proposed amendment retroactive effect "on the date of the commencement of the main law."
>
> The aforesaid duality of the law and the government decision cannot be consistent with the language of s. 29 [of the Basic Law: the Government, 5728-1968, now s. 32 of the Basic Law: the Government, 5761-2001] and its legislative purpose. Extending the power of the government in a way that will allow such a situation blurs the boundaries between the executive branch and the legislative branch and undermines the very essence of the constitutional system in Israel, which is based on the separation of powers between the branches. The qualification in s. 29 that the government is competent to act "subject to any law" does not say only that it is prohibited for government acts to conflict with any law or to breach any law, but also that when there is a law that creates an arrangement, the power of the government yields to it, and it cannot create an alternative arrangement. If there was a legal void, then it existed until the law that created the arrangement was enacted. From that time onward, the void in the law was filled, and the

> government was not left with any more residual power in that particular matter... The possibility that the government is free to act on a "parallel track" to the legislation that regulated the matter certainly is inconsistent with the proper legal policy to reduce, in so far as possible, the scope of s. 29 as an independent source of authority.
>
> What is more, the government decision also is inconsistent with the qualification of 'subject to any law' in s. 29, in the sense that the power to classify development towns and development areas was granted in law to the ministerial committee that was established by the law. Once this power has been granted by law to one authority, the government does not have power to do this.'

The court said in summary (*ibid.* [33]):

> '... The government decision cannot exist together with the law, as long as it is not repealed or amended, and therefore we should make an absolute order, as requested... that the respondents should refrain from carrying out and implementing the government decision...'.

52. The case law ruling in *Kiryat Gat Municipality v. State of Israel* [33] was determined when the Development Towns and Areas Law was in force and when the government tried to bypass it, rather than to implement it, by creating a bypass route of establishing national priority areas. The court found that the act of the government was contrary to the act of the Knesset and the principle of the separation of powers and the decentralization of power, and therefore it set aside the government decision (even though it held, by a majority, that the decision to set it aside would be suspended for four months from the date of the judgment). This time the government acted promptly. Thus, after the petition was filed and a month before the judgment was given, the state asked the Knesset to decide — in view of difficulties that had arisen in implementation and in view of the burden that implementation would impose on the state budget — to postpone the commencement of the law by three years. As the explanatory notes to s. 19 of the draft State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals) Law, 5754-1993 (*Draft Laws*, 5754, 16, at p. 28), state:

> 'The Development Towns and Areas Law was enacted in 1988. The law authorizes a ministerial committee for development towns to classify the development towns and to give them a

> series of benefits in various matters. A condition for giving the benefits, for all the towns apart from border towns, is that they are removed from the list of towns entitled to Income Tax concessions.
>
> According to estimates of the Budgets Department, the cost of implementing the law after cancelling the Income Tax concessions is approximately NIS 150 million.
>
> The law has not been implemented until the present, both because of the fact that the mayors of the towns have not agreed to waive the tax concessions in return for receipt of the benefits thereunder, and also because of the budget cost involved in implementing it.
>
> Recently the government adopted the recommendations of a committee of heads of departments to draw up a map reclassifying development towns and areas, and it decided to establish an inter-ministerial committee for implementing the recommendations, which will examine the legal, economic and public ramifications of the matter.
>
> It is proposed that the commencement of the Development Towns and Areas Law should be postponed by three years in order to allow the committee that was established to examine the legal and economic aspects and to adapt the legal position to the decisions and policy that have been determined with regard to national priority areas.'

53. The Knesset acceded to the government's request and the commencement of the law was postponed until 1996. The time passed, 1996 approached, and we see that the government once again asked the Knesset to postpone the commencement of the Development Towns and Areas Law by a further period until 1999. The request was explained on budgetary grounds: the cost of implementing the law. As the explanatory notes to s. 10 of the draft State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals) Law, 5756-1995 (*Draft Laws*, 5756, 136, at p. 141) stated:

> 'The cost of implementing the law is an amount of approximately NIS 500 million per annum, and therefore it is proposed to postpone its implementation by three more years.'

54. The Knesset once again acceded to the government's request, and it postponed the commencement of the law until the 1999 budget year. But even in 1999 the law did not come into effect, and shortly before it was

supposed to come into force the government once again asked the Knesset to postpone its commencement by an additional five years, until the year 2004. This time no reasons were given. The Knesset acceded to the government's request and postponed the date of the law's commencement. See s. 5 of the draft State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals) Law, 5759-1999 (*Draft Laws*, 5759, 6, at p. 8) and s. 4(2) of the State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals) Law, 5759-1999, that was enacted and published in *Statutes*, 5759, 90.

55. When five years had passed, during which time the government adopted decision no. 2288 to establish national priority areas, which is the decision being challenged in the petition before us, the government decided to rid itself, once and for all, of the Development Towns and Areas Law. It therefore asked the Knesset to repeal the law in its entirety and to allow the government to distribute state resources as it saw fit. According to the explanatory notes to s. 115 of the draft Economic Policy for the 2004 Fiscal Year (Legislation Amendments) Law, 5764-2003 (*Government Draft Laws*, 5764, 52, at p. 163):

> 'According to the Development Towns and Areas Law, 5748-1988, development towns and areas should be allocated a series of benefits that are reflected in increased grants to the local authorities and grants and various tax concessions to the residents, including increased education and welfare services, fully funded by the state, where the value of these benefits may amount to hundreds of millions of new sheqels. The commencement of the law has been postponed several times and has been fixed for the 2004 fiscal year.
>
> The government is already acting today to give priority to certain areas and sectors, both in accordance with the national priority areas and in accordance with decisions concerning various multi-year plans (border area, specific treatment, Arab sector, etc.) and is allocating various benefits for these areas, which are reflected both in grants to the local authorities and in giving priority in education, welfare, taxation and land allocations. All of this will be subject to budgetary constraints and priorities as determined each budget year. Therefore it is proposed that the aforesaid law should be repealed...'

But this time the Knesset did not accede to the government's request, and instead of repealing the Development Towns and Areas Law, it decided in a law to postpone its commencement by three years, until 2007. That is how the law stands at the present.

56. The position is therefore as follows: in 1988 the Knesset enacted the Development Towns and Areas Law, and it provided in it an express and detailed arrangement for distributing various grants and benefits to the areas of the country that need social and economic development and advancement. This arrangement has never been repealed, but its commencement has been postponed time and again, mainly for budgetary reasons. At the same time, in addition to the law, the government created a route that bypasses the law — or perhaps we should say a route that bypasses a postponed law — and it began to give 'national priority areas' the very same benefits, or some of the same benefits, that the law sought to give, this time by virtue of its residual power. The government even turned to the Knesset and asked it to repeal the law entirely and give it the exclusive power to grant money, but the Knesset refused to accede to this request. Against this whole background, the following is the problem that we are charged with solving: when the Knesset decided to enact a law that provides arrangements for giving pecuniary grants when various conditions are fulfilled, and when it went on to say that the commencement of the law would take place after a certain number of years, is the government competent, by virtue of its residual power, to give pecuniary grants that are addressed by the law during the interim period until the law comes into effect? Should we say that postponing the commencement of the Development Towns and Areas Law created a 'void,' and that the government was therefore entitled, in accordance with its residual power, to grant all or some of the pecuniary grants, at least in accordance with the law? Or, in the words of the respondents in their reply, should we say that the events that have taken place have taught us that —

> 'Once again an administrative void has been created with regard to the implementation of a socio-economic policy; [and] since this is the case, it should not be ruled out that this void may be filled by the government's use of its residual power'?

Has the government therefore made use of its (residual) power, or should we express the matter differently by saying that the actual arrangement provided in the Development Towns and Areas Law, or the very fact that the Knesset saw fit to address this matter of giving pecuniary grants to certain areas and towns in Israel — whether those areas and towns are called

development towns or whether they are called national priority areas — shows that the Knesset wanted the arrangement that it determined to apply, in the manner that it determined, and in this way it deprived the government of its residual power?

57. Let us be frank and say that this question is not an easy one. We have considered it at length and we have not reached a clear decision. On the one hand, it may be argued that the enactment of the Development Towns and Areas Law together with the sequence of events since it was enacted in 1988 until the present — a period of seventeen years — indicates that a kind of negative arrangement has been created around the law, a negative arrangement that prevents the government from having residual power to give pecuniary grants that it wishes to give to the national priority areas. We should remember, in this context, that the Knesset expressly rejected the government's request to repeal the Development Towns and Areas Law utterly, something that would, according to the government (and we will say more on this below), free its residual power from the restraints that surrounded it and allow it to give pecuniary grants in accordance with a policy that it would determine from time to time without being bound by a statute of the Knesset. Logic dictates that the meaning of this is that the Knesset refused to allow the government's residual power to awaken from its slumber so that it might give pecuniary grants to certain areas of the country in accordance with its policy from time to time. In refusing to accede to the government's request, it is as if the Knesset expressed its opinion that the law should indeed continue to exist, and not merely parts or a portion of it. And by postponing the commencement of the law, it is as if the Knesset expressed its opinion that, for the time being, the law should not be implemented in its entirety or in part. Admittedly, had the government asked the Knesset to limit the scope of the law, by adapting it to its policy that it applied in the national priority areas, the Knesset might have acceded to this request and it might have refused. But it should have adopted this course rather than bypassing the law by postponing the commencement of the law and determining another arrangement in its place.

On the other hand, we cannot say without reservation that the Knesset consciously and deliberately sought to prevent the government from giving grants and benefits to national priority areas; on the contrary, the Knesset knew all along the way that, notwithstanding the fact that the commencement of the law had been postponed, the government was continuing to give grants to national priority areas. Against this background, it might be argued that the Knesset did not seek at all to create a negative arrangement around the law;

all that the Knesset intended was to shirk the responsibility of distributing benefits, or, to be more precise, of determining primary arrangements for distributing benefits, and at the same time to place the implementation of this task at the government's door. The Knesset therefore wanted — according to this argument — to entrust the determination of the primary arrangements for distribution solely to the government, under the general supervision of the Knesset.

58. Both of these approaches are reasonable, and we cannot rule out either of them. But when both of them are placed before us side by side, we realize that we are not required to decide between them at all, nor to go on to determine whether the *internal* restrictions on the residual power of the government are satisfied in our case or not. The reason for this is that when it enacted a clear and express law concerning the distribution of benefits, the Knesset itself stated its express opinion that the arrangements for distributing benefits of the kind under discussion is a primary arrangement and that it should be made in a statute of the Knesset rather than in subordinate legislation or in a government decision. It follows from this that there are *external* restrictions on the residual power of the government. We shall consider this issue further in our remarks below, and as we shall see there are additional reasons — substantial reasons — for reaching the conclusion that by virtue of the external restrictions on its residual power, the government was prohibited from deciding upon national priority areas in the manner that it did.

Turning from general principles to the specific case — 'external restrictions' — the power to determine primary arrangements; the violation of the basic rights of the individual

59. We have discussed the internal restrictions in s. 32 of the Basic Law: the Government, 5761-2001, and we have expressed our opinion that the government decisions that established the national priority areas are decisions that were made *ultra vires*. The reason for this is that they were not made in accordance with an authorization in a substantive law, and since they are not consistent with the restriction of 'subject to any law' they also do not fall within the scope of the government's residual power. There is a law, namely the Development Towns and Areas Law; the arrangement determined in the government decisions is a 'parallel arrangement' to the arrangement in the Development Towns and Areas Law; therefore the government never acquired residual power to make the decisions that it made. But this is not all. Our opinion is that the government decisions concerning the national priority

areas also do not satisfy the external restrictions that surround the provisions of s. 32 of the Basic Law — those restrictions that tell us that in the absence of an express and detailed substantive law, the government does not have residual power to make primary arrangements.

60. Anyone who looks at the government decisions will easily reach the conclusion that the act of establishing national priority areas is tantamount to declaring a major policy, an all-embracing policy that gives significant and meaningful preference in many different walks of life to large areas of the country. It need not be said that a decision to benefit, to a significant degree, towns and residents in certain parts of the country has necessarily a significant effect also on the residents of the other parts of the country. This effect is recognizable in each of the benefits that the decision is supposed to provide: housing, agriculture, tax payments, education and other benefits. Moreover, benefits that will be given to the residents of the national priority areas will necessarily have an effect on the state budget, i.e., on the other inhabitants of the state. Let us therefore read the government decision and say the following: if this decision is not a primary arrangement, or to go further, if it is not a prime example of a primary arrangement, then we do not know what would be a primary arrangement. After making a decision of this kind, what remains for the Knesset to do? We can therefore say that because of its broad application and the large number of benefits that it provides, the decision to establish national priority areas appears to be a primary arrangement; its content is the content of a primary arrangement; it sounds like a primary arrangement; and it operates like a primary arrangement. From all of this we know that the decision concerns a primary arrangement.

61. And if anyone still has any doubt that the government's decision is a primary arrangement — and in our mind there is no doubt at all — let the Development Towns and Areas Law itself come and testify that the decision concerns a primary arrangement. We see that the Knesset itself was of the opinion — and rightly so — that giving benefits in many different walks of life to the residents of specific areas in Israel requires a primary arrangement in a statute of the Knesset, and for this very reason it enacted the Development Towns and Areas Law. Thus, the very enactment of the law shows that it is a primary arrangement. The law, as such, is a manifestation of the outlook of the Knesset — the supreme body in the state — that it took the trouble to enact a law because the matter, in its opinion, concerns an arrangement of prime importance. Now that we know that the government decision is similar in content, very similar, to the content of the Development Towns and Areas Law, it is a simple and logical deduction that the

government decision contains a primary arrangement and that it is a primary arrangement *par excellence*. The conclusion that follows from this, of course, is that the government had no authority at all, within the framework of its residual power, to make the decisions that it made in order to establish national priority areas.

62. Significant support for the approach that the government's decision is a decision that requires a primary arrangement in a statute of the Knesset will be found in the variety of statutes that concern the establishment of national priority areas — whether in name or in essence — to promote certain activities that are addressed in those statutes. A study of those statutes will reveal to us that where the Knesset saw fit to do so, it enacted detailed statutes that order the distribution of benefits and grants in various spheres and to particular sectors, and it even went on to determine (primary) arrangements with regard to the content and scope of the benefits and grants, as well as criteria for distributing them. One such statute, for example, is the Encouragement of Capital Investments Law, 5719-1959, which orders an investment grant to be given to enterprises that are set up in areas 'that will be determined by the ministers, with the approval of the Finance Committee of the Knesset' (s. 40D). The Free Manufacturing Areas in Israel Law, 5754-1994, authorizes the government to determine an area in Israel to be a 'free area' (s. 19); it determines ways and restrictions for locating an area to be declared a free area (s. 18), and it determines the scope of the benefits that will be granted to an area that is declared to be a free area. The Compulsory Tenders Law, 5752-1992, provides that preference should be given to products that are manufactured in 'national priority areas,' which are defined in the law as 'the areas determined in accordance with section 40D of the Encouragement of Capital Investments Law, 5719-1959… or other areas determined by the government, from time to time, for the purpose of this law, and of which a notice has been published in *Reshumot*' (s. 3A(a)(3)). The Compulsory Tenders Law and regulations enacted thereunder also determine specific areas that will be considered national priority areas for certain matters. The Council of Higher Education Law, 5718-1958, allows preference 'of students who are permanent residents of national priority areas determined by the government and of students in institutes of higher education or academic colleges that are situated in those areas' (s. 25B). The Encouragement of Research and Development in Industry Law, 5744-1984, concerns, as its name indicates, the granting of large-scale benefits for research and development in industry, and detailed arrangements are provided in the law for the distribution of those benefits. The law goes on to

provide that 'The Ministers, with the approval of the Finance Committee of the Knesset, may determine rules concerning an addition to the rates determined by the Research Committee, in national priority areas,' which are 'the areas determined under section 40D of the Encouragement of Capital Investments Law… or other areas determined by the government, from time to time, for the purpose of the benefits under the aforesaid law' (s. 28(c)).

Thus we see that the Knesset has shown, in an express and unequivocal manner, that arrangements such as the arrangement provided in the government decision to establish national priority areas are primary arrangements that should be made in a statute of the Knesset, rather than merely in a government decision. The Knesset is accustomed, as a matter of course, to enact detailed laws and to determine arrangements — which are primary arrangements in character — for the distribution of benefits like the benefits that the government decision seeks to grant. We can deduce from this that legislation of the Knesset with due process is the direct method for giving benefits and grants to certain sectors in society, and therefore — for our purposes — for determining national priority areas (see and cf., by analogy, the manner in which a doctrine is created in Israeli law: *Israel Women's Network v. Minister of Labour and Social Affairs* [7], at pp. 658, 662-663; *Niv v. National Labour Court* [56], at pp. 687-688). In our case, the government did not adopt this direct method; it chose a roundabout one, a short cut, by determining primary arrangements itself, as if it were a legislator, but without a substantive statute of the Knesset that authorizes it to do so, and at the same time it appointed itself, in its usual capacity, to execute those arrangements. The conclusion that follows from all this is that by making itself, by virtue of the residual power, a legislator of primary arrangements, the government departed from the scope of its power as the executive branch, and its decision concerning the national priority areas was a defective one *ab initio*.

63. Our conclusion from the aforesaid is simply that the government was prohibited from ordering the establishment of national priority areas. This decision amounts to a primary arrangement and as such it is within the jurisdiction of the Knesset alone. In other words, in our opinion there are *external* restrictions upon the residual power of the government in our case, and we have discussed this in length above.

64. Moreover, as we explained in our remarks above, one of the external restrictions imposed on the residual power of the government according to s. 32 of the Basic Law: the Government, 5761-2001, is the restriction whereby

it may not violate the basic rights of the individual. My colleague the president showed extensively in his opinion that the decision made by the government in our case is a discriminatory decision, and what is more, a decision that violates the basic rights of the individual. We can deduce from this that the government was not permitted or authorized to make the decision that it made, if only for the reason that this decision violates the basic rights of the individual. It follows that even if we said that the government was entitled, in principle, to decide to establish national priority areas as it did — and we do not think this — in any case, since this decision is a decision that violates the basic rights of the individual, the government was not competent to decide it by virtue of its residual power. For this reason also, therefore, we are of the opinion that in making the decision that it did, the government acted outside the scope of its residual power.

Before concluding

65. The petitioners' petition focuses mainly on the field of education and the effect of the government's decision to declare a certain area — to the exclusion of others — as a national priority area, which amounts to discrimination against students who were not fortunate enough to be included within the scope of that declaration. But this cannot affect our determination that the government's decision was a defective decision from the outset, and that it ought to be set aside. The wide-ranging effects of the decision to determine national priority areas in the field of education alone is sufficient, as my colleague the president discussed in his opinion, for us to order the government to ask the Knesset to determine in statute arrangements for granting benefits that are the same or similar to the ones decided upon by the government.

Summary and conclusions

66. My opinion is that the government decisions to establish national priority areas like the decision of the government in this case are decisions whose nature and character are such that they require a primary arrangement that must find its home in a law of the Knesset. It follows from this that the government, as the executive branch, did not acquire residual power under s. 32 of the Basic Law: the Government, 5761-2001, to make the decisions that it made. No one will deny that the government's intention was a proper and desirable one, but we are now discussing an institutional matter, which is the demarcation of the boundaries between the Knesset and the government, and good intentions are not sufficient to acquire power. The government was not permitted, according to the system of government in Israel and as required by

the principle of the rule of law, to determine such a wide-ranging and pervasive benefits policy as the one that it determined, and the conclusion that follows from this is that the government acted *ultra vires*.

66. I therefore agree with the conclusion of my colleague the president that the order *nisi* should be made absolute. I also agree that the effect of our decision should be suspended, this too in accordance with the president's decision.

Justice E.E. Levy

I agree with the opinions of the president and the vice-president.

Justice D. Beinisch

I have read the opinions of President Barak and Vice-President M. Cheshin and I agree with them.

The two opinions of my colleagues touch some very sensitive nerves in Israeli society; the two fundamental issues that are raised in them — discrimination in education in the Arab sector and the duty to determine primary arrangements by means of Knesset legislation — have been addressed by this court on more than one occasion.

I have nothing to add to the remarks of the president with regard to the seriousness of the violation of the right to education; I would only emphasize that the question of discrimination in so far as the right to education in the Arab sector is concerned has arisen once again before us, even though it has already been considered in a series of judgments as set out in the president's opinion. For its part, the state confirms before us that it recognizes the fact that the Arab sector has been discriminated against in the field of education for many years, and in the petition before us it argues, as it has in previous petitions, that in recent years attention has been directed towards that discrimination, and it is alleged that the problem has been resolved by means of operative steps taken to remedy the situation and to improve it by allocating special budgets. Admittedly, according to the figures that were presented to us in the response to the present petition, as they were on previous occasions, a significant improvement has apparently taken place, as reflected in the allocation of special budgets to the Arab sector in general (after the Or Commission report), and education in particular (following the Shoshani report). But the change is unsatisfactory and it does not provide a solution to the discriminatory result that can be seen from the classification of

towns in the national priority areas that was done without including the Arab population at all within the framework of this priority, which involves budgetary benefits.

In such circumstances, it is not possible to approve the basis for the distribution to priority towns, since the discrimination it creates prejudices equality without any objective justification or any basis in statute, and in any case, equality is violated since the condition of proportionality is not satisfied.

Just as this court has expressed its criticism on more than one occasion with regard to the status of the right to education and the seriousness of the discrimination suffered by those attempting to realize that right, so too it has criticized the failure to determine primary arrangements. The practice that has developed whereby the government as the executive branch — and these remarks are directed against successive Israeli governments — makes use of the provisions of s. 32 of the Basic Law: the Government (and the earlier versions of this section of legislation) has found expression in several areas. This was discussed extensively by the vice-president. The tendency to implement policy effectively by appropriating broad powers to determine wide-ranging fundamental arrangements with budgetary ramifications that affect the whole public is the temptation that lies in wait for every government. Even though we agree that the power given to the government in the aforesaid s. 32, with its objective and limited scope, is essential for the government's work, and even though there is no primary legislation that can encompass the whole scope and limits of the government's work, there is a great concern that the power will be abused. In any case, the government certainly may not make use of the residual power given to it to violate human rights. I do not need to say anything about the importance of the principle of the rule of law that is enshrined in the foundations of our democratic system of government. It is to be hoped that the considerations mentioned by the vice-president in his opinion and the principles that he discussed with regard to the distinction between government activity that constitutes a primary arrangement, which as such is invalid, and activity that lawfully falls within the sphere of executive action and the government's powers will assist in upholding the principles of the rule of law that are required by the structure of our system of government, and also guide the government with regard to the limits of its powers.

In the case before us, as stated in the opinions of my colleagues, not only is Knesset legislation necessary because of the character of the primary

arrangement, but the legislature will also have to take into account the fact that the necessary legislation requires a comprehensive arrangement that includes provisions that do not violate human rights disproportionately, and this needs serious and thorough work. For this reason, and in view of the need not to harm suddenly and disproportionately the towns that are benefitting today from the budgets that they need, I also agree with the relief of suspending the voidance of the government decision.

Justice E. Rivlin

I agree with the comprehensive and exhaustive opinions of my colleagues, President A. Barak and Vice-President M. Cheshin. Like them, I am of the opinion that there were two defects in the government's decision concerning national priority areas in the field of education. *First*, it is not within the government's power to determine an arrangement that by its very nature is a primary arrangement, and *second* — and this is no less important — the decision is tainted by prohibited discrimination and unlawfully violates the right to equality, a basic right that is enshrined in our constitutional law.

Justice A. Procaccia

I agree.

1. The petition before us integrates two fundamental human rights: the right to education and the right to equality, including the right to equality in education, which are recognized as basic principles in constitutional law. This combination of rights has special weight, since it addresses the most important value in human life — the education of children and adolescents, the shaping of their personality to prepare them for what awaits them in their adult lives, and the need to train them to meet the challenges of life; education is intended to formulate the basic values on which their education will be based, and its purpose is to give them the tools to realize their abilities and talents and to attain complete self-realization. In addition to realizing the human potential of the individual, from a broader social perspective, education is also necessary to raise a new generation that will realize the vision of Israel society as a society based on democratic values, affording full protection to basic human rights.

2. A central goal in implementing the principle of equality in education is creating equality of opportunities and the same starting points for different sectors of the population. In order to achieve substantive equality it is sometimes necessary to treat different sectors of the population in a different

and discerning manner, by means of affirmative action on behalf of one group or another in order to bridge the major disparity and discrimination that have taken place over many generations (HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [83], at para. 6; *Association of Tour Bus Operators v. Minister of Finance* [78], at p. 117). In order to ensure that the potential of the younger generation, in all sectors, is ultimately realized in full, and in order to achieve a real equality of opportunities for all Israeli citizens, discernment is required in allocating the material resources in a manner that will provide greater support to those in need and less support for stronger students. In this way, the education system in Israel will achieve the most from its students, and it will give all groups an equal opportunity to realize their abilities and potential achievements.

3. In this spirit we will require, for example, a correction of the significant disparity that has been revealed in the allocation of resources for 'regular attendance officers' in educational institutions in Arab Bedouin towns in the south of the country (HCJ 6671/03 *Abu-Ghanem v. Ministry of Education* [84]). In these schools, where the student drop-out rate is far higher than in other sectors of the population, clear priority is needed to allocate jobs in this field from the perspective that affirmative action is needed to realize the value of substantive equality between the different sectors of the population (see also I. Zamir, 'Equality of Rights for Arabs in Israel,' 9 *Mishpat uMimshal* 11 (2005), at p. 31).

4. The need to bridge the major gaps in the field of education requires, on the one hand, a determined policy to implement the duty to act to achieve equality between sectors of the population. On the other hand, it is clearly not possible to achieve in full all the changes and social transformations in one stroke. Bridging major gaps that have been created over many years requires a broad perspective and the adoption of a policy of greater and lesser priorities, where what is important takes preference over what is secondary, and where there is an assurance that remedying one injustice does not inadvertently create another injustice. Consideration must be given to other important social goals and an order of priorities must be determined for these. Most important of all, a proper policy of achieving equality in education requires the fixing of a proper timetable in which the gradual process that has been begun to reduce the gaps will be implemented at a reasonable pace until the desired goal is attained.

5. Bridging the gaps in academic achievement between different population groups is a national goal of supreme importance. The effect of

bridging these gaps on the quality of life of the individual and the ability to achieve self-realization is great. No less significant is the decisive effect that shaping the values and image of Israeli society will have on future generations in all walks of life. For the human resource is the foundation on which this society is based and its most precious asset, in which we should invest the best material resources that we have.

Justice S. Joubran

1. I agree with the comprehensive opinions of my colleagues President A. Barak and Vice-President M. Cheshin, according to which the government does not have the power to determine a primary arrangement, as stated in the opinion of my colleague Vice-President Cheshin, and the government decision is tainted by prohibited discrimination and unlawfully violated the right to equality between Jewish citizens and non-Jewish citizens, as stated in the opinion of my colleague President Barak. Similarly, I agree with the remarks added by my colleague Justice A. Procaccia.

2. Like my colleagues, I too accept that the government decision that demarcated the national priority areas in education, discriminates against Arab towns. It is also my opinion the geographic criterion that was chosen led to a discriminatory result between Jewish citizens and non-Jewish citizens. I agree with the determination of my colleague President Barak that priority in the field of education for outlying areas should be given equally to Jews and Arabs.

I would like to expand on the right to equality and the right to education.

3. The learned Justice (Emeritus) Prof. Itzchak Zamir and Justice Moshe Sobel state in their article 'Equality before the Law,' 5 *Mishpat uMimshal* 165 (2000), that equality is one of the basic values of every civilized state. The same is true in Israel. It can be said that equality, more than any other value, is the common denominator, if not the basis, for all the basic human rights and for all the other values lying at the heart of democracy. Indeed, genuine equality, since it also applies to relations between the individual and the government, is one of the cornerstones of democracy, including the rule of law. It is essential not only for formal democracy, one of whose principles is 'one man one vote,' but also for substantive democracy, which seeks to benefit human beings as human beings. It is a central component not only of the formal rule of law, which means equality under the law, but also of the substantive rule of law, which demands that the law itself will further the basic values of a civilized state.

It was already said of the principle of equality thirty years ago that it is the 'essence of our whole constitutional system' (*Bergman v. Minister of Finance* [1]). In another case it was said that 'equality lies at the heart of social existence' (*Kadan v. Israel Land Administration* [8]). It has also been said that equality is 'one of the cornerstones of democracy' (HCJ 869/92 *Zvilli v. Chairman of Central Elections Committee for Thirteenth Knesset* [85]).

Of the essence of equality and the deleterious effect of discrimination it has been said that —

> '… equality is a basic value for every democracy… it is based on considerations of justice and fairness… the need to maintain equality is essential for society and for the social consensus on which it is built. Equality protects the government from arbitrariness. 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 unpleasant feelings. It undermines the forces that unite society. It destroys a person's identity' (*per* my colleague Justice A. Barak in HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [20], at p. 330).

In the same spirit it has been said that —

> '… (True or perceived) discrimination leads to a feeling of unfair treatment and to frustration, and a feeling of unfair treatment and frustration lead to envy. And when envy comes, understanding is lost… We are prepared to suffer inconvenience, pain and distress if we know that others too, who are the our equals, are suffering like us and with us; but we are outraged and cannot accept a situation in which others, who are our equals, receive what we do not receive' (*per* my colleague Justice M. Cheshin in *C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at pp. 203-204).

4. The Declaration of the Founding of the State of Israel states that —

> 'The State of Israel… shall be based on the principles of liberty, justice and peace, in the light of the vision of the prophets of Israel, it shall maintain a complete equality of social and political rights for all its citizens, without any difference of religion, race or sex, it shall guarantee freedom of religion, conscience, language, education and culture, protect the holy

> sites of all religions, and be faithful to the principles of the charter of the United Nations.'

Later in the Declaration of Independence, the members of the Arab people living in Israel are called upon 'to uphold peace and to take part in the building of the state on the basis of full and equal citizenship, on the basis of appropriate representation in all its institutions, whether temporary or permanent.'

The struggle for dignity and equality is, as we have said, enshrined in the Declaration of Independence, within the framework of establishing the State of Israel as a Jewish and democratic state, and this expression is in addition to the label 'Jewish.' Equality also received a constitutional status in the enactment of the new Basic Laws: the Basic Law: Human Dignity and Liberty, and the Basic Law: Freedom of Occupation. The first two sections of these say: 'The basic rights of the individual in Israel are based on the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty, and they shall be upheld in the spirit of the principles in the Declaration of the Founding of the State of Israel,' and also: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to enshrine in a Basic Law the values of the State of Israel as a Jewish and democratic state.'

Justice E. Rubinstein, in one of his articles, points out that it should be remembered that the equation provided in the Basic Law: Human Dignity and Liberty has two parts. The State of Israel is a Jewish and a democratic state. It is easier to define what a democratic state is than it is to define what a Jewish state is. Moreover, the Jewish part of the equation should also be regarded as implying equality (see Justice E. Rubinstein, 'On Equality for Arabs,' *Netivei Mimshal uMishpat*, 279). Indeed, contrary to what some people claim… the fact that the state is Jewish does not conflict with its democratic character and its aspiration to give equality of rights. It was not by chance that the drafters of the Declaration of Independence chose to base the liberty, justice and peace that would be the foundations of the state on the vision of the prophets of Israel, since they were always the pillar of fire at the forefront of the struggle on behalf of the weak and the different, and for the equality of human beings, in the spirit of the words of the prophet Malachi: 'Have we not all one Father, has not one God created us…' (Malachi 2, 10 [87]).

Education is considered a main tool for the social and economic advancement of every society. It should be noted that the Arab society in the

State of Israel has always taken seriously the need for and the importance of education, in the belief that education is a tool that is capable of guaranteeing social mobility.

A democratic society should aspire to equal education and giving equal opportunities to all its citizens. The right to equal education is a basic right and a fundamental condition for the self-realization of every individual in accordance with his needs.

Petition granted.

29 Shevat 5766.

27 February 2006.