The Supreme Court Sitting as the Court for Civil Appeals

Civil Appeal No. 9535/06

Before:	The Honorable Judge (Ret.) A. Procaccia
	The Honorable Judge E. Arbel
	The Honorable Judge Y. Alon
The Appellants:	1. Abdallah Abu Masad
	2. Tawila El-Ganami
	3. Ibrahim Ahel-Atrash
	4. Salim Abu El-Ki'an
	5. EId Salaman Tal-Nabari
	6. Ibrahim Sabeikh El-Hawashala
	vs.
The Respondents:	1. The Water Commissioner
	2. The Israel Lands Administration
	Appeal on the verdict of the Court for Water Matters, dated 13 September 2006, in case no. WA 609/05, given by the Honorable Judge Ron Shapiro, and public representatives Gideon Hermelin and Shaul Streit.
On behalf of the Appellants:	Adv. Adal Badir
On behalf of the Respondents:	Adv. Tahel Brandes

VERDICT

Judge (Ret.) A. Procaccia:

1. This appeal raises the question of the extent to which Bedouins living in various illegal places of settlement in the Negev have a legal right to demand that the State install private connection points to water in their homes in their illegal place of residence, while in current circumstances they are provided water through two alternative supply systems: first, through water centers adjacent to permanent settlements, where water can be purchased and independently transported to their place of residence; second, by applying to the allocations committee for drinking water, which is authorized to recommend the connection of unrecognized village residents to private water connections through specific requests, and following special humanitarian considerations.

2. This is an appeal on the verdict of the District Court in Haifa, sitting as the Water Tribunal (The

Honorable Judge R. Shapiro, and public representatives G. Hermelin and S. Streit), which rejected the request of the appellants, Bedouins living in the Negev, to cancel the decision of the Water Commissioner (his title prior to the amendment to the Water Law, 5719-1959 (hereinafter: (the Water Law)) not to supply them with private connections to water in their illegal places of settlement.

General Factual Background

3. The Appellants are six citizens who are residents of unrecognized villages in the Negev, who submitted requests to the allocations committee for drinking water to approve private water connections to their homes at various points along Mekorot's water pipes in the region. Each of the Appellants submitted a request on his behalf and on behalf of several additional families, so that, in fact, each request was submitted by several dozen people, all Bedouin citizens living in illegal settlements in the Negev.

4. The Respondents are the state-run Authority for Water and Sewage (hereinafter: "The State Authority") and the Israel Land Administration, who are the administrative authorities involved in approving the connection of individuals in illegal settlements to private water connection points. The process of approving a private water connection requires submitting a request to the "Committee for Allocating Drinking Water" (hereinafter: "The Water Committee"), a special committee that acts on a humanitarian basis within the targeted administration for the advancement of the Bedouin sector in Israel. After submitting the request, the committee deliberates on the need for and possibility of giving exceptional approval for a private water connection to the individual's home in an illegal settlement. Following this inquiry, the committee submits its recommendation to the State Authority, the entity that approves such connections, under the Water Law.

5. The context of the petition under consideration is the approach taken by the state to deal with the phenomenon of illegal Bedouin settlements in the Negev, and the comprehensive policy of the government regarding this matter. The Bedouin community in Israel is located mainly in the Negev. Approximately half of the Bedouin community lives in permanent settlements, established over the years by the governments of Israel, as part of a general plan designed for this purpose. The other half of the Bedouin community lives in illegal locations, also referred to as "unrecognized villages." These are unorganized and unrecognized settlements. Several are new, having been built without plans, and without any of the legally required adaptations to the regulations of the Planning and Construction Law, 5725-1965 (hereinafter: "The Planning and Construction Law"), with all that derives from this. In many cases, there are also issues of trespassing on government or privately-owned land. This type of settlement raises many substantial difficulties in various spheres, including the provision of vital services to the residents of those villages. The government's general policy, and its implications for the Bedouin community in the Negev, is a widespread and complicated question with many ramifications (High Court of Justice 528/88 *Avitan vs. the Israel Land Administration* , Verdict 43(4) 297 (1989); High Court of Justice 1991/100 *Abu Hamed vs. the National Council for Planning and Construction* (not published, 26.7.2007); High Court of Justice case 6672/00 *Abu-Kef vs. the Minister of the Interior* (not published 5.11.2002); Civil Appeal 8354/04 *The Association for Aid and Protection of the Rights of the Bedouin in Israel vs. the National Council for Planning and Construction* (not published 25.1.2006); High Court of Justice 2778/05 *The Ramat Hanegev Regional Council vs the Prime Minister* (not published, 19.11.2007)); for critical review, see Marwan Dalal "Society, Economy and Law: Critical Thoughts" Economic, Social and Cultural Rights in Israel 941, 962-976 (Yoram Rabin and Yuval Shani, Editors, 2004); Ronen Shamir, Suspended in Space: Bedouins Under the Law of Israel, 30 Law and Soc'y Rev. 321 (1996). We will not address the processes within the general questions of policy toward the Bedouin community, but only to the extent which this matter directly affects the specific issue under consideration in our case.

6. The connection of the unrecognized villages in the Negev to water sources was deliberated in the High Court of Justice case 3586/01 *the Regional Council for Unrecognized Villages vs. the Minister of National Infrastructure* (not published, 16.2.2003) (hereinafter: HCJ 3586/01). In this case it was determined that the most suitable way to clarify the rights of residents in the unrecognized villages in the Negev to have their private homes connected to water, was for them to submit individual and specific requests by groups of at least ten families to the Water Committee, which is authorized to recommend private water connections to the Director of the Authority. If this procedure does not suffice their needs, those submitting the applications will be able to appeal the decisions of the Director of the State Authority to the qualified court.

7. Following HCJ 3586/01, the appellants submitted individual requests to the Water Authority, with the aim of receiving permission to connect their private homes to the water pipes. Representatives of the Water Committee discussed the appellants' requests, and even visited their areas of settlement, in an attempt to examine their conditions and the specific need, if it exists, to connect the residents' homes to private water points. The committee decided to recommend to the Director of the Authority to reject the requests of Appellants nos. 1-2 and 4-6. However, the committee recommended to accept the request of Appellant no. 3, and to connect him privately to a joint connection with another group of appellants, and to register the abovementioned connection in the name of that group.

8. The Director of the Authority adopted the recommendations of the Water Committee and decided, accordingly, not to connect Appellants nos. 1-2 and 4-6 to private water points, and to approve the connection of Appellant no. 3 to a private water point together with a group of appellants, and to register the connection in the group's name. The cooperation with the group was implemented for technical reasons. The Appellants submitted an appeal to the Water Tribunal on the decision of the Director of the Authority, based on the provisions of the Water Law.

The Appeal and the Water Tribunal's Verdict

9. In the appeal, the Appellants claimed there were flaws in the decision of the Director of the Authority. First of all, it was claimed that the Director of the Authority did not exercise independent discretion when making his decision. Thus, it was claimed that the decision was given while relating to extraneous considerations, and that it violates the basic rights of the Appellants to live in dignity. Finally, the Appellants claimed that they have been discriminated against in comparison to "Lone Farm" residents who were allowed to be connected to the various infrastructural facilities.

10. The Water Tribunal rejected the appeal, for the following reasons:

First of all, the Water Tribunal noted that the appeal was submitted late, and this alone is sufficient cause for it to be rejected. Nonetheless, the Water Tribunal also discussed the crux of the matter and determined that the right to water is a component of the right of the appellants to health and dignity and that the State is obligated to provide them with water in order to uphold this right. However, it was determined that in the balance between the right to water, on the one hand, and the public interest in upholding policies of planning and the enforcement of planning laws, on the other hand, the public interest overpowers the interests of the appellants, and the appeal must, therefore, be rejected.

The Water Tribunal stressed that the actual construction of the illegal buildings where the Appellants currently reside, is sufficient cause to rescind their claims in the appeal, as it is not possible that on one hand the Appellants will erect illegal settlements, and on the other they will demand the State to indirectly recognize these settlements by connecting them to water

infrastructures. In addition, the Water Tribunal rejected the claims of discrimination raised by the Appellants, and their claim that the decision of the Authority's Director was reached by refraining from his duty to discretion. In light of the aforesaid, the Court has come to the conclusion that the decision of the Authority's Director not to approve the Appellants' private connections to water, excluding Appellant no. 3, whose request for connection was approved, is reasonable and does not require intervention. The Appellants submitted this appeal on the decision of the Water Tribunal.

The Claims of the Parties

11. The claims of the Appellants in the appeal:

First, they claim that their request was not submitted late, as they never received the decision of the Authority's Director, but only received letters from the representatives of the Water Committee, that notified them that the Authority's Director had rejected their requests, and they, therefore, did not know the last date for submitting the appeal. They also refer to a lack of clarity in provisions nos. 31 and 34 of the Water Law, in regard to the date for submitting the appeal.

Second, it was claimed that the Director of the Authority made his decision without using independent discretion, acting as a "rubber stamp" for the decision of the Water Authority, and therefore, his decision should be cancelled.

Third, the Appellants claim that the main consideration in rejecting their requests for a private water connection is to apply pressure on them to move to legal, permanent settlements as part of the government's general policy. According to this claim, this consideration was given too much weight, as if it was the only relevant consideration, and thus the decision of the Authority's Director was unbalanced. Accordingly, the Appellants claim that the Water Tribunal erred when, as stated in the reasons for its verdict, it linked the issue of the private connections to water and alternative habitation solutions offered to them, as the issue of settling permanent habitation should not be part of the considerations to be taken into account regarding connecting their homes to water sources.

Fourth, the Appellants claim that the Authority's Director did not give sufficient weight in his decision to their constitutional right to water, that derives from their basic rights to life, dignity, health and equality, and the possible risk to them due to the complete absence of water or the lack of water of sufficient quantity or quality. The Appellants also claim that the decision of the Director of the Authority constitutes a violation of Israel's international commitments, as the right to water is a recognized right under the *International Covenant on Economic, Social and Cultural Rights*, of 1966; and a violation of Israel's commitments under the *Convention on the Rights of the Child* , of 1989, regarding the children of the Appellants.

Fifth, it was claimed that the Water Tribunal erred when it did not accept the Appellant's claim regarding discrimination between them and the residents of the Lone Farms in all that regards their connection to infrastructure, in order to receive vital human services.

Finally, the Appellants claim that the Water Tribunal also erred in its interpretation of section 157a of the Planning and Construction Law, when it determined that the connection of the Appellants to a water source is also prohibited by this law. They claim that the provisions of this law apply only when there exists a functioning approval authority, and therefore has no application to unrecognized villages, such as those where they reside.

12. The Respondents, alternatively, claim that the appeal must be rejected, as the decisions of the Director of the Authority are reasonable and this is the law as determined in the decisions of the

Water Tribunal.

The Respondents do not deny the right of the Appellants to water as part of their basic rights to live in dignity; they also do not dispute their obligation to provide drinking water to the residents of the unrecognized villages. Nevertheless, according to the Respondents, the method of supply must take into account the laws of planning and construction and the general policy of the government. In determining the method of supply, one must take into consideration the illegal settlements that contradict the planning laws and the government's policy, according to which the residents of the unrecognized settlements in the Negev – amongst them the Appellants – have the option of moving to permanent habitation and thus to receive full connection to water infrastructure, and to other vital services that the state provides to those living within the law, such as electricity, and other municipal services.

Even when considering the fact that the Appellants refuse to move their place of residence, there are two alternative systems for providing water to the residents of the unrecognized villages: first, supplying water through "water centers," which are targeted water infrastructures, where water tanks are placed adjacent to government-built permanent settlements, according to the decision of the Ministers Committee for the Arab Sector, of 14 February 2000. The residents of the unrecognized villages are permitted to come to these centers, purchase water, and independently transport it to their place of living. The Respondents admit that this is not the optimal way of obtaining water, due to the need to pay the cost of transporting the water and the hardship involved. However, they claim, given the illegality of the settlements, that this method of providing water can be deemed reasonable. Second, these residents have the possibility of submitting a private request to the Water Committee. In the framework of the government's policy, the Water Committee has been instructed to connect private homes only in exceptional cases, and for humanitarian considerations. A permit for a private connection via this method has been given in situations where the applicant for a permit was not offered the solution of permanent accommodation, and when there is no reasonable solution for water consumption and there is a shortage of water.

The State explains that, the issue of private connections to water is a component of the government's general policy regarding Bedouin settlements in the Negev, and the main issue in this case is the transfer of residents from the unrecognized villages to permanent settlements. In that regard it was claimed that the government policy assumes that the person who is living in an unrecognized village and is requesting the permit for a private water connection has a right to water, but this right is not absolute, but only relative. In contrast, there are various public interests, such as: the regulation of illegal settlements in the Negev; considerations pertaining to the location of the Appellant's residence, his condition and extent of his need for water; examining housing alternatives for the Appellant; and his proximity to the "water center". The Respondents emphasize that in those cases that there exists a real and direct need for water, and there is a technical possibility of creating a new private connection, the connection is approved by the Director of the Authority. An example of this can be found in the case of Appellant No. 3, for whom such a need was identified and a joint connection with another group was approved.

The two alternative systems assume, therefore, that a citizen and resident in Israel has the right to water, even if he chooses not to live in a permanent location, and lives in an illegal site; but the manner in which this right is realized for a resident of an unrecognized village is one of the two above mentioned alternatives, i.e. transporting water from the water centers or through a permit for a private connection in exceptional cases.

The Respondents also claim that the decisions of the Authority's Director in the case of the Appellants were made after the Water Committee held a comprehensive examination of their requests, including visits to the sites of their homes, and a plenary discussion. The Committee

investigated the existing level of accessibility to water for each of the Appellants who lacked the requested private connection, examined the technical possibilities of implementing such a connection, and considered the availability of the alternatives for permanent settlement for each of the Appellants. In particular, the Water Committee investigated the existence of a humanitarian need for the connection, and in the cases where such a need was found, tended to recommend the permit for a private water connection. Regarding Appellant no. 1, no water shortage was found, and there is available alternative permanent housing for the Appellant and his family. Regarding Appellant no. 2 it was found that he and the families he represents live in the area of a firing range, and they also have available alternative options for housing. Regarding the request of Appellant no. 3, as stated above, the committee's examination found that the area where he and the families he represents live has a severe water shortage. Therefore, it was recommended to provide him with a private water connection, but for technical reasons it was suggested that the connection be registered in the name of another group. The explanation for this is that the other group resides at a higher elevation, and that it would be technically easier to connect Appellant no. 3 to this point, and from there to the homes of the others in his group. Regarding the request of Appellant no. 4, the committee found that the water pipe adjacent to his home is not able to provide the quantity of water required for the connections that are already in place and, therefore, it was not technically possible to add more connections to this line. In addition, it was found that there are alternative housing possibilities for the group represented by this Appellant, and it was also claimed that legal evacuation procedures against many of his family members are currently being conducted at the Magistrates Court in Be'er Sheva. Regarding the request of Appellant no. 6, it was found that infrastructure for a water system and 14 water connections exist in that area. It was also discovered that a water center is due to be established in the area. In light of this information, it was recommended not to approve his request for a private connection.

Regarding the claim of a delay in the submission of the Appellants' appeal, the Respondents state that letters were sent to the Appellants containing notification of the Water Commissioner's decision regarding their requests, and their appeal was filed extremely late. Therefore, the Water Tribunal's ruling in this matter must be upheld, and the appeal must be dismissed out of hand.

Regarding the independent discretion of the Director of the Authority, the Respondents claim that the Water Committee is a body that oversees the collection of relevant data and formulates recommendations regarding the submitted requests and that the Authority's Director is permitted to rely on the assessments of this professional body before making his decision. The Appellants did not prove any basis for their claims, according to which the Authority's Director adopted the Water Committee's recommendations without using discretion. Regarding the reference to section 157a of the Planning and Construction Law, the Respondents state that it provides an additional approach to strengthening the claim that the decision of the Director of the Authority' was given within legal boundaries, and is to be considered reasonable. Regarding the claim of discrimination it was claimed that this case is fundamentally different from that of the Lone Farms due to the fact that the status of the Lone Farms has already been regulated by the authorizing bodies and has been fully legitimized by law, unlike the unrecognized Bedouin settlements. Therefore, there is no basis to the claim of discrimination between these two forms of settlement.

Later Developments

13. On 23 December 2007 the Minister of Construction and Housing appointed a committee which would submit its recommendations to the government regarding the regulation of Bedouin settlement in the Negev. This committee, headed by Judge (ret.) Goldberg, submitted its conclusions to the Minister of Construction and Housing on 11 December 2008 (hereinafter: the Goldberg Committee). The committee compiled a general proposal for policy in regard to the settlement of

Bedouins in the Negev, including the unrecognized settlements. The committee recommended, *inter alia*, conducting a process for regulating lands for the Bedouin, out of consideration for their historical affinity to the area, as opposed to a legal right to the land. The Goldberg Committee also recommended recognizing, as much as possible, the unrecognized villages, and including them amongst the existing clusters of settlements. During the interim period and until full recognition, it was recommended to recognize these villages as "transitional settlements," and to provide them with services via an "anchoring settlement" in each aforementioned cluster, in lieu of municipal tax payments and a change of address. No new construction will be permitted in the transitional settlements (Goldberg Committee Report, Paragraphs 108-109).

14. On 18 January 2009 the government of Israel decided to appoint an operational team, which would submit a detailed and applicable draft for regulating Bedouin settlement in the Negev, based on the Goldberg Committee Report and taking into account the reservations raised by various committee members in the committee's report (Government Decision No. 4411, dated 18 January 2009). To the best of our knowledge, this team has not yet submitted its recommendations.

The Deliberation Framework

15. This appeal was submitted according to Section 146 of the Water Law, which states that a verdict of the Water Tribunal is subject to appeal in a manner corresponding to that of a verdict of a district court in a civil case. In fact, the law does give a framework of deliberations that is civil in nature, but this is fundamentally a process of judicial oversight of the decision of an administrative court (The Water Tribunal) which conducted, in turn, a judicial review of the administrative decision made by the Director of the Authority, who is the administrator authorized to decide on the granting of permits for private water connections.

16. The Water Tribunal is a distinct professional administrative tribunal, whose responsibility is to discuss appeals according to the Water Law (Shlomo Levin, Administrative Tribunals 97-101 (1969)). The tribunal has been granted a degree of flexibility in discussions and evidence that exceeds the scope customary for other courts (Section 144 of the Water Law). Three participants sit on the tribunal bench: a judge and two public representatives (Section 141 of the Water Law). As a professional body, the Water Tribunal has broad jurisdiction in its field of expertise, and the level of intervention into its decisions is minimal, excluding cases of fundamental legal error, and other acceptable causes for intervention for administrative court decisions (High Court of Justice 221/64, *Pardes Chana VS The Minister of Agriculture*, Verdict 18(4), 533, 546 (1964) (hereinafter: the Pardes Chana Case)). Insofar as the disputed questions are of a general nature, and exceed issues that center on professional expertise, there is, as is customary, greater leeway for judicial criticism on court decisions.

17. In examining the appeal of the Water Tribunal's decision in the case before us, consideration must be given to the complex procedures which a citizen requesting a private water connection must undergo in order to clarify his situation: first, his request is examined by the Water Committee; then it is brought before the Authority's Director for a decision, which the Appellant is permitted to appeal before the Water Tribunal; lastly, the Appellant may submit an appeal to the Supreme Court, against the decision of the Water Tribunal.

The Normative Plan

18. The issue at hand deals with the administrative legality of decisions made by the Director of

the Authority not to permit private connections of the Appellants' homes in the illegal settlements to water sources, excluding Appellant no. 3, and to order the residents to suffice with an alternative system for water consumption, based on independent transportation of water from water centers, and for the provision of special water permits by the Water Committee on a humanitarian basis. For this purpose one must examine the reasonableness of the general arrangement that is implemented in regard to the provision of water to residents of the unrecognized villages, together with the examination of individual decisions given in the cases of the Appellants. As the right to water is a basic right, as a part of the constitutional right to life with dignity, one must also examine the reasonableness of the decisions made by the Authority's Director on the basis of constitutional principles that require the upholding of a balance between basic rights and general public interests. We will examine the issue at hand, based on these guidelines.

The Right to Water – Its Normative Status

19. For our purposes we will examine the normative status of an individual's right to water.

There exist three levels in the normative recognition of a person's right to water: the right to water on the level of a regular law, both by virtue of a statutory arrangement and by virtue of customary law; the constitutional right to water, derived from another recognized constitutional right, by virtue of the Basic Law: Human Dignity and Liberty – in our case, the right to live in dignity; and finally, at the top of the pyramid, the legislative right to water that is recognized by virtue of itself. This constitutional right for water is recognized in different countries, particularly in those that suffer from a severe shortage of water (see, for example, section 27(1)(b) in the final clause of the South African Constitution; section 216(4) of the Gambian Constitution 1996; section 14 of the Ugandan Constitution 1995; section 90(1) of the Ethiopian Constitution 1998; section 112 of the Zambian Constitution 1996; section 20 of the Nigerian Constitution 1999) and documents and conventions in international law (see, for example: Stephan McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 Geo. Int'l Envtl. L. Rev. 1 (1992); Peter Gleick, *The Human Right to Water*, 1 Water Pol'y 487 Henri Smets, *Economics of Water Services and the Right to Water*, in (1999); *Fresh Water and International Economic Law*173-177 (Edith Brown-Weiss et al. Eds., 2005).

20. Israel recognizes the right to water first and foremost as a statutory right by virtue of the Water Law. The right to water has not yet been granted independent constitutional status by virtue of a basic law. Nevertheless, as water is vital to the very existence of a person, and to his existence with dignity, one must examine whether the right to water was granted the normative status of a constitutional right, deriving from the constitutional right to life with dignity; and whether, by extension, the State is obligated to provide any person living in Israel with water to the extent needed for minimal existence with dignity.

The Constitutional Right of a Person for Water

21. The source of the right to a dignified existence lies at the crux of the basic right to human dignity, given recognition as a constitutional right in constitutional law in Israel. Section 4 of the Basic Law: Human Dignity and Liberty states: "All persons are entitled to protection of their life, body and dignity," and section 2 of the Basic Law states that: "There shall be no violation of the life, body or dignity of any person as such." The right to dignity lies therefore, in the basic law, both in the positive and negatives aspects thereof (High Court of Justice 366/03, *Commitment for Peace and Social Justice Association vs. the Minister of Finance*, section 11 of the verdict of Justice

Barak (not published, 12 December 2005) (hereinafter: the case of the Commitment Association); Aharon Barak "Prologue" Economic, Social and Cultural Rights in Israel 7 (Yoram Rabin and Yuval Shani, Editors, 2004) (hereinafter: Barak – Prologue).

Indeed, "the idea that the dignity of a person as a constitutional right also includes the right of a minimum of human existence, such as a roof over one's head, basic food, and basic medical care, and that the state is obligated to ensure that a person's level of existence does not go below a minimum required for living with dignity has put down deep roots in the Israeli legal system" (Legislative Appeal 3829/04 *Twito vs. the Municipality of Jerusalem*, Verdict 59(4), 769, 779 (2004)). . This approach was underscored in a series of cases that were brought before this Court (High Court of Justice 4634/04 *Physicians for Human Rights vs. The Minister of Public Security* (not published, February 12, 2007); Civil Appeal 4905/98 *Gimzu vs. Yeshayahu*, Verdict 55(3) 360 (2001); High Court of Justice 4128/02 *Adam Teva V'Din vs. the Prime Minister*, Verdict 58(3) 503 (2004); Civil Appeal 5368/01 *Yehuda vs. Tshuva*, Verdict 58(1) 214 (2003); High Court of Justice 1384/04 *B'Tzedek Association vs. the Minister if Internal Affairs* (not published, March 14, 2005)). As quoted by Justice Barak:

> "The right of a person to dignity is also the right to conduct his everyday life as a human being, without being subdued by distress and encountering unbearable depravity. This is an approach, by which the right to dignity is the right that a person be ensured the minimum of material means to exist within the society in which he lives. This approach has been repeatedly expressed in the rulings of this court, in a variety of contexts" (The case of the Commitment Association, section 15 of Justice Barak's verdict; Aharon Barak "Human Rights as a Legislative Right" Hapraklit 41, 271, 280 (1994) (hereinafter: Barak – Human Dignity).

22. Human dignity is a complex concept, that integrates various and different values – some of a physical-existential nature, and others of a mental-spiritual nature. The harm to human dignity might be expressed in psychological humiliation and degradation, and might be expressed in the denial of basic physical-existential necessities without which a person could not exist with dignity. Take from a person the roof over his head, his food, his water, and his basic medical treatment and you have taken his ability to exist with dignity, and to realize his existence as a human being. The fundamental importance of the human right to minimal existence is that the need to implement this right in extreme circumstances might lead to a situation where the constitutional obligation to ensure that a person has his most basic rights, including water, available to him becomes the obligation of the State (the case of the Commitment Association, section 22 of Justice Barak's verdict: Barak – Human Dignity, page 273; Aharon Barak "The Economic Constitution of Israel" Law and Governance D 357 (5747); Barak Medina "The State's Obligation to Provide Basic Needs; From a "Debate on Rights" to a "Theory on Public Funding" Economic, Social and Cultural Rights in Israel 131, 147-158 (Yoram Rabin and Yuval Shani, Editors, 2004)). In this way the nature of the right to minimal existence with dignity is different, it might impose on the State the positive obligation to ensure the realization of this right, in contrast to other legislative rights, which are characterized by the upholding of a prohibition on the State to harm the rights of an individual to realize them himself (the case of the Commitment Association, section 11 of Justice Barak's verdict; High Court of Justice 9722/04 Polgat VS the State of Israel, section 21 (not published, 7 December 2006); Barak – Prologue, page 7; Ruth Gabizon "On the Relationship Between the Civil-Political and Social-Economic Rights" Economic, Social and Cultural Rights in Israel 25, 41-44 (Yoram Rabin and Yuval Shani (Editors), 2004); Yoram Rabin and Yuval Shani "Prologue" Economic,

Social and Cultural Rights in Israel 11 (Yoram Rabin and Yuval Shani Editors, 2004)).

23. Accessibility to water sources for basic human use falls within the realm of the right to minimal existence with dignity. Water is a vital need for humans, and without basic accessibility to water of a reasonable quality, humans cannot exist. Therefore, one must regard the right to water as a right to human existence with dignity that is afforded constitutional protection by virtue of the constitutional right to human dignity, anchored in the Basic Law: Human Dignity and Liberty.

24. As with any constitutional right, the right to water is not an absolute right, but a right which has relative protection and requires consideration for the upholding of important and contradicting values. There might be competing interests of another person or of society at large opposing it. Just as any legislative right, the scope of protection for the right to water varies, in a balance between it and the opposing, competing interests that derive from the particular circumstances of the case. The relative intensity of the competing values is examined within the framework of this balance. Insofar as the need for water under given concrete circumstances is a vital and existential need, thus the right for water gains greater weight, and the contradicting values retreat thereby. On the other hand, insofar as the right to water is realized in its basic form, as part of the right for minimal existence with dignity, and the stated demand is for its realization in a more comfortable and accessible manner, the opposing interests and values might gain greater weight and overpower the former. The principles of the limiting clause in the Basic Law: Human Dignity and Liberty serve as a criterion for the appropriate balance between the contradicting values on a constitutional level. These principles also reflect on the reasonableness and proportionality of decisions made by the qualified authority in regard to the provision of water to individuals and settlements, when examined on an administrative level.

Human Right to Water in International Law

25. An individual's right to water also derives from the principles of international law, to which Israel is a party as a member of the family of nations.

26. Israel is a party to the International Covenant for Social, Economic and Cultural Rights 1996 (ratified on 3 October 1991, 21, 1037, volume 31, page 205). Although this convention has in fact not been incorporated into our legal system through legislation, it comprises a guiding and directing value not only on an international level, but also in the interpretation of internal legal matters (Aharon Barak, Interpretations in Law, Volume C: Legislative Interpretation 235 – 237 (5744)).

27. The right of a person to maintain a suitable quality of life is set in section 11 of the Covenant, as quoted:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through

> international co-operation, the measures, including specific programs, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

This instruction relates to a person's basic right for food for his existence, and this also includes the right to water.

28. Section 4 of the Covenant states that "the State may subject such rights only to such limitations as are determined by law in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." This is a balancing instruction that is similar in nature to the characteristics of the limitation clause in Israel's Basic Law.

29. The publications of the Committee for Economic, Social and Cultural Rights, responsible for the implementation of the Treaty, might be used as a source for interpreting the instructions of the Covenant, even though they do not carry any binding legal status (Yuval Shani "Economic, Social and Economic Rights in International Law: What Use can Israeli Courts Make of These?" Economic, Social and Economic Rights in Israel 297, 321 (Yoram Rabin and Yuval Shani Editors, 2004)).

Although the right to water is not specifically included in the Covenant, the Committee for Economic, Social and Cultural Rights has determined in General Comment no. 15 that water is included within the boundaries of the right for suitable living conditions (section 11 of the Covenant) and of the right for suitable standards of health (section 12 of the Covenant), while placing normative criteria for the realization thereof (UN Committee on Economic, Social and Cultural Right (CESCR), *General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C. (26 November, 2002)* (hereinafter: Interpretative comment No. 15)). Section 1 of General Comment No. 15 states that:

> "*Water is a limited natural resource and a public benefit, fundamental for* ***life and health****. The human right to water is indispensable for leading life in human dignity. It is a prerequisite for the realization of other human rights*". (Emphasis not in original).

Section B of General Comment No. 15 states the normative content of the right to water. Section 10 of the comment states that the right to water includes free access to existing water sources, the right for protection from disturbances in consuming a minimal amount of water, and the right to benefit from an equal supply of water. Section 11 of General Comment No. 15 anchors the concept that water is a social and cultural resource, and not only an economic resource, and the obligation to manage a water system in order to maintain intergenerational justice. Finally, Section 12 determines that the criteria for the realization of the right to water are availability, quality and

accessibility. The element of accessibility has four aspects: physical access to water, economic access to water, equality in access to water and access to information about water. This instruction reflects on the scope of the right to water.

Section 16 of the General Comment directly discusses the right of special populations to water. Sub-sections (c) to (e) determine the obligation of countries in this regard, as follows:

> "(c) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal populated settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;
>
> (d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;
>
> (e) Nomadic and traveler communities have access to adequate water at traditional and designated halting sites;"

Section 37 of General Comment No. 15 determines the core of the right to water, and the State's "core obligation" in regard to the right to water. In this framework the obligation to ensure accessibility to a minimal quantity of water required for an individual's personal and household needs was set; the obligation to ensure the lack of discrimination in access to water, especially for weak populations; the need for the existence of reasonable access to water at a reasonable distance from a person's home; and the need to uphold personal security in accessibility to water sources, including the equal and fair division of water.

Much on the constitutional status of a person's right to water, and the regulation of the essence of this right is in international law.

A Person's Right to Water on a Legislative Level

30. Water is a public resource. Section 1 of the Water Law states the basic norm for regulating water sources and their uses in Israel:

> "Water sources in the country are public property, subject to State control and intended for the needs of its inhabitants and the development of the land."

Water sources are, therefore, public property, and the State acts as a trustee for the public in order to fulfill the public's need for water, and to promote development plans in Israel. It has already been ruled that: "Water sources are public property, and the need to safeguard them derives not only from principles of good governance, but also from the protection provided to this precious and limited proprietary resource, shared by all state citizens" (High Court of Justice 1773/01 *Blum vs. the Minister of Agriculture and Rural Development*, Verdict 56(3) 320, 326 (2002); Civil Appeal 10078/03 *Shatil vs. the State of Israel* (Not Published, March 19, 2007).

31. Section 3 of the Water Law states that "every person is entitled to receive water and to use it subject to the provisions of this law." This provision determines the statutory right of every person in Israel for water, subject to certain conditions set by law (Civil Appeal 293/65 *Ben Ami Hatis vs. The Water Commissioner*, Verdict 19(4) 71 (1965); Civil Appeal 535/89 The Water Commissioner VS Perlmutter, Verdict 46(5) 695 (1992) (hereinafter: The Perlmutter Case)). The right to water is subject, therefore, to the provisions of the Water Law and to the authority vested in the authorized body for the purpose of managing water assets in Israel.

32. In addition to the general restriction anchored in section 3 of the Water Law, various fundamental restrictions are found in the law that accompanies the right to water. Thus, for example, it was determined that a person has a right to receive water from a water source as long as by receiving this water the water source is not salted or depleted (section 5 of the Water Law: the Pardes Chana Case, page 539). Thus it was determined that the right to water is "joined to a purpose," in the sense that it can be used only for the purposes stated in the law, which are – household use; agriculture; industry; work, trade and services; public services, and preservation and rehabilitation of nature and landscaping elements (Section 6 of the Water Law; Civil Appeal 246/65 *Braz vs. the Water Commissioner*, Verdict 19 (3), 519, 521 (1965)))). The law applies to the right to water in every way in which it was formulated – both by law, if by agreement or custom, or in any other way (section 7 of the Water Law; The Perlmutter Case, pgs. 701-702). An additional outstanding feature of the right is that it is generally conditioned on payment (Chapter 4, Section A of the Water Law; Civil Appeal 7262/00 Poriya vs. Levy, Verdict 56(3) 899 (2002); High Court of Justice 2632/94 *Deganya A vs. The Minister of Agriculture*, Verdict 50(2) 715 (1996); Civil Appeal 788/87 *Levy vs. Pines*, Verdict 44(2) 52 (1990); Civil Appeal 726/72 "HaChaklai", *Communal Agricultural Organization Ltd. vs. Shapiro*, Verdict 27(2) 589 (1973))). The question arises whether a governmental authority may release a citizen from paying for water in certain individual cases (High Court of Justice 4682/05 *Sialya vs. The Head of the Civil Administration for Judea and Samaria* (not published, September 11, 2005); Neta Ziv "Poverty, Reducing Gaps and Equality: The Case of the Right for Water" Law and Governance 7(2) 945, 984 (2004)).

33. An additional important arrangement regarding our case is the Water and Sewage Corporate Law, 5861 – 2001 (hereinafter: The Water Corporate Law), in light of its extensive effect on the regulation of the water system and methods of supplying water to residents. This law arranges the operation of the municipal water systems through municipal water corporations. The purpose of establishing these water corporations was to create a "closed system" in the sphere of water and sewage, through which income from water and sewage fees would be invested in the maintenance, expansion and improvement of water and sewage systems (Section 1 of the Water Corporate Law; High Court of Justice 9827/04 *Local Government Center vs. The State of Israel*, paragraphs 9-10 of Justice Naor's ruling (not published, 25 January 2006)). This legislation reflects the trend of privatizing the water system and transferring the management of water as a public resource to a new managerial model framework (section 72-79 of the Water Corporate Law; Basic Budgetary Regulations (Assignment or Attachment of a Right to the Water and Sewage Corporation), 5765 – 2005). This model also considers the benefit of water consumers as part of a relationship between the water corporations and all residents (section of the Water Corporate Law).

The Authority to Approve a Water Connection

34. The authority to approve a person's private water connection is given to the Director of the Government Authority for Water and Sewage, and subject to the Water Law. This authority was established in 2007 for the purpose of anchoring all activities pertaining to water and sewage to one central governmental body. This authority was given regulatory authorities over the water system, including supervision and control of the system.

35. There exists a licensing regime over the provision of water in Israel. The provision or supply of water entails receiving a license from the Director of the Government Authority, dependent on meeting certain conditions that were determined for this purpose (section 23 of the Water Law; High Court of Justice 3688/94 *Tzabarivs. The Minister of Agriculture*, paragraph 3 (not published, 8 July 1996). The Water Law gives the Director of the authority extensive powers of discretion in awarding the license, and he is permitted to determine in the license any stipulation which he believes necessary to ensure efficient production, storage, transportation and distribution of water, and to prevent the reduction of water sources; and thus is the case when there is no other directive in the regulations set by the state authority (section 25 of the Water Law).

36. Our case focuses on individual citizens, who wish to connect to the water infrastructure of the main water supplier, i.e. "Mekorot" Israel National Water Company. In this case, section 34(a) of the Water Law states:

> "34. The Obligation to Supply Water
>
> (a) The director of the government authority is permitted to order the holder of a license to provide water to a certain individual, on condition that this provision does not significantly harm the provision of needs of the license owner and his consumers, and on condition that the basic expenses for arranging provision will not fall on the holder of the license ; and in the case that there is no agreement between the parties on the quantity, price and terms of delivery of water – the director of the government authority will rule in this matter, according to the regulations set by the council of the government authority. Any person who believes that he has been negatively affected by an order or regulation provided according to this subsection is permitted to appeal to a court."

Subject to this section, the Director of the Authority decides whether to connect a certain person to a supplier's existing water infrastructure (ibid 26/97 *Mekorot Water Company Ltd. vs. The Water Commissioner* (not published, 25 March 1999) (Justice Bain); and in this court: Civil Appeal 410/75 *Shatzman vs. Givat Ada Company for Provision of Water Ltd*., Verdict 30(1) 330, 332-333 (1975). In the same matter it was ruled that "the purpose of the regulations set in section 34 is to force the holder of a production license, such as the above mentioned respondent, to provide water to a certain individual who is not included among his regular consumers"; (but compare: the Perlmutter Case, paragraph 4 to the ruling of Justice Or)

37. The criteria for implementing the powers of the government authority and its director derive from the nature of their position and the purpose of their work, as set in the legislation that empowers them. Section 124(11) of the Water Law states that the governmental authority for water and sewage "will be responsible for the management of water and sewage system … will act according to government policy and according to its authority in the water system, according to this and any other law." Section 124(17) of the Water Law, which specifies the responsibilities of the authority council states, amongst other things, that the authority must implement "the policy of the government which has ramifications on the water system" (sub-section (2)).

38. It appears, therefore, from the provisions of the Water Law and the detailing of its responsibilities that the Authority's Director must, in the framework of his duties, act in accordance with the government's policy, and in consideration of the main objectives of the management of the

water system; the decisions of the Director of the Authority must abide by the standards of administrative law. They must be based on all relevant considerations, and on practical considerations only, and abide by the criteria of reasonableness and proportionality in law (High Court of Justice 5016/96 *Horevvs. S The Minister of Transportation*, Verdict 51(4), 34 (1997) (hereinafter: The Horev Case); High Court of Justice 953/87 *Poraz vs. The Municipality of Tel Aviv*, Verdict 42(2) 309 (1988)).

39. As our matter centers on the right to water, which has constitutional nature, the demand for reasonableness in the decisions of the Authority's Director requires an examination of the criteria of constitutional proportionality in law and the balances found in the limitation clause of the Basic Law (The Horev Case, page 37; High Court of Justice 935/89 *Ganor vs. The Attorney General*, Verdict 44(2) 485, 513-514 (1990); High Court of Justice 11437/05 *Kav La'Oved vs. The Minister of Internal Affairs*, paragraphs 32-33 (not published, 13 April 2011); Aharon Barak, Proportionality in Law: Damaging the Legislative Right and its Limitations (462-465 (2010) (hereinafter: Barak – Proportionality)).

The Decisions of the Director of the Authority in the Eye of Public Law

40. The decisions of the Director of the Authority in this case must be examined both according to the general policy of the authority in regard to the provision of water to unrecognized Bedouin settlements and in relation to individual decisions that were reached in the case of the Appellants. The foremost principles of the authority's policy in this case are: there is no dispute on the obligation to enable the Bedouin community access to water resources required for their existence. This also includes the residents of the unrecognized settlements. But the quality of access and methods of delivery of water to the residents is affected, *inter alia*, by the need to adapt the forms of settlement to the legal requirements stated in planning and building laws and according to government policy. According to this policy the tendency is to create incentives for the Bedouin community to settle in legal permanent villages, in various alternatives offered by the state. As long as the illegal settlement continues in the Negev, and as an intermediate stage until a comprehensive solution is found for Bedouin settlement, the authority operates on two tracks, in order to ensure that the Bedouins have access to water sources: first, by establishing water centers, from where residents can transport water to the unrecognized settlements, and second, by providing individual permits for private water connections in specific cases, according to the recommendation of the water committee and based on humanitarian considerations.

We will examine this general policy, based on rules of relevance, reasonableness and proportionality in law.

Relevance

41. The first issue to be examined is whether the illegality of the Bedouin settlements, and the government policy to solve this phenomenon by providing legal permanent settlements, are to be considered relevant considerations in ruling on the individual requests of the Appellants for a private water connection; or are these possibly extraneous considerations which must not be taken into account. In other words, must one take into account, for the sake of reasonable discretion in the matter of a private water connection, the fact that those requesting a permit, as stated above, are residents of illegal settlements, who have, in most of the cases before us, the option of moving to legal permanent villages that the state is providing for them, where the supply of vital services, including a direct supply of water to their homes, is a matter of routine?

42. My answer to this question is in the affirmative: the element of illegal settlement, the need to deal with this phenomenon and the existence of available alternatives – legal settlement – are

relevant considerations that can be, and must be, taken into account when examining a request for a private connection to a water source.

The illegal settlements of the Bedouin throughout the Negev have become a leading national problem, whose implications are widespread in all areas of life. It constitutes a phenomenon that greatly harms the laws of planning and construction and the protection of property; it is a case of "a group of people making a law unto themselves," and choosing, at their own discretion, when and how to settle, with total disregard to state laws, including basic planning regulations. Occasionally the land on which these groups settle is state or privately-owned land, so we are also dealing with a case of trespassing, that harms the proprietary rights of others, and illegal settlements might have an impact also on the quality of the environment and it is clear that this phenomenon involves the avoidance of paying taxes land levies (Goldberg Committee Report, paragraph 63).

Furthermore, the phenomenon of illegal Bedouin settlement is an expression of deep disregard for the rule of law, and of principles of public order that bind all citizens. A civilized and well-run country cannot accept a situation where a group of people make a law for themselves, which opposes the rules of public order and law, and exceeds the realms of a normal society.

It thus derives that when residents of an illegal settlement submit a request to approve a water connection directly to their homes, the Authority's Director is permitted to take into account the illegality of their settlement and the damage involved to the law and public order. This is especially the case when the group submitting the request has a way to obtain legal and permanent housing that the State is making available to them, with all basic vital services within immediate accessibility, as accepted in regard to any legal settlement. The Appellants' disregard for this alternative exacerbates the damage to the law involved in unrecognized settlements, and it is justified to consider this factor when the authorized body deliberates a request for a connection..

Alongside general public interest in coping with illegal settlements, the authorizing body must ensure the provision of a minimal supply of water to the residents of those settlements, as this is a vital human need. However, the nature of the illegal settlements might affect the level of accessibility and convenience of the water sources for the residents .

My conclusion, therefore, is that in determining a test for a person's level of accessibility to water sources, the fact that he is a resident of an illegal settlement is a relevant consideration which may be taken into account.

Probability and Proportionality

43. The question is whether the policy of the authorized body to solve problems pertaining to a person's accessibility to water in illegal settlements in the Negev fulfills the requirement of reasonableness and proportionality; does the existence of "water centers," from where residents of the settlements can transport water to their homes, together with the possibility of obtaining individual permits for private water connections in exceptional cases and on an humanitarian basis fulfill the requirements of reasonableness and proportionality?

44. The requirement for administrative reasonableness means achieving a balance between opposing considerations, while giving appropriate relative weight to each according to the matter at hand. Proportionality is the appropriate test for examining the nature of the violation of a basic human right, which is measured according to the principles of the limitation clause and, in our case, section 8 of the Basic Law: Human Dignity and Liberty. Proportionality is perceived as one of the "main issues" deriving from reasonableness, as "making the demand for reasonableness a concrete fact" or as a "branch on the tree of unreasonableness," when an administrative entity is discussing

the damage to a legislative right (Barak – Proportionality, page 464).

> The limitations clause in section 8 of the Basic Law states:
>
> "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."

In our case, the implementation of the state planning policy on the degree of accessibility of residents of the unrecognized Bedouin villages to water sources involves a violation of their right to water, which is afforded them as a human right. But one can say that this violation, on condition that it is implemented within reasonable levels of proportionality, does not violate the values of the State of Israel and is intended for an appropriate purpose, i.e.: to solve the problem of illegal settlements in the South, by giving residents of the illegal settlements an incentive to move to legal population centers provided to them by the State.

45. It remains to examine the proportionality of the Authority's policy, which is based on the existence of "water centers" and the possibility of obtaining permits for private connections in irregular cases, based on humanitarian considerations. The constitutional proportionality is assessed by the rational connection, or the correspondence of the means taken to the goal to be realized. This matter demands that the use of the means will lead to the realization of the goal in a rational way; needs must be examined as well as means that will lead to a lesser violation of basic rights; the third test is the test of narrow proportionality, which, in regard to a constitutional violation, requires the upholding of an appropriate relation between the sum total of the benefit gained from the violating action and the realization of the desired purpose and the damage that might be caused from the violation to an individual's constitutional right (Barak – Proportionality, page 373, 391, 419).

When implementing the proportionality tests in our case, one can conclude that there exists a rational connection between the chosen means – refusal, as a rule, to directly connect the homes of residents in illegal settlements to water sources, while arranging accessibility to regional water sources and providing private permits for connection based on humanitarian causes – and the goal. The goal in this case is to provide an incentive to the residents of the unrecognized settlements to move to legal villages, offered to them by the State.

The test of "need" or "lesser violation" was also employed in this case. Indeed, the rule is that one does not approve a private connection in an unrecognized village; but, on the other hand, the existence of water centers enables the transportation of water to water tanks in the village, and the provision of individual permits in exceptional cases limits the violation and transforms it into a lesser violation.

The test of narrow proportionality, requiring an appropriate relation between the benefit derived from the realization of the purpose involved in the violation and the level of violation of a constitutional right, can also be seen in this case. The benefit deriving from the realization of the purpose involved in a violation is manifested in the incentive given to illegal residents to move to available legal locations, which directly provide all vital services without requiring residents to travel far to obtain these services. This incentive is vital in order to prevent the perpetuation of illegal settlements, and it is important to avoid providing indirect encouragement to illegal settlements through direct provision of unlimited services, directly to the residents' homes. On the other hand, the violation of the right to water that this policy entails, focuses on the convenience in accessibility to water sources. This policy does not violate the actual right of fundamental accessibility to water sources. The harm to the residents of the unrecognized settlements is reflected in the inconvenience caused to them by the need to transport water from the water centers to the

settlements, and possibly also in the incurred costs of transporting water to settlements that are far away from the water sources, and to all those who do not have an irregular permit for private connections due to humanitarian considerations. No claims were raised before us that these actually deprive the residents of their right to the supply of a minimal quantity of water, as water is available for all who require it from the abovementioned centers. Therefore, a test of narrow proportionality is also upheld, as there is a balance between the level of violation of the right to water in the authority's policy, and the importance of the various aspects of the state planning policy, which attempts to abolish the phenomenon of illegal Bedouin settlements in the Negev. There is a balance between the degree of the violation of the right to water – affecting the convenience in accessibility to water sources and not to the actual possibility of receiving a regular supply of water – and the benefit underlying the goal that motivated the violation – coping with and finding a solution to the phenomenon of illegal settlements.

It must be emphasized that this proportionality is subject also to the fact that in cases where accessibility to water centers is not reasonably possible and it has not been made possible to acquire the minimal levels required for daily existence, or that the option of moving to permanent and legal settlements is not actually presented to the person applying for a permit for a private connection, these considerations might favor providing the above mentioned permit. The abovementioned humanitarian exception constitutes an inseparable part of the internal balance contained within the Authority's policy.

Proportionality is attained, therefore, as long as a person's basic right to accessibility to water sources is maintained, even if this involves inconvenience and the bearing of certain monetary costs. It must be noted that, in light of the phenomenon of illegal settlements, this is not an optimal system for water consumption, but a minimal arrangement, intended to uphold the basic right to water even if its realization involves effort and cost. The realization of the full right to water requires the legal regulation of the settlements, and this is contingent on the inhabitants' choice, and open to their decision.

46. The Authority's policy, therefore, withstood the test of relevance, reasonableness and proportionality. Its implementation in each and every case requires specific examination of the circumstances of each case (in this matter compare, amongst others: High Court of Justice 2887/04 *Abu Madigamvs. The Israel Lands Administration* (not published, 15 April 2007); High Court of Justice 7115/97 *Adalah: The Legal Center vs. The Ministry of Health* (not published, 19 December 2001); High Court of of Justice 4540/00 *Abu Apash vs. The Minister of Health* (not published, 14 May 2006; High Court of Justice 5108/04 *Abu Guda vs. The Minister of Education*, Verdict 59(2) 241 (2004)).

From the General to the Particular

47. Since we have determined that the Authority's policy generally upholds conditions of relevance, reasonableness and proportionality, we can now begin to clarify the specific decisions of the Authority's Director in regard to each of the Appellants.

48. First, we must clarify that decisions in the cases of the Appellants were reached after the Water Committee visited the settlement sites and examined first-hand the needs of the Appellant's group and the level of accessibility of this group to the water centers. This is a summary of the committee's findings:

Appellant No. 1 – During the visit to the site it was found that there are water routers and pipes for providing water; the water center is located at a distance of 3.5 kilometers from the road (Exhibit B of the Respondents' summaries) and that the Appellant and his group have found an

available and legal housing solution in Aro'ar.

Appellant No. 2 – This Appellant and his group have settled in firing range no. 503. The Committee stated in is decision that it does not have a mandate to provide water within a firing range and that this group has access to legal housing alternatives, in Abu Krinat and Aro'ar.

Appellant No. 3 – The visiting Water Committee found that there is a severe water shortage in the area and recommended that this Appellant and his group receive a private water connection through a connection to another group, for technical and topographic reasons.

Appellant No. 4 – The water pipe adjacent to the residence of this Appellant and his group is not adequate for the supply of the quantity of water, required for the existing water connections. Therefore, technically, no extra connection can be added to this line. It was determined that there is no extra pipe in the region to which additional connections can be joined. This group was offered a permanent housing solution, which would give them full services directly to their homes. The committee also added that evacuation and expulsion proceedings are currently underway in regard to several members of this group, and demolition orders have even been issued for the buildings they constructed.

Appellant No. 5 – Plots for a permanent village, offering the full range of services to their homes, were allocated to this group already in 2001.

Appellant No. 6 – When visiting the site, the Water Committee found infrastructure of a water system and 14 existing connections to water in the area. A water center is planned to be erected in close proximity to the site.

49. It appears from the Committee’s decisions, which were adopted by the Water Tribunal, that Appellants Nos. 1 and 6 have reasonable access to water sources. In regards to Appellant No. 3, the Authority's Director approved his request for a private connection. However, in regards to Appellant No. 2, Appellant No. 4 and Appellant No. 5, it is not clear from the details provided by the state whether these groups have reasonable access to water sources without a private water connection. As these groups have settled in illegal settlements and as they have been offered solutions for permanent settlement, it is justified, in principle, not to accept their requests for private connections to water sources. However, this is all on the condition that the State upholds its obligation to ensure reasonable access for this group to sources of water and that there are no exceptional humanitarian circumstances justifying the granting of individual permits. The level of fulfillment of these terms in relation to these Appellants has not been sufficiently clarified.

50. In light of that stated above, it deems fit to require additional examination on behalf of Appellants 2, 4 and 5 by the Water Committee and the Authority Director, to enable them to re-examine the level of access of these Appellants to the water sources in the area, the probability of this accessibility, and the possible existence of special humanitarian needs that might justify the provision of a private water connection. If needed, it will also be possible to instruct on alternative solutions for private connections insofar as this is necessary to ensure minimal access of the Appellants to water sources.

51. I do not find any reason to go into detail concerning the other claims raised by the Appellants.

Epilogue

52. The fate of the Bedouin community in southern Israel is a leading national problem.

Residents of the community are citizens with equal rights in the State of Israel, but over the years a phenomenon has developed in the construction of unrecognized settlements in the south of the country that has created a deep rift between the norms obligating all citizens of the State and the lifestyles of some members of the Bedouin community. The phenomenon of illegal settlements by the Bedouin community in various areas of the Negev is against the law and violates regulations of public order that bind all citizens of the country. This has implications for the ability of these residents to profit from all services and benefits to which legal citizens are entitled by law. The State has invested great resources in creating an infrastructure for the integration of the Bedouin community in permanent settlements; the realization of this policy enables the State to provide full rights to civil services to all residents, while ensuring direct and full accessibility. To date, these efforts have been only partially successful, and one must hope that the process of integrating the Bedouin community in permanent settlements will be accelerated for the benefit of the community, and in order to bridge existing gaps in Israeli society.

53. Alongside this social dilemma that has not yet been fully solved, the State is responsible for ensuring the basic access of a person to water sources in Israel, even if he resides on land that is not his, has built a house that is defiant of the laws of planning and construction, has trespassed on another person's property, violated that person’s proprietary rights, and even if he has violated the foundations of the rule of law by all these. One must find the balance between the demand for keeping the law and its appropriate enforcement and the concern for a person's basic and existential need for water, even if he does not abide by the law. The solution to this dilemma must be found in the balance between contradicting values, as required by a law abiding state that acts in the spirit of human rights.

54. The principles of the State policy formulated for the solution of the water problem in the unrecognized settlements fundamentally reflects an appropriate balance between the contradicting values in this case. The more that the Bedouin community integrates into permanent settlements, the question of their eligibility to full civil services provided by the State to its citizens will be solved, including the issue of private water connections. As long as the problem of the isolation of the unrecognized settlements continues, the existing gap regarding convenient accessibility of all services, and water sources in particular, will remain. But, one must ensure in all cases reasonable accessibility on a minimal level, even if not through private connections to homes in illegal settlements. Thus the State must also provide for specific needs on a humanitarian basis, when the need arises.

55. In light of that stated above, I will recommend to my colleagues to reject the appeals of Appellants Nos. 1, 3 and 6. On the other hand, I recommend to return the cases of Appellants Nos. 2, 4 and 5 for an additional examination by the Water Committee, and the Director of the Authority, in order to investigate the question of the access of these Appellants to water sources, including the level of reasonableness under these circumstances, all in order to ensure minimal access to water sources. One must also consider the possibility of outstanding humanitarian needs of some of the Appellants, which might justify awarding individual permits for private connections to water sources.

There is no court order for expenses.

J U D G E (RET.)

Justice E. Arbel:

I agree with the conclusion reached by my colleague, Justice E. Procaccia, in her ruling and the comprehensive and profound analysis on which it is based. Like her, I believe that the starting point is that the violation of a basic right such as the right to water must withstand the test of the limitation clause, even when we are discussing trespassers or law-offenders (for a similar case see my opinion in the High Court of Justice 2887/04 *Abu Madigan vs. the Israel Lands Administration* (not published, 15 April 2007) (hereinafter: the Abut Madigan Case)). Furthermore, I also agree with her ruling that the illegality of the settlement should bear weight in evaluating the reasonableness and proportionality of the response provided to the realization of the right to water.

Even so, I wish to emphasize that the result of the balance in the matter before us derives from the fundamental nature of the right to water and, at the same time, from the complexity of the issue that is the background of the specific case of the Appellants, and which relates to the long-standing dispute about the rights of the Bedouin community in the lands in southern Israel. These two features of the case before us affect the implementation of the principled position, which I have repeated several times in the past, according to which "a sinner should not be benefited," requires that the violation of the law by a person demanding a right will be taken into consideration when examining his rights (See in other contexts: Civil Appeal 3015/06 *The State of Israel vs. Finkelstein* (not published, 9 December 2008); Administrative Appeal 398/07 *The Movement for Freedom of Information vs. the Tax Authorities*, paragraph 59 of my verdict (not published, 23 September 2008)).

I believe that in regard to the importance and fundamental nature of the right to water, there is no need to add to what my colleague has stated, but regarding the complex issue of the reality of the Bedouin community in Israel, I wish to add a few words.

As stated in my colleague's verdict, this issue has been in the background of many appeals that have been brought to this court (See, in addition to my colleague's references, also: The High Court of Justice 6602/07, *El Una vs. The Minister of Health* (not published, 25 June 2009) and appeals that are still pending, such as The High Court of Justice 7245/10, *Adalah vs. The Ministry of Welfare* (not published, decision expected 21 February 2011)). Of course, the verdicts in these appeals have focused on the concrete issues brought before the court, or as I termed them in the past, the "by-products" of the conflict, and not the fundamental and complex conflict itself. However, the increase in minor problems related to this fundamental issue and its sensitivity, have led us to call upon the implementing authority to hurry and find a comprehensive and all-encompassing solution to this problem (The Abu Madigam Case, paragraphs 5 and 49 of my verdict). Indeed, for the purpose of examining this issue and suggesting a systemic solution, a committee was established, headed by Justice E. Goldberg (Ret.), that submitted its recommendations on 11 December 2008 (The Committee for the Regulation of Bedouin Settlement in the Negev – Report (2008) – www.pmo.gov.il/NR/rdonlyres/063BBB1A-E947-4816-9BD7-81547A01008C/0/DochGoldberg.pdf (hereinafter: the Goldberg Report or the Report). About one month after submitting the report, Government Decision no. 4411 specified the principles which constituted the basis for the committee's recommendations and which will constitute the basis for regulating Bedouin settlements in the Negev. In general, these are the issues pertaining to the regulation of lands; the formulation of a policy that will take the claims of the Bedouin population for land rights into account, alongside State needs and land and monetary resources; and the importance of formulating a policy that will be applicable within a short period of time, "in a way that will anchor and strengthen the relationship of trust between the Bedouins and the State" (section 3 of the Government Decision no. 4411, dated 18 January 2009). Accordingly, it was determined that an implementation team will be appointed, which will be mandated, amongst other matters, to formulate recommendations regarding the reservations raised in the Report by the

committee members and to submit to the government a detailed plan for regulating Bedouin settlement in the Negev within six months. Nevertheless, more than two years have passed since this decision was taken, and only on 31 May 2011, after writing these lines, were the team's recommendations submitted (Implementation Team of the Goldberg Report for Regulating Bedouin Settlement in the Negev, Report (2011) http://www.pmo.gov.il/NR/rdon/yres/AE7F35EO-B594-4A55-BA2C136D6575FDB5/0/goldUP.pdf) (hereinafter: the Report of the Implementation Team).

Beyond the vast, principled importance in the immediate application of the policy regarding Bedouin settlement in the Negev – an importance deriving both from the government decision itself and from the report of the implementation team – I believe that this delay also has practical relevance. As stated above, and also mentioned in the recommendations of the Goldberg Report, is the option of regulating unrecognized settlements (The Goldberg Report, Chapter on proposed policies of settlement, especially see paragraph 110; Report of the Implementation Team, especially pages 18, 32), in a sense that is similar to the process of regulating the Lone Farms, where legal flaws were found in the establishment of these farms (see regarding this issue: The High Court of Justice 243/99, *Adam, Teva V'Din vs. The Minister of Agriculture* (not published, 12 July 2009). Without having to respond to the claim of discrimination, and exactly because of my principled opinion on the relevance of the illegality element on decisions concerning requests for private connections to water sources – I will note only that when such an option of regulation or acknowledgment is up for discussion, and has even been implemented in certain cases, it is clear that there is relevance to the weight that must be attributed to the illegality of the settlement in the unrecognized villages. Additionally, I do not believe that this practical relevance changes the balanced result in our case which my colleague reached in her verdict, especially in regard to Appellants Nos. 1, 3 and 6. But, it might have significance in the renewed investigation that is to be conducted by the Water Committee and the Authority's Director, regarding the access of Appellants Nos. 2, 4 and 5 to water sources. To quote my colleague, the definition of the reasonableness of this accessibility is affected, amongst other things, by the illegality of the settlement.

Therefore, all that is possible must be done in order to commence implementation of the formulated policy, in order to solve the problems and conflicts accompanying the settlement of Bedouins in the Negev, as this is an issue that has been calling out for a solution for a very long time. It is obvious that as long as the implementation of the proposed plan is done in coordination with the Bedouin community, there are greater chances that we will be able to achieve the desired result of integrating the Bedouin community into Israeli society, as citizens with equal rights and obligations, and the earlier the better.

J U D G E

Justice Y. Elon:

In her comprehensive verdict my colleague, Justice A. Procaccia detailed the nature and essence of the right to water, against the balance and limitations that are involved in the implementation of this right, in the matter of those who illegally constructed buildings and settlement – in her words:

> "In determining the test for the level of a person's access to water sources, one could take into account the fact that he is a resident of an illegal settlement as a relevant consideration"

This is the reason which stands at the foundation of the ruling of the Water Tribunal in the case before us, and is due to this reason, on a principled level, that the claims raised in this appeal must be rejected.

At the same time, I join my colleague in the conclusion that regarding Appellants Nos. 2, 4 5 there is vagueness concerning the data brought before the Court in response to the question regarding minimal access to water distribution centers, and in this matter it deems just that this issue will be investigated in the way suggested by my colleague in her verdict.

In light of this, I agree with the verdict of my colleague, Justice A. Procaccia.

J U D G E

It was therefore decided, as stated in the verdict of Justice (Ret.) Procaccia .

Given today, 3 Sivan, 5771 (5 June 2011).

Justice (Ret.) Justice Justice