

SUPREME COURT OF ISRAEL

Adel Kaadan v. Israel Lands Administration

HCJ 6698/95

THE SUPREME COURT

October 29, 1995 (case date)

March 8, 2000, Delivered

**JUDGES:** Aharon Barak; Theodor Or; Mishael Cheshin; Yaakov Kedmi; Itzhak Zamir

**JUDGMENTS:** HCJ 6698/95

1. Adel Ka'adan

2. Iman Ka'adan

v.

1. Israel Land Administration

2. Ministry of Construction and Housing

3. Tel-Eron Local Council

4. The Jewish Agency for Israel

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

6. Israel Farmers Association

The Supreme Court Sitting as the High Court of Justice

[March 8, 2000]

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

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

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

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

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

For petitioners-Neta Ziv, Dan Yakir

For respondents 1 & 2-Uzi Fogelman

For respondent 3-Ilan Porat

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

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

**JUDGMENT**

**President A. Barak**

The State of Israel has allocated land to the Jewish Agency for Israel. The Jewish Agency, in turn, has established a communal settlement on that land. The settlement was established through a cooperative society. In accordance with its

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

### **The Facts**

1. The State of Israel is the owner of lands in the Eron valley region. On some of these lands it is in the process of establishing a large urban settlement called Harish. In another area, some distance from Harish, two adjacent hills were settled that together constitute the settlement of Katzir. On one of these hilltops, called "The Central Hill", the State (the Ministry of Construction and Housing) established a neighborhood. The State constructed the residential units. These units were allocated to the public at large, in accordance with the customary rules of the Ministry of Construction and Housing. Both Jews and Arabs are entitled to purchase residential units in this neighborhood. The area located on the second hilltop (known as the "Western Hill") was allocated for development to the Jewish Agency for Israel; by the State of Israel (the Israel Land Administration, hereinafter: "the Administration") -- within the framework of a "licensing agreement". The Agreement, drawn up in 1986, is for a term of seven years. It is extended periodically. The last agreement, dated September 1, 1993, was to remain in force until the year 2000.

2. The Jewish Agency decided to establish a rural-communal settlement on the land it received from the State (on the Western Hill). It established (in 1982), the Katzir Communal Settlement [hereinafter: "the Communal Settlement"]. The Jewish Agency invested considerable sums in it, in the form of infrastructure and buildings. Katzir is a cooperative society for communal settlement (hereinafter the Katzir Cooperative Society). It was formed (in 1981) with the assistance of the Israel Farmers Association. The goals of the Katzir Cooperative Society are, inter alia, to establish, maintain and manage a rural communal settlement, set up on the basis of the organization of its members as a community that institutes cooperation among its members. The cooperative society numbers more than 250 families. These families built their homes in Katzir, leading their lives in a communal and cooperative framework, as defined in the Society's bylaws. These bylaws stipulate, inter alia, that only a person who, inter alia, "has completed [the] compulsory military service in accordance with the Security Service Law [Consolidated Version]-1959, or has been discharged from compulsory service under that same law, or whose military service was postponed in accordance with that law" (chapter C, s. 6e of the regulations, as amended on 8.2.82.) may be admitted to the Society. In point of fact, Arabs are not admitted as members of the Cooperative Society.

3. From a municipal standpoint, the Katzir Communal Settlement is managed by a local committee. It is within the jurisdiction of the Tel-Eron Local Council. The urban settlement of Harish is also within that Council's jurisdiction.

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

### **The Petitioners' Claims**

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

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

### **The Respondents' Claims**

8. The respondents raise two preliminary claims. First, they claim that the petition was filed after a prolonged delay, as the land upon which the Communal Settlement is situated was allocated to the Jewish Agency many years ago, and since that time the respondents have invested considerable investments in its development and infrastructure. The respondents also argue that the change in the existing situation, sought by the petitioners today, would also lead to a serious encroachment on their autonomy, and interference with the social-settlement fabric that the society's members have chosen. In this regard, the respondents go on to claim that if the petitioners desire to alter the existing situation, they have the option of waiting until September 1, 2000, at which time the existing development license is scheduled to expire. Therefore, the petition suffers from both delay and prematurity. An additional preliminary claim raised by the Katzir Cooperative Society relates to the fact that the petitioners failed to actually apply for membership in the Cooperative Society. Their application was therefore never evaluated on its merits, and was consequently never rejected. In light of the above, the Cooperative Society claims that the petition was filed prematurely. Furthermore, the Cooperative Society claims that it has the autonomous authority to decide whether to accept or reject any of the candidates for membership, and that the authority to review the exercise of this discretion, lies only with the general court system, and not with the High Court of Justice.

10. The Jewish Agency clarifies that it has set itself the goal to settle Jews all over the country in general, and in border areas and areas with sparse Jewish population in particular. This goal, the Agency asserts, is along with the other goals it has set itself a legitimate goal, anchored in the Status of the Agency Law and the provisions of the Covenant, and is consistent with the State of Israel's very existence as a Jewish and democratic state. As such, it argues, granting the present petition would effectively signal the end of the extensive settlement enterprise operated by the Agency since the turn of the century. It would also constitute a violation of the Agency's freedom of association, and essentially thwart one of the fundamental purposes at the core of the Agency's existence. Furthermore: no one disputes the petitioners' (or any other person's) right to establish a new settlement or join an existing one; however, this does not mean that the petitioners may demand to settle in a settlement established by the Jewish Agency and to benefit, directly, or indirectly, from the Jewish Agency's investment. In this matter, it goes on to claim that the Supreme Court has in the past recognized the authority to allocate residential land to an identifiable segment of the population, whether on the basis of nationality or any other basis.

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

### **The Questions before Us:**

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

### **The Administration's Activities: the General Purpose of Equality**

20. Alongside the specific purposes underlying the Administration's authority and discretion, there are overarching, general purposes that extend as a normative umbrella over all Israeli legislation. These general purposes reflect the basic

values of Israeli law and society. They are an expression of the fact that each piece of legislation is an integral part of a comprehensive legal system. The basic foundations of this system "permeate" every piece of legislation, and constitute its general purpose. These fundamental principles also reflect the State of Israel's character as a Jewish and democratic state. Among these principles the principle of equality is relevant to our issues.

### **Equality as a Fundamental Principle**

21. Equality is one of the State of Israel's fundamental values. Every authority in Israel-and first and foremost the government, its authorities and employees-is required to treat all individuals in the State equally. This is dictated by the Jewish and democratic character of the State; it derives from the principle of the rule of law in the State. It is given expression, inter alia, in our Proclamation of Independence [42] which establishes that:

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

Indeed, the State must honor and protect every individual's fundamental right to equality. Equality lies at the very foundation of social co-existence. It is the "beginning of all beginnings." (Justice Cheshin in HCJ 7111/95 Center for Local Government v. The Knesset [5] at 501). It is "one of the central pillars of the democratic regime. It is critical for the social contract at the core of our social structure." (Zwilli [3] at 707). It constitutes a basic constitutional principle, intertwined with, and incorporated into, all of our basic legal concepts, constituting an indivisible part of them (Justice Shamgar in HCJ 114/78 Burkan v. Minister of Finance [6], at 806). I referred to this in one of the cases where I stated: "Indeed, equality is a basic principle of every democratic society, 'to which the law of every democratic country, for reasons of justice and fairness, aspires.' (President Agranat in FH 10/69). . . The individual integrates into society and does his part to help build it, knowing that others too are doing the same. The need to ensure equality is natural to man. It is based on considerations of justice and fairness. A person who seeks for his right be recognized must in turn recognize the right of others to seek similar recognition. The need to ensure equality is critical to society and the social contract upon which it is founded. Equality protects the regime from arbitrariness. In fact, no element is more destructive to society than the feeling of its sons and daughters that they are being treated unequally. The feeling that one is being treated unequally is of the most difficult to bear. It weakens the forces that unite society. It harms the person's sense of self." (The Poraz case [2] at 332)

In a similar vein, Justice Cheshin wrote:

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

As such, "equality of rights and obligations for all citizens of the State of Israel is part of the essence and character of the State of Israel"

22. The State's duty to operate with equality applies to each and every one of its actions. It certainly applies where an administrative authority operates in the realm of public law. In a long list of judgments, the Supreme Court has repeatedly emphasized the obligation of administrative authorities to treat all individuals equally. The principle of equality is also applicable where the State acts within the realm of private law. Therefore, it applies to contractual relations entered into by the State. Indeed, at the basis of our stance is the approach that the State and its authorities are public fiduciaries. "Governmental authorities derive their authority from the public, which elected them in an egalitarian manner, therefore they too must exercise their authority over the public in an egalitarian manner." Justice Sussman also discussed this, noting:

"While the private citizen is entitled to 'discriminate' between one person and another and choose those he will deal with, even if his reasons and motivations are unreasonable, the discrimination by a public authority is prohibited. The reason is that when administrating its assets, or when performing its functions, the authority assumed the role of a fiduciary vis-a-vis the public, and as such, the authority must treat equals equally, and when it violates this fundamental

principle and unlawfully discriminates against a citizen, then those are grounds for the intervention of this Court: it is of no consequence whether the use itself or the action itself belong in the realm of private law or public law. The role of fiduciary vis-?-vis the citizen and the obligations that stem from this stem from the law and, as such, are subject to supervision and review in this Court."(HCJ 262/62, Peretz v. Chairman, Members of the Local Council and Residents of Kfar Shmaryahu [11] at 2115).

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

"Public lands must be administered in accordance with government criteria-the adoption of such criteria is incumbent upon public authorities in all of their dealings, and, all the more so, when the matter relates to property belonging to the public as a whole. Translation of these criteria to behavioral norms points, inter alia, to the need to act with fairness and equality and in accordance with the norms of proper administration." (HCJ 5023/91 Poraz v. Minister of Construction and Housing [13] at p. 801) Thus, the principle of equality establishes that the state may not discriminate among individuals when deciding on the allocation of state lands to them.

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

"When we were exiled from our country and cast out from our land, we fell victim to the nations among whom we dwelled and in each generation we tasted the bitter taste of persecution, oppression and discrimination, just for being Jews-whose 'laws are diverse from all people.' Having learnt from our own bitter, miserable experience, which permeated deep into our awareness and national and human consciousness, one can expect that we will not follow the wayward ways of these nations and with the renewal of our independence in the State of Israel, it is our responsibility to avoid even the slightest hint of discrimination and unequal treatment toward any non-Jewish, law abiding, person who lives among us, whose desire it is to live with us in his own way according to his religion and beliefs. The hatred of strangers carries a double curse: it destroys the divine image of the hater and causes harm to the hated, through no fault of his own. We must act humanely and with tolerance towards all people created in the image of God, and ensure the great principle of equality between all people in rights and duties. (HCJ 392/72 Berger v. Regional Committee for Planning and Construction, Haifa Region [14] at 771).

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

26. The State accepts that when it established the urban settlement of Harish, and an additional neighborhood on the Central Hill of Katzir (via the Ministry of Construction and Housing), the land allocated was "for the public at large, in

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

27. A response to these claims has been provided by the Jewish Agency, the Farmers Association and the Katzir Communal Society. In their response, they claim that the Jewish settlement is a "link in a chain of outposts, intended to preserve Israel's expanses for the Jewish people" and that the settlement is consistent with the purposes they have delineated for themselves, which is the settlement of Jews throughout the country as a whole, and in rural areas and in areas where the Jewish population is sparse in particular; population dispersal; and increase of Israel's security thereby. In a specific context, the Farmers Association argues that Arab residents may encounter difficulties in fulfilling their duties of guarding the settlement, which has been exposed in the past to various terrorist actions. Moreover, the respondents argue that the presence of Arab residents in the settlement may cause Jewish residents to leave, turning a settlement that was intended to be a Jewish settlement into an Arab settlement.

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

29. My conclusion is therefore the following: A decision by the Administration to directly allocate land in Tel-Eron for the establishment of an exclusively Jewish neighborhood would have violated the (general) purpose of the Administration's authority - which is the realization of equality. Such a decision would not have realized the special purposes of the Israel Land Administration Law that under the circumstances - and according to the appropriate balancing formula - would have prevailed. Therefore, such a decision, had it been adopted by the Israel Land Administration, would have been unlawful. The Jewish Agency and the Farmers Association raised two fundamental arguments counter to this conclusion, to which we now turn.

30. Their first argument is this: since the Administration is equally prepared to allocate land for the establishment of an exclusively Arab communal settlement, its decision to allocate land for the establishment of the exclusively Jewish communal settlement of Katzir does not violate the principle of equality. Their contention, in its legal garb, is that treatment which is separate but equal amounts to equal treatment. It is well known that this argument was raised in the 1950's in the United States, regarding the United States' educational policy that provided separate education for white students and African-American students. Addressing that policy's constitutionality, the United States Supreme Court held (in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) [30]) that a "separate but equal" policy is "inherently unequal." At the core of this approach is the notion that separation conveys an affront to a minority group that is excluded, sharpens the difference between it and others, and cements feelings of social inferiority. This view was expressed in section 3 of the International Convention for the Elimination of all Types of Racial Discrimination. Over the years, much has been written on the subject, emphasizing that occasionally, separate treatment may be considered

equal, or in the alternative, that separate treatment may be justified, despite the violation of equality. This is especially so, inter alia, when it is the minority group itself that initiates the separate but equal treatment, seeking to preserve its culture and lifestyle and hoping to prevent "forced assimilation." (as noted by Justice Shamgar in *Burkan* [6], at 808; E. Benvenisti, "Separate But Equal" in the Allocation of State Lands for Housing, 21 *Iyunei Mishpat* 769 (1998); and D. Days, *Brown Blues: Rethinking the Integrative Ideals*, 34 *Wm. & Mary L. Rev.* 53 (1992); M. Tein *The Devaluation of Non-White Community in Remedies for Subsidized Housing Discrimination*, 140 *U. Pa. L. Rev.* 1463 (1992)). Indeed, I am prepared to assume -- without ruling on the matter -- that there are situations in which treatment that is separate but equal is lawful. This Court's decision in the *Avitan Case* (HCJ 528/88 *Avitan v. Israel Land Administration* [20]) illustrates this point. In that case, the Israel Land Administration decided to lease out land exclusively for Bedouins, within the framework of a policy of helping Bedouins transition to permanent housing. A Jewish petitioner's request to lease this land was denied by the Administration. His petition against the Israel Land Administration was denied. In explaining the court's position Justice Or noted:

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

Such a situation -- in which separate treatment may be considered lawful -- does not present itself here, and this is for two reasons: First, in point of fact, there has been no request for the establishment of an exclusively Arab communal settlement. In actuality, the State of Israel only allocates land for Jewish communal settlements. The result ("the effect") of the separation policy, as practiced today, is discriminatory, even if the motive for the separation is not the desire to discriminate. The existence of discrimination is determined, inter alia, by the effect of the decision or policy, and the effect of the policy in the case before us is discriminatory. Thus, the policy of the Administration today, in practice, grants Arabs treatment that is separate but not equal. Second, there are no characteristics distinguishing those Jews seeking to build their homes in a communal settlement through the Katzir Cooperative Society that would justify the State allocating land exclusively for Jewish settlement. The communal settlement of Katzir is open to all Jews per se. In any event, the residents of the settlement are by no means a "distinct group." Quite the opposite is true: Any Jew in Israel, as one of the many residents, who desires to pursue a communal rural life is apparently eligible for acceptance to the Cooperative Society. As such, the Society can be said to serve the vast majority of the Israeli public. No defining feature characterizes the residents of the settlement, with the exception of their nationality, which, in the circumstances before us, is a discriminatory criterion. Indeed, most of the considerations presented to us by the Jewish Agency, are based on the same "suspect" classification of national origin, and their entire goal is none other than to advance Jewish settlement in the area. Indeed, the combination of the unequal consequence of the policy and unequal considerations driving it, together form a critical "mass" of inequality, a "mass" that can by no means be cancelled out or mitigated by the respondents' fundamental readiness to allocate land for a separate Arab rural communal settlement. We therefore dismiss their claim that, in the circumstances before us, there is no violation of the principle of equality.

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

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

The values of the State of Israel as a Jewish and democratic state, inter alia, anchor the right of the Jewish people to stand on its own in their sovereign state, as declared by the Proclamation of Independence [42]:

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

Indeed, the return of the Jewish people to their historic homeland is derived from the values of the State of Israel as both a Jewish and democratic state. From these values -- each separately and from their amalgamation -- several conclusions arise. Hebrew, for instance, is necessarily the principal language of the State, and its primary holidays will reflect the national renewal of the Jewish nation. Jewish heritage constitutes a central component of Israel's religious and cultural heritage, and a number of other conclusions are implicit, but need not be expanded upon at present. However, the values of the State of Israel as a Jewish and democratic state do not, by any means, suggest that the State will discriminate between its citizens. Both Jews and non-Jews are citizens with equal rights and duties in the State of Israel. "The State -- is the state of the Jews; the regime that exists in it -- is an enlightened democracy, which grants rights to all citizens, Jews as non-Jews alike." (Justice D. Levin in EA 2/88 Ben-Shalom v. the Twelfth Knesset's Central Elections Committee. [8], at 231). I discussed this issue in one of the cases, noting: "In the State of Israel, as a Jewish and democratic state, every person-irrespective of his religion, beliefs or nationality-will enjoy full human rights." (LCA 7504/95 Yaasin v. Party Registrar [24], at 70).

My colleague Justice M. Cheshin noted in another case:

"It is incumbent upon us to remember and to know- how could we forget-that the Jewish people have never had - never had nor does it have now -- any state other than the State of Israel, the state of the Jews. And yet, within the State itself, all citizens have equal rights." (LCA 2316/96 Isaacson v. Party Registrar (hereinafter: "the Isaacson case") [25] at 549). Moreover: not only do the values of the State of Israel as a Jewish state not dictate discrimination on the basis of religion and nationality, they in fact proscribe such discrimination, and demand equality between religions and nationalities. (See HCJ 392/72 supra. [14], at 771; HCJ 175/71 Abu-Gosh-Kiryat Yearim Music Festival v. Minister of Education and Culture [26]): "The principle of equality and prohibition of discrimination, embodied in the Biblical commandment 'You shall have one law, it shall be for the stranger, as for one of your own country' (Leviticus 24:22) [39], that has been construed by the Sages as requiring a law which is equal for all of you' (Babylonian Talmud, Tractate Ketubboth, 33a [40]; Babba Kamma 83b[41]) is a rule that has been sanctified in the law of Israel since we became a nation." (Justice T?rkel in HCJ 200/83 Wathad v. Minister of Finance [27] at 119).

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

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

### **Interim Summary**

33. We have therefore reached the conclusion that had the land for the establishment of the Katzir communal settlement been allocated by the State directly, the State would have been duty-bound to act with equality towards all those requesting the right to build a house there. The significance of this is that, every person in Israel, regardless of nationality, would have been eligible to compete for the right to build a house in the Katzir communal settlement.

38. What arises from all of the above as regards the case before us? We have held that the State may not discriminate directly on the basis of religion or nationality in allocating state land. From this it follows that the State is also not permitted to discriminate indirectly on the basis of religion or nationality in the allocation of land. Consequently, the

State cannot enable such discrimination by transferring land to the Jewish Agency.

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

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

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

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

Send To: BUSSON, SOPHIE  
FORDHAM UNIVERSITY SCHOOL OF LAW  
140 W 62ND ST  
NEW YORK, NY 10023-7407