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At the Supreme Court Sitting as the High Court of Justice

H CJ 5373/08

Before:

**Honorable President D. Beinisch
Honorable Justice A. Procaccia
Honorable Justice Y. Danziger**

The Petitioners:

- 1. Ismaeel Ibrahim Abu Libdeh**
- 2. Ahmad Wael Gulani**
- 3. Muhammad Wael Gulani**
- 4. Diaa Hassan Jaber Bassiso**
- 5. Fuad Hassan Jaber Bassiso**
- 6. The Association for Civil Rights in Israel**

v.

The Respondents:

- 1. Minister of Education**
- 2. Jerusalem Education Authority**

Petition for *Order Nisi*

Representing the Petitioners:
Representing Respondent 1:
Representing Respondent 2:

Adv. Tali Nir
Adv. Ilil Amir
Adv. Dan Ben Tal

Judgment

Justice A. Procaccia:

1. This petition concerns the complaint of five students, residents of East Jerusalem, that the state does not uphold their right to free education in official educational institutions, and that consequently they are forced to study in unofficial institutions, and their parents bear a heavy financial burden. They demand, through their parents, to be reimbursed for their educational costs based on the argument that their basic right to free education under the law, is being violated. The Association for Civil Rights in Israel joined the petition as a public petitioner.

The Petition

2. The petition is directed against the Minister of Education and against the Jerusalem Education Authority which is responsible for the education in the city (hereinafter: **MANHI**). According to the petition, many children, residents of East Jerusalem, are forced to study in unofficial recognized schools or in unrecognized private schools, since the official education system in the city cannot absorb them, in the absence of physical infrastructures of buildings and adequate teaching personnel. The unofficial schools which are attended by the students are operated by various private parties, some of which are not supervised by the state's education authorities, and therefore remain outside the state's education system. Many of them charge the students' families high tuition. According to the figures specified in the petition, which was filed on June 16, 2008, during the school year 5768 (2007-2008) about 79,000 children were entitled to free education in East Jerusalem, out of whom 40,256 students studied in institutions which belong to the official education system. On the other hand, 17,905 students studied in unofficial recognized institutions, and 20,363 students studied in Waqf and other unrecognized private schools. According to the petition, about 9,000 students, residents of East Jerusalem, are not registered in any of the above educational institutions. According to MANHI's figures (which appear in the website of the municipality of Jerusalem), during the school year 5770 (2009-2010) 82,324 children were entitled to free education in East Jerusalem, out of whom 42,271 students studied in official municipal schools (1,456 class rooms) and 20,603 students studied in unofficial recognized schools (753 class rooms). 20,363 students studied in Waqf and other private schools (726 class rooms). These figures indicate that about half of the number of students in East Jerusalem study in the official education system, and the remaining half study in unofficial schools. Half of this group attends unofficial recognized schools, supervised by the Ministry of Education, and the other half attends private schools which are outside the education system, and are not supervised by the competent authorities in Israel.
3. Petitioner 1, resident of Shuafat neighborhood, Jerusalem, was a second grade student when the petition was filed. His parents wanted to enroll him in an official school in his place of residence, but were told by MANHI that he could not be placed in an official educational institution due to shortage of classrooms. In view of the above, the parents had to enroll him in the 'Ahabab El-Rahman' private school in his neighborhood, and paid for him annual tuition of NIS 3,760.

Petitioners 2 and 3 are brothers, residents of Shekhunat Hashalom, Jerusalem, who were second and fourth grade students when the petition was filed. The parents of these petitioners tried, for a number of years, to enroll their children in official schools in East Jerusalem, but the answer which they have received from both the schools they applied to as well as from MANHI was, that due to shortage of classrooms, they could not be absorbed by the municipal education system. Therefore, these petitioners were sent by their parents to the 'Shirin' school in their neighborhood, which is an unofficial recognized educational institution. The parents of these children paid for them in the school year 5768 tuition in a total amount of NIS 4,925.

Petitioners 4 and 5 are brothers, residents of Beit Hanina neighborhood, who were second and ninth grade students when the petition was filed. Their parents wanted to enroll them in official schools in their place of residence but their application was rejected due to shortage of classrooms, by the schools themselves as well as by MANHI. Therefore, petitioner 4 enrolled in the unofficial recognized 'Bridge' school in his neighborhood, whereas petitioner 5 enrolled in the 'Alahd' private school in Al-Ram. Due to his enrollment in this school, petitioner 4 [*sic*] must cross the Al-Ram checkpoint every morning, which involves considerable time and effort. During the school year 5768, the parents of petitioners 4 and 5 paid tuition in the sum of NIS 3,800 for petitioner 4, and tuition in the sum of NIS 2,190 for petitioner 5.

4. The petitioners argue that the state of Israel and the municipality of Jerusalem, being the authorities in charge of this matter, are obligated to provide all children residing in East Jerusalem a free official educational framework, in accordance with the basic principle of free compulsory education entrenched in the education laws of the state of Israel. In view of the absence of adequate infrastructures for the fulfillment of this obligation in East Jerusalem, the authorities are obligated to find a proper alternative for the students living in this part of the city. To the extent that the authorities fail to abide by this obligation imposed upon them by law, the state must act pursuant to section 6 of the Compulsory Education Law, 5709-1949 (hereinafter: **Compulsory Education Law**) and establish a mechanism for the repayment of the tuition to the parents of the children who are forced, against their will, to attend unofficial schools and finance their education using their own resources. This situation, in which the parents must bear the educational costs of their children by themselves and in which the education system fails to provide an adequate solution, does not comply with the basic right to free compulsory education which is afforded to every child in Israel, and directly contradicts the principle of equality in education which equally applies to the children of East Jerusalem, as it applies to the children of the western part of the city.

The remedies requested in this petition are, **firstly**, to order the Minister of Education to exercise his authority under section 6(c) of the Compulsory Education Law, and establish a mechanism for the repayment of the tuition to the children of East Jerusalem who wish to attend the official education system but are rejected by the authorities due to shortage of sufficient educational frameworks which can absorb them. **Secondly**, to order the Minister of Education to issue an order directing state treasury to reimburse the expenditures of the parents of petitioners 1-5 in connection with the education of their children in unofficial educational institutions.

Respondents' Position

The State of Israel – Ministry of Education

5. The state draws the required distinction between unofficial recognized schools which operate under a duly issued license according to the **Supervision of Schools Law, 5729-1969** (hereinafter: the **Supervision of Schools Law**, or the **Supervision Law**), and private schools which operate outside the recognized educational framework without a license and are not supervised by the Ministry of Education, such as the schools attended by petitioners 1 and 5. As to unofficial recognized schools, the Ministry of Education participates in the educational expenses of such institutions and transfers to them governmental funds in an amount equal to about 65% - 75% of the funds transferred to the official institutions. Such state funds are transferred directly to the schools, as is customary in the entire education system, rather than directly to the parents of the students themselves. It was emphasized, that in view of section 11A of the **State Education Law, 5713-1953** (hereinafter: **State Education Law**), the local educational authority, which is the municipality of Jerusalem in this case, is also obligated to participate in the funding of unofficial recognized educational institutions. Thus, the public funding transferred to the unofficial recognized education system is almost equal to the rate of the public funding transferred to the official institutions. The collection of tuition by official and unofficial schools, and the imposition of parents' payments in sums which exceed the sums approved by the Ministry of Education, is contrary to the law (section 6(d) of the Compulsory Education Law). The Ministry of Education acts to enforce the statutory provisions concerning this matter, but the enforcement measures do not always fully achieve the proper results. The collection of parents' payments contrary to the law is a state-wide problem, which is not unique to East Jerusalem, and efforts are made to deal with it. As to the private schools which do not fall under the supervision of the Ministry of Education at all, the position of the state is that it has no obligation to transfer to them any state funds whatsoever, since they exist and operate

contrary to the law according to which an educational institution may not operate without a license, and since state supervisory bodies are unable to inspect their compliance with safety requirements and their pedagogical level. The state claims, that the real solution for the educational problem in the eastern part of the city is the construction of additional classrooms, and that the handling of this matter is in advanced stages, is funded by the state of Israel and the Ministry of Education, and is monitored by this court within the framework of the petitions in HCJ 3834/01 **Hamdan v. Jerusalem Municipality** and HCJ 5185/01 **Badria v. Jerusalem Municipality**. According to the state, imposing upon the Ministry of Education the obligation to bear all educational costs for 40,000 East Jerusalem students who currently attend the unofficial education system, might materially damage the state's budgetary ability to plan and build additional classrooms in the eastern part of the city at the required pace, which is the real solution for the problem of shortage of official educational systems in the eastern part of the city. The state also argues that due to the fact that it is difficult to distinguish between the students who study in unofficial institutions by choice and between those who are forced to do so due to the absence of solution within the official education system, there is no room to determine that the Ministry of Education should finance 100% of the educational costs of all students who attend such institutions.

With respect to the specific remedies concerning petitioners 1 and 5, the state claims that the municipality of Jerusalem, being the local educational authority, is the one which should provide a specific solution to these petitioners.

The Municipality of Jerusalem – MANHI

6. MANHI claims that it is thoroughly familiar with the difficulty involved in the shortage of sufficient official education systems in East Jerusalem, and that it has been acting for years to solve them. According to MANHI, the solution for this problem lies in the construction of additional classrooms, a matter which was discussed in the related petitions which will be referred to below. MANHI notified that every student in the eastern part of the city who wanted to register to the first grade in a state school would be admitted. On the other hand, students who have already been placed in other schools and who wanted to move to state schools, might be rejected due to a shortage of classrooms in the official education system in the city. It emphasizes that it transfers to the unofficial recognized institutions the budgets which it is obligated to transfer to them under the law. According to MANHI, during the school year 5770 more educational institutions have applied for public funding as compared to previous years.

With respect to petitioner 1, MANHI points out that personnel on its behalf tried to contact his parents after a place was found for him in the municipal school "Shuafat Elementary School Boys C" but they were unable to reach them. With respect to petitioner 2 and 3, it was noted, that after the beginning of the school year, personnel on its behalf notified the parents that they could be placed in the municipal school "Shuafat Elementary School Boys C", but the parents did not show up to register their children. Recently, the parents submitted a new application to enroll their children in the municipal schools, which application will be examined towards the upcoming school year. With respect to petitioners 4 and 5, MANHI confirms that they could not be placed in the official educational system, and their problem has not been solved.

Related Petitions

7. The discussion in this petition requires the review of petitions the subject matter of which is closely related to the severe shortage of classrooms in the official education system in East Jerusalem. It is difficult to establish a position in the issues being the subject matter of this petition without referring to the related petitions, which directly project on the issues that should be resolved in the case at hand.

HCJ 5125/00 'Awaida v. The Municipality of Jerusalem

8. Said petition (hereinafter: '**Awaida**) was filed in July 2000 by 117 minors, residents of East Jerusalem, who were joined by a member of the city council of the municipality of Jerusalem, Mr. Meir Margalit. The petition was directed against the municipality of Jerusalem and the Ministry of Education, and the remedies requested therein were materially similar to those requested in the petition at hand, namely, obligating the competent authorities to enroll the petitioners in official educational institutions, and to the extent this could not be done, to provide governmental funding to cover the tuition of the children in private schools. The position of the state was that the petition should be rejected based on the argument that it was premature, due to the fact that at that time answers to the students' applications to be integrated into the official education system have not been received yet; that the applications were submitted by surprise, after years of having attended unofficial institutions, and in a manner which did not leave the authorities enough time to make the necessary arrangements to provide the requested remedies. The state has completely rejected the possibility that the tuition of students who attended private schools which were neither recognized nor supervised by the state would be covered by public funding.

After an *order nisi* was issued in the petition, the parties reached an agreement, according to which a joint committee of the Ministry of Education and the municipality of Jerusalem would be established, which would evaluate the needs of the official education system in East Jerusalem, and recommend of the required and feasible solutions which would enable to integrate the students into the official education system, both in the short run and the long run. In view of the above, the petition was deleted on February 5, 2001.

HCJ 3834/01 Hamdan v. Jerusalem Municipality and HCJ 5185/01 Badria v. Jerusalem Municipality.

9. The petition in HCJ 3834/01 **Hamdan v. Jerusalem Municipality** (hereinafter: **Hamdan**), dated May 2001, was filed by 26 minors, residents of East Jerusalem, who were joined by Mr. Joseph (Pepe) Alalo, member of the city council of the municipality of Jerusalem and the Pro-Jerusalem Society, against the municipality of Jerusalem and the Ministry of Education and Culture. The principle remedy requested was to order the respondents to enroll petitioners 1-26 and any other student in the eastern part of the city who was entitled to free compulsory education in official schools in their places of residence, or thereabout, according to the provisions of the Compulsory Education Law. According to the petition, the respondents refused to enroll these students in official schools based on the argument that their applications to enroll were submitted after the last enrollment date. The petitioners however claim that said refusal is contrary to the procedure, according to which registration must be made even after the termination of the enrollment period. It was further argued that such refusal infringed on the ability of the inspection team which was established following '**Awaida**, to determine the number of students who wanted to enroll in the official education system in the eastern part of the city.

In response, the respondents argued that the official education system, which consisted at that time of 30,000 students from East Jerusalem, could not absorb the 20,000 students of the private system,

within a short period of time. Therefore, it was argued, they should not be obligated to integrate the students who attended the private education system into the official system. The respondents wanted to focus on the specific problems of the petitioners in 'Awaida and in this petition, referred to the solutions which were found, by that time, to about 1,800 students, and reported of additional ventures which were under construction or tender, and which were expected, upon the completion thereof, to provide solution to thousands of additional students in the future.

10. The petition in HCJ 5185/01 **Badria v. Jerusalem Municipality** (hereinafter: **Badria**) was filed in July 2001 by 905 minors, residents of East Jerusalem, who were joined by representatives of neighborhoods in East Jerusalem, Mr. Joseph (pepe) Alalo, member of the city council, and the Pro-Jerusalem Society, against the municipality of Jerusalem and the Ministry of Education. The remedies requested in this petition were similar to the ones requested in 'Awaida, i.e.: to enroll the children in the official education system nearby their place of residence, or, alternatively, to fund their educational costs in the private institutions in which they will be forced to enroll as a result of this situation.

The respondents emphasized the difficulty in having thousands of students successfully integrated into the official education system, and their endeavors to increase the number of classrooms in the area. They denied the existence of an obligation to use public funds to cover the educational costs of students who attended unofficial educational institutions, and claimed that public support was provided to unofficial recognized institutions. They also claimed that private institutions which were not subordinated to state supervision and acted unlawfully were not entitled to any public funding.

11. Following the issuance of orders and *orders nisi* in **Hamdan** and **Badria**, a partial judgment in both petitions was rendered (the Honorable Vice President S. Levin, and the Honorable Justices D. Dorner and D. Beinisch). The judgment noted that the enrollment of children, residents of East Jerusalem, in educational institutions in accordance with the Compulsory Education Law has been on the court's agenda for a long time and that "**petitioners' claims for many years of neglect in this matter are not baseless.**" With respect to the principle remedy which was requested – to obligate the authorities to actually enroll the petitioners and other students in official educational institutions in the eastern part of the city – the effect of a judgment was given to respondents' declaration that they adopted a four-year plan for the construction of 245 new classrooms. As to petitioners' request to obligate the respondents to finance the tuition of the students who could not be placed in the official education system, it was held as follows:

"We are of the opinion that within the framework of this petition there is no room to give a sweeping declaratory relief, obligating the respondents to cover the tuition of children, residents of East Jerusalem, in unrecognized institutions. Nevertheless, nothing in our judgment constitutes an opinion on the question of whether the law grants the children who were deprived of their statutory rights under the Compulsory Education Law, the right to demand that their rights under said law be upheld."

The above petitions remained pending before the court for an additional period, and on August 11, 2002 a final judgment was rendered which held that the petitions were exhausted, but to the extent that petitioners' claims so justify, and to the extent that they have a legal cause to do so, the petitioners may turn to the court again.

Contempt of Court Proceedings in Hamdan and Badria

12. In September 2005, about four years following the date on which the partial judgment was rendered, the petitioners in **Hamdan** and **Badria** filed a contempt of court request according to section 6 of the **Contempt of Court Ordinance**, in which they argued that the respondents did not uphold the judgment and did not fulfill their undertaking to build classrooms in the eastern part of the city. In their response to the request, the respondents admitted that not all of the classrooms which they undertook to build have indeed been erected, but claimed that they were making extensive efforts to advance a plan for the expansion of the buildings of the official education system in the eastern part of the city.
13. Upon the conclusion of the hearing of the contempt of court request, this court held, that it was indeed under the impression that for various reasons the respondents did not fulfill their entire undertaking to complete the construction of additional classrooms in East Jerusalem, and in fact, the problem of shortage of classrooms only worsened since the judgment in the petitions was rendered. It was further held, that the respondents should conduct a needs assessment survey based on updated figures concerning the number of children who were entitled to free compulsory education in the Arab sector in Jerusalem, and present a detailed work plan on their behalf for the construction of additional classrooms in East Jerusalem.
14. Since then, the contempt of court request remained pending before this court, and several hearings were held in that matter from time to time, to follow up on the progress made in the planning and construction of the classrooms in East Jerusalem.

On March 1, 2007 the respondents notified that they have decided to build 400 classrooms over the upcoming five years and that 80 million NIS had been earmarked for this purpose per year, for a period of five years. Half of the budget was allocated to finance the expropriation of land, and its other half to finance the construction. However, the respondents clarified that it would not be feasible to complete the construction in its entirety within five years, since the entire process was long and complex. On March 18, 2007 the government of Israel announced of a multi-annual plan to build 8,000 classrooms stat-wide, including classrooms in the Arab sector in East Jerusalem. This plan includes the construction of the above 400 classrooms in East Jerusalem.

15. This court continued to monitor the construction process of the classrooms in East Jerusalem within the framework of the contempt of court proceedings. The municipality and the state provided from time to time updates concerning the progress made in the expropriation proceedings, planning and construction of the schools and kindergartens in East Jerusalem.

By the conclusion of the hearing in **Hamdan** and **Badria** which was held on July 1, 2009, the court noted (the Honorable President Beinisch and the Honorable Justices Arbel and Melcer) that since March 2007 significant steps have been taken to promote the solution to the problem, but they were still too scarce and basic as compared with the existing needs. Therefore, the court determined at this stage to continue to monitor the execution of the plan.

Updating Notices and Recent Developments

16. On October 10, 2010 we have decided to hear this petition as if an *order nisi* was granted therein. We have also decided to join the hearing of this petition with the hearing of the contempt of court request which was filed in **Hamdan** and **Badria**, and we allowed complementary arguments.

17. The municipality and the state specified in detail the progress made in the implementation of the master plan which was drawn up in 2007. According to them, a significant progress was made in this regard, and they were jointly acting to advance the construction at the proper pace, by the transfer of large budgets and the removal of bureaucratic hindrances. According to them, the real solution to the problem lies in construction, which concerns the erection of classrooms, although this alternative involves long and complex proceedings. Another important figure which was presented by them was that whereas in 2000, 29,000 students attended the official education system in the eastern part of the city, currently, it is attended by 41,630 students. The increase was made possible by virtue of the large budgets which were transferred to cover the shortage of classrooms. The state has also clarified that over the last year about 300 students wanted to enroll in the official education system in the eastern part of the city, but were rejected due to unavailability of classrooms, and were referred to unofficial recognized institutions in this part of the city. The state noted, *inter alia*, that the Ministry of Education was currently examining an additional alternative solution for the problem of the availability of the official education system to the students of East Jerusalem – according to which the schools which were had the status of unofficial but recognized institutions would be integrated into the official education system. Along the above statements, the state has reiterated its position that state budgets should not be transferred to private schools which were operating without a license and contrary to the law. It has further argued, that in view of the complex circumstances in East Jerusalem, the provisions of section 6(c) of the Compulsory Education Law could not be currently implemented and the tuition of the children who were attending unofficial institutions could not be funded, due to the concern, *inter alia*, that the state and the municipality would be flooded with insincere requests of students to enroll in the official education system, despite the fact that in practice they prefer the unofficial education system, for the sole purpose of receiving the tuition payable to the unofficial institution which would be transferred to them.
18. On November 24, 2010, the petitioners in **Hamdan** and **Badria** notified that they were moving to withdraw the request filed by them under the Contempt of Court Ordinance. They explained that they have reached the conclusion that the above proceedings were no longer the appropriate legal arena for making the required changes for solving the official education problem in East Jerusalem. They argued that only recently the respondents have completed their undertaking to build 245 classrooms within five years, which was entrenched in the partial judgment dated August 29, 2001, and that many years would probably pass before the respondents complete the construction of the 400 classrooms which they undertook to build in 2007. According to them, over the last decade, the gap between the number of students who are entitled to free education in the Arab sector in the city and those who actually exercise this right – has increased rather than decreased. In addition, over the last decade, the number of students who have been studying in private institutions increased by 133%, which in fact nullifies the right of these students to free compulsory education. The petitioners expressed their hope that the court finds a way to grant remedy which would limit the infringement on the right to free education in other proceedings which were pending before it. The petitioners further point out in these petitions that many students study in rented, below-standards buildings which severely infringe on their learning conditions. In addition, they argue that more than 5,000 children who are entitled to free education in the Arab sector in East Jerusalem are not registered in any educational institution. The planning proceedings are carried out very slowly, and the construction of the schools is not properly budgeted. Nevertheless, the petitioners agree, that as indicated in the notice of the municipality of Jerusalem, a substantial - although insufficient - change has occurred in the promotion of the plans for the construction of classrooms in the Arab sector in the eastern part of the city. Based on the figures of the municipality, the petitioners estimate that over the course of the next five years about 400-450 classrooms will be built. This will meet, for the first time, the annual increase in the number of students, but it will not reduce the existing gaps. Although their objectives were not achieved, the petitioners declare that they have

reached the conclusion that the request has exhausted itself and that the punitive and enforcement sanctions available under the contempt of court proceedings could not solve the education problems in the eastern part of the city. Therefore, they moved to withdraw these proceedings.

19. On January 18, 2011 we held a complementary hearing in this petition and in the petitions of **Hamdan** and **Badria** in which the parties' complementary arguments were heard. In a reasoned decision of this panel (written by the Honorable President Beinisch), **Hamdan** and **Badria** were deleted, in view of the request of the petitioners in said petitions and the respondents were ordered to bear their costs and expenses.

Interim Summary – The Factual Condition in the Petition before us

20. On the individual level concerning the petitioners in this petition: it seems that a solution was found for petitioners 1-3 since a place was found for them in the official education system in the municipal school 'Shuafat Elementary School Boys C'. On the other hand, the problem of petitioners 4 and 5 was not solved and MANHI confirmed that it did not manage to find places for them in the official education system. We assume, based on the facts which arise from the petition that they continue to attend the unofficial recognized educational institution and the private school, which they have attended in the school year 5768.
21. As to the general situation concerning the official education in East Jerusalem: a severe and complex situation arises, under which the obligation to provide free official education is not fully upheld by the competent authorities due to shortage of buildings and sufficient teaching personnel, and many children in this part of the city whose parents wish to enroll them in the official education system, are left without a solution. During the last decade in which the court has been monitoring the handling of the various petitions in this matter, the gap between the number of students who were entitled to official education and those who actually exercised this right has not been bridged. The requests of a considerable number of children to enroll in the official education system are still being rejected, and they are forced to look for a solution in alternative institutions, where they are often required to pay considerable educational expenses.

The specific issue which is up for discussion in the petition before us is – whether petitioners 4 and 5, who were not integrated into the official educational institutions despite their will to be so integrated, are entitled to be reimbursed for their educational costs in a recognized but unofficial educational institution and a private educational institution which is not supervised by the state. The individual case naturally raises the question in its general context, since any decision in the individual case projects on the public at large.

The Normative Framework

The Implementation of the Israeli law and jurisdiction in East Jerusalem

22. Following the six day war the law, jurisdiction and administration of the State of Israel were implemented in East Jerusalem (**Law and Administration Order (No. 1)** 5727-1967, which was issued pursuant to section 11B of the **Law and Administration Ordinance**, 5708-1948; **The Declaration concerning the Expansion of the Boundaries of Jerusalem Municipality** (file of regulations, page 2694 (20 Sivan 5727, June 28, 1967)), which was issued pursuant to section 8A of the **Municipalities Ordinance [New Version]**; Section 5 of the **Basic Law: Jerusalem Capital of Israel**). Hence, the eastern part of Jerusalem was integrated into and made part of the State of Israel, and full synchronicity was created between the law, jurisdiction and administration which govern the western and eastern parts of the city (see: H CJ 282/88 '**Awad v. The Prime Minister**

and Minister of Interior, IsrSC 42(2) 424, 429-430 (1988) (hereinafter: '**Awad**'). Children who were born to East Jerusalem residents who have a permanent residency permit, have the same status as their parents ('**Awad**', page 430; AAA 5829/05 **Dari v. Minister of Interior**, paragraph 6 (not reported, September 20, 2007); CA 48/89 '**Issa v. Director, District Population Administration Office, East Jerusalem – Ministry of Interior**, IsrSC 43(4) 573, (1989)). Accordingly, the entire Israeli law applies to residents of East Jerusalem who are permanent residents.

Main Issues in which Decision is required

23. In examining the issue which is up for discussion, three main questions should be addressed: **the first** – Was petitioners' right to free education in an official educational institution violated? **The second** – are the petitioners entitled to an individual financing of their entire educational costs in unofficial educational institutions, which should be transferred to them? and **the third** – should an operative remedy be given at this time under the circumstances of this matter?

The Right to Education

24. The right to education was acknowledged as a basic human right from the foundation of the State of Israel. It is rooted in the Israeli Declaration of Establishment of the State of Israel, in which the state undertook to maintain freedom of education and culture. The right to education is entrenched in diverse education legislation which constituted part of the first and important acts of legislation which were enacted immediately after the establishment of the state. The right to education is entwined as a basic element in the entire moral infrastructure of the constitutional system of Israel. It mainly concerns the right of the individual, but it also reflects and projects on the character of the society as a whole. Without education, a person is deprived of the opportunity for self realization, the development of his skills and abilities and the formulation of his moral and ethical views, in the absence of which his ability to become part of a civilized society is infringed; without education the character of the society is infringed and the effort to establish in Israel a democratic and tolerant society which safeguards basic liberties and develops general and unique culture, may fail (HCJ 4363/00 **Upper Poria Board v. Minister of Education**, IsrSC 56(4) 203, 213-215 (2002) (hereinafter: **Upper Poria Board**); HCJ 2599/00 **Yated – Children with Down Syndrome Parents Society v. Ministry of Education**, IsrSC 56(5) 834, 841-843 (2002) (hereinafter: **Yated**); HCJ 7374/01 **A v. Director-General Ministry of Education**, IsrSC 57(6) 529, 545 (2003)). The realization of additional basic rights is premised on the right to education, such as the freedom of speech and the ability to obtain information, the freedom to elect and be elected, the freedom of association and freedom of occupation. In the absence of the right to education, such other rights may also be infringed (**Yated**, page 843; HCJ 4541/94 **Miller v. Minister of Defence**, IsrSC 49(40) 94, 132 (1995) (hereinafter: **Miller**); HCJ 6973/03 **Marziano v. Minister of Finance**, IsrSC 58(2) 270, 276 (2003) (hereinafter: **Marziano**)).
25. Israel expressed its deep commitment to the realization of the right to education by joining international declarations and by assuming upon itself obligations under international multilateral treaties (**The Universal Declaration of Human Rights** of 1948, Article 26 (hereinafter: the Universal Declaration); **The Covenant on Economic, Social and Cultural Rights** of 1966, Article 13 (hereinafter: **the Covenant on Economic, Social and Cultural Rights**); **The Convention on the Rights of the Child** of 1989, Article 28 (hereinafter: **the Convention on the Rights of the**

Child); and see the comments of the Committee on Economic, Social and Cultural Rights which was established pursuant to the covenant: Committee on Economic, Social and Cultural Rights, Gen. Comm. 11, U.N. Doc. E/C.12/1999/4 (1999), and Gen. Comm. 13, U.N. Doc. E/C.12/1999/10 (1999)).

26. The question whether the right to education is, in and of itself, a constitutional right which forms part of human dignity has been discussed by this court more than once (for instance, HCJ 1554/95 **Friends of GILAT Association v. Minister of Education, Culture and Sport**, IsrSC 50(3) 2 (1996)(Justice Or)). The crucial importance of education in the life of the individual and in the formulation of his human existence, the centrality of education in determining a person's way of life and quality of life and the significance of this factor for the realization of his human dignity, ostensibly intertwine the right to education in its basic meaning with the value of human dignity which was recognized in Israel as a constitutional right under the **Basic Law: Human Liberty and Dignity**. It seems, that the right to education forms part of the "hard core" of human dignity, without which the value of personal dignity is materially and severely compromised (HCJ 7426/08 **Tabeka Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education**, paragraphs 14-16 (not reported, August 31, 2010) (hereinafter: **Tabeka**); HCJ 366/03 **Commitment to Peace and Social Justice Society v. Minister of Finance**, paragraphs 14-15 to the judgment of President Barak, and compare: paragraphs 1-3 to the judgment of Justice Levy (not reported, December 12, 2005); Yoram Rabin "*The right to Education – Status and Scope in Israel*" in **Economic, Social and Cultural Rights in Israel** 567, 570-573, 604-608 (Yoram Rabin and Yuval Shani, editors, 2004); Orna Ben Naftali and Yuval Shani **International Law between War and Peace** 214-215 (2006); Committee on Economic, Social and Cultural Rights, Gen. Comm. 3, para. 10 (1990); Gershon Gontovnik "*The Constitutional Law: Directions of Development Following the Constitutional Revolution*", **Iyune Mishpat** 22, 129, 138-140 (1999); and compare: HCJ 7052/03 **Adalah v. Minister of Interior**, paragraph 32 to the judgment of President Barak, paragraph 47 to the judgment of Vice President Cheshin (not reported, May 14, 2006)(hereinafter: **Adalah**)).

In our case, the right to education goes hand in hand with the right to equality, jointly forming a **right to equality in education**. This integration of these two rights which focus on a **person's right to free official education** carries this issue to the constitutional sphere which concerns human rights.

Right and Obligation to Education

27. The right of every child and youth to education was initially entrenched by legislation in the Compulsory Education Law (sections 2(A) and 6(A)) and was also expressed in section 3 of the **Student Rights Law, 5761-2000** (hereinafter: the **Student Rights Law**). Alongside this right, the law obligates – both the student's parents and the state – to provide for the children's education, and in so doing, the state is obligated by law to provide official free education to all children in the ages of compulsory education (sections 3, 4, 6 and 7 to the Compulsory Education Law). Hence, the right to education is of a complex nature of a right coupled with a parallel duty:

"The right to education is a complex right. It has an aspect of a human right, against which stands a "human duty" which must be exercised within the framework of compulsory education. The duty to education under the law applies both to the individual and the state which must allocate resources for the establishment and

up-keeping of a free education system and which must ensure that the right and obligation to education are realized in practice. Rarely does the law enforce the realization of human rights. Such is the right to education." (HCJ 4805/07 **Center for Jewish Pluralism - Israel Movement for Progressive Judaism v. Ministry of Education**, paragraph 52 (not reported, July 27, 2008); and compare: Yoram Rabin, **The Right to Education** 137-141 (2002) (hereinafter: **Rabin**)).

The purpose of the legislation, which imposes compulsory education on every child in Israel, is to provide him with basic education, the funding of which is imposed on the public authority (**Upper Poria Committee**, page 214).

28. According to the Compulsory Education Law, education must be provided to every child between the ages 3-17. It imposes a double obligation on the child's parents and on the public authority; the parents are obligated to enroll the child in a "recognized educational institution", which is an official educational institution or an unofficial recognized educational institution. They are also obligated to ensure that their child attends school on a regular basis (section 1, 3, 4, 6 and 7 of the Compulsory Education Law, section 20 of the State Education Law). Alongside the above, the state and the local authority are compelled to jointly maintain "official educational institutions for the purpose of providing free compulsory education" (section 7(b) of the Compulsory Education Law). At the same time, the educational institutions are prohibited from collecting tuition from the parents of the students who attend the official education system and the unofficial recognized education system, and limitations were imposed on additional payments collected from them (sections 6(a), 6(d) and 7 of the Compulsory Education Law). These arrangements constitute, together, the right of the student to free official education on the one hand, and the duty of the authorities to provide free official education to every entitled person, on the other. The right of the student and the duty of the authority are intertwined and linked to each other.

The Right to Equality

29. The right to equality as such, has already been recognized as an underlying principle enshrined by the state, in the Declaration of Independence, in which the state undertook to maintain an absolute civil and politic equality for all citizens of the state regardless of their religion, race and gender. The aspects of equality govern the entire legal system. The right to equality is recognized as a constitutional right which forms part of human dignity in as much as it is deeply related to the right to human respect. Hence, it is protected as part of human dignity under the **Basic Law: Human Liberty and Dignity** (HCJ 6427/02 **The Movement for Quality Government in Israel v. The Knesset**, paragraphs 38-40 to the judgment of President Barak (not reported, May 11, 2006) (hereinafter: the **Movement for Quality Government**); **Adalah**, paragraph 39 to the judgment of President Barak). The value of equality is a governing principle which is reflected in Israeli legislation, on all levels, and which has been entwined in case law throughout the years (for instance, **Equal Rights for Women Law, 5711-1951**; **Employment (Equal Opportunities) Law, 5748-1988**; **Prohibition on Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000** (hereinafter: **Prohibition on Discrimination in Products and Services Law**); HCJ 953/87 **Poraz v. The Mayor of Tel Aviv – Jaffa**, IsrSC 42(2) 309, 332 (1988) (hereinafter: **Poraz**); HCJ 721/94 **El-Al Israel Airlines Ltd. v. Jonathan Danielowitz**, IsrSC 48(5) 749, 759-760 (1994) (hereinafter: **Danielowitz**); HCJ 2671/98 **Israel Women's Network v. The Minister of Labor**, IsrSC 52(3) 630, 650-658 (1998) (hereinafter: **Women's Network**); HCJ 6698/95 **Ka'adan v. Israel Land Administration**, IsrSC 54(1) 258, 272-275 (2000) (hereinafter: **Ka'adan**); HCJ 4124/00 **Yekutieli v. Minister of Religious Affairs**,

paragraphs 34-36 (not reported, June 14, 2010)). Discrimination which is based on group affiliation - be it race, religion, ethnic origin, nationality, gender and the like infringes on the hard core of human dignity, and is regarded as an infringement on human dignity contrary to the **Basic Law: Human Dignity and Liberty** (Miller, page 132, 138; **Israel Women's Network**, pages 658-659; HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel**, paragraph 13 of President Barak's judgment (not reported, February 27, 2006)(hereinafter: the **Monitoring Committee**); HCJ 6304/09 **Lahav - Israel Association of the Self-Employed v. Attorney General**, paragraphs 76-77 (not reported, September 2, 2010)).

The Right to Equality in Education

30. The principle of equality has a crucial significance in connection with the realization of the right to education. Without equality in education, the realization of the right to education is not guaranteed. Discrimination in education means preferring one group or one individual over others of equal status and denying the disfavored group or individual an equal opportunity to fulfill their potential and maximize their chances.
31. The right to equality in education is entrenched not only in the general principles of the system, but also in specific education legislation. The Compulsory Education Law provides that "Compulsory education shall apply to each child and youth" (section 2(A) of the law), and the State Education Law provides, as one of its objectives, that "Equal opportunities must be provided for all children as well as the possibility to develop in their own way and to create an atmosphere that fosters and encourages that which is different and supports it" (section 2(8) of the law); the Student Rights Law provides that "Each child and youth in Israel is entitled to education according to the provisions of any law" (section 3 of the law). Moreover, section 5 of the Student Rights Law includes an explicit provision which prohibits discrimination in education, as follows:

"Prohibition against Discrimination

5. (A) No local educational authority, educational institution or anyone acting on their behalf shall discriminate students based on ethnic, socio-economic or political reasons, either of the child or of his parents, in each of the following:
 - (1) The enrollment, admission or removal of a student from an educational institution;
 - (2) The setting up of curriculum activities and separate groupings in the same educational institution;
 - (3) Maintaining separate classrooms in the same educational institution;
 - (4) Students' rights and duties, including discipline rules and the implementation thereof".

(See also prohibition against discrimination in educational services in sections 2(A) and 3(A) of the Prohibition against Discrimination in Products and Services Law; **Upper Poria Board**, page 218; HCJ 1067/08 '**Noar Kahalacha**' **Association v. Ministry of Education**, paragraph 17 of Justice Levy's judgment (not reported, August 6, 2009)(hereinafter: **Noar Kahalacha**). Discrimination in education infringes on the basic values which the right to education is liable to realize. It severely injures the individual. It infringes on the objectives which education is liable to realize on the general social level. Discrimination in education may perpetuate feelings of

inferiority and humiliation in the development process of the child's personality, which may accompany him as an adult; it may develop feelings of alienation and disharmony between the various sectors of society (Yated, page 843; Miller, page 132; Marziano, page 276). Indeed, "**The violation of equality is always severe. It is many times more severe when it violates the right to education.**" (the Monitoring Committee, paragraph 15 of President Barak's judgment).

32. The prohibition against discrimination in education is also reflected in international law, in conventions which entrench the prohibition against discrimination, *inter alia*, for racial or national origin reasons (Articles 5(E)(5) of the **Convention on Elimination of all Forms of Racial Discrimination** of 1965 and Article 26 of the **Convention on Civil and Political Rights** of 1966). This value is also entrenched in conventions which address the right to education, and provide that **every person** is entitled to education, and by so doing assimilate the principle of equality in education. They provide that every person should be given an equal opportunity to education (The **Universal Declaration of Human Rights**, Article 26; The **Covenant on Economic, Social and Cultural Rights**, Article 13; The **Convention on the Rights of the Child**, Article 28). The prohibition against discrimination is also entrenched in a special convention which specifically addresses this issue – the **Convention against Discrimination in Education** of 1960, which explicitly prohibits discrimination in education based on skin color, race and other characteristics, and establishes the principle of equality in education and equality in accessibility to education (for a general discussion see: Pentti Arajärvi, **Article 26**, in: *The Universal Declaration of Human Rights: A Commentary* 405-423 (Asbjørn Eide et al. eds, 1992); Rabin, pages 177-184; Committee on Economic, Social and Cultural Rights, Gen. Comm. 13, U.N. Doc. E/C.12/1990/10, paragraphs 31-37 (1999); Geraldine Van Bueren, **The International Law on the Rights of the Child** 245-248 (1995)). The Right to education under equal terms and the obligation of the state to provide free elementary education, are also regulated in regional human rights conventions, such as the **First Protocol of the European Convention on Human Rights** (Article 2 of the protocol), The **First Protocol of the American Convention on Human Rights** (Article 13 of the Protocol), and the **African Convention on Human Rights** (Article 17).

The Right to Equality in Education – a Constitutional Right

33. To the extent a question exists as to whether the **right to education** is a constitutional right, then the right to **equality in education** interfaces directly with the constitutional right to human dignity. Discrimination in general, and when effected in education in particular, creates a sense of deprivation and inferiority, which infringes on a child's dignity as a human being. The violation of equality in education constitutes a violation of the constitutional right to human dignity (Yated, page 843; Miller, pages 132-133; Noar Kahalacha, the comments of Justice Melcer in paragraphs 3 to 5; Tabeka, paragraphs 19-21).

The Types of Institutions in the Educational System in Israel, their Supervision and Funding by Public Funds

34. The duty to provide free educational services is jointly imposed on the state and the local authority (sections 7(a) and (b) of the Compulsory Education Law). The Compulsory Education Law imposes on the parents the duty to send their child to a "recognized institution" on a regular basis (section 4 of the law). A "recognized educational institution" includes an official educational institution in which state education is provided, and an unofficial recognized educational institution (section 1 of the Compulsory Education Law). In addition to these two types of educational institutions, the law also recognizes private schools which are unrecognized and unofficial referred to as "Exempt Institutions". In such institutions, according to an order issued by the competent

authority, the parents and children are exempt from the duty to study in a recognized educational institution, pursuant to section 4 of the law (section 5 of the Compulsory Education Law). In order to obtain the status of an "Exempt Institution", the private educational institution must belong to the educational system, and get an exemption by an order issued by the Minister of Education and published in the official gazette (Rashumot).

35. All types of educational institutions which belong to the institutionalized education system are supervised by the state. The Schools Supervision Law imposes a licensing duty on every school which is attended by more than ten students on a regular basis, with the exception of the educational institutions specified in the last part of section 2(a) of the law, including schools which were excluded from the applicability of the law by order issued by the Minister. As a general rule – all educational institutions – the official institutions, the unofficial recognized institutions and the exempt institutions – must have a license according to the Supervision Law, which ensures the implementation of basic standards of physical safety, suitable conditions and the rendering of education in a proper level to the students. Accordingly, all types of educational institutions in the education system, are subject to state supervision, and must act in accordance with the terms of the license issued to them. The director general of the Ministry of Education is authorized to instruct the institutions how to act according to the license and to even cancel it if its terms are materially breached. He is also authorized to close down a school upon the occurrence of certain events (sections 3, 9, 10, 15, 28, 32 of the Supervision Law).
36. The official educational institutions are fully budgeted by the public authorities (the state and local educational authority)(sections 1, 7(a) and (b) of the Compulsory Education Law). Unofficial recognized educational institutions are not necessarily supported by public funds. According to section 11 of State Education Law, the Minister of Education is empowered to promulgate regulations which will establish conditions for the classification of institutions as unofficial recognized institutions, the supervision thereof and the budgetary support provided to them by the state "**if the Minister decides to grant such support and at the rate determined by him**". By virtue of this authority the State Education Regulations were promulgated, which regulate, *inter alia*, the grant of governmental support to unofficial recognized institutions in accordance with the conditions specified in regulations 8 and 9. However, it should be remembered that the regulations in this matter were promulgated by virtue of a discretionary power conferred upon the Minister in primary legislation, and they should be interpreted and implemented keeping that in mind (**Upper Poria Board**, page 216; H CJ 8437/99 **Chabad kindergartens Network in the holy land, Registered Association v. Minister of Education**, IsrSC 54(3) 69, 86 (2000)). As to unrecognized private institutions which operate under license and which are supervised by the Ministry of Education, no statutory arrangement was established for the budgeting of their management, but in practice, Exempt Institutions enjoy state support at certain rates. No data concerning such rates were presented to us. In any event, the main financing burden of the Exempt Institutions is borne by the community and the students' parents. It should be noted that special arrangements were established by legislation for the budgeting of Haredi educational institutions. (sections 3A(9) and (10) of **the Foundations of the Budget Law, 5745-1985**, and **the Unique Cultural Educational Institutions Law, 5768-2008**).
37. To complete the above it should be noted that an unrecognized private educational institution which operates **outside** the education system, without a license and without being supervised by the Ministry of Education, breaches the law and commits a criminal offense under the Supervision Law (Section 33(a) of said law). Needless to say that an educational institution which operates contrary to the law cannot receive budgetary support from the government and the authority is precluded from supporting its activity by public funds.

Budgeting free compulsory education in an unofficial recognized institution

38. The state is responsible for the rendering of compulsory education under the law (section 7(a) of the Compulsory Education Law). A child who is subject to compulsory education is entitled to free education in an official institution (section 6 of the law). The obligation to maintain official educational institutions for the purpose of rendering free compulsory education is imposed on the state and the local authority within the jurisdiction of which the children reside, and they fully support these institutions (section 7(b) of the law). A child who is entitled to free education is completely exempt from tuition, which are fully borne by the competent authorities.
39. The Compulsory Education Law addresses a situation in which a child who is entitled to free official education is unable to receive it, for this reason or another. Sections 6(c) and (d) of the Compulsory Education Law provide as follows:

(c) Notwithstanding the provisions of sub-section (a), the Minister may direct, by order, if he is of the opinion that a person's education in an official educational institution may not be guaranteed – that such person will study in another educational institution, and the state treasury will bear his educational costs in such institution, in accordance with the terms and conditions which were set forth in said order.

(d) A person who is entitled to free education under this section will not be required to pay registration fees or any other payment for his education in an official educational institution or for his education in any other educational institution the costs of which are borne by state treasury in accordance with sub section (c)...

".

According to the above provisions, a student who is subject to the Compulsory Education Law, is entitled to free education in an official institution. If the state cannot provide to such student education in an official institution, it must place him in another educational institution, and state treasury must bear his educational costs in such institution (**Upper Poria Board**, page 217). Consequently, a person who is entitled to free education, will not be required to pay registration fees or any other payment for his education the costs of which should be borne by the state within the framework of the official education. This is premised on the assumption that the core curriculum reflects the contents of the compulsory education, and it should be provided to every student who is entitled to free official education, even if he is forced, against his will, to enroll in an unofficial institution, provided that such other institution belongs to the education system and does not operate outside the system. Additional extra-curriculum enrichment programs are conditioned on the parents' volition and their willingness to fund them, and the state is not obligated to cover them. It has already been held:

"Pursuant to section 6(c) of the Compulsory Education Law, state treasury is obligated to bear a student's tuition in an unofficial educational institution, if his education in an official institution may not be guaranteed. Pursuant to section 7(b) of said law, maintaining official institutions for the purpose of providing compulsory education within the jurisdiction of a local authority is jointly imposed on the state and the local educational authority. It is reasonable to say that due to the fact that in the case at hand there are no official post primary schools in the

regional council, the council, being the local educational authority, must bear, together with the state, the educational costs of the students in an unofficial recognized institution (**Upper Poria Board**, page 225).

(See explanation to section 6(c) by the chair of the education committee, MK Yadlin in the second and third reading: Knesset Reports 5738, issue 25, meeting 104, page 2505 (April 5, 1978)).

40. The concept embedded in the statutory arrangement is that in as much as the public authorities do not fulfill their obligation to provide free official education to those who are entitled to receive it, they must bear the costs of such education in alternative schools, provided they belong to the education system.
41. Two points should be made on the meaning of section 6(c) of the Compulsory Education Law: **Firstly**, the statutory provision which obligates the state to pay for the education of a child in an alternative educational institution, when his enrolment in an official institution may not be guaranteed, concerns a legislative arrangement between the state and the educational institution which absorbs the child (hereinafter also: the **absorbing institution**), as opposed to an arrangement between the state and the parents of the respective child. Due to the fact that the support given to the absorbing educational institution from public funds, is based on the number of students who attend the institution, special attention should be given to the institution and its budgetary needs upon the integration of another student according to the provisions of section 6(c) of the law. The rates of governmental support provided to unofficial recognized institutions which are set in the State Education Regulations are based on the assumption that the enrolment of students in these institutions is the fruit of the free choice of their parents who prefer education which has unique characteristics. In view of the above, in addition to the governmental support, the students' parents bear the remaining educational costs arising from the curriculum, including enrichment programs. A different rule applies when a student is forced to enroll in an alternative educational institution due to the fact that his request to enroll in the official education system was rejected based on unavailability, or any other reason. Under these circumstances, the law provides that the child's right to free education is upheld, and the competent authorities must bear his **entire** educational costs in the unofficial educational institution. This requires an adequate financial arrangement between the absorbing institution and the authorities. And indeed, the law provides in section 6(d) that a person who is entitled to free education should not be required to pay registration fees or any other payment, based on the assumption that the state is responsible for the payment of all educational costs in its relations with the respective educational institution. It therefore follows, that the parents of the students do not have a direct cause of action against the state for the payment of the educational costs in accordance with section 6(c) of the law. However, they are entitled to insist that their child, who was not integrated into the official education system despite his will to be so integrated, **will not be required to pay tuition** to the unofficial recognized institution, and that the state will bear the costs of his education *vis-à-vis* the respective educational institution. The parents have a cause of action to demand that the state fulfills its obligation, *vis-à-vis* the educational institution, to finance the tuition of their child. However, under these circumstances they do not have a direct cause of action against the state to have the tuition transferred to their hands.

Secondly, as a general rule, the obligation of the state to bear the educational costs in the alternative educational institution under section 6(c) of the Compulsory Education Law cannot be applied to private institutions which operate outside the law and which do not fall under the supervisory system of the state; The obligation of the state to bear students' free compulsory education costs applies to students who attend educational institutions which belong to the education system of the state and are supervised by it.

It should be noted that in 1978 a **Compulsory Education (free education in an unofficial institution) Order, 5738-1978** was issued, by virtue of the authority granted to the Minister of Education under section 6(c) of the Compulsory Education Law. This order applies to education in unofficial institutions in junior high schools and post-primary education as defined therein. It is clear, that the provisions of said order do not exhaust the authority – and duty – of the Minister of Education under section 6(c) of the Compulsory Education Law.

From the General to the Particular

42. Against the backdrop of the above analysis it should be examined: whether the constitutional right of the children of East Jerusalem to equality in education has been violated by the failure to provide free official education to each and every applicant? If a violation occurred, does it meet the conditions of the "constitutional violation" in the spirit of the principles of the limitation clause of the Basic Law; and if not, what is the proper remedy?

Violation of the Right to Equality in Education in East Jerusalem

43. The figures presented above indicate that there are presently 40,000 children entitled to free official education in East Jerusalem who do not attend official schools but rather alternative ones. At least some of them turned to alternative education after having been rejected by the official system because of shortage of sufficient infrastructures of buildings and teaching personnel. The data concerning the numbers thereof are not clear. In any event, it appears that the right of many children in the eastern part of the city to receive free official education is not upheld, and at this point the authorities do not fully meet their legal obligation to give every child in Israel free official education.

As a result of this situation children who are not absorbed in official educational institutions turn to unofficial recognized institutions or to private unrecognized institutions, and their parents are forced to bear the costs of their education, which should be provided to them free of charge. Their right to **official education** in state institutions as well as their right to **free education** are violated, and their parents who are forced to pay for the education of their children suffer pecuniary loss.

44. This situation involves the violation of the constitutional right of children in East Jerusalem for **equality in education**. This violation constitutes a violation of a constitutional right granted to them by virtue of the **Basic Law: Human Dignity and Liberty**. The violation of the right to equality in education, and in this case, the realization of the basic right to free official education, involves infringement on human dignity and therefore constitutes a violation of the Basic Law (**Tabeka**, paragraphs 14-21). This is not only a breach of the education laws, which establish a child's right to free official education, and which impose on state authorities the obligation to ensure that this right is realized. The above described situation violates the right of the children of East Jerusalem to equality in availability of official educational systems in their area, in the same manner which applies to this matter in all other parts of the country. The violation of equality in this sense also constitutes, by its nature, a violation of dignity, and is inextricably intertwined and integrated in the sphere of human dignity (AAA 343/09 **Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality**, paragraphs 39-42, 45-52 (not reported, September 14, 2010)). The violation of the right to equality in education in East Jerusalem is not the plight of a few. It is the plight of a significant portion of an entire sector of the population, which is not able to exercise a basic right afforded to it by law and by the constitutional values of Israeli law.
45. The competent authorities are well aware of the severe violation of the rights of the children of East Jerusalem to equality in education and are acting sincerely and with a sense of commitment to

rectify the situation; But in view of the pace of the activity and the resources allocated to it, it seems that only a partial solution to this serious and complicated problem will be provided in the coming years. A significant part of the problem stems from the focusing on one solution – the construction of classrooms – which by its nature is lengthy and involves many performance complexities. The authorities' recognition of the infringement and the need to solve it, as important as it may be, does not derogate from the existence and severity of the discrimination, since the '*mens rea*' of the public authority does not project on the mere existence of the constitutional violation, and discrimination may also exist in the absence of any intent or motive to discriminate (**Poraz**, page 334; H CJ 1000/92 **Bavli v. The Great Rabbinical Court**, IsrSC 48(2), 221, 242 (1994); **Danielowitz**, page 764; **Women's Network**, page 654; **Monitoring Committee**, paragraphs 18 and 22 to President Barak's judgment).

The Nature of the Infringement – Does it meet the Standards of Reasonableness and Proportionality

46. The infringement on the right to equality in education of the children of East Jerusalem by failing to provide official free education to every entitled child does not meet the tests of administrative reasonableness and constitutional proportionality. The public authorities did not present any significant pertinent reason which explains or justifies their failure to fulfill their obligation to provide free official education to anyone who is entitled to receive same in East Jerusalem. Indeed, these are systemic needs which depend on budget and man power, and they should be afforded adequate priority in view of their importance. Nevertheless, in view of the long period which passed since the issue of official education in East Jerusalem was brought up for discussion, this basic problem should have already been solved. This, however, did not happen, mainly due to the fact that the public authority focuses on the construction of classrooms as a single solution, instead of resorting to additional measures, along with the construction, which will provide a physical solution to the shortage of classrooms. Against the nature of the infringement and the severity thereof, no opposing arguments were presented to the effect that the infringement met the test of administrative reasonableness or constitutional proportionality. This infringement on the rights of a large sector of the population to which Israeli law applies, does not comply with the values of a democratic state, it does not serve any proper cause, and is not proportional as it does not meet the recognized proportionality tests.

Hence, the violation of the right to equality in education in East Jerusalem by failing to provide official education to each and every entitled child, does not meet the tests of administrative reasonableness and constitutional proportionality. It is not limited to a breach of a governmental duty imposed on the competent authorities by law, but it rather concerns a violation of a constitutional right of a considerable part of the members of the Arab sector in East Jerusalem, who are entitled to equality in accessibility to free official education, which is not provided in an equal manner in the eastern part of the city (**Monitoring Committee**, paragraphs 53-55 and 59 to the judgment of President Barak; **Movement for Quality Government**, paragraphs 45-49 to the judgment of President Barak).

The Remedy

47. The requested remedy in the petition before us is not directed at the authorities for the purpose of obligating them to enroll the petitioners and others like them in the official educational institutions in the city. It concerns the obligation of the authorities to establish a mechanism under which they will pay tuition to the parents of students from East Jerusalem who wish to exercise their right to

enroll in the official educational frameworks in the city but are rejected due to shortage of classrooms, and are forced to enroll in private recognized institutions.

48. An analysis of the situation indicates, that the required solution for the official education problem in East Jerusalem lies in two levels. **One level** – is the physical arrangement for the expansion of the ability to physically absorb students into the official educational framework. **The other level** – is the financial-budgetary arrangement for the funding of free education of students who were not integrated into the official education system despite their request, by way of providing financial support to the absorbing educational institutions by the public authority so that no financial participation shall be required of the parents of the students who attend such institutions in the funding of the core curriculum.

It should be clarified in this regard that the budgeting of the unofficial recognized institutions at the acceptable rates according to the custom and the law, does not necessarily correspond to the financial arrangement which is required for the purpose of funding the education of a child in an unofficial recognized educational institution whose request to enroll in the official education system was rejected. Normally, students who enroll in the unofficial recognized education system prefer this framework freely, and therefore their parents assume upon themselves the additional payments which are required for the purpose of studying in a unique educational framework. A different rule applies to a student who is referred to such school not by his own choice, but due to shortage of available official educational frameworks in his area. Under these circumstances, the student is entitled to public funding of the entire core curriculum tuition charged by the absorbing institution without imposing on his family any financial burden in connection with his education. These funds should be paid according to adequate arrangements to be entered into between the public authority and the educational institution, taking into consideration the budgetary support that the institution receives from state funds.

49. The combination of the physical and financial solutions for the purpose of solving the shortage of classrooms in the Arab sector should provide solution for the fulfillment of the obligation of the public authority to provide free compulsory education to those who are entitled to receive same. This solution should be realized within a reasonable period of time, taking into consideration the importance of the right to equality in education on the one hand, and the complexity of the required solution in view of the large scope of the gap which must be bridged, on the other.
50. As the petition indicates, the effort to solve the problem focuses, and rightly so, on a considerable expansion of the physical infrastructure of classrooms and professional personnel that should be added to the official education system in East Jerusalem. The competent authorities are aware of their obligation to provide free compulsory education to all entitled children, and of the need to fully exercise their responsibility. The issue has already been brought up for judicial discussion in the beginning of the 2000's. Since then a certain progress has been made on the physical level by the construction of classrooms, but the needs remain unsatisfied. The gap which currently exists between the availability of classrooms in the official education system in the eastern part of the city and the scope of the demand is still very large, and is reflected in an unknown number of students out of 40,000 who attend unofficial educational frameworks in the city. The chance to bridge this gap by resorting to the construction solution alone is not very high, and is certainly not feasible within a reasonable time frame.
51. The construction process, by its nature, is lengthy and often encounters objective difficulties and special complexities as a result of expropriation needs, various planning requirements, and the duration of the construction. In view of the above, it seems necessary to take additional measures on the physical level which will enable to expand the infrastructure of the official education systems in the eastern part of the city before the construction of the entire designated number of classrooms is completed. Thus, for instance, additional options should be considered, such as the

institution of a **second shift** of studies, the placement of classrooms in **mobile structures**, the **rental of existing structures** in the city for classrooms purposes, **transportation of students** to schools in other parts of the city and such other physical solutions which are often used by the authorities in different parts of the country, whenever the need arises to expand the physical infrastructure of the official education in a certain area. These additional measures are coupled by the measure proposed by the state, which involves the willingness of the competent authority to assimilate unofficial recognized schools into the official educational framework. Along the lines of these measures, the public authority should consider additional solutions, which will jointly form an array of measures which will provide, within a reasonable period of time, a physical solution to every student in East Jerusalem within the framework of the official education system in Israel. Considering the long period which passed and the fact that no sufficient solution for the problem of the official education in East Jerusalem was found, the authorities are currently bound to focus on finding practical solutions for the physical expansion of the official education system in the eastern part of the city, within a reasonable period of time, as is required in view of the importance of the inhabitants' right to equality in education on the one hand, and the scope and complexity of the problem which requires solution, on the other.

52. If within a prescribed period of time to be determined, the public authorities do not fulfill their obligation to expand the physical infrastructure of the official education system in the eastern part of the city, and are not able to fulfill the obligation to enroll all applicants in the official education system, they will have to enter into financial arrangements with the unofficial educational institutions which will cover the tuition of the children who attend these institutions and which were not integrated into the official education system. This obligation is imposed on the authorities **vis-à-vis the alternate educational institutions which are attended by the children** and it does not involve payment of public funds directly to the children's parents. The above financing arrangements are required according to section 6(c) of the Compulsory Education Law only with respect to recognized institutions which belong to education system of the state, act under license and are subject to the supervision of the Ministry of Education. The obligation to enter into such financial arrangements does not apply to educational institutions which operate outside the law and outside the supervisory system of the state.
53. The financial arrangements between the state and the unofficial educational institutions concerning the payment of the tuition of the children who are entitled to free education and were rejected by the official educational framework, should take into account the financial support transferred by the state and the municipality to the unofficial recognized institutions under the education legislation, provided that the arrangement entered into guarantees that no financial obligation whatsoever will be imposed on these students in connection with the core curriculum taken by them in school.
54. Indeed, a difficulty may arise in identifying the children who, in the first place, have preferred the unique education over the official education, and who are therefore excluded from the applicability of the provisions of section 6(c) of the Compulsory Education Law, as opposed to the children who have enrolled in the alternative education system only because they have not been integrated into the official education system. A phenomenon of fictitious applications of students to the official education system may also be encountered, intended to establish an entitlement for an exemption from tuition in an unofficial institution also for students who, in the first place, did not sincerely intend to enroll in the official education system, and who therefore are not entitled to have their tuition covered by the state. This issue, with its various complexities, requires adequate administrative organization, which depends on the collection of data, the allocation of proper budgets and the formulation of a series of actions which will provide a proper solution for the situation on the financial-budgetary level within a reasonable period of time.
55. The adequate remedy in this petition requires, therefore, a vigorous action on two main levels: **firstly, on the physical level**, action must be taken on the construction level for the addition of

classrooms which will considerably increase the existing physical infrastructure for the placement of the children of the eastern part of the city. However this solution alone is not sufficient, and it is impossible to wait until construction, which is lengthy by its nature, is completed. Additional physical solutions should be formulated, such as the location of existing buildings for rent for classroom purposes, the placement of mobile structures, transportation of students to buildings in other parts of the city, the institution of a second shift in official educational institutions, the assimilation of recognized institutions into the official system, and such other solutions the cumulative weight of which may provide a solution for the existing gap.

Secondly, if over the course of the period to be determined, the gap between the inhabitants' applications to enroll in the official education system and the absorption ability of the education system in the eastern part of the city is not bridged, the authority will have to make the necessary arrangements on the **financial level** to enter into financial arrangements with the alternative educational institutions which absorbed the students whose applications to enroll in the official education system were rejected.

56. It seems that the complexity of the issue and the solutions required for its rectification, justify the establishment of a special team of experts in the competent authority to draw up a plan, set time tables and oversee its execution to guarantee that the task of adapting the official education system in East Jerusalem to the needs of the residents is undertaken seriously, in accordance with the operative order which will be issued in this petition.

Rectifying the Flaw - Timeframe

57. Rectifying the existing gap and having the state abide by its obligation to provide free official education to all entitled children state-wide, including East Jerusalem, is a high priority national goal. This directly affects the material rights of the individual. Furthermore, this affects the character and values of Israeli society and its conduct in all areas of life. Solving the problem of official education in East Jerusalem is therefore, a national mission which should be solved as soon as possible.

58. This petition brings to the fore a deep problem, which encompasses a large part of the population, whose right to equality in education is not upheld due to systemic gaps. The above analysis of the factual and legal levels, outlines the courses of action which the authorities should take in order to solve, within a reasonable period of time, the existing gap between the requirements of the Compulsory Education Law and the manner by which it is implemented in practice in East Jerusalem.

Taking the courses of action which were specified above for the purpose of solving the problem, both on the physical and financial levels, requires the grant of a reasonable time frame for their realization, in view of the large gap between the current situation and that which is required by law, which should be bridged.

59. Taking into consideration the infringement on the rights of the children of East Jerusalem on the one hand, and the complexity of the required solution on the other, in view of the scope of the gap to be bridged, it is advisable to establish, in advance, the time frame during which the authorities will have to provide the **systemic physical solution** for the needs of the official education in East Jerusalem.
60. In granting an order which obligates a public authority to rectify a systemic flaw of a wide scope and special complexity, which existed for many years, the court may take into consideration the difficulties which the authority may face when it starts to implement the required rectifying processes for the purpose of upholding the order. Therefore, not infrequently, the remedy which obligates the rectification of the flaw is granted, but the public authority is given a certain limited

period of time for the purpose of making the arrangements for its rectification (see for instance, HCJFH 4128/00 **Director General of the Prime Minister's Office v. Hoffman**, IsrSC 57(3) 289, 318-319 (2003)). In other cases the effective date of an operative order which was granted may be postponed, for similar reasons (HCJ 1715/97 **Board of Investment Directors in Israel v Minister of Finance**, IsrSC 51(4) 367, 416-417 (1997); HCJ 10296/02 **Teachers' Association in High Schools, Seminaries and Colleges v. Minister of Education, Culture and Sport**, IsrSC 59(3) 224, 237-240 (2004); **Yated**, page 849` HCJ 3267/97 **Rubinstein v. Minister of Defence**, IsrSC 55(2) 255, 264 (2000); HCJ 6298/07 **Resler v. The Knesset** (decision dated September 8, 2009)). In other cases a petition may be rejected, with a clarification that the authority must act to rectify the flaw within a prescribed period of time, and should it fail to do so, the petitioners will have the right to turn again to the court (HCJ 6671/03 **Abu Ghanem, et. al. v. Ministry of Education**, IsrSC 59(5) 577, 592-595 (2005); HCJ 4634/04 **Physicians for Human Rights Israel v. Minister of Public Security**, paragraph 31 (not reported, February 12, 2007); HCJ 7844/07 **Advocate Cohen v. Government of Israel**, paragraphs 29-32 (not reported, April 14, 2008)).

61. In the case before us, considering the importance of the infringed right, the long period which passed since the issue has been initially brought for judicial review, and the complexity of the required solutions in view of the scope of the problem, an operative order should be granted, which will establish the period of time within the framework of which the authority must provide an adequate solution for bridging the existing gap in the official education system in the eastern part of the city.
62. For this purpose, it is proposed that the authorities will have to provide the adequate **systemic physical solutions** for the provision of official education to all entitled children within a period of **five years** from the date of this judgment. The assumption is, that the authorities will act vigorously and relentlessly to narrow down the scope of the gap in the official education in East Jerusalem year by year, until its full elimination within five years. If after the termination of this period, a full solution is not provided to the entitled persons who wish to enroll in the official education system, the competent authorities will have to refer the applicants to unofficial schools, which belong to the education system, and enter into **financial arrangements** with the absorbing educational institutions to cover their educational costs, within the framework of section 6(c) of the Compulsory Education Law.
63. The above solution is applicable both to the case of the petitioners at hand, from whom only the case of petitioners 4 and 5 remains pending in the absence of a specific solution, as well as to the general and broad level which requires a solution. Nevertheless, it is advisable that the authorities act, to the extent possible, to find a specific solution, within the framework of the official education system, for petitioners 4 and 5 for the next school year, in as much as this is still relevant for them.

The Operative Order

64. Based on the above, I propose to my colleagues to accept the petition and grant an absolute order as follows:
 - (a) The respondents must act on the various levels required to create a gradual physical infrastructure which will enable the integration of all East Jerusalem students who are entitled to free compulsory education and who wish to receive same, into the official education framework in the city. For the full realization of this objective, the respondents will be granted a period of **five years** from the date of this judgment.
 - (b) If upon the termination of the period prescribed in sub-section (a) the public authority is still unable to supply the entire demand for free official education in the eastern part of the city, the respondents will have to refer the students whose applications to enroll in the official education

system were rejected to unofficial schools which belong to the education system, and enter into adequate financial arrangements with these institutions, to cover the core curriculum educational costs of these students.

The respondents will bear petitioners' legal costs in the sum of NIS 40,000.

J u s t i c e

Justice Y. Danziger:

1. Having reviewed the thorough and learned opinion of my colleague, **Justice A. Procaccia**, I wish to join her opinion, both with respect to the grounds and the conclusion reached by her. I am also of the opinion that the competent authorities do not fulfill their obligation to provide free official education to all East Jerusalem children, including, *inter alia*, due to the severe shortage of schools and classrooms in the eastern part of the city, and despite measures taken by the respondents throughout the years to promote a solution for the problem.
2. The commitment of the State of Israel to the right to education is entrenched in the Declaration of Independence which was read by David Ben Gurion in the meeting of the temporary state council dated 5 Iyar 5708, May 14, 1948. Ben-Gurion concluded the reading of the Declaration of Independence with the words "The State of Israel is established". According to the Declaration of Independence (which was referred to both in the Basic Law: Human Liberty and Dignity (section 1) as well as in the Basic Law: Freedom of Occupation (section 1), which state that the basic human rights in Israel "shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel"), the state undertook to uphold the full social and political equality of all its citizens - without distinction of race, creed and gender – and to guarantee, *inter alia*, freedom of education and culture.
3. The right to education was entrenched by the Knesset shortly after the establishment of the state in the Compulsory Education Law, 5709-1949 (hereinafter: **Compulsory Education Law**) the purpose of which is to provide to each and every child in Israel basic level compulsory education. The responsibility to provide free compulsory education is imposed on the state, whereas the responsibility to establish and manage official educational institutions, which will answer the needs of all students and in which their right to free compulsory education will be exercised, is imposed on the state and the local authorities (each authority in its jurisdiction) jointly. Over the years the state has reiterated its deep commitment to the right to free education to children with regular skills and to children with special needs in a diverse education legislation.
4. The state of Israel has even expressed its international commitment to the right to education by joining the Universal Declaration on Human Rights of 1948 and by assuming upon itself the obligation to act according to the acceptable international norms when it ratified the international Covenant on Economic, Social and Cultural Rights of 1966 and the Convention on the Rights of the Child of 1989.
5. I wish to go back to fundamental principles: education is essential for the existence of the society and for the existence of a functioning and viable democratic state. Education constitutes an essential element for the realization of the self of every person, which is crucial for his success and prosperity [see for instance, the comments of Justice [as then entitled] T. Or in HCJ 1554/95 **Friends of GILAT Association v. Minister of Education, Culture and Sport**, IsrSC 50(3) 2, 24 (1996) (hereinafter: **Friends of GILAT**)]. The right to free education implements the principle of equality by enabling every child to realize the abilities and potential embedded in him, to be integrated into society and make progress therein [see, for instance, the comments of Justice D.

Dorner in HCJ 2599/00 **Yated - Children with Down Syndrome Parents Society v. Ministry of Education**, IsrSC 56(5) 834, 843 (2002) (hereinafter: **Yated**)].

6. The question of whether or not the right to education is a constitutional right which constitutes part of the right to human dignity, as this right is defined in sections 2 and 4 of the Basic Law: Human Dignity and Liberty, has been discussed by this court more than once, but has not yet been resolved. In the matter of the **Friends of GILAT** Justice **T. Or** was indeed of the opinion that the right to education was not included in the right to dignity, but his two colleagues on the panel, Justices **T. Tal** and **D. Dorner** were of the opinion that a decision on this issue should be made in due course (see: *ibid*, page 34). In **Yated** Justice D. Dorner was of the opinion that discrimination in the realization of the right to education may be regarded as "a humiliation which infringes on a person's right to human dignity" if it is exercised against the backdrop of group affiliation, as opposed to a violation of equality for political, administrative or budgetary reasons (see: *ibid*, page 843). In view of the fact that in **Yated** discrimination of children with special needs was effected against the backdrop of group affiliation but was based on budgetary grounds, and in view of the fact that under such circumstances the question whether discrimination infringed on human dignity had many aspects, Justice D. Dorner preferred not to decide on this issue (see: *ibid*, *ibid*).
7. I am of the opinion that in the case at hand there is no need to decide on the status of the right to education as a constitutional right which derives from human dignity, since in our case the violation of the constitutional right to equality in education is clear, as explained by my colleague. However, I agree with my colleague, Justice **A. Procaccia**, that as a general rule, the great importance of education in the life of every person – and particularly in the formulation of the manner and quality of his life and the realization of his own dignity – ostensibly justifies the incorporation of the right to education in its basic form into the value of human dignity which was recognized in Israel as a constitutional right under the Basic Law: Human Dignity and Liberty (see: paragraph 26 of the opinion of my colleague and the references specified therein). However, a decision on this issue is not required in the case at hand.
8. In this petition – in which the petitioners argue that the state does not uphold their right to free compulsory education in official educational institutions, and that consequently they are forced to attend unofficial educational institutions and bear a heavy burden of payments to such institutions – the right to education is integrated into the right to equality and these two rights form one right – the right to equality in education. This right is entrenched not only in the general principles of our jurisprudence but also in legislation in the field of education (as specified in paragraph 31 of my colleague's opinion).

I agree with the holdings of my colleague that without equality in education the realization of the right to education may not be guaranteed, since "the right to equality in education interfaces directly with the constitutional right of human dignity" and the violation of this right "constitutes a violation of the constitutional right to human dignity [see" paragraph 33 of my colleague's opinion; **Yated**, page 843; HCJ 7426/08 **Tabeka Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education** (not reported, August 31, 2010) paragraphs 16-21 of the judgment of my colleague Justice **A. Procaccia** (hereinafter: **Tabeka**)].

9. The data before us indicate that the children of East Jerusalem who were not integrated into the official educational institutions are forced to attend unofficial recognized educational institutions or private unrecognized educational institutions, and their parents are forced to bear the costs of their education. The infringement on the rights of these children is twofold: firstly, their right to official education is violated; and secondly, their right to free education is violated.

I agree with my colleague that in this situation the constitutional right of these children to equality in education is violated. I am of the opinion that the infringement on the children is not limited to the violation of the education laws – which establish the child's entitlement to free official

education and which impose on the state and its agencies the obligation to guarantee this right – rather, it is a blatant violation of the right to equality in education, a right which forms an inseparable part of the right to human dignity, and therefore constitutes, in my opinion, a violation of the Basic Law: Human Dignity and Liberty. The prohibition on discrimination in education – which entrenches the right to equality in education – directly interfaces with the constitutional right to human dignity, and as my colleague said in **Tabeka** "It does not merely touch upon the rims of human dignity, but rather touches upon the core thereof." (see: *ibid*, paragraph 19). In my opinion, the violation of the right to equality in education constitutes, by its very nature, an infringement on the child's dignity, and therefore it constitutes a violation of human dignity in accordance with the provisions of the Basic Law: Human Dignity and Liberty (compare: **Tabeka**, *ibid*, paragraph 20).

10. As my colleague points out, the violation of the right to education and the right to equality in education of the children of East Jerusalem by failing to provide free official education to all children who are entitled to same does not meet the tests of administrative reasonableness and constitutional proportionality. In my opinion, the respondents did not present before us reasons which can explain their failure to fulfill their obligation to provide to all children of East Jerusalem free official education. I agree with my colleague that even if the competent authorities have acted and continue to act with the intention to right the wrong, such infringement prevents a significant part of an entire sector of the population from exercising a basic right afforded to it by law and by the constitutional values of our jurisprudence (see: paragraph 44 to the opinion of my colleague).
11. My colleague states in her opinion that the problem raised in this petition will be solved by respondents' vigorous activity on two levels (see: paragraphs 48-56 to my colleague's opinion): **the first**: requires to take action on the physical level for the expansion of the infrastructure of the East Jerusalem education system. Some of these actions should be taken forthwith, such as: the institution of a second shift in the official educational institutions; the location and rental of existing buildings which currently are not being used as educational institutions and the construction of classrooms therein; the installation of mobile structures adjacent to the official educational institutions which will be used as classrooms and such similar solutions; and some of which are actions for the longer run that mainly concern the construction of additional classrooms. **The second**, actions on the financial level, which will be manifested in financial arrangements to be entered into between the public authorities and the alternative educational institutions which act within the boundaries of the law and belong to the education system, which are attended by a certain part of the children of East Jerusalem who were not integrated into the official educational institutions, which will guarantee that the parents of said students are not charged with any educational costs whatsoever for the basic curriculum taken by their children in such institutions.
12. For the purpose of determining the adequate operative order to be issued, my colleague refers, on the one hand, to the severity of the infringement on the children of East Jerusalem and the period of time which passed since the problem has been "raised", and on the other, to the complexity of the required solution, due, *inter alia*, to the scope of the problem and the depth of the gaps. Based on these considerations my colleague is of the opinion that a period of **five years** should be prescribed during which the authorities will have to provide the adequate systemic physical solutions for the purpose of providing official education to every child who is entitled to receive same in East Jerusalem, and that if after the expiration of the above period full solution is not provided to those who are entitled to receive same, the authorities will have to refer the applicants to unofficial schools which belong to the education system, and enter into financial arrangements to cover their educational costs with the educational institutions to which they were referred (paragraph 62 to her opinion).

Similar to my colleague, I am of the opinion that the allocation of a five year period for the comprehensive solution of the problem, is due and reasonable under the circumstances, particularly if we take into consideration the fact, that according to the updating notices given by the

municipality of Jerusalem prior to the hearing of the petition which was held on July 1, 2009, it has completed the construction of five schools and one kindergarten in the two years which preceded the updating notices, that about 650 additional classrooms were in different stages of construction (commencing from the initial stages of location and expropriation proceedings and ending with advanced construction stages of schools and kindergartens) and that the construction of a small portion thereof has even been completed and is already being used as classrooms.

Nothing in the above said may derogate from the need to take various immediate actions to narrow down the gap in the education provided to the children of East Jerusalem. In this context, the possible option which was referred to by the respondents in their notice dated January 16, 2011, according to which unofficial educational institutions will be assimilated into the state education system, should be considered, as well as various additional solutions which were specified by my colleague such as the institution of studying shifts, installation of mobile structures and students' transportation to other parts of Jerusalem (see paragraph 51 of her opinion).

13. I would like to add that I am not oblivious of the fact that the operative order issued by us has considerable budgetary ramifications. However, under the circumstances which were created, the respondents must allocate adequate budgets and resources to rectify the blatant infringement on the right to equality in education of a significant part of East Jerusalem students, an infringement the responsibility for which lies on the respondents. Since the eastern part of Jerusalem has been incorporated into and made part of the State of Israel and the "the entire Israeli law" applies to the inhabitants of East Jerusalem holding the status of permanent residents (see paragraph 22 of my colleague's opinion), the state is committed towards the students of the eastern part of the city. Our judgment therefore facilitates the realization of the legislative intent, which imposes on the state the responsibility for the education of the children and the obligation to provide free education to all children who are entitled to receive same according to the Compulsory Education Law. The law's intent was also to guarantee the right to free official education where such education could not be granted, as set forth in sections 6(c) and 6(d) of the Compulsory Education Law.
14. In this context which concerns the budgetary ramifications of the operative remedy granted by us, I cannot help remembering a sentence which was said in seventies of the previous decade by the president of Harvard University, Derek Bok: "If you think education is expensive, try ignorance".

It would not be unfounded to say that not all parents of East Jerusalem students have the financial ability to pay for the education of their children in the unofficial institutions. As far as these children are concerned, there is a real concern that they will drop out of the education system, a fact which may significantly affect the options (including the professional and economic ones) which will be available to them in the futures, and which increases the risk that in the future they may find it difficult to lead a normative lifestyle or support themselves. A forward looking approach leads to the conclusion that investing in the education of children at a young age, may reduce risk factors for the development of a situation in which much higher sums would have to be invested in these children in the future. Also with respect to the children whose parents can afford to pay for their education in unofficial educational institutions, the possible ramifications of education in such institutions should be considered as far as they concern that considerable part of children who attend private unsupervised institutions. As far as this group of children is concerned, the state does not supervise and has no influence over the curriculum which the children are exposed to or over the level of their education, with all ensuing consequences. I do not take lightly the budgetary ramifications which derive from our judgment, but this should be examined from a wider perspective, and mainly from a forward looking standpoint.

President D. Beinisch:

1. The right of the children of East Jerusalem to education, like the right afforded to all Israeli children, has already been recognized in the judgment rendered in HCJ 5185/01 **Badria v. Jerusalem Municipality** (not reported, August 29, 2001). Since the date of the above judgment and until this present day, the court has been monitoring, in an exceptional manner, the state's fulfillment of its obligations to provide practical solutions to the shortage of classrooms in East Jerusalem - obligations which derive from the right to education. Unfortunately, despite their efforts, the authorities in charge of education failed to provide free education to the children of East Jerusalem. As specified in the judgment of my colleague, Justice **A. Procaccia**, the monitoring focused on finding solutions for the construction of new classrooms and schools. Within the framework of the proceedings before this court the parties submitted many updating notices. Commencing from 2006 – and in view of respondents' slow progress – senior office holders who were in charge of advancing the solution to the problem appeared before us in person. According to the court's proposal an inter-ministerial committee was established, the purpose of which was to liaise between the various parties responsible for the solution of the problem on the national and local levels. The committee held a number of meetings, and based on its conclusions the construction of classrooms in East Jerusalem continued.
2. The monitoring by this court of the execution of the plans for the construction of additional classrooms in East Jerusalem was based on two basic assumptions. The first assumption, which is not in dispute, is that the obligations imposed on the state to provide free education apply to East Jerusalem as well. The second assumption was that the problem before us was difficult and the solution thereof - complex. Due to various reasons – first and foremost economic and budgetary difficulties and possibly additional reasons too – the authorities have ignored the need to build sufficient classrooms in East Jerusalem, the matter was neglected and the number of schools was not adapted to the natural growth of the population. Apparently, in certain periods, a certain part of the local population preferred private schools over the official education. Whatever the reason, for years the state and the municipality failed to allocate sufficient resources which could have bridge the gap between the statutory requirements and the current situation, in which tens of thousands of children who were entitled to compulsory education were not provided with an educational framework in the official institutions. As a result of the huge need which became apparent in the beginning of the 2000's, many measures had to be taken to effectively and efficiently close the gap between the needs and the required solution. Among other things, a real solution for the problem requires the allocation of considerable resources and the taking of various measures, including, among other things, expropriation and construction proceedings. Activities of this type, by their nature, are lengthy. Therefore, in the beginning of the process, we thought that monitoring by the court may assist to put together the various parties in charge of finding a solution for the problem and promote the formulation and implementation of the proposed solutions for the provision of classrooms as well as educational and inspection personnel.
3. As broadly described by my colleague Justice **Procaccia**, a certain progress has been indeed made in the condition of the official education in East Jerusalem. Since the judgment in HCJ 5185/01 was rendered, about 257 classrooms have been built and currently there are plans in various implementation stages for the construction of several hundred additional classrooms. In its efforts to solve the problem, the state put at the disposal of Jerusalem municipality a special budget for the expropriation of land on which the schools would be erected. It was also decided to shorten the expropriation proceedings to advance the beginning of the construction. As a result of these steps, the number of students who attend the official education systems in the eastern part of the city has significantly increased in the last decade; Never-the-less, the education problem of the children of the eastern part of the city has not been solved. A very large number of students still attend

unofficial recognized schools or private schools, and apparently a considerable number of students do not study in any educational framework at all. It should be further noted that the poor economic condition of parts of the Arab population in the eastern part of the city, is another obstacle which makes it difficult for many to attend private schools. The parties do not have an estimate of the number of students who attend the private systems of their own volition – and certainly there are many students of this sort – and on the other hand, the number of students who enrolled in the private systems because no solution was found for them within the official system – is unknown. However, it seems that the number of students who were not placed in this system is large.

4. Therefore, the above indicates, that along the progress and the efforts invested by the respondents to find solutions for the problem of shortage of classrooms in East Jerusalem, their progress was too slow; even if we take into consideration the logistic and economic hardships and the special conditions in East Jerusalem. In any event, the result is that many children in East Jerusalem remain without appropriate educational frameworks. This outcome is unacceptable. The status and importance of the right to education require that all relevant parties endeavor to find a prompt and effective solution for the problem.
5. As stated in the opinion of my colleague Justice **Procaccia**, petitioners' counsel in HCJ 5185/01- within the framework of which the monitoring proceedings were conducted by the court – moved to withdraw the petition. Having heard his arguments, we accepted the motion. We were convinced that the court's involvement at this stage was exhausted and could not advance respondents' essential activity. We have however pointed out that the state's undertakings made before this court within the monitoring proceedings remained in force. It should be noted, that among our considerations to accept the motion to withdraw the petition, we took into account the existence of this petition, in which the requested remedies are very similar to the remedies which were requested in HCJ 5185/01 and in a related petition.
6. As to the petition before us, which relates, as aforesaid, to the handling by the authorities and the monitoring conducted by the court in related petitions, I join the conclusions of my colleague, Justice **A. Procaccia**. Indeed, the importance of the right to education, which was reiterated by the court many times in the past, cannot be overstated (see, for instance: HCJ 1554/95 **Friends of GILAT Association v. Minister of Education, Culture and Sport**, IsrSC 50(3) 2, 24 (1996); HCJ 2599/00 **Yated v. Ministry of Education**, IsrSC 56(5) 834 (2002)). As I have noted in a previous case, the right to education "is essential for the development of the personality of every child and youth, for their self realization and the exhaustion of their skills and abilities; the right to education exposes them to a variety of views, which are essential for the formulation of their identities, opinions and choices, as well as for the internalization of the value of human dignity, and particularly, the dignity of the other, the different or the abnormal; the realization of the right to education is their bridge to social integration as autonomous individuals, who can choose their way from various available options, and improve their condition and the condition of the community in which they live." (see HCJ 7351/03 **Ironi Rishon LeZion Parents Council v. Minister of Education, Culture and Sports**. (not reported, July 18, 2005; paragraph 4 of the judgment)). The right to equality in education, which forms part of the general constitutional right to equality, may not be overstated either; and in this matter we have already warned in the past of discrimination which concerned the right to education in the Arab sector (see: HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel**, (not reported, February 27, 2006; page 82 of the judgment)).
7. Along the regulation of compulsory education, Compulsory Education Law, 5709-1949 establishes the state's duty to provide free education against the right of all children of Israel to receive free education. The purpose of free education is to enable equality of opportunities in education, in order to give all children – regardless of their economic condition – an equal opportunity to realize themselves and develop their personalities. It should be noted that in the petition at hand there was

no dispute between the parties concerning the duty to provide free education to the children of East Jerusalem. Rather, the hearing focused on the scope and manner by which this duty should be implemented.

8. Thus, I accept the operative conclusion proposed by my colleague, Justice **A. Procaccia**. The time frame outlined by her to solve the shortage of official educational institutions in East Jerusalem – five years – is indeed a reasonable and sufficient time frame to narrow down the existing gaps. Indeed, I am willing to assume that a special complexity is involved in the implementation of the right to education – which was not disputed by the parties – under the conditions of East Jerusalem. This complexity is the product of the considerable resources which are currently required, the required physical infrastructures, and the need to have buildings and arrange for suitable and adequate schools in which students may be placed. Other than the above, in order to integrate all students who so wish into the official frameworks, the training of teachers and inspectors will be required taking into consideration the needs of the population. All of the above may serve as justification to give the state time to execute the judgment, but they may not exempt the respondents of the obligation to provide free education. The complex handling, and in particular, the lack of data concerning the children who wanted to enroll in the official school system, and turned to other schools due to shortage of classrooms, justifies to postpone respondents' duty to transfer funds for the students who could not be placed in the official system in accordance with the interpretation of section 6(c) of the Compulsory Education Law. Parenthetically, it should be noted that the municipality's representative stated in the hearing which was held before that currently the possibility to increase the scope of unofficial recognized schools in the eastern part of the city was under examination, and we were even advised that presently, as opposed to the past, existing schools wish to take part in this plan. Thus, for instance, whereas in 2009 there was only one unofficial recognized school, last year there were eleven schools, and in this current year seventeen new applications were submitted. This course of action will enable to increase the number of students in the unofficial recognized education and will decrease the number of new classrooms to be built. This solution will also facilitate the possibility – if any arises by the end of the prescribed time frame – to finance the education of the children who could not be placed in the official education system.
9. Therefore, I join the judgment of my colleague, Justice **A. Procaccia**. It should be noted that although the court does no longer monitor the proceedings aimed at finding a solution for the problem of education in East Jerusalem, we trust that the respondents will continue to act even more forcefully to find quicker solutions which will enable to fully realize the right to education on equal terms throughout the various parts of the city of Jerusalem.

P r e s i d e n t

Therefore, it was decided as specified in the judgment rendered by Justice Procaccia.

Given today, 2 Adar A 5771 (February 6, 2011).

President

Justice

Justice