

III. H.C. 6698/95, Ka'adan v. Israel Lands Authority *et al.*

54(1) *Piskei Din* 258.

Allocation of State land for an exclusively Jewish settlement, not accepting Arab members; the principle of equality; as one of the basic principles of the State of Israel; State duty to act with equality in regard to all its citizens; applicable to all State activities, including allocation of State lands; policy of "separate but equal" unlawful; State duty to act with equality applicable also to allocation of land to the Jewish Agency; present judgment not affecting past State policy of establishing of settlements inhabited solely by Jews.

The petitioners are an Arab couple, citizens of Israel, who wished to build their home in Katzir, a communal settlement in the north of Israel. The settlement was established in 1982 by the Jewish Agency in collaboration with the Katzir Cooperative Society, on State land that was allocated to it for this purpose by the Jewish Agency (which, in turn, received the land from the Israel Lands Authority). The Katzir Cooperative Society refused to accept the Petitioners and permit them to build their home in Katzir on the ground that only Jews may be members of the Society. The Petitioners claimed in their petition that the policy of the Katzir Cooperative Society constitutes discrimination on the basis of religion or nationality; and that such discrimination is prohibited with regard to State land, on which it had been established.

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The petition was discussed by a panel of five Judges: four held that the petition should be granted, and one dissented. The majority judgment on behalf of the Court was delivered by Barak J.P., who was joined by Orr J., Zamir J. and Cheshin J. The minority opinion was presented by Kedmi J.

Barak J.P. defined the question involved in the petition as being that whether the refusal to allow the petitioners to build their home in Katzir constituted unlawful discrimination. This question was divided by Barak J. into two sub-questions:

(a) whether the State may directly allocate land on the basis of religion or nationality; and,

(b) whether the State may indirectly allocate land on the basis of religion or nationality – meaning in fact allocation of land to the Jewish Agency knowing that the Agency will permit only Jews to settle on it. Both question had been separately discussed by Barak J. and answered by him in the negative.

(a) May the State allocate land on the basis of religion or nationality?

1. This question requires examination of the normative system applying to State lands. The starting point on this matter is the Basic Law: Israel Lands,³⁹ which provides in its Section 1 that “the ownership of Israel lands, being the lands in Israel State, the Development Authority or the Keren Kayemet Le-Israel shall not be transferred either by sale or in any other manner”. Israel lands are managed by the Israel Lands Authority (the “Lands Authority”) according to the Israel Lands Law-1960.

2. In managing State lands, the Lands Authority – being an administrative body – must act in accordance with the specific purposes underlying the empowering legislation, namely the Israel Lands Law; and also in accordance with the general purposes of the legal system.

3. Among the specific purposes of the Lands Authority’s power according to the Israel Lands Law is the purpose of safeguarding, developing and managing of the lands in the ownership of the State in order to prevent their transfer to undesirable elements; the carrying out of national projects of absorption of immigration; the encouraging of agricultural settlements, and the like. These specific purposes do not empower the Lands Authority to adopt a discriminating policy.

4. In addition to the specific purposes of any administrative authority, there are general purposes which constitute a “normative umbrella” that is stretched over every legislative act. “These general purposes reflect the basic values of the Israeli legal and social order. They consist of general principles which should be integrated into every statutory act and regarded as its general purpose. These general principles reflect the nature of the State of Israel as a Jewish and democratic State”. The general principle relevant to the case is the principle of equality.

5. The principle of equality is one of the basic principles of the State of Israel. Every authority in Israel has to act on the basis of equality in its relation to individuals. This principle stems from both the Jewish and the democratic character of the State; it derives from the binding principle of the

rule of law. It found its expression in the 1948 Declaration of Independence, which provides that:

The State of Israel ... will ensure complete equality of social and political rights to all citizens irrespective of religion, race or sex.

It follows, that the State must respect the basic right of every individual to equality, and even to protect it. The principle of equality is the premise of the social order; it is a basic constitutional principle which forms part of our basic legal concepts. Equality of rights and duties for all Israeli citizens is one of the basic features of the State of Israel.

6. The duty of the State to act with equality in regard to its citizens applies to all its activities. It obviously applies when State authorities operate in the domain of public law. Hence, it also applies to the allocation of State lands. As the Lands Authority is holding State land, all duties that apply to the State apply equally to it as a State trustee. In fact, the Lands Authority is “the State itself”. State land should be managed in accordance with national standards, because it is actually the property of the whole public. One of the basic national standards is the one binding the State to act honestly and without discrimination.

7. Although “equality” is a complex concept, it is agreed that the principle of equality prohibits the State from distinguishing between its citizens on the basis of religion or nationality. This prohibition is enshrined in international documents and conventions (such as the 1948 Universal Declaration on Human Rights, the 1966 International Convention on Civil and Political Rights, and the 1955 European Convention on Human Rights). It is included in the majority of modern Constitutions. This Court already held in H.C. 114/78⁴⁰ that:

The principle of non-discrimination between one person and another on the grounds of ... nationality ... or religion is a basic constitutional principle, forming an integral part of our legal concepts.

Therefore, when acting contrary to the equality principle, the State (by intermediary of the Lands Authority) acts contrary to both the specific purpose of the law in question; and the general purpose of implementing the basic principles of the legal system – a purpose which is attributed to every legislation.

³⁹ 14 L.S.I. 48.

⁴⁰ Excerpted in 20 Israel Y.B. Hum. Rts. 374 (1980).

8. The State engages in unlawful discrimination even if it is ready to allocate State land for the purpose of establishing an exclusively Arab settlement (in addition to an exclusively Jewish settlement). In such a case, it adopts the policy of "separate but equal", which had been declared in the 1950s in the United States in the *Brown* case as "inherently unequal". This approach reflects the opinion that separation is offensive to a minority and points to its social inferiority. Racial segregation is expressly condemned in Article 3 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.

9. Indeed, there are cases where a "separate but equal" treatment to certain groups of the population may be considered lawful. This occurs when the "separate but equal" treatment is a wish of a certain minority, which desires to preserve its specific culture and lifestyle, and to prevent "compulsive assimilation". An example for such a case is allocation of land exclusively to Bedouin tribes within the framework of a policy encouraging their permanent settlement. However, the present case is not as such, because the State in fact does not allocate lands for exclusively Arab settlements but only to Jewish settlements. It follows that the Lands Authority policy has a discriminatory effect, even if it was not intended a priori to discriminate.

10. There are no specific characteristics whatsoever in the Jewish settlers of Katzir, that might justify their classification as an "exclusive group" which deserves separate treatment. The settlement is open to all Jews, without any particular requirements. The sole criteria for becoming a member of the settlement is the criteria of nationality, which constitutes unlawful discrimination.

11. The argument that the Jewish character of the State (as pronounced in the Basic Law: Human Dignity and Liberty) may justify discrimination by the State between its citizens on the ground of religion or nationality is unacceptable. The "values of the State of Israel as a Jewish and democratic State" (according to Section 1 of the Basic Law) do not permit the State to discriminate between its citizens. "In Israel, Jews and non-Jews are citizens with equal rights and duties. The State – is a Jewish State; its regime – is an enlightened democratic regime, which confers rights to all the citizens, Jews and non-Jews". The "Jewish" and "democratic" values of the State in fact create a prohibition of discrimination, and require equality between all religions and nationalities.

12. It follows that the Lands Authority does not possess the power to directly allocate lands for establishment of an exclusively Jewish settlement, because such a power is incompatible with the general purpose underlying its power, being that of enforcement of equality.

(b) *May the State allocate land to a third party, knowing that it will allocate it to Jews only?*

13. If the Lands Authority – acting on behalf of the State – allocates land to a third party knowing that the third party, in turn, will allocate the land according to criteria of religion or nationality, it thereby infringes the principle of equality which the State is bound to observe. The State cannot release itself from the legal obligation to act with equality when allocating its land by means of using a third party which practices a discriminatory policy. What the State is prohibited to do directly, it is also prohibited to do indirectly. It follows that the State itself infringes its duty to act with equality when it allocates land to a third party which allocates it to Jews only.

14. The State cannot release itself from the duty of acting with equality even if the third party to which the land is allocated is the Jewish Agency, whose activity is directed towards promotion of Jewish settlement. Indeed, the Jewish Agency enjoys in Israel a special legal position that found its expression in the Law on the Special Position of the Jewish Agency-1952. Ever since the establishment of the State of Israel, the Jewish Agency has always played and continues to play a major role in the development of the State as a Jewish and democratic State. However, even if the Jewish Agency is permitted to distinguish in its activity between Jews and non-Jews, it may not do so in all that concerns allocation of State land.

15. The petition is not directed against the past State policy of establishing – with the assistance of the Jewish Agency – settlements like *kibbutzim* or *moshavim* which had been inhabited solely by Jews. Rather, it looks to the future. Therefore, the Court will not take a position with regard to these types of settlements, and will limit its decision to the particular circumstances of the communal settlement of Katzir.

Conclusion

The petition raised practical difficulties because the allocation of land to the settlement of Katzir took place about eighteen years ago and all land parcels there had already been purchased. Hence, the Court found it proper to render a twofold judgment: a declaratory and an operative. In its declaratory ruling the Court stated 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.

In its operative order, the Court required the State to consider – in light of the principle of equality – the petitioners' request to acquire State land in the settlement of Katzir for the purpose of building their home there.

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Y. Kedmi J. delivered a minority opinion. He agreed with the ruling of Barak J.P. in all that concerns the special position of the value of equality among the State of Israel values; and with the implications of this position on allocation of State lands. He also agreed that the duty of the State to act in equality cannot be evaded by allocating land to the Jewish Agency, which is permitted to limit the sector of the population entitled to benefit from its activity because of its nature as a Jewish-Zionist institution.

However, Kedmi J. opined that “the approach emphasizing the primacy of the value of equality should not close the door to the possibility of balancing this value against other values, such as that of national security”. The last value is concerned with safeguarding the existence of the State of Israel as a Jewish and democratic State. Therefore, in exceptional circumstances where establishment of an exclusive Jewish settlement on State land is justified by the value of national security – this value may restrict and even override the value of equality.

The possibility of balancing between these conflicting values actually prevents the questioning of the legality of past allocations of State land to Jewish settlements only. As to the present case – since the allocation of lands in the settlement of Katzir took place almost eighteen years ago, perhaps under the circumstances that existed then, the value of equality had to be balanced against other essential values, especially that of national security. Given the precedental character of this judgment in all that concerns application of the principle of equality in allocation of State land in general and in allocation of land to the Jewish Agency in particular – it should not have a retrospective effect.

Therefore, in the view of Kedmi J., the Court had to restrict its decision to declaration of the application of the principle of equality to direct and indirect allocation of State land in the future, without a possibility to apply it to activities that took place in the past (including the allocation of land to the Katzir settlement that took place many years ago).