Law and Politics in Israel Lands: Toward Distributive Justice

DAPHNE BARAK-EREZ

In contrast to the tradition of other Western countries, the vast majority of land in Israel is publicly owned and administered by a government agency: the Israel Lands Administration (‘the Administration’ or ‘the Lands Administration’).¹ Private use of land is thus largely dependent upon the state’s readiness (through the operation of the Lands Administration) to permit and facilitate such use. Therefore, the state has a direct influence on the distribution of wealth, power and life opportunities within Israeli society by its decisions regarding Israel’s land resources.² The question of how to allocate rights and material benefits among individuals or groups is not a legal one; the answer to it should rather reflect principles of justice formulated in the realms of political theory and philosophy. Law, however, also plays an important role in this context. It must ensure that decisions with distributive implications are the product of an open, just, and fair process, primarily in view of the perennial danger that distribution will confer benefits exclusively to well-organized interest groups.

The developments in this area can be described by distinguishing between three stages: (a) the first three decades of the Lands Administration (until the beginning of the 1990s), characterized by broad administrative autonomy without any substantial judicial review of the Administration’s actions; (b) the decade from the beginning of the 1990s, during which time specific cases of discrimination were reviewed, but without reference to land policy as such; and (c) the stage initiated by the new and ground-breaking decision of the Supreme Court in the matter of the agricultural lands, a decision that heralded the transition to a comprehensive review of administrative policy from the perspective of distributive justice in society as a whole. Of course, only time will tell whether this decision actually succeeded in bringing about the change it declared.
ADMINISTRATIVE AUTONOMY WITHIN AN OPEN-ENDED LEGISLATIVE FRAMEWORK

The disputes over decisions relating to Israel lands derive primarily from the fact that the law which applies to these lands—the Israel Lands Administration Law, 1960—lacks the requisite legal tools for the challenges it is supposed to cope with. It does not state the objectives of the Administration’s operation nor does it establish any priority scales to guide those charged with its implementation (in contrast with accepted legislative practice regarding administrative authorities). The only provision dealing with policy in this area is section 3 of the Law that provides: ‘The Government shall appoint an Israel Lands Council which shall lay down the land policy in accordance with which the Administration shall act, shall supervise the activities of the Administration, and shall approve the draft of its budget, which shall be fixed by law.’ Nonetheless, even with respect to the Israel Lands Council (‘the Council’), there are no framework provisions or guiding principles within the Law. In effect it received a ‘blank cheque’. Furthermore, until recently the Law lacked any provisions for dealing with the Council’s composition, and the appointment of its members was exclusively a matter of governmental discretion.

In the absence of legislative guarantees that lands be administrated for the benefit of the public, judicial review becomes particularly important. Paradoxically, however, it is precisely where judicial review is needed most that it is confronted by the most formidable difficulties in discharging its role. For without guiding legislative directives, the objectives and purposes of such review are amorphous. Judicial review generally begins with an examination of the statutorily determined objectives, which should guide the relevant administrative agency. Sometimes, where the law refrains from specifically addressing the considerations that should define and guide the actions of an administrative agency, the court can infer them from the agency’s composition. However, the vague references to the composition of the Israel Lands Council thwart any attempt to draw any decisive conclusions from this factor as well.

In practice, for many years, the selection of potential candidates for contracts with the Israel Lands Administration was not based on any clear, normative arrangement. Traditionally, Israeli administrative law did not recognize a general duty to offer contracts through tender, unless there was legislation that explicitly mandated it, for example, in the case of local government. Indeed, the Israel Lands Administration gradually adopted a system of internal directives which included provisions governing the duty to initiate public tenders. However, these directives were not always complied with. Essentially, they reflected accepted procedures in the Israel Lands Administration, but their status as internal directives endowed them
with a degree of flexibility that was vulnerable to abuse precisely in the sensitive cases, exposing them to improper preferences. Summing up this point, it is submitted that for many years the absence of an appropriate legislative framework meant that judicial review of the decisions of the Israel Lands Administration was minimal, and in the absence of a statutory duty to issue tenders, the allocation of public lands was conducted without due supervision.

FROM ADMINISTRATIVE AUTONOMY TO INDIVIDUAL-BASED EQUALITY

From the beginning of the 1990s, the Supreme Court adopted a new policy, which deviated from the previous passivity that characterized its treatment of the Lands Administration’s decisions. The judgment signifying the new direction in judicial policy was Poraz v. Minister for Housing and Construction. In this case, the Israel Lands Council decided to lease lands to a number of politically affiliated religious associations, without conducting any preliminary competitive proceedings. Prima facie, the allocation had a commendable goal—to assist in increasing the supply of residential opportunities in the centre of the country. Yet the question remained as to why these associations were more deserving than other groups of families desiring to build their homes in that region? In a landmark judgment, Chief Justice Shamgar invalidated the decisions, ruling that fairness and equality dictated that any allocation of public lands be based on a mechanism that ensured equal opportunities, such as a tender or a lottery. Just a short while later, a similar decision was given in Elyakim 1986—Communal Agricultural Settlement Association Ltd v. Israel Land Administration. This decision dealt with a piece of land zoned for commercial initiatives. Again, there was no prior competitive proceeding for selecting the lessees. The intended lessees were a group of local kibbutzim, and their priority (over other potential lessees) was explained against the background of their previous losses, incurred in their agricultural activities. The court refused to accept this explanation as a justification for the total failure to conduct any form of competition, pointing at the possibility of initiating a competition restricted to residents of the region who had faced similar hardships.

These precedents are significant because they constitute the normative basis for intervention in land allocation preferences based on protectionist considerations. While neither of the aforementioned judgments included a detailed presentation of the factual background of the rulings, it is difficult to ignore the fact that both cases concerned decisions which granted priority to organized sectors that were better equipped to operate as pressure groups in Israeli public life, and that benefited from cooperation with administrative agencies. Even so, the limitations of the precedents...
must also be acknowledged. In both cases, the court refrained from interfering with the determination of the Administration’s policy priorities—whether to prefer young couples, new immigrants, or local residents—restricting its review to the aspect of individual-based equality in applying current policies. In the *Poraz* case, Justice Shamgar explicitly considered the possibility that allocation without competition might be justified by ‘policy considerations’ such as ‘security needs, construction of a suburb in support of a development enterprise, an urgent extension of an existing enterprise, or the expansion of a settlement for the absorption of its second generation’. While Justice Shamgar regarded these as being ‘exceptional cases’, they exemplify the Administration’s broad scope of discretion. In *Elyakim*, Justice Tal explicitly ruled, ‘had the Administration issued a closed tender, intended exclusively for the settlements in the region of the local council, it would have been deemed reasonable. But granting an exemption from tender to one particular body in the council, and no other, even if the initiative originated with the two *kibbutzim*—is not reasonable’. Here too, the court restricted its judicial review to an examination of whether the requirements of formal equality were satisfied, in the sense that all those included in the sector which the Administration had decided to prefer (in this case, farmers who had suffered financial losses), should merit the same treatment. In terms of the basic doctrines of administrative law, which charge policy making with the agency, this division of powers between the court and the Administration is understandable. However, in the absence of statutory guidelines, the meaning of these holdings was that the Administration and the Council had almost unlimited power in formulating their distributive decisions.

This consequence is of major importance when considering one of the exceptions to the general duty to conduct a tender open to all: the priority given to local residents. As mentioned in *Poraz*, the possibility of granting priority to members of the local ‘second generation’ was recognized as a legitimate exception to the general rule of open and equal competition, and this holding was also reaffirmed in later rulings. In *Rosenberg v. Ministry of Construction and Residence* the court approved a decision to incorporate an element of preference for local residents within the framework of a ‘Build Your Apartment’ project in Ramat HaSharon. In another case, *Beerotaim, Workers Village for Cooperative Agricultural Settlement Ltd. v. Arad*, the court affirmed a decision to allow a cooperative association for settlement (*moshav*) to select the candidates for receiving construction plots in the lands leased to it by the Israel Land Administration. The court ruled that this decision did not constitute unlawful delegation of administrative powers, because from a formal perspective, the cooperative association’s position only served as a recommendation. This decision is also connected to the traditional preference given to local residents, because it is common knowledge that selection processes conducted by closed associations of this
kind tend to prefer their own members. All things being equal, it was reasonable to presume that those recommended by the moshav would be approved as lessees and that they would be members of its second generation (provided that they were interested). This in fact was the factual background of the judgment itself, according to which the only candidates for the new plots were members of the cooperative association, as opposed to other residents of the moshav, who were not members of the cooperative. The legitimacy of preferring second-generation members was reaffirmed in another petition dealing with the expansion of the moshavim, in Kefar Hittim Cooperative Agricultural Settlement Ltd v. Bein. In that case, specific emphasis was given to the legitimacy of granting priority to the children of the moshav members over the children of its other non-member residents. According to Justice Dorner,

the continuing sons [children of members] have undertaken to become members of the moshav, bearing the burden of the Cooperative Association’s debts; the moshav desires to maintain its existence, its continuity, and the number of members, a desire which receives expression in its decision to grant preferential conditions to continuing sons with respect to the purchasing of plots. This desire is a legitimate one.

Apart from questions regarding a potential conflict of interests in such a situation, it is important to consider the distributive implications of these decisions. Maintaining the existing communal composition tends to preserve the status quo regarding the allocation of benefits deriving from public lands. Allocation to the second generation of the settlement reflects consideration of the communal aspect, but it also perpetuates existing preferences, the preservation of which is not always justified. Hence, someone whose parents missed out in the ‘first round’ of distribution becomes equally deprived once again in the ‘second round’. These issues were not mentioned in any of the aforementioned judgments.

The enactment of Mandatory Tenders Law, 1992 did not substantially limit the scope of discretion exercised by the Israel Lands Administration. The general statutory duty to issue a tender was applied to the Administration, like all other branches of central government. However, this law empowers the Minister of Finance to prescribe exceptions to this rule and, in practice, this power was exercised generously also with respect to the contract initiatives of the Administration. In some of these exceptions, the fingerprints of interest groups are clearly evident. The Administration’s broad discretion in this area also derives from the fact that it is not even bound by the exemptions specified by the regulations. Even where lands can be leased without a tender, the Administration is at liberty to market them by issuing a tender open to all, and, in fact, is under duty to consider this possibility. Indeed, issuing a tender even when the
statutory duty to do so does not apply is usually desirable. At the same
time, however, there are cases in which the tender procedure is inimical to
the interests of weaker sectors, who have difficulty in competing for land
leases with the wealthy under open market conditions (for example, the
Bedouins, who are expressly mentioned in the exceptions stated in the
regulations). When the Administration decides to utilize (or not to utilize) an
exception to the statutory tender duty, it once again adopts a decision of
distributive significance. In addition, decisions in these matters are not
necessarily uniform. The lack of uniformity is exemplified by comparing
two similar cases—the Eilat Municipality v. Israel Lands Administration
case, and the Rosenberg case already mentioned earlier. In the Eilat
Municipality case, the court was requested to review a decision to lease
plots within the framework of a ‘Build Your House’ project, by way of a
lottery open to all. The Eilat Municipality opposed the decision, claiming
that priority should have been given to the local residents. The court
rejected this argument, holding that exemption from the duty to issue a
tender in developing areas was voluntary and not obligatory. Accordingly,
it ruled that the Administration was only required to ensure that the
objective of the leasing would be realized by specifying conditions
regarding a commitment to reside in Eilat for a few years. Contrary to this
decision, in the Rosenberg case, the decision petitioned against actually
included an element of priority given to local residents in the framework of
‘Build Your Apartment’ in the municipality of Ramat HaSharon. The
majority opinion dismissed the petition, conceding that considering one’s
connection with the community was indeed a reasonable consideration.
The judgment appears both logical and humane when read in isolation.
However, considering it against the background of the court’s decision in
the Eilat Municipality case indicates that in the absence of legislative
guidance, judicial review is liable to leave a wake of conflicting decisions,
each of them intrinsically reasonable on its merits.

The tendency of judicial review to assess each case on its own merits and
not within the broader context of decisions in other cases (as evidenced
from the combined reading of the judgments in Eilat Municipality and in
Rosenberg) is particularly problematic for claims of group discrimination
in the administration of Israel Lands. Proving a claim of sectoral
discrimination, i.e. discrimination concerning injustice caused to a
particular sector in the allocation of land resources, requires a broad
perspective, relating not only to the particular decision that constitutes
grounds for the petition, but also to additional decisions that were adopted
in the past. This broad perspective is required, for example, in order to
assess the claims of discrimination against the Arab sector, whose
engagements with the Administration over the years were quantitatively
and qualitatively limited. It is difficult to prove claims of this kind in
proceedings conducted in a judicial format, where the discussion is limited
to the facts proven in court, and to the parties involved. This was the
background for the rejection—due to insufficient factual substantiation—
of a claim posed by Bedouin petitioners that they had been discriminated
against in land allocations, in comparison to Jewish settlers. Notably, the
Bedouin claim was rejected on the basis of ‘insufficient factual
substantiation’. However, when deliberating the question of the ‘closing’
of the Katzir settlement for Jews only, the court noted, in the background
of its decision, that ‘in fact the State of Israel allocates land only for Jewish
communal settlements’.

TOWARDS A THIRD STAGE: FROM INDIVIDUAL EQUALITY TO
DISTRIBUTIVE JUSTICE

At the beginning of the twenty-first century, a ground-breaking judgment
was given regarding decisions of the Israel Lands Council on the lands
allocated to agricultural settlers (primarily to kibbutzim and moshavim). Potentially, the judgment heralds the commencement of an era in which
judicial review examines the more general distributive effects of land
policies. The decisions dealt by the court in this matter granted the settlers
rights in their leased lands in excess of their previous contractual
entitlements. More specifically, the decisions allowed the settlers to develop
land originally leased for agricultural purposes for non-agricultural uses as
well. And, where settlers were required to return lands to the state due to
rezoning and new planning of the area for urban uses, the compensation
offered them would be based on (a certain percentage of) the new value of the
lands after rezoning.

The central petition against these decisions was filed by the Mizrahi
Democratic Rainbow, an association of intellectuals and descendants of
Jewish immigrants from Arab (Mizrahi) countries, who claimed to
represent the relatively indigent sectors of the Israeli (Jewish) population.
The Mizrahi Democratic Rainbow regarded the decisions as a
perpetuation of the injustice caused by the original allocation of lands, in
which most of the immigrants from Arab countries did not participate.
Legally speaking, it argued that these decisions exceeded the powers of the
Council, because they included substantive (‘primary’) arrangements
which should have been established by legislation, and that they were also
unreasonable, principally because of the discrimination in favour of the
agricultural sector and the disregard of social, economic, and ecological
considerations. Another petition was filed by the Society for the Protection
of Nature, emphasizing the preservation of open areas.

The Supreme Court annulled these decisions, which it deemed
unreasonable because of their disregard for ‘distributive justice’. The
judgment in this matter signified an important transition from the
narrowly-based consideration of personal equality to broader considerations of distributive justice. It is interesting to note that after the petitions were filed, an inter-office committee was set up to examine the decisions and their ramifications (the Milgrom Committee). The Committee held that the decisions were unreasonable, and ought to be replaced by decisions that would significantly reduce the benefits to the agricultural sector. In light of these conclusions, the position adopted by the State was that the original decisions could not stand and new decisions should be adopted. Against this background, it is not surprising that the petitions were accepted. Therefore, the primary importance of the judgment was not in the actual invalidation of the decisions, but rather in the normative guidelines proposed by the court for future decisions regarding Israel lands.

The court expressed dissatisfaction with the fact that under current legislation the primary principles which guide land policy are decided by administrative bodies (rather than by the legislature), but refrained from invalidating the decisions for this reason. The main thrust of the judgment was that allocation of lands must comport with the principle of distributive justice. According to Justice Or:

Distributive justice is a paramount value, warranting appropriate emphasis in any decision of an administrative authority regarding allocation of public resources. This is particularly true in the case before us. The Israel Lands Administration is the body charged with responsibility for Israel lands in their entirety, and it is impossible to overstate the importance of this asset and the importance attaching to its distribution and allocation in a just and appropriate manner. The decisions in the petitions before us have critical implications for the allocation of this limited, and particularly valuable resource. There is an essential public interest that resources of this kind be allocated by the State, or authorities acting on its behalf, in a manner that is fair, just and reasonable.

The judgment emphasized the scarcity of land resources in Israel and the need for land reserves. While it did not discount the possibility of considering the historical claim raised by the settlers, which emphasized their contribution to the Zionist enterprise, the court made it clear that this consideration would have to be factored in with other social interests.

The novelty of the attitude expressed in the Rainbow judgment regarding the principle of distributive justice is particularly striking when compared with a previous judgment given by Justice Or regarding prior decisions that preferred agricultural settlers, in Mehadrin v. Government of Israel. In that case, the petitioners argued against decisions which distinguished between the rates of compensation awarded to lessees belonging to the cooperative settlements sector and those awarded to
private farmers (although in both cases the lands had to be returned due to rezoning). Justice Or refrained from deciding the question of this alleged discrimination after accepting the petitioners’ preliminary claim regarding the conflict of interests of those Council members belonging to the cooperative settlements sector who had participated in the decision-making process. Explaining the nature of their conflict of interests, Justice Or stated that these Council members were expected ‘to decide on the minimal, suitable rate of compensation that would ensure the goal of timely construction on lands zoned for agricultural purposes’,43 as opposed to the interest of their sector in the maximization of compensation. This argumentation implied that the Israel Lands Council was supposed to aspire to decisions that were optimally efficient (and thrifty) from an economic perspective. By implication, these concepts were rejected by the Rainbow judgment, in its endorsement of distributive justice as a guiding principle in the administration of Israel Lands.

The decisions discussed by the Rainbow judgment were not invalidated because they were not efficiency-based, but rather because they failed to address the needs and considerations pertaining to other groups, external to the agricultural sector. Regarding the decision awarding compensation to the agricultural lessees based on the future value of their land when planned for urban development purposes,44 the court held that besides ensuring quick availability of lands for development (by giving the lessees incentives to cooperate with the new plans), it was necessary to consider additional factors, including: the planning aspect (preservation of open areas, and the focus on urban development in the metropolitan regions of Israel); social considerations (the social tensions liable to result from high compensation awarded to a limited, defined group); the availability of alternative methods for changing the use of land leased in the past for agricultural purposes (requiring lessees to return land not used for agricultural purposes); and the possibility of making distinctions between various regions of the country (center or periphery) in accordance with the demand for land.

The judgment also criticized the rate of compensation and the mechanism for calculating compensation (based on the future value of the land) because in effect it created a partnership between the lessee and the state, even though the alleged purpose was only to create an incentive for vacating the land. The percentage-based formula adopted by the decisions engendered uncertainty regarding the scale of the benefit and contributed to discrimination between lessees in different parts of the country (unacceptable in general, and especially in view of the historical claim raised by the agricultural settlers concerning reward for their past efforts and their investments).45 The court added that the degree of disparity between the compensation calculated on the basis of past investments (the contractual criterion) and the compensation actually
decided upon, was indicative per se of the decision’s unreasonableness.46 Another decision which was discussed in the judgement had paved the way for extensive ‘enlargements’ of moshavim by authorizing the building of new residential houses on agricultural land.47 This decision was deemed problematic because it contradicted existing planning policy (by drawing the stronger populations out of the cities and increasing traffic congestion). Despite the fact that this decision was justified by the need to strengthen the population of agricultural settlements, the court held that the decision went too far, by significantly reducing the lease fees (and thus also creating an incentive for speculative investment). Notably, here too the ruling differs considerably from the Beerotaim case.48 The third decision discussed by the court and deemed unreasonable concerned the development of industrial zones in an agricultural area.49 The court once again recognized the need to locate additional sources of employment in the agricultural settlements, but here too it ruled that there was no justification for the significant reduction in the lease fees for land used for industrial purposes.

DISTRIBUTIVE JUSTICE: ISSUES OF SUBSTANCE

The importance of the Rainbow judgment lies first and foremost in the recognition it conferred on the value of distributive justice, which became part of the legal discourse in the context of Israeli public law. However, numerous questions remain regarding the practical application of this principle. How does one realize distributive justice? What are the judgment’s implications or dictates with respect to other cases, such as the distribution of lands in the Arab sector?50 Indeed, the concept of distributive justice is considered amorphous, and serious disputes will probably arise regarding the scope and manner of its application. Conceivably, the court’s decision could have benefited from a greater effort to clarify its practical implications and applications. Even so, the principle, as such, is not an empty slogan. Firstly, it clearly extends beyond the requirements of individual equality as expressed in the Poraz precedent, which mandated that, all things being equal, the allocation of land should be effected through a competitive format. Secondly, it requires that the Israel Lands Council—and the Israel Lands Administration in its wake—would refrain from consistently disregarding the needs of any segment or group in Israel, and obligates it to consider actively the needs of the diverse segments of the population. Thirdly, it necessitates considering the needs of future generations of Israelis (by securing unexploited land reserves available for them). In other words, distributive justice is not just intra-generational, but also inter-generational.51 Interestingly enough, despite their opposition to the Rainbow judgment, even the arguments of the agricultural settlers were based on the idea of distributive justice in its
broad sense, albeit with a different result in mind. The settlers’ claims regarding the consideration of their historical rights and their contribution to the state and the defence of its borders exceeded the ambit of their rights as individuals, and attempted to confer on them benefits based on their group affiliation.

The emerging dialogue concerning the duty to administer Israel Lands in accordance with the principle of distributive justice may draw inspiration from writings dealing with questions of just planning. Even in countries in which the lands are privately owned, administrative authorities influence the uses of the land and the degree of benefit derived from it using their statutory powers in the area of planning. Decisions adopted by the authorities necessarily affect residential standards and access to communal services and employment opportunities. As such, they have clear distributive significance. The lessons of the attendant theoretical discussion in the area of planning can serve as a source of inspiration for the application of the principle of distributive justice in the context of land allocation.

In his book *Social Justice and the City*, political geographer David Harvey presented a theory of regional distributive justice based on the following central criteria: need, contribution to the common good, and compensation for difficulties. The ‘need’ criterion mandates consideration for the basic needs of those sectors of the population affected by the planning, addressing a number of aspects, such as housing, employment, communal services and leisure culture. The criterion of ‘contribution to the common good’ considers the influence of resource allocation on other places or groups (including negative externalizations, such as pollution, etc.). The consideration of ‘compensation for difficulties’ essentially expresses the concept of affirmative action and mandates consideration for the difficulties occasioned by residence in zones with adverse basic conditions whether geographic (floods, earthquakes, etc.) or social (crime). In his later writings, Harvey broadened his analysis to include environmental justice and implications for future generations.

DISTRIBUTIVE JUSTICE: ISSUES OF PROCESS

In addition to developing a substantive concept of distributive justice, emphasis should also be given to the administrative decision-making process, in order to maximize the chances that proper consideration will be given to the largest possible spectrum of relevant interests. In order to achieve this goal, it is important to guarantee public access to the process in order to achieve a more comprehensive participation of diverse sectors of the population in it.

One important procedural safeguard should be to guarantee public access to information about the administrative procedures while they still
take place. Decisions pertaining to the uses of Israel Lands are more vulnerable to the improper influences of organized interest groups when they are taken covertly, remote from the public eye and knowledge. Due to such potential influences, proposals under consideration must be publicized. Generally, until now, decisions pertaining to Israel Lands had a low public profile at the time of their adoption. Nor was the public aware of significant deliberations taking place, or of other proposals under consideration. On the other hand, ‘those who were supposed to know’ knew. The 1995 Amendment of the Israel Lands Administration Law led to a slight improvement, but regretfully of limited benefit. Today, the Law requires publication of decisions adopted by the Israel Lands Council.54 However the Law explicitly provides that a breach of this duty will not impugn the validity of the decision. According to the concluding passage of section 4M of the Law, ‘the effective date [of the decision] shall not be contingent upon publication, unless provided otherwise in the decision’. And most importantly, the statutory duty to publicize only relates to the final decisions and therefore deprives the public of the requisite tools for influencing the formative moments of the decision-making process whereas the advance publication of decision proposals is important primarily when there are well-organized interest groups who have better access to the administrators.55 The Law must create conditions that promote public awareness of proposed decisions prior to the termination of the administrative process.

From the perspective of public awareness of the decisions pertaining to Israel lands, there were democratic advantages to legislative initiatives in this area—the Public Housing Law Bill, 1998,56 for which the legislative proceedings were completed, and the Entrenchment and Registration of Farmers’ Rights in Land Bill, 1996,58 which did not get to legislation. While these initiatives were considered controversial, they were preferable to the decisions of the Israel Lands Council in the sense that they were presented for public debate. In other words, the administrative decisions on Israel Lands, adopted under conditions of no publicity and without due acknowledgment of their political character, have been inferior even to legislation promoted by interest groups. In the latter, there is no attempt to camouflage the political disputes. The legislative bills in this area were initiated by politicians whose political motives and agendas are usually of public knowledge, thus increasing the chance of their being deliberated by the general public. In fact, the administration of Israel Lands was heavily handicapped in comparison to both professional and political decision-making processes: it was not based on purely professional considerations, nor was it conducted under conditions of public review and criticism. Of course, access to the process and openness may be achieved also in the framework of administrative decision-making, and not only in the Knesset.59 Notably, the Milgrom Committee, which reviewed the decisions
on the agricultural lands, published notifications requesting all those interested to present their positions to the Committee.

A second procedural concern relates to the active participation of various groups in the processes leading to distributive decisions. Distributive decisions reflecting social preferences should not be accepted solely on the basis of ‘expert’ knowledge. In other words, in this context, the administrative process need not necessarily aspire to a ‘correct’ result, but rather to a result that reflects the desires of the equitable owner—the public. The question is how to attain public input into administrative decision-making when direct democracy is no longer practicable (and certainly not with respect to the ongoing administration of assets) and when the legislator too is unable to provide specific responses to all the questions which arise. Should the solution be based on a more representative composition of the Israel Lands Council as opposed to the partial format of public representation, reflected in the existing statutory arrangement? Presumably, this kind of reform would promote democratic values in the administrative decision-making process. The appointment of Arab representatives to the Israel Lands Council signified a first step in this direction. On the other hand, one cannot dismiss the fear that here, too, well-organized interest groups will be more successful in effectively utilizing this system. The 1995 Amendment of the Law endorsed the representation-based approach, but included only very general guidelines, once again exposing itself to interest-based exploitation. As stated, the Amendment recognized the possibility of appointing ‘public representatives’ as members of the Israel Lands Council (in limited numbers), but it lacks provisions regarding the method for appointing them.

In addition, the question arises as to how to differentiate between legitimate representation and illegitimate bias. As noted in the Mehadrin case the Supreme Court invalidated decisions adopted by the Council in relation to compensation for agricultural lessees, because some of the participants in the proceedings were members of kibbutzim and moshavim and, as such, stood to benefit from the decision. According to further judgments, members with pecuniary interests in agricultural lands were disqualified from serving on a sub-committee connected to the rezoning of their land, even when it only had advisory powers.

These judgments expose the inherent paradox ingrained in the implementation of representative statutory schemes. It is precisely when the representation principle fulfils its goals that the blight of bias kicks in. The question that arises is whether to apply a softer version of the law of conflict of interests with respect to bodies defined as political, as opposed to authorities whose decisions are supposed to be essentially professional, subject to the condition that they also be required to operate in accordance with equality-based criteria. The dilemma is far from simple. At any rate, with regard to the Israel Lands Council, it would seem that the main
problem lies elsewhere: Endorsing the principle of representative appointments in this context can be expected to further empower the organized interest groups, and thus perpetuate the inaccessibility of the decision-making process to weaker groups which suffer from underrepresentation in the Israeli public administration. Moreover, it would be at the expense of ‘the silent majority’—those citizens who are not defined to a degree that warrants their recognition as a defined interest group, but who in fact constitute the backbone of Israeli society.

For these reasons, it would seem appropriate to consider alternative methods for the realization of the democratic-representative ideal in fundamental decisions relating to benefits gained from public property. For example, since it is unlikely that the appointments to the Israel Lands Council will fully reflect the entire complex of interests deserving of representation, it may be preferable to waive altogether the principle of representative appointments to the Council, and replace it by a system of professional appointments in the areas relevant to the Administration’s activity and simultaneously to open the Council proceedings to the representatives of the different groups, thus enabling them to present their positions to the Council. It must be stressed that participation in the Administration’s decision-making process is of tremendous importance and has the potential to significantly influence the decisions adopted, as indicated by the comparison of decisions adopted with the participation of bodies external to the Administration with decisions adopted in forums closed to them.64

Another option may be to consider transferring the main policy decisions of the Israel Lands Council to the political arena, where the debates are more accessible to the public and covered by the media. A solution in this vein, not involving an upheaval of the entire system, would be to add a requirement of governmental approval to such decisions.65 Admittedly, the government has no advantage over the Israel Lands Council from a professional perspective, but it is a more representative body and its decisions are subject to an ongoing public debate. Submitting the main decisions on land policy for official approval by the government would make the government directly responsible for the distributive implications of the land policy, and would guarantee public deliberation in these matters.

While these proposals for procedural reforms are important, it should be remembered that a fair process does not always guarantee the quality of the decisions adopted or the ability to reach a consensus. Nor can it eliminate the structural biases resulting from the composition of the deciding body or from effective activities of certain pressure groups. The aftermath of the Rainbow judgment serves as an example of the limitations of procedural reforms. The Rainbow judgment instructed the Israeli Lands Council to issue transitional provisions, which would apply to the
transactions concluded pursuant to the decisions invalidated by the court. To that end, the Council appointed a committee headed by Moshe Nissim, formerly a senior minister in the Israeli government, and then decided to adopt transitional provisions that were essentially consistent with the Committee’s recommendations.

This decision prompted renewed petitions to the High Court by the Mizrahi Democratic Rainbow and other social organizations. They contested the transitional provisions, claiming that in essence they divested the Rainbow judgment of any practical significance. Interestingly, although the Nissim Committee heard both the parties with interests in the lands, and their counterparts, it did not generate social consensus regarding the appropriate policy. Following the petition, the attorney general gave notice that he would not be able to defend the transitional provisions decided upon by the Israel Lands Council, and his position triggered a new decision that curtailed their scope, so that they would apply only to a smaller number of transactions which had reached a relatively advanced stage.66 This in turn prompted a number of additional petitions by lessees who did not fall within the purview of the new transitional provisions. Ultimately, the court dismissed all the petitions in this matter—both those submitted by the protesting social organizations and those of the lessees who claimed that they were aggrieved by the second decision.67

Arguably, in the matter of transitional provisions, the appropriate administrative process did not engender social consensus. This result does not indicate, however, that an emphasis upon the importance of process is futile. In the circumstances of the case, the magnitude of the burden assumed by the Council made disagreement almost inevitable. On the one hand, the transition provisions were required to amend previous decisions pertaining to agricultural lands, in accordance with the principle of distributive justice. On the other hand, they had to consider issues of individual justice (with regard to those who had planned transactions and even begun realizing them on the basis of previous decisions). Reconciling these conflicting positions was a particularly difficult task. Furthermore, the transition provisions were debated against the background of prior animosity between the rival parties and a previous history of a flawed process, and in the absence of any significant changes in the composition of the Israel Lands Council. One may hope that a fair process—open and accessible—will succeed in producing more successful results at least in relation to new policy decisions.

ISRAEL LANDS AND THE FUTURE OF LAND LAW IN ISRAEL

The developing judicial review of decisions regarding the administration of Israel Lands has made it clear that these decisions should be based on principles of individual equality (as implemented by the court since the
beginning of the 1990s) and distributive group-oriented equality (as made clear by the *Rainbow* judgment). It remains to be seen whether these principles will be integrated into the everyday decision-making processes of the Administration, or whether they will remain only obscure principles guiding judicial review.

Another question relates to the possibility of more fundamental legal reforms regarding Israel lands. A potentially important reform, which has to be considered would aim to amend the Israel Lands Administration Law by adding to it provisions on the objectives and principles that should guide the operations of the Land Administration. Indeed, statutory provisions of this kind would be necessarily broad and would not impose substantial restrictions on the exercise of the Administration’s discretionary powers. Still, they would confer some limitations and guidelines.

A more radical reform, occasionally proposed, is to abandon the tradition of public ownership of lands and progress towards a private ownership-based land regime. It is doubtful whether proposals of this kind have any significant chance of passing, taking into consideration that the public ownership of land in Israel has been traditionally justified also by security considerations related to the Arab–Israeli conflict. At any rate, it is important to remember that any decision to privatize Israel lands would necessarily face significant distributive questions, similar to those discussed so far in the context of administering them. In fact, current land administration in Israel leads to de-facto privatization, given the long periods of leasing and the limited impact of the Land Administration on the use of land. These questions will become even more critical in the context of full privatization in which the distribution is, by definition, a final distribution by the state.

NOTES

1. The basic constitutional norm that preserves public ownership of land is established in section 1 of the Basic Law: Israel Lands, which provides that ‘The ownership of Israel lands… shall not be transferred either by sale or in any other manner’. This arrangement was influenced by the format for land acquisition prior to the establishment of the state, the collectivist world view prevalent in Israeli society at that time and, obviously, by national considerations relating to the Israel–Arab conflict. See further J. Weisman ‘Israel’s State-Owned Land’, *Mishpatim*, Vol. 21 (1991), p. 79 (Hebrew).

2. See M. Mautner (ed.), *Distributive Justice in Israel*, Tel Aviv, 2001 (Hebrew).


4. Professor Zamir notes that the powers granted to the Israel Lands Administration serve a classic example of the legislative practice of conferring an administrative body with ‘sweeping authority’, and warns that a law of this kind (occasionally referred to as a ‘framework law’), is not consistent with the concept of the rule of law. See I. Zamir, *Administrative Power*, Jerusalem, 1996, Vol. 1, pp. 236–237 (Hebrew).

5. Israel Lands Administration Law (Amendment), 1995 (hereinafter, the 1995 Amendment) added a number of provisions regarding these matters, but they include restrictions of a particularly limited nature.

7. See section 197 of the Municipal Corporations Ordinance [New Version].

8. For example, according to Decision I of the Israel Lands Council, ‘The transfer of urban lands, with the exception of land zoned for public purposes, shall be effected by way of a public tender’. In the context of this provision it was determined that ‘In accordance with the decision of the director of the Israel Lands Administration, the Council is entitled to exempt the Administration from its obligation to transfer land by way of a public tender’.


11. Ibid., p. 801.


13. Ibid., p. 165.


15. Ibid., p. 801.

16. *Elyakim*, p. 165


20. Ibid., p. 947.


22. Section 2 of the Mandatory Tenders Law.

23. Section 4(b) of the Mandatory Tenders Law.


25. Section 42 of the Mandatory Tenders Regulations.

26. Section 25(20) of the Mandatory Tenders Regulations.

27. C.A 1444/95 *Eilat Municipality v. Israel Lands Administration*, 49 (3) P.D. 749 (hereinafter, *Eilat Municipality*).


31. Ibid., p. 394.

32. H.C. 6698/95 *Kada’an v. Israel Lands Administration*, 54 (1) P.D. 258, 279. The court noted this fact in its examination of the possibility of closing the settlement to Arabs, based on the claim of ‘separate but equal’. In the absence of allocation of lands for Arab settlements, this claim is bound to be rejected on the factual plane alone, even before addressing the normative problems it raises.

33. The *kibbutz*, *moshav* (singular form) and *kibbutzim*, *moshavim* (plural form) are two Israeli frameworks of communal living, distinguished from each other by their particular economic structures.

34. H.C. 244/00 *Association for New Dialogue for Democratic Dialogue v. Minister of National Infrastructures*, 56(6) P.D. 25 (hereinafter, *Rainbow*).

35. The details of these decisions were as follows: compensation for the agricultural settlers in cases of rezoning on a percentage basis of between 27 and 29 percent of the value of the land after the rezoning (Decision 727 which replaced previous decisions in the same spirit: Decisions 533, 611 and 666); development of industrial zones on lands previously leased as agricultural lands under conditions that included a significant reduction in lease payments, an exemption from tender, and possible cooperation of external developers (Decision 717 which replaced Decision 441); and rezoning for the purpose of expanding the *moshavim* while offering a reduction in lease payments and an exemption from tender (Decision 737, which replaced Decision 612). These decisions directly benefited the two sectors which worked for
their promotion—the settlers themselves and the land developers who sought to capitalize on the new opportunities for building, and in doing so demonstrated one of the weaknesses of the administrative process: its vulnerability to being biased in favour of the specific entities which the administrative authority is supposed to supervise. This tendency was discussed in the literature, in which it was referred to as the ‘capture’ problem (the dynamic of administrative agencies becoming ‘captured’ by the very same economic factors and players over which they are supposed to supervise). See S.P. Huntington, ‘The Marasmus of the ICC: The Commission, Railroads, and the Public Interest’, Yale L.J., Vol. 61 (1952) 467; L.L. Jaffe ‘The Effective Limits of the Administrative Process: A Reevaluation’, Harv. L. Rev., Vol. 67 (1954), pp. 1105, 1107.


37. Justice Or delivered the main opinion, which was concurred with by the other justices on the panel—Justices Barak, Matsa, Shtrasberg-Cohen, Dorner, Beinish, and Procaccia.

38. Rainbow, p. 83. In the context of American constitutional law, the concern regarding delegation of legislative powers to the executive branch shaped the ‘non-delegation doctrine’.


40. Ibid., pp. 64.

41. Decisions 666 and 667.

42. H.C. 5575/94, Mehadrin Ltd. v. Government of Israel, 49(3) P.D. 133 (hereinafter, Mehadrin).

43. Ibid., p.148.

44. Decision 727.

45. Actually, when history is taken into account, agricultural settlers should be compensated in correlation to their investments in the land and the duration of their settlement. From this perspective, the current value of the land is of less relevance especially when compensation correlated with this value awards bigger sums to settlers whose history is not necessarily long or significant. Furthermore, the historical consideration gives additional weight to the argument that those living in the periphery of the country, who had survived difficult periods in the defence of the state borders, should receive higher compensation, not only in percentages, but also in absolute figures, despite the low economic value of their lands.

46. Rainbow, p. 74.

47. Decision 737.


49. Decision 717.


52. David Harvey, Social Justice and the City, London, 1973, pp. 101–108. For a criticism of Israeli planning bodies for their tendency to prefer profit maximizing considerations over considerations of social justice, see Y. Blank ‘The Location of the Local: Local Government Law, Decentralization and Territorial Inequality in Israel’, Mispatim, Vol. 34 (2004), pp. 197, 265–281 (Hebrew). For example, municipalities tended to prefer commercial building which produced higher payments of municipal taxes, and opposed the construction of small apartments, whose purchasers were generally characterized as being poor.


54. Section 4M, Israel Lands Administration Law.


Mehadrin, p. 42.


An additional question discussed in the case law regarding representative appointments was to which extent is a representative of a particular body, or group, obliged to act in accordance with the dictates and guidelines that he receives. See H.C. 5848/99, Paritzky v. District Committee for Planning and Construction in Jerusalem, 54(3) P.D. 5.

For example, the decision on the ‘Build Your House’ plan in Eilat (discussed in Eilat Municipality), which did not give priority to the local residents, was adopted without coordination with the Municipality. Justice Cheshin criticized the Lands Administration for that, adding: ‘in terms of proper administrative proceedings, it is inconceivable that the Israel Lands Administration should be the only instance determining how lands are to be allocated for building within the boundaries of Eilat, and be forced to unquestioningly accept the decision made in Jerusalem’. The same applies to the issue of Tel Aviv and in other subjects involving the Israel Lands Administration. Ibid., p. 769. In contrast, the decision regarding the ‘Build Your House’ project in Ramat HaSharon (discussed in the Rosenberg case), which granted priority to the local residents, was coordinated with the Municipality. A comparison between the two cases indicates that cooperation at the decision-making stage has a potential for significantly influencing the process.

It should be clarified that decision-making in the government is also subject to the rules of administrative law, including the prohibition on conflict of interests.

Decision 972 of the Israel Lands Council, of 2 September 2003. The transitional provisions were premised on two main parameters: ‘Reliance’ and ‘Planning’, and accordingly led to the validation of transactions which had moved forward either from a contractual perspective or from a planning perspective.

H.C. 10934/02, Kibbutz Kfar Azza Association for Cooperative Agricultural Settlement v. Israel Lands Administration 58(5) P.D. 144. The court was satisfied that the second decision provided appropriate protection to the reliance interests of the parties to the transactions.

It is worthwhile to mention that in another famous judgment which dealt with administrative policy with distributive implications, the non-drafting of Yeshiva students to military service, the court held that the issue of group exemption from service should be legislated, rather than based only upon administrative decisions. See H.C., 3267/97 Rubinstein v. Minister of Defence, 52(5) P.D. 481.