HCJ 727/00

1. Committee of Heads of Local Arab Councils in Israel
2. Balal Ibrahim
3. Agudat Ha'arba'aim
4. Il Beit, the Arab Association for the Protection of Human Rights
5. Adalah Legal Center for Arab Minority Rights in Israel
v.
1. Ministry of Construction and Housing
2. Prime Minister of Israel, Ehud Barak

The Supreme Court Sitting as the High Court of Justice
[December 12th, 2001]
Before President A. Barak, Justices J. Türkel and D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice for an *order nisi* and an interlocutory order.

Facts: Petition seeking the establishment of egalitarian socio-economic criteria for the implementation of the Neighborhood Restoration Project, and a similar inclusion of Arab settlements, which are ranked under the first and second cluster by the Central Office of Statistics, to the inclusion within the project of Jewish settlements which fall under that same ranking.

Held: In the majority opinion, written by Justice Beinisch, the petition was granted in part as to the requested criteria. The court determined that the petition was made partially extraneous given the drafting of new criteria in 1999, and that the criteria were to be redrafted and the criterion relating to 'saturated construction' and its relative weight among the rest of the criteria was to be given explicit expression within the criteria. The petition was denied in relation to the immediate inclusion of all the settlements detailed therein.

Israeli cases cited:

[1] HCJ 2814/97 *Chief Supervision Committee for Matters of Arab Education in Israel v. Ministry of Education, Culture and Sport*, IsrSC 54(3) 233.
[2] HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affairs* IsrSC 54(2) 164.
[3] HCJ 59/88 *Tzaban v. Minister of Treasury* IsrSC 42(4) 705.
[4] HCJ 1703/92 *C.A.L. Cargo Airlines v. Prime Minister* IsrSC 52(4) 193-205.
[5] HCJ 1438/98 *Conservative Movement v. The Minister of Religious Affairs* (unreported).
[6] HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* IsrSC 51(4) 259.
[7] HCJ 637/89 *'A Constitution for the State of Israel' v. Ministry of Finance* IsrSC 46(1) 191.

[8] HCJ 4906/98 *'Am Hofshi' Association for the Freedom of Religion, Conscience, Education and Culture v. Ministry of Construction and Housing* IsrSC 54(2) 503.

For petitioners – Maruan Dalel
For respondent – Malchiel Blass

JUDGMENT

Justice D. Beinisch

1. An *order nisi* was issued by the Court ordering the respondents to explain why egalitarian socio-economic criteria are not to be established for the implementation of the Neighborhood Restoration Project (hereinafter: 'the project'). So too, the order directs the respondents to explain why they are not including all the Arab settlements which were ranked in the first and second cluster according to the rankings of the Central Office of Statistics (hereinafter: 'the COS') within the project in the same way that all the Jewish settlements which belong to these clusters are included in the project.

Background to the Petition

The background to the petition is the desire of the petitioners – public entities from within the Arab population – to implement educational and welfare programs in the Arab sector, a demand that has already been raised in a prior petition: HCJ 2814/97 *Chief Supervision Committee for Matters of Arab Education in Israel v. Ministry of Education, Culture and Sport* (hereinafter: 'HCJ EWS') [1]. In that petition the question of the implementation of the Division for Educational and Welfare Services (EWS division) programs in Arab educational institutions in Israel was under consideration, and it was determined that funds were to be granted gradually for implementation of the division's programs in a manner relative to the proportion of the Arab population in the overall population in Israel. It was clarified in that petition that some of the division's funds are distributed via a Neighborhood Restoration Project to those settlements and neighborhoods that have been included in the project. The claim relating to the budget for neighborhood restoration was dismissed for being too general, and because the EWS budget which relates to the Neighborhood Restoration Project constitutes only one component in the many components which result from the inclusion of a settlement within the Neighborhood Restoration Project. As we noted in that case [1]:

> 'Including a settlement or a neighborhood within this project is a necessary condition for the existence of the neighborhood restoration program that the EWS division implements. However, this inclusion is in the hands of the Ministry of Construction and Housing, which operates according to principles determined by the government. This matter, therefore, warrants a separate inquiry, which will focus on the consideration of the criteria according to which

> the government enacts the Neighborhood Restoration Project. Given that the petition before us focuses on the question of discrimination in regard to welfare in educational funds, while the subject of broadening the Neighborhood Restoration Project relates to the extension of a wide net that is not laid out before us in this petition – we have not seen fit to deliberate on it in the framework of the petition before us.' (p. 239 of the judgment).

Consequently, the petition before us, which deals in its entirety with the Neighborhood Restoration Project in all is various components, both physical and social-educational, was submitted.

The neighborhood restoration project

2. We have learned of the quality, essence, and scope of the Neighborhood Restoration Project from the affidavit given in support of the State's response which was signed by the head of the division for social neighborhood restoration and the coordinator of government offices for the project since September, 1982, Ms. Hagit Hovev. In her affidavit Ms. Hovev surveyed the development of the Neighborhood Restoration Project since its establishment was announced in 1977, when it was established as a national-social project of the State in collaboration with Diaspora Jews via the Jewish Agency. As is apparent from her affidavit, the project was intended to deal in a comprehensive and multi-faceted manner with social disparity in the State and to deal in particular with points of social hardship and areas of physical wear in city centers and development towns. The project is the responsibility of the Ministry of Construction and Housing, and includes two primary realms: the physical realm and the social realm. The physical realm of the project includes many components, among them: expanding residential apartments, renovation of residential buildings and courtyards, completion of the development of public *infra*structure, renovation of apartments for the elderly, and encouragement of the purchase of apartments under public lease. The social realm includes inter alia: programs for the very young, reinforcement of formal studies, programs for youth and at-risk youth and higher education programs.

At first, the project was jointly administered by the government and the Jewish Agency, whereby the Agency served as the mediating entity between the project's administration and the Jewish communities abroad, and also participated in its financing. However, since 1990, following the immigration from the CIS, the Agency's role in the project diminished, and it was passed on to government hands, both in terms of administration and budget. Implementation of the project is fairly flexible: the project may include both entire settlements, and specific neighborhoods suffering hardship within established cities. So too, a settlement or neighborhood might be included in only one realm of the project, for example: the physical realm without being included in the other realm of the project. It is important to note that the project is limited in time, and after its implementation is completed in a particular settlement, the settlement is removed from the project.

The arguments of the parties

3. The parties are claiming three different remedies, which all surround one central claim, which is a claim of discrimination. The petitioners present much numerical data which proves, according to them, the difficult situation of the Arab settlements and the discriminatory attitude toward them, in the limited scope of the application of the Neighborhood Restoration Project to them. Inter alia, they claim that despite the fact that all of the Jewish neighborhoods that are in the first three clusters of the COS ranking are included in the project, only 5 out of 48 of the Arab settlements found in these clusters are included in the project. Consequently, the petitioners request in their petition that egalitarian criteria be established for implementing the Neighborhood Restoration Project, and they also request that an egalitarian policy be administered between the Arab settlements and the Jewish settlements by including within the framework of the project all the Arab settlements found in clusters 1 and 2 in the COS ranking.

After the *order nisi* was granted, the State's response was received on April 13, 2000. In its response the State did not disagree with the need for egalitarian treatment of the Arab population, but claimed that the question at the center of the discussion in our matter was the question of 'the application of the concept of equality'. According to the State's claim, the application is particularly complex in the case before us, where it is a matter of a project that has been implemented for over twenty years and when the ramification of the requested remedy is a budget increase of tens of millions of shekels per year, or a detraction from funds given to other settlements which are not party to the petition. Beyond this generalized claim, the State raised many additional arguments in the framework of the two affidavits that were attached to the petition – the aforementioned affidavit from the Ministry of Construction and Housing and an affidavit on behalf of the Prime Minister's office. First, the State admits that at first the project included a relatively small number of Arab settlements as it was a joint project of the State, the Jewish Agency and Jewish communities in the world. According to its claim, with the lessening of the role of the Jewish agency in the project there has been a marked increase in the number of Arab settlements and neighborhoods included in the project. According to the claim, as a result of the respondents' policy as to the appropriate criteria for application of the project, and in consideration of the need to complete implementation of the project in the settlements and neighborhoods in which its implementation had already begun, recent years witnessed a gradual change whereby Arab settlements were added to the project and Jewish settlements in which implementation of the project was completed, were taken out.

As to the matter of the criteria for inclusion of additional settlements in the framework of the project, the State argues that in 1999, new criteria were implemented which guide the inter-office team in its recommendations for inclusion of new neighborhoods or settlements within the project. These criteria were already added to the State's

response in the framework of the discussion in said HCJ EWS, and they were attached again in attachment HH/1 to the affidavit of Ms. Hagit Hovev which is attached to the State's response, and in attachment P/4 to the petition. The four criteria that appear on the list are: multi-dimensional hardship of a large percentage of the neighborhood's inhabitants (45%). A lack or low level of physical and social *infra*structures (25%), socio-economic strength of the settlement's population (20%), the presence of new immigrants or particularly weak populations in the neighborhood (10%). According to the State's claim, the petitioners arguments according to which it is appropriate to rely exclusively on the COS data to determine the list of settlements included in the project is to be dismissed, as this data does not give a full picture as to the ranking of the settlements included in the project. Based on the criteria that were established, the COS data makes up only 60 percent of the points to be weighed which are examined for purposes of implementing the project, while the remaining 40 percent are based on data from the various government offices. Beyond these criteria the State noted, that beginning in 1986 the Ministry of Construction and Housing decided to give preference in the framework of the project to urban areas of hardship, which are characterized by saturated construction, as in these areas the investment can contribute to improvement in the lives of more residents. The State further claimed that the new criteria are future-looking only, meaning: they will apply only to settlements that will be included in the project from now on. According to its claim, a change in criteria which will lead to removing settlements in which the work is in progress will cause damage to these settlements and may cause the funds that were already invested to go to waste. Beyond this, the State noted that due to the ongoing nature of the project and the limited funds at its disposal, it was decided in 2000 not to include new settlements in the project and to concentrate efforts on the 10 neighborhoods which have been included in the project for many years with the goal of completing the work in them.

Another central claim raised by the State, deals with the existence of alternate programs for investing funds in the Arab sector, programs which are better suited, according to the State's claim, to the needs of the sector, and their purpose, inter alia, is to add funds to the Arab sector in order to close gaps that were created over the years. According to the State's claim, the Neighborhood Restoration Project was intended primarily to assist in renewing an area that has deteriorated or to complete physical or social *infra*structures that are lacking, while many of the Arab settlements require establishing *infra*structure from scratch. The central program that according to the State will be able to properly address the needs, including the needs for which the Neighbourhood Restoration Project was intended, is a four year plan to develop the Arab sector which was approved by a government decision dated October 22, 2000, and which will include the total sum of 4 billion NIS (including an addition of 2 billion NIS beyond existing development budgets). According to the State's claim, the program is meant to include activity of all government offices, inter alia, construction of *infra*structures and

public buildings, and funds in the areas of education – building classrooms, pedagogical programs and a five year plan for the Bedouin settlements in the north that was begun in 1998 and which will include a total sum of 615 million NIS. Beyond these broad programs, the State noted in its response two additional programs, smaller in scope, which are operated by the Ministry of Construction and Housing, and their budgets are also directed at the Arab sector – the 'reinforcement' program and the program to complete development in old neighborhoods.

The petitioners, for their part, claimed in response that criteria that relate only to new settlements are not sufficient, and that non-inclusion of Arab settlements immediately in the project causes them cumulative damage, the result of which will be a deepening of the social gaps. So too, the petitioners noted that the criterion relating to 'saturated construction' was not mentioned in the framework of the official criteria and that it is a criterion which distinguishes between groups based on an irrelevant basis and leads to a discriminatory result. In regard to the alternate programs the petitioners argue that it is a matter of a claim that is not relevant, since the existence of one assistance program does not offset the right of the Arab sector to benefit from another program.

Consequent to hearing the parties' arguments and reading their written arguments the case was taken under consideration. Later, on May 17, 2001, we decided to ask the respondents additional questions relating to the distinction between the physical and the social realms of the project, to the criterion of 'saturated building', to an update as to the results of the efforts to concentrate the effort in the year 2000 and to the extent of implementation of the multi-year program to the Arab sector.

In its response of June 21, 2001 the respondent noted that the criteria are indeed general and do not distinguish between the social and the physical realms of the project. They also noted that the anchor for the criterion as to 'saturated construction' which is not mentioned in the general criteria listed above, is found in the guidelines for external renovation of structure that is included in the project, and which is based on the decision of the entities in charge of the project. As to concentration of the effort in implementation of the project in the year 2000, the respondents noted that the concentration of effort was a success and the project has ended in 10 neighborhoods in the realm of physical restoration, and in 4 neighborhoods in the realm of social restoration. The State added in its notice that at this stage no additional settlements or neighborhoods will be included in the project, as it is the intention of the Ministry of Construction and Housing to conduct a comprehensive assessment of the project in the upcoming months. As to this the Stated noted that:

> 'At this stage, the inclusion of additional neighborhoods or settlements to the Neighborhood Restoration Project is not on the agenda as it is the intention of the Minister of Construction and Housing and the Director of its office to conduct a comprehensive assessment in the upcoming

> months of the cumulative contribution of the Neighborhood Restoration Project from its inception, both in the physical and social realm. In the framework of this assessment it is the intention of the office to assess the suitability of the underlying premises which are at the basis of the project, the geographic units which will be included in it and a formula for its application to the many changes that have taken place in Israel in the social and urban reality, since the project's inception. This stance of the Ministry of Construction and Housing relates to all settlements in Israel that are not included in the project, including Arab settlements which need programs in the social realm.'

As to the application of the multi-year plan to the Arab sector, the State noted that staff work has begun in the budget department of the treasury the purpose of which is to produce necessary regulations for the implementation of the project which were to be presented for approval by the Finance Committee by the end of June 2001. So too, the State's counsel noted in his response in a general manner what the areas of overlap are between the multi-year plan and the Neighborhood Restoration Project, and which areas in the project supplement the projects in various aspects. As of the date of this judgment the State has not given notification as to whether these funds were approved and to what extent.

Current allocation of budgets

4. As said, the respondents admit in their response, that there was historical discrimination in the allocation of funds in the framework of the Neighborhood Restoration Project, however, according to their claim this discrimination has greatly decreased with the gradual inclusion of Arab settlements and neighborhoods within the project. In order to prove this claim, the respondents presented before us the data which relates to the year 2000. As appears from this data, of the settlements and neighborhoods included in the project, close to 20% are Arab settlements, as is the proportion of the Arab population in Israel. However, this data does not reflect the full picture, and this is also the State's position in its affidavits. Comparison of the budgets as they have been presented by the respondents shows that the proportion of funds that were allocated to the minority sector in the framework of the project stands at 10% only. The State noted that this budget data does not reflect the true sum that was allocated to the minority sector as additional funds were added in additional restoration programs. According to the claim, in order to get a full picture of the funds directed to the sector the calculation must include two additional programs: the 'reinforcement' program and the program of supplementation of development in the older neighborhoods. The 'reinforcement' program is similar in its characteristics to the physical realms of the Neighborhood Restoration Project, and was also intended to deal with physical multi-dimensional hardship, including: external renovation of structures and development of courtyards, renovation of apartments for the elderly and assistance in

expansion of apartments. This program was implemented in a very small number of neighborhoods in the year 2000, and overall in its framework, 7.5 million NIS were allocated, of which 3.8 were allocated to the minority sector. The program for supplementation of the development of older neighborhoods dealt with the development of the physical *infra*structure in minority settlements. This program is operated within various five-year plans which are designated for the minority sector – a five-year plan for Bedouins in the Negev (which is in preparation phases – although limited funds have already been allocated in its framework), and the multi-year plan for the Arab sector. In the framework of these programs, the amount of 38.9 million NIS was included in the year 2000 budget of the programs division of the Ministry of Housing, for development of physical *infra*structures in minority settlements, as opposed to the sum of 19.75 million NIS which are dedicated to this purpose in Jewish settlements. According to the State's claim, if the amounts allocated in the framework of those two programs are included in the overall calculation, it appears that the proportion of funds dedicated to advancing older neighborhoods in the minority sector in Israel reaches up to 24% (about 60 million NIS out of 260 million) – a proportion greater than the portion of the sector in the population.

In order to more accurately assess the claim of the respondents, we must distinguish between the physical side and the social side of the project. On the physical side, if we also include in the framework of the calculation the two programs parallel to the Neighborhood Restoration Project (both of which relate only to the physical side) then it would appear that the determination is correct that the funds directed at the Arab sector in the year 2000 forms a proportion of 29% of the overall allocation directed at physical restoration in Israel (about 50 million NIS out of 174 million NIS). This proportion is greater than the portion of the sector in the population, and therefore, on its face, there does not appear to be discrimination, but rather a goal of remedying the disadvantage.

Conversely as to the social realm the funds directed to the Arab sector in the framework of the Neighborhood Restoration Project, makes up only 13% of the total budget (12 million NIS out of 90 million) a proportion lesser than the proportion of the sector in the population. The situation that is created indeed creates a feeling of discrimination which is particularly oppressive given that many of the Arab settlements are at the bottom of the socio-economic ranking. We also discussed the painful situation of discrimination in funds intended for education in the Arab sector and the need to address this seriously in said HCJ EWS, which dealt, as said, with the implementation of EWS programs in the Arab sector, it was stated there:

> 'In the framework of the petition there was no disputing that education in the Arab sector has been disadvantaged over many years and there was no dispute that this needs to be corrected. From the responses submitted to us on behalf of the State we have been convinced that significant steps have

> been taken for the allocation of budgetary resources to the Arab sector in order to achieve the goal of equality of resources in said area in accordance with the relative proportion of the Arab population in Israel.' (p. 240 of the judgment)

The question before us is what is the conclusion to be drawn in the framework of the petition before us as to this matter, both in relation to the petition to establish egalitarian criteria and in relation to the petition for inclusion of Arab settlements within the project.

The principle of equality in allocation of state funds

5. It appears that it is not necessary to go back and expand on the fact that the value of equality is a basic value in our legal system, and that it stands at the basis of our democratic regime. In light of its status the value of equality obligates the authority in the implementation of the totality of its powers. We have noted more than once that the value of equality obligates the authority in allocation of state funds. Such allocation must be done on an egalitarian basis and according to clear criteria. As Justice Zamir has said in HCJ 1113/99 *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affair* [2] at 170:

> 'The principle of equality binds every public entity in the State. First, it binds the State itself. The principle of equality applies to all the areas in which the State operates. It applies first and foremost to the allocation of the State's funds. The resources of the State, whether in land or money, as well as other resources, belong to all citizens, and all citizens are entitled to benefit from them in accordance with the principle of equality, without discrimination on the basis of religion, race, gender or other illegitimate consideration.'

And, at p. 172 as well:

> 'Discrimination on the basis of religion or nationality in allocation of state funds, which is even prohibited if it is done indirectly, certainly is a fortiori prohibited when it is done directly.'(See, for example, HCJ 59/88 *Tzaban v. Minister of Treasury* [3] at 706; HCJ 1703/92 *C.A.L. Cargo Airlines v. Prime Minister* [4] at 205.)

These words are true seven-fold when it is a matter of allocation of state funds for the actualization of basic rights such as the right to education, housing, or health.

It is clear that when an authority is directed to act with equality, we are dealing with substantive equality, and not merely formal equality. At times, in order to achieve substantive equality we must act differently toward different individuals. Violation of the principle of equality which creates the grounds for our intervention is different treatment of individuals amongst whom there is no difference relevant to the matter at hand (see for example HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [5] paragraph 20). In the words of Justice Zamir,

discriminatory treatment is different treatment of those who belong to the same 'equality group' (see HCJ 3792/95 *National Youth Theater v. Minister of Science and Arts* [6] 281-283). From this starting point we are to examine the question of application of the Neighborhood Restoration Project to the Arab sector.

The question of criteria

6. The first part of the petition deals with the subject of criteria. As said, according to the petitioners claim, social-economic egalitarian criteria are to be established for application of the project. As is seen from the State's response, in 1999, an inter-office commission examined the criteria for the project that were established in the 1980's, and following this examination new and egalitarian criteria were established which the State has given notice are already in place and will serve from now on as a basis for inclusion of settlements in the framework of the project. We have already mentioned that the criteria include both multi-dimensional social hardship and multi-dimensional physical hardship. According to the State's claim, the new criteria which were established are 60% based on the rankings of the COS, and 40% on additional data from various government offices. From the State's response it is further seen that there exists in fact an additional criterion which does not appear explicitly in the list of criteria that were presented to the court, although it influences the inclusion of neighborhoods within the framework of the physical realm of the project – and that is the criterion of granting preference to an urban neighborhood characterized by saturated construction. In response to additional questions by the Court, it was stated by the State that this criterion is anchored in a procedure for external renovation of structures and the development of courtyards from the year 1998 (which replaced previous procedures from 1986 and 1993), which establishes that renovation of residential buildings is conditioned upon it being a structure that includes at least four residential units. So too, it was emphasized that there are dozens of criteria and internal guidelines in each of the relevant offices which relate to specific programs operated in the framework of the project. As is seen from the State's response, the criteria detailed in P/4, which are, as stated, new, relate only to the inclusion of new settlements in the project, and do not apply to neighborhoods already included in the project, according to arrangements and policy that was determined years ago.

As said, criteria for distribution of budgets from the public pie must be egalitarian in nature, but beyond this, the criteria must also fulfill the other rules which apply to administrative decisions, which means that: they must be based on relevant considerations, a factual basis which reflects the relationship between the purpose for which the financial allocation was intended and the relevant facts, and they must meet tests of reasonableness. (See for example HCJ 1438/98 [5] above). So too the criteria must be sufficiently concrete to enable their application according to objective measures to the extent possible. (See HCJ 3792/95 [6] above, at pp. 273-274).

7. The Neighborhood Restoration Project is in fact characterized by

two levels of criteria: the first level, deals with the criteria which serve to determine which neighborhoods or settlements will be included in the project. The second level, deals with specific and more detailed criteria which relate to the operation of certain programs which are included in the Neighborhood Restoration Project. These criteria are of course only relevant to neighborhoods or settlements which have overcome the hurdles of the first level's criteria and are included in the project. In this petition we are dealing with the first level of criteria, meaning: criteria which relate to the inclusion of a neighborhood or settlement within the project. On its face it appears that the list of criteria brought to us, meets the necessary conditions for allocation of state funds. It is a matter of criteria which are based on objective sources of information that the government has – COS data and data from various government offices, the criteria are suited to the purpose of the project and they explicitly note the relative weight of each criterion. Therefore, ostensibly, these criteria are self-evidently egalitarian and reasonable. However, it is worth noting, that for some reason the inter-office commission chose to draft the criteria in technical and opaque language which appears to be intelligible only to those with specialized knowledge. It seems that it is appropriate that criteria which apply to the public be drafted in a more detailed, explicit, and clear manner. Thus, for example, it would be appropriate to detail the content of the phrase 'multi-dimensional hardship' and that all the relevant quantitative variables be detailed, whether directly, or by way of reference, such that those dealing with the matter – Jewish and Arab settlements as one – will know what the standards are for allocating the project's funds and its applicability to them.

The generalized drafting of the criteria on its own, even if it requires clarification, does not point to a flaw which justifies our intervention to nullify them; moreover, in their response to the State's response the petitioners are not making arguments against the criteria as they were presented. Therefore, were these criteria the only criteria for inclusion of settlements and neighborhoods in the project, it might be possible to say that the State properly addressed the first part of the petition, making what was requested superfluous. However, it turns out that it is not so. From the State's response it appears that there is an additional criterion which is not included in the list of criteria of the first level – the one that determines the settlements included in the project – and it constitutes a hidden criterion which is able to influence the determination relative to the inclusion of neighborhoods in the project. It is the criterion of saturated construction, which is anchored – according to the State's claim – in an internal guideline which relates to the renovation of houses and courtyards – a specific guideline which relates to a specific program which belongs to the physical realm of the project. Ostensibly, it is therefore a matter of a criterion which by its nature belongs to the second level of criteria – a criterion which relates to a specific program – which filtered through to the first level of criteria, as it was used to determine the neighborhoods which would be included in the project to at the beginning. Using this criterion which is not counted among the criteria

on the list is not proper, both due to its lack of inclusion and because of the lack of clarity as to the weight it is given as to the substance of the determination as to inclusion in the project.

8. The petitions argue that applying a criterion which conditions implementation of the project on the existence of saturated construction, excludes their settlements from the project overall, as Arab settlements are not urban settlements that were built with saturated construction. Lacking data as to the quality and scope of influence of this criterion among the other criteria, we cannot determine that this criterion may be an obstacle to inclusion of the Arab settlements in the framework of the project, even though it certainly may impact the scope of the inclusion of Arab settlements, many of which are not saturated construction settlements. On the other hand, it is not to be said in a sweeping manner that saturated construction removes the Arab sector from the project in light of the existence of distressed neighborhoods in many urban cities in which there is a dense Arab population. Despite this, the claim is correct that under the circumstances there was a flaw in the application of the criteria of saturated construction as a pre-condition to the implementation of the project.

It should be said first, that when the implementation of the project is dependent, among other things, on the physical condition of neighborhoods and structures, there is nothing wrong in principle with the fact that among other considerations which relate to the physical aspect, consideration which relate to the density of the population and the density of the construction will also be considered. Giving preference to restorative treatment in areas of distress of high residential density which is characteristic of urban settlements constitutes a relevant and legitimate consideration. There is also nothing wrong with the rationale that the State raised for giving preference to urban neighborhoods due to the advantage which stems from the effectiveness of the investment in crowded neighborhoods. However, as has been said more than once in our case law, when we are dealing with equal distribution of resources it is not sufficient that the considerations for allocation are relevant considerations, but there is also significance to the weight of each of the relevant considerations. In determining standards for budgetary allocation the totality of considerations which relate to the goal for which the financial support was intended, is to be taken into consideration. Thus for example, the fact that the said criterion is not related at all to the social realm of the project necessitates the conclusion that in the face of the double purpose of the project – physical and social – the criterion which relates to the physical aspect of the project is not to be given determinative weight as to implementation within the social aspect.

Accordingly it can be determined that the saturated construction criterion is not to be used as a threshold criteria until this criterion is included in the list of criteria which determine the conditions for implementing the project and its relative weight, among the other criteria, its scope and concrete reference to the degree of the density of the construction, is clearly defined. In determining the relative weight of

this criterion it is to be taken into account that considerations which relate to the physical aspect of the project are not exhaustive or exclusive and the project also has the purpose of support and encouragement in the social-educational realm in distressed regions.

Therefore, as long as there is not explicit reference in the criteria for the implementation of the project to the criterion of saturated construction, and as long as its relative weight is not determined, this criterion is not to be included as a pre-condition to the implementation of the program. Subject to the defining of the criterion which relates to saturated construction, as explained above, the establishment of the new criteria is able to address what has been sought under the first part of the petition.

Inclusion of the settlements in the first and second cluster in the project

9. The State's notice as to the implementation of criteria for the inclusion of new settlements in the framework of the project does not satisfy the petitioners even if they are not claiming that the criteria that were implemented are flawed. It is the petitioners' claim that even if from now on the inclusion of settlements in the project is done on an egalitarian basis, since it is a matter of an ongoing project, the passage of time deepens the schism between the needy settlements in the Arab sector and the settlements that are included in the project already. They also claim in response to the supplement to the State's answer, that despite the State's notice that there is an intention not to include new settlements in the project, the Arab settlements which ranked in the socio-economic scale of the COS as belonging to the first and second clusters should be included in the framework of the Neighborhood Restoration Project.

This petition–to include all the settlements in the first and second cluster of the COS in the Neighborhood Restoration Project – is to be denied in the face of the formulation of the new criteria. With the establishment of the criteria, the test for including settlements within the framework of the project is in the suitability of the settlement to said criteria, and a determination based exclusively on COS data is not longer sufficient. However, by the nature of things, in light of the heavy weight of the COS data in the framework of the criteria, and in light of the great hardship which exists in the Arab sector, which no one disputes, it is reasonable to assume that the result of establishing the new criteria will be the inclusion of the settlements under discussion in the petition, or at least most of them, in the project. Indeed this is the significance of applying egalitarian criteria; including settlements in which the hardship is greater before settlements whose economic-social situation is better.

However, in the face of the existence of the new criteria, the parties dispute remains; it deals with the question: whether in the present situation as long as the Neighborhood Restoration Project exists as to settlements which were recognized in the framework of the project in the past, it is proper to add the requested Arab settlements immediately, without waiting for their gradual inclusion according to the criteria which

were established. The State argues as to this, that the request to add additional settlements to the project now, is to be denied. In its reasoning it points to the fact that the budget for neighborhood restoration is limited in scope and since it is an ongoing project, the addition of new settlements may harm those that have already been included in the framework of the program.

10. We accept that a change in a discriminatory policy and implementation of a new and egalitarian policy, on its own, does not justify harming those who were included in the original program. (see as to the this: HCJ 637/*89 'A Constitution for the State of Israel' v. Ministry of Finance* [7] at p. 207; HCJ 4906/98 *'Am Hofshi' Association for the Freedom of Religion, Conscience, Education and Culture v. Ministry of Construction and Housing* [8] at p. 523). The neighborhoods and settlements that were included in the past in the Neighborhood Restoration Project are distressed neighborhoods and there is no dispute that it is not appropriate to stop programs in these neighborhoods and settlements. The petitioners note that they are not asking for this. It is to be taken into consideration that it is a matter of ongoing programs whose implementation has already begun and it is proper to enable their completion. Moreover, the settlements benefitting from these programs have a reliance interest that is also to be recognized for the purpose of granting additional allocation for completion of the project. Therefore, inclusion of the Arab settlements without consideration of the limited scope of the project in its present formulation, and without consideration of the reliance interest of those benefitting from it, is not a proper solution.

As for the need to remedy the disadvantage caused to the Arab sector in this matter, the State argues that the proper way to address the situation that was created is in implementation of the government decision of October 22, 2000, to implement the multi-year program in the framework of which funds will be allocated in broad scope to development of settlements in the Arab sector and programs whose purpose overlaps with the programs included in the Neighborhood Restoration Project will also be implemented. These designated programs are meant to be in a scope that is significantly broader than the Neighborhood Restoration Project and encompass both realms of physical *infra*structure and social realms. This response of the State does not properly address what is requested in the petition. The multi-year plan is indeed meant to address the disadvantage that has been created over the years and to bridge the gaps of the past, but at this time, at the phase in which the multi-year plan is in today, it cannot serve as a substitute for programs operated via the Neighborhood Restoration Project. This is for two reasons: the first, due to the absence of concrete-budgetary expression for said plans, and the second which is derived from it, that absent budgetary expression, it cannot be established whether the designated program was necessarily designated for development of a program parallel to the one included in the Neighborhood Restoration Project. If defined programs will be established which will also have budgetary expression and which will

have the ability to address the needs which today are addressed in the framework of the Neighborhood Restoration Project, it will be possible to determine that any program equal in weight will replace a similar program given within the framework of the project. However, as long as there is no such concrete expression, the program does not create an exemption of the requirement to apply the said project to the Arab sector.

As we have described, in the situation that was created the core of the problem is in implementing the programs in the social realm and in particular in education programs. In the petition in HCJ *EWS* [1] we discussed the need to establish conditions for implementation of the special programs of the Division for Education and Welfare Services in the Ministry of Education – the EWS Division – in an egalitarian manner on the Arab sector. It was made clear that a certain part of the activity of the division which deals with advancing weak populations in Israel is conditioned on the inclusion of the settlement or neighborhood in the framework of the Neighborhood Restoration Project, and that the part of the Arab settlements in this project was very limited. With the addition of Arab settlements to the project, over the course of the years, there has been improvement in this matter, however, the proportion of the funds granted in the framework of the Neighborhood Restoration Project in the social realm is still lower than the appropriate relative proportion in accordance with the size of the population and in accordance with its needs, which differs from the allocation of funds in the physical realm which is included in neighborhood restoration. This is not an appropriate situation. The State has the duty to grant education to the overall population according to egalitarian criteria, while giving equal opportunity. When it chose to establish programs for the advancement of education in distressed strata, via the Neighborhood Restoration Project, it must maintain these programs in an egalitarian manner, and even detached from the realm of physical restoration. As we noted, the Neighborhood Restoration Project enables separation between the physical realm and the social realm.

As said, from the State's notice we have learned that the future of the project is being re-examined and that this re-examination will take several months. It is to be assumed that the re-examination is nearing an end; before we point to the appropriate remedy, we will note that the petition is based on the presumption that the Neighborhood Restoration Project continues to exist and this is also the starting point of our discussion. Accordingly, we accept the State's claim that consequent to the ongoing character of the project which still necessitates its operation in neighborhoods included within it, and in consideration of the limited budget designated to the project today, it will not be possible include immediately all the distressed Arab neighborhoods. However, the budgetary portion of the project which relates to social restoration is to be implemented for the appropriate settlements according to the established criteria, within a short time period. This implementation will be done to a degree that suits the needs and hardship of the Arab sector, and in any event, in a degree that will not be less than its relative proportion in the population.

11. In conclusion, the necessary conclusion of the above is this:

(A) As to the first remedy, which deals with establishing egalitarian criteria, the petition was made partially extraneous in the face of the drafting of the requested criteria in 1999. However, as said above, the criteria are to be redrafted and the criterion relating to 'saturated construction' and its relative weight among the rest of the criteria is to be given explicit expression within them.

(B) The petition to include within the project all the Arab settlements which are included in the first and second clusters according to the socio-economic ranking of the COS is denied. However, we determine that if it is not decided to end the Neighborhood Restoration Project, the objective of including new settlements in the project, on the assumption that settlements whose hardship is the greatest will be included in accordance with the criteria as they will be amended, is to be continued. In all that relates to programs which relate to the social-educational realm of the project, they are to be given preference and to be applied to Arab settlements in a proportion which matches their needs and their hardship. In any event, beginning with the next budget year, care is to be taken that the proportion of the budget that is designated for the Arab sector in the framework of the social-educational realm of the project is not to be less than the relative proportion of the sector in the population.

(C) The multi-year plan for development in the Arab sector whose importance the government of Israel has recognized, and proclaimed its intention to actualize in a gradual manner, will not detract from the Neighborhood Restoration Project, unless it establishes programs of equal value which can replace the programs operated today in this realm.

The petition is therefore granted in part as to the requested criteria as said in paragraph 11(a), and is denied as to the immediate inclusion of all the settlements detailed in the petition subject to what has been detailed in paragraphs 11(b) and (c). Under the circumstances there is no order as to expenses.

President A. Barak
I agree.

Justice J. Kedmi
I agree.

It was decided as per the opinion of Justice Beinisch.

12 December 2001
27 Kislev 5762