In the Supreme Court **HCJ 5931/06**
Sitting as a Court of Civil Appeals **HCJ 2038/09**

Before: His Honor, President (ret.) A. Grunis
Her Honor, President M. Naor
His Honor, Deputy President E. Rubinstein
His Honor, Justice S. Joubran
Her Honor, Justice E. Hayut
His Honor, Justice H. Melcer
His Honor, Justice Y. Danziger

The Appellants in CA 5931/06:
1. Daoud Hattab Hussein
2. Alian Issa Azat
3. Saba Naji Suleiman Alarja
4. Jamal Naji Suleiman Alarja
5. Majed Naji Suleiman Alarja

The Appellants in CA 2038/09:
1. Dr. Walid Abd al-Hadi Ayad
2. Dr. Fatma Ayad
3. Mahmoud Abd al-Hadi Iyad
4. Haled Abd al-Hadi Ayad
5. Hiam Ayad
6. Ali Abd al-Hadi Ayad
7. Signe Breivik
8. Safa Abd al-Hadi Ayad
9. Hamad Ahmed Ayad
10. Fatma Abd al-Hadi Ayad
11. Hassan Salameh Ayad
12. Dr Higad Abd al-Hadi Ayad
13. Dr Fayez Ibrahim Abd al-Majid Hamad

V.

The Respondents in CA 5931/06:
1. Shaul Cohen
2. Adv. Ami Fulman in his Capacity as Receiver
3. Dan Levitt

4. Robert Fleischer
5. Yaron Meidan
6. Shlomo Ohana
7. Lilian Ohana
8. Moshe Ben Zion Mizrahi
9. The Head of the Jerusalem Land Registry
10. The Custodian of Absentees' Property

The Respondents in CA 2038/09:

1. The Custodian of Absentees' Property
2. The State of Israel – The Ministry Of Defence

CA 5931/06: Appeal against the Jerusalem District Court's judgment of May 9, 2006 in CF 6044/04, awarded by The HonorableJudge R. Carmel

CA 2038/09: Appeal against the Jerusalem District Court's judgment of October 2, 2008 in CF 6161/04, awarded by The Honorable Judge I. Inbar

On behalf of the Appellants in CA 5931/06 and CA 2038/09	**Adv. Avigdor Feldman; Adv. Miri Hart; Adv. Shlomo Lecker; Adv. Ramsey Ketilat**
On behalf of the First Respondent in CA 5931/06:	**Adv. Haim Novogrotzki**
On behalf of the Second Respondent in CA 5931/06	**Adv. Ami Fulman**
On behalf of the Third to Fifth Respondents in CA 5931/06:	**Adv. A. Baron; Adv. Shirley Fleischer-Geva**
On behalf of the Sixth and Seventh Respondents in CA 5931/06:	**Adv. David Ohana**
On behalf of the Eighth Respondent in CA 5931/06:	**Adv. Eitan Geva**
On behalf of the Ninth and Tenth Respondents in CA 5931/06, the Respondents in CA 2038/09 and the	**Dr. Haya Zandberg, Adv.; Adv. Moshe Golan**

Attorney General:

Facts: The appeals focused upon the question of whether properties in East Jerusalem that belong to residents of Judea and Samaria are deemed "absentee property" as defined under the Absentees' Property Law.

Held: In dismissing the appeals, the Supreme Court held that the Absentees' Property Law applies to properties in East Jerusalem whose owners, beneficiaries or holders are residents of Judea and Samaria. However, in light of the significant difficulties attendant to implementing the Law in accordance with its language, in general, the authorities should refrain from exercising their statutory authority in regard to such properties except in the most exceptional circumstances, and that even then, only subject to the pre-approval of the Attorney General and a decision by the Government or a ministerial committee appointed by it. The Court's holdings in this judgment will apply prospectively, and only where no statutory steps have been implemented in regard to the said properties. The holdings of this judgment lead to the conclusion that the specific properties that are the subjects of the appeals are absentees' property.

JUDGMENT

President (ret.) A. Grunis

1. The appeals before the Court focus on the question of whether properties in East Jerusalem, the rights in which are owned by residents of Judea and Samaria, constitute "absentees'" property within the meaning of the Absentees' Property Law, 5710-1950 (hereinafter referred to as "the Absentees' Property Law" or "the Law").

This question arose in four cases that were heard jointly (CA 5931/06, CA 2250/06, CA 6580/07 and CA 2038/09). This Court held a considerable number of hearings in the appeals. In the course of hearing the appeals, various attempts were made to resolve the disputes between the parties. In two of the appeals, the need for the Court's decision did indeed become unnecessary. Thus, on February 13, 2014, the appeal in CA 2250/06 (*Custodian of Absentees' Property v. Dakak Noha)* was withdrawn after the parties reached a settlement agreement that was granted the force of a judgment. The appeal in CA 6580/07 (*Custodian of Absentees' Property v. Estate of Abu Zaharaya*) was dismissed on September 10, 2013, after the appellant gave notice that he was withdrawing the appeal. The time has now come to decide the remaining two appeals – CA 2038/09 and CA 5931/06.

The Background and Chain of Events

2. The appeals before us concern properties in East Jerusalem that were determined to be "absentees' property", and whose owners were residents of Judea and Samaria.

CA 5931/06

3. CA 5931/06 concerns some five acres of land located in Beit Safafa on which fruit trees are planted (parcel 34 in block 30277) (hereinafter referred to as "Property 1"). Following to the Six Day War, the property was included in the territory to which the State of Israel extended its jurisdiction on June 28, 1967 under the Law and Administration Order (No. 1), 5727-1967 (hereinafter referred to as "Order No. 1"). One half of the rights in the property were registered in the Jordanian Land Registry in the name of a resident of Beit Jala who sold them at the beginning of the 1970s to Jewish Israeli nationals. The rights of the Jewish purchasers were recorded in the Land Registry in 1972 and 1974. The remaining half of the rights in the property belonged to Appellants 3-5, who are residents of Beit Jala, and members of their family (hereinafter referred to as "the Alarja family"). In 1973, the majority of the Alarja family's rights in the property were sold (excluding the rights of one of its members, who owned one fourteenth of the parcel and is not party to this appeal). At the end of a chain of transactions, the rights came into the possession of Appellants 1 and 2, who are residents of Beit Safafa. Their applications to register the property in the Land Registry were declined on the ground that they had to apply to the Custodian of Absentees' Property (hereinafter referred to as "the Custodian"). In 1996, the Custodian informed them that he would not release the property.

4. The Appellants filed a claim for declaratory relief in the Jerusalem District Court, to the effect that Property 1 was not absentees' property, or in the alternative, that the Custodian was obliged to release it (CF 6044/04, Judge R. Carmel). The claim was dismissed in a judgment given on May 9, 2006, which held that the property was absentees' property. The court held that the properties in East Jerusalem of residents of Judea and Samaria are absentees' property despite the fact that the absenteeism is "technical". Hence, whether the owners of Property 1 resided in Egypt at the relevant time (as pleaded in respect of some members of the Alarja family) or were residents of Beit Jala, they were "absentees". Consequently, the rights in Property 1 were vested in the Custodian, and it was held that any disposition made in respect of it by Appellants 3-5 after June 28, 1967 (when it became "absentees' property") was invalid. The court dismissed the Appellants' plea of discrimination in comparison with the Jewish purchasers, whose rights in the property were registered in their name. In the court's

opinion, the very registration of the rights did not mean that the registration was lawful, and the same could not constitute a "lever for the making of another mistake by another unlawful registration" (para. 13 of the judgment). In addition, the District Court disagreed with the judgment in OM (Jerusalem District) 3080/04 *Dakak v. Heirs of Naama Atia Adawi Najar, Deceased* (January 23, 2006, The Honorable Judge B. Okon, hereinafter: the *Dakak* case), from which it appears that the residents of Judea and Samaria are not "absentees" according to section 1(b)(1)(ii) of the Law. We shall further refer to the *Dakak* case below (an appeal was filed against the judgment in the *Dakak* case in CA 2250/06, as noted in para. 1 above). The first appeal herein (CA 5931/06) was filed against the judgment in CF 6044/04.

5. To complete the picture, it should be noted that other legal proceedings have been conducted in respect of Property 1. These were further to the deletion of the Alarja family's rights from the Land Registry in accordance with a judgment awarded in default of defense on the application of the Respondent 1 (CF (Jerusalem Magistrates) 21351/95, Judge I. Zur, partial judgment of January 31, 1996). The rights ofRespondent 1 in the property were then sold to Respondents 3-7. The Appellants filed lawsuits to set aside the said judgment and for declaratory relief according to which they are the owners of the property (CF (Jerusalem Magistrates) 10386/96, Judge. R. Shamia); CF (Jerusalem District) 1264/97, Judge B. Okon, the claim was struck out on March 23, 2003). The Custodian, for his part, filed a claim for declaratory relief to the effect that the Alarja family's rights in Property 1 constituted absentees' property, and that the transactions made in regard to its part of the property were void (CF (Jerusalem District) 1504/96, Judge A. Procaccia). The claim was dismissed further to a settlement that was formulated between the Custodian and Respondents 1-7, which was approved by the court on March 5, 2002). It should be noted that in the latter proceedings the Appellants originally joined the position of the Custodian, including the plea that the property was absentees' property, but they then withdrew that plea with the court's approval. We would further add that in the period during which the proceedings have been heard, Appellants 1, 3 and 4 have unfortunately passed away.

CA 2038/09

6. CA 2038/09 concerns 0.84 acres of land in Abu Dis (hereinafter referred to as "Property 2"), on which there is a residential building which, in 1964, was converted to a hotel known as the Cliff Hotel (hereinafter referred to as "the hotel"). The property is in the territory to which the State of Israel's jurisdiction and administration were extended in 1967. Its original owner (hereinafter referred to as "the deceased") was a resident of Abu Dis and a national of Jordan. The Appellants own the rights in the

property by virtue of inheritance and law. On July 24, 2003, the Custodian issued an absentee certificate under section 30 of the Law in respect of Property 2. Further thereto, the Appellants filed a claim in the Jerusalem District Court for the award of declaratory relief to the effect that the property was not "absentees' property". In the alternative, they applied for the property to be released or, in the further alternative, they asked that the absentee certificate issued in respect of it be declared void (CF 6161/04, Judge I. Inbar). It should be noted that the parties were originally at issue as regards the property's location in Israel, but in the course of the proceedings they agreed that the property has been in the area of Israel since 1967. The claim was dismissed on October 2, 2008. It was held that, at the determining time, the deceased was resident in Judea and Samaria, namely outside the area of Israel, about 300 meters from the hotel, and he was not a resident of East Jerusalem. Such being the case, it was held that the property was "absentees' property", both according to section 1(b)(1)(i) of the Law (because the deceased was a national of Jordan) and by virtue of section 1(b)(1)(ii) of the Law (as he was a resident of Judea and Samaria) (the section is quoted in para. 13 below). The court disagreed with the interpretation laid down in *Dakak*, according to which the Law does not apply to the properties in East Jerusalem of the residents of Judea and Samaria. In the court's view, weight should be given to the difficulties involved in the authority's treating the residents of Judea and Samaria as "absentees" for the purpose of implementing the Law, but not in regard to the Law's incidence. In addition, it was noted that the pleas concerning the modus operandi of the Custodian under the Law are within the jurisdiction of the High Court of Justice rather than the District Court. Furthermore, the Appellants' plea that the Custodian was precluded from exercising his powers because of a representation that the State had made to the effect that the property was not in Israel, which led to a change of their position to their detriment, was dismissed. The second appeal before us (CA 2038/09) is brought against the judgment in CF 6161/04.

7. It should incidentally be noted that since 2003 there have been various developments in respect to Property 2 due to its proximity to the security fence. In that connection, part of the property was demolished with the consent of the parties, and the security forces then seized possession of it by virtue of the Emergency Land Requisition (Regulation) Law, 5710-1949. In 2013, part of the land was expropriated for security purposes by virtue of the Land (Acquisition for Public Purposes) Ordinance 1943 (hereinafter: "the Acquisition Ordinance"). These matters, which are beyond the scope of these proceedings, were tried in various different legal proceedings (see HCJ 1622/13, judgment of February 12, 2014, Deputy President M. Naor, and Justices E. Rubinstein and D. Barak-Erez); HCJ 1190/14, judgment of March 18, 2014, Deputy President M. Naor, and Justices E. Rubinstein and Y. Danziger; and ALA 6895/04,judgment of November 16, 2004 on the application for

leave to appeal against the District Court's judgment in CF 6161/04 on an application for a provisional injunction)).

8. Incidental to the proceedings before us, on July 18, 2013, the Special Committee under section 29 of the Law (hereinafter: "the Special Committee") deliberated on the release of the two properties involved in the appeals. As regards Property 1 (the property involved in CA 5931/06), the Respondents, represented by the State Attorney (hereinafter: "the Respondents"), stated that the Custodian was no longer in possession of the land, but only the proceeds therefrom, because the property had been purchased by third parties "in market overt conditions" (para. 31(a) of the Respondents' application of October 5, 2014). The Special Committee recommended the release of those proceeds to whichever of the Appellants were residents of Judea and Samaria and still living. As regards the Appellants who had died while the proceedings were being heard, supplementary particulars were requested, and as regards the other members of the Alarja family it was recommended not to release the proceeds of the property. As regards Property 2 (the property involved in CA 2038/09), the Special Committee recommended the release *in specie* of the part that had not been requisitioned for the construction of the security fence, and to release the proceeds for the part requisitioned only to the owners who are residents of Judea and Samaria, who are the ones who had held the property continuously until it had been requisitioned. Under the circumstances, the Respondents argued that the appeals had become theoretical and they moved for their dismissal. The Appellants, for their part, stated that they insisted on the appeals. According to them, if their position on the basic question concerning the application of the Law in their case were accepted, then it would not have been appropriate from the outset to view the properties as "absentees' property", and the Special Committee's decision was *ultra vires*. In addition, the Appellants in CA 2038/09 pleaded that in light of the security forces' seizure of Property 2 for the construction of the security fence, the decision concerning the release of the property had no real meaning. In our decision of December 28, 2014 we dismissed the application to dismiss the appeals.

The Parties' Arguments

9. In both the appeals before us, the Appellants assert that it was not appropriate to view the properties concerned as "absentees' property". For the sake of convenience, we shall cite their basic arguments with regard to the application of the Absentees' Property Law together. We shall then separately consider their individual arguments in respect of the properties in dispute. In principle, the Appellants assert that the Law should not be applied to property in East Jerusalem whose owners, beneficiaries or holders (hereinafter referred to as "the owners of the rights") are residents of Judea and Samaria. According to them, those properties merely became "absentees' property"

because of the unilateral extension of the law of the State of Israel to the areas where they are located. This occurred without the owners moving from the spot, and while they were subject to the authority and control of Israel near their property. According to them, the purpose of the Law was to contend with the unique circumstances that prevailed at the time of the State's establishment, which are now different, and the legislature could not have envisaged the reality created further to the Six Day War. According to them, the residents of Judea and Samaria have nothing at all to do with the "absentees" at whom the Law was aimed. The Appellants state that the various attorneys general over the years were also cognizant of these difficulties.

They argue that the Law should, therefore, be interpreted against the background of its purpose and the historical context in which it was enacted, in the spirit of the Basic Laws, and in recognition of the need to protect their property, such that its provisions will not apply to the said properties. They propose a "pragmatic" interpretation of section 1(b)(1)(ii) of the Law, by which the properties are prima facie considered absentees' property (the section is quoted in para. 13 below). This section deals with anyone who at any time during the period prescribed in the Law was "in any part of Palestine[1] outside the area of Israel". According to the Appellants, "outside the area of Israel" should be read as "the area outside Israeli control". That is to say that "the area of Israel" should not be viewed as relating only to the area in which the law, jurisdiction and administration of Israel has been applied. In fact, their argument is that since Judea and Samaria have been under the effective control of the State of Israel since 1967, it should not be regarded as "outside the area of Israel" for the purpose of the Law, and section 1(b)(1)(ii) of the Law therefore does not apply to the residents of Judea and Samaria. In addition, the Appellants propose adopting the interpretation that the District Court applied in *Dakak*, which we shall discuss further (in para. 26 below). The Appellants also propose viewing "the area of Israel" within the meaning of section 1(b)(1)(ii) of the Law solely as the area in which the law of the State of Israel applied at the time of the Law's enactment. According to the argument, that area does not include new territory over which the law, jurisdiction and administration of Israel have been applied or which is held by Israel, unless the provisions of the Law have been expressly applied to the additional territory. In the Appellants' opinion, the interpretations propounded are not contrary to section 3 of the Legal and Administrative Matters (Regulation) Law [Consolidated Version], 5730-1970 (hereinafter referred to as "the Legal Regulation Law"), from which it emerges that the

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[1] Translator's note: The Hebrew version of the Absentees' Property Law uses the term *"Eretz Israel"* (the Land of Israel) which refers, at least in this context, to the territory that became the State of Israel, the West Bank and the Gaza Strip after the 1948 War of Independence. The authorized translation of the Law,

properties of East Jerusalem residents that are located in East Jerusalem are not to be regarded as "absentees' property". (Section 3(a) of the said Law provides that "a person who, on the day of the coming into force of an application of law order, is in the area of application of the order and a resident thereof shall not, from that day, be regarded as an absentee within the meaning of the Absentees' Property Law, 5710-1950, in respect of property situated in that area".) According to them, the said section deals only with the residents of East Jerusalem, where Israeli law has been applied, and a negative arrangement is not to be inferred therefrom in respect of residents who are under Israeli control in Judea and Samaria. They believe that there is no foundation for the distinction between residents of Judea and Samaria, who are under Israeli control, and the residents of East Jerusalem. Alongside this, the Appellants plead that the Custodian is interpreting the broad provisions of the Law in a discriminatory and degrading way. Thus, for example, according to them, on a strict interpretation of the Law, Jewish residents of Judea and Samaria and members of the security forces who are staying there are also "absentees", but the Law is only applied to Arab residents of Judea and Samaria.

10. The Appellants assert that applying the interpretation proposed leads to the conclusion that the properties involved in the appeals are not absentees' property. The Appellants in CA 5931/06 argue that the refusal to register their rights in Property 1 in the Land Registry, while the rights of the Jewish purchasers have been registered, amounts to discrimination. Moreover, they make arguments in respect of the conduct of the Custodian in their case, including in respect of the difference in his attitude toward them, compared with his attitude toward the Jewish purchasers. Consequently, they ask that we find that Property 1 is not absentees' property, or alternatively, that we order its release under section 28 of the Law, if it is indeed held that absentees' property is involved. In any event, they explain that if it is held that the property is not absentees' property, it will be necessary to conduct a factual enquiry with regard to the litigants' title thereto. The Appellants in CA 2038/09 plead that Property 2 was requisitioned contrary to the Attorney General's directives in this regard. In addition, they wonder why it was necessary to make use of "such a Draconian and improper law", when he could have satisfied himself with the issuing of a seizure order for security purposes, the duration and purposes of which are limited, as was indeed later done (para. 29 of the summations of January 26, 2010). Moreover, they make various different arguments concerning the way in which the property was requisitioned and about the real purpose of the move. In that connection they plead laches and the Respondents' failure to act in respect of the property because of the representation that

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prepared at the Ministry of Justice, upon which this translation is based, translates the terms *"Eretz Israel"* as

they made, according to which the property was in Judea and Samaria rather than Israel, which led to a detrimental change in the position of the Appellants in CA 2038/09. They also complain of the determination that the District Court is not competent to treat of the way in which the Law is implemented. In view of all the foregoing, they ask that we quash the requisition of Property 2 by virtue of the Law, and return it to them.

11. The Respondents' position is that the Law applies to properties in East Jerusalem of the residents of Judea and Samaria. According to them, "area of Israel", in the sense of the Law, relates only to territory to which Israeli law has been applied. They warn against the serious consequences involved in adopting the interpretive approach advanced by the Appellants, which is similar to the interpretation laid down by the District Court in *Dakak*. According to them, the term "area of Israel" is mentioned both in respect of the location of the particular property (section 1(b)(1) of the Law) and in respect of the location of the owners of the rights in the property (section 1(b)(1)(ii) of the Law). Hence, the interpretation proposed might lead to properties in Judea and Samaria being regarded as "absentees' property" as well, when their owners are included in one of the other alternatives of section 1(b)(1) of the Law. According to them, the presumption is that this is the position in the case of many of the residents of Judea and Samaria, who were Jordanian nationals. Consequently, they assert that the Appellants' proposal will in any event be of no help to them. In addition, the Respondents object to the proposal to interpret the "area of Israel" as a "photograph" of the situation that existed at the time of the Law's enactment. According to them, there is no basis for that in the Law, and it is contrary to its purpose – to enable the transfer of ownership to the Custodian of any property situated in the area of the State and belonging to an "absentee", to be used for the development of the country. They also mention that the Law was enacted when the final boundaries of the State had not yet been formulated (and in fact the provision of section 1(b)(1)(ii) of the Law already appeared in the Absentees' Property Emergency Regulations, 5709-1948 of December 12, 1948 (hereinafter referred to as "the Emergency Regulations") which applied during the War of Independence and preceded the Law). Alongside this, the Respondents argue that a restrictive policy should be adopted when implementing the Law. According to them, the powers in the Law should not be exercised in respect of the properties at issue, unless the Attorney General's approval is first obtained. They contend that over the years a restrictive policy has indeed been adopted in the implementation of the Law, in accordance with the position of the Attorneys General. According to the Respondents, looking to the future, this modus operandi will lead to

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"Palestine" and "*Eretz Israeli*" as "Palestinian".

results similar to those that will be obtained as a result of finding that the Law does not apply in the instant cases. However, adopting it, as distinct from finding that the Law does not apply, is essentially of significance in respect of the past. This is because a finding that the Law does not apply in these cases means that all the acts that have been done in respect of properties of that type are void, with the substantial difficulties involved therein that they mention. In addition, the Respondents reject the Appellants' argument of discrimination in the implementation of the Law. According to them, the Custodian adopts a standard policy in respect of everyone lawfully moving outside the area of Israel, regardless of his ethnic origin. Thus, for example, the Law is not implemented in respect of State nationals, be they Jews or Arabs, even where the strict implementation of its provisions would necessitate an application to release their property.

As regards the properties in dispute, the Respondents argue that, under the circumstances, the Special Committee's decision provides a proper answer to the Appellants. The Respondents reject the pleas of discrimination made in CA 5931/06 and emphasize that the improper registration in the past of the rights of Jewish purchasers does not justify similar registration now. According to them, until the 1970s the Custodian used to permit the sale of absentees' property to Israelis in order to facilitate matters for the residents of Judea and Samaria and the Gaza Strip, but that policy has been changed. In addition, they explain why the Custodian has not acted to cancel registration of the transactions made by the Jewish purchasers and they state that they did in the past act against the transfer of rights in Property 1 to the Respondent 1, who is a Jewish national of Israel. In addition, the Respondents plead that ruling on the competing rights in respect of the property involved in CA 5931/06 necessitates the review of factual and legal arguments that were not considered at the trial instance in view of its conclusion that Property 1 is "absentees' property".

12. The other Respondents in CA 5931/06, the Jewish purchasers of the rights in Property 1, join in the Custodian's position on the question of principle with regard to the application of the Law. As regards the interpretation proposed by the Appellants, they state that since the Oslo Accords, effective control of a large proportion of Judea and Samaria is not held by the State of Israel and they argue that the said interpretation would necessitate equating the status of Judea and Samaria's residents with that of Israeli residents in other respects. They emphasize that they acquired the rights in Property 1 in good faith and for consideration, and they comment that the Appellants' domicile has never been established. According to them, the Appellants in CA 5931/06 are undermining the judgments that have been awarded in respect of Property 1, and their conduct in the various proceedings in respect thereof amounts to an abuse of

process, *inter alia* in view of the change in their versions on the question of absenteeism.

Discussion and Decision

13. The proceedings before us concern, as aforesaid, the question of whether properties in East Jerusalem, the owners of the rights in which are residents of Judea and Samaria, are "absentees' property" under the Absentees' Property Law. We would immediately emphasize that these proceedings address only such properties and not any other type of property. The point of departure for the discussion is the Absentees' Property Law, and we shall therefore commence by presenting its main provisions. "The portal" to the Law is contained in the definitions of "absentee" and "absentees' property". "Absentees' property" is defined in section 1(e) of the Law as follows:

> "'Absentees' property' means property, *the legal owner of which*, at any time during the period between Kislev 16, 5708 (November 29, 1947) and the day on which a declaration is published under section 9(d) of the Law and Administration Ordinance, 5708-1948, that the state of emergency declared by the Provisional Council of State on Iyar 10, 5708 (May 19, 1948) has ceased to exist, *was an absentee or which, at any time as aforesaid, an absentee held or enjoyed, whether by himself or through another*; but it does not include movable property held by an absentee and exempt from attachment or seizure under section 3 of the Civil Procedure Ordinance, 1938" [emphasis added – A.G.].

The term "absentee" is defined in section 1(b) of the Law as follows:

> "(b) 'Absentee' means –
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> (1) A person who, at any time during the period between Kislev 16, 5708 (November 29, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948 that the state of emergency declared by the Provisional Council of State on Iyar 10, 5708 (May 19, 1948) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period –
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> (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or Yemen, or

(ii) was in one of these countries or in any part of Palestine outside the area of Israel, or

(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine

(a) for a place outside Palestine before Av 27, 5708 (September 1, 1948); or

(b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment;"

It should be noted as regards the mention of "Trans-Jordan" in sections 1(b)(1)(i) and (ii) that in 1994 the legislature excluded from the application of the Absentees' Property Law certain properties, the owners of the right in which where nationals or citizens of Jordan. This was further to the peace agreement with Jordan (see section 6 of the Implementation of the Peace Agreement between the State of Israel and the Hashemite Kingdom Law, 5755-1995 (hereinafter referred to as "the Peace Agreement with Jordan Law")).

14. According to the Absentees' Property Law, "absentees' property" is vested in the Custodian and the "absentees" lose their rights in it (see CA 8481/05 *Lulu v. Custodian of Absentees' Property*, para. 7 (February 28, 2007) (: the *Lulu* case)). The vesting of the property in the Custodian in accordance with the Law is not dependent upon his doing any act, and the rights in it automatically pass to him from the moment that the conditions for its being "absentees' property" are fulfilled (section 4 of the Law; CA 109/87 *Makura Farm Ltd v. Hassan*, IsrSC 47(5) 1, 29 (1993) (hereinafter: the *Makura Farm* case); CA 427/71 *Faraj v. The State of Israel*, IsrSC 27(1) 96, 101 (1972) (hereinafter: the*Fara* case"), in which it was stated that since automatic vesting is involved, the Custodian might not even be aware that a property has been vested in him; CA 4630/02 *The Custodian of Absentees' Property v. Abu Hatum*, para. L(3) (September 18, 2007) (hereinafter: the *Hatum* case; CA 8753/07 *The Estate of Atalla Halil Bahij, Deceased v. Custodian of Absentees' Property*, para. J (November 16, 2010)). It should be emphasized that in view of the prolonged state of emergency, which is still in force, the application of the Law continues and its operation has not yet ended. That is to say that anyone who has fulfilled or does in future fulfil the conditions for the definition of an "absentee" during the relevant period (namely since 1947 until the future end of the state of emergency) will be regarded as an "absentee"

and his property in Israel will be vested in the Custodian. That is unless he has been excluded from the scope of the Law.

The status of the Custodian in respect of absentees' property is the same as was that of the owner of the property, and he is entrusted with its management, care and supervision (section 4 of the Law). To that end, very extensive powers have been granted to him (see HCJ 6/50 *Freund v. Supervisor of Absentees' Property, Jerusalem*, IsrSC 4 333, 337 (Justice M. Dunkelblum) (1950) (hereinafter: the *Freund* case); Minutes of Meeting No. 123 of the First Knesset, 950, 956 (March 7, 1950) (hereinafter: the *Minutes 123*); Menahem Hoffnung, *Israel – State Security Versus the Rule of Law*, 162 (5761) (Hebrew) (hereinafter: *Hoffnung*)). In this connection it is provided that the Custodian may incur expenses and make investments in order to safeguard, maintain, repair and develop the property (section 7 of the Law); continue the management of a business on behalf of the absentee (section 8 of the Law, and sections 24 and 25, which concern a partnership of which an absentee is a member and properties of which absentees are co-owners); order the eviction of someone who is occupying the property without any right (section 10 of the Law); order the discontinuance of construction on the property and its demolition (section 11 of the Law). In addition, the Law requires that absentees' property be handed over to the Custodian (section 6 of the Law) and information in respect of it provided (section 21 of the Law). The Law imposes restrictions and prohibitions concerning the doing of various different acts with the property without the Custodian's consent (section 22 of the Law), and it provides that certain acts that have been done in respect of the property are null and void (section 23 of the Law). In addition, certain acts that have been done contrary to the Law are regarded as criminal offences, the penalty for which might amount to up to two years' imprisonment (section 35 of the Law). Although the Law restricts the Custodian's ability to sell and grant a long lease of immovable property that has been vested in him (section 19), it does permit him to transfer it to the Development Authority, subject to certain reservations. In this connection it should be noted that in an agreement that was made on September 29, 1953 between the Custodian and the Development Authority, all the immovable property vested in the Custodian was transferred to the Authority (according to *The Government Yearbook 5715*, 47). Similarly, the Law limits the liability that the Custodian bears for his acts (sections 16 and 29P of the Law), and lays down lenient evidential arrangements for him (section 30 of the Law; *Makura Farm*, pp. 12-13). The Law further provides that transactions made between the Custodian and another person in good faith will not be invalidated even if it is established after the fact that the property was not vested property (section 17 of the Law). Alongside this, the Law lays down various mechanisms that are apparently aimed at mitigating its serious effects. Thus, the Custodian has been authorized, in certain circumstances, to "relieve" a person of his

"absenteeism" (section 27 of the Law) and to release properties that have been vested in him (sections 28-29 of the Law; for the significance of such release, see CA 263/60 *Kleiner v. Director of Estate Tax*, IsrSC 14 2521 (1960) (hereinafter: the *Kleiner* case; for further discussion of several of the decisions that have been given by the Special Committee, including its recommendation for a sweeping release of properties in certain cases, see Haim Zandberg, *Israel Land, Zionism and Post-Zionism*, 83-83 (2007) (Hebrew)).

15. As we see, the Law grants the Custodian very extensive powers and its overall provisions create a far-reaching arrangement, at the center of which is the expropriation of the rights in absentees' property from the owners and their vesting in the Custodian. This arrangement should be understood against the special circumstances that led to its enactment. At the end of the War of Independence, and in fact even during it, the young State of Israel faced a complex, new reality. This was, *inter alia*, due to the enlarged area under its control and the mass departure of Arab residents, leaving behind them extensive property, abandoned and vulnerable to intrusion and unruly squatting, on the basis of "might makes right" (see Eyal Benvenisti and Eyal Zamir, "Private Property In the Israeli-Palestinian Peace Settlement", Research of the Jerusalem Institute for Israel Studies, 77, 7-9 (1998) (Hebrew) (hereinafter: *Benvenisti and Zamir, Private Property*)). These challenges necessitated a rapid legal answer that would make it possible to settle the rights in, and deal with, those properties. Indeed, in the first years of the State a series of legal arrangements was laid down to contend with the complex reality that had arisen (for further reading, see for example Shlomo Ifrach, "Legislation Concerning Property and Government in the Occupied Territories", 6 *Hapraklit* 18 (1949) (Hebrew); *Hoffnung*, pp. 159-168; Eyal Zamir and Eyal Benvenisti, "Jewish Land in Judea, Samaria, the Gaza Strip and East Jerusalem", Research of the Jerusalem Institute for Israel Studies, 52, 28-29 (1993) (Hebrew) (hereinafter: *Zamir and Benvenisti, Jewish Land*)). One of the major pieces of legislation enacted in this context is the Absentees' Property Law, which was enacted in 1950 and replaced the Emergency Regulations that had been promulgated in this respect and that applied during the War of Independence.

16. The Law was designed to regulate the administration of "absentees'" property by the State authorities, and make it possible to safeguard it against lawlessness (see, Minutes of Meeting No. 119 of the First Knesset, 872 (February 27, 1950) (hereinafter: *Minutes 119);* CA 58/54 *Habab v. Custodian of Absentees' Property*, IsrSC 10 912, 918 (1956); *Freund*, p. 337). The purpose of the Law was not expressly defined in it and it did not prescribe for whose benefit "the absentees' property" should be safeguarded (see Minutes 123, p. 952; Shlomo Ifrach, "Thoughts on the Absentees' Property Law, 5710-1950", *9 HaPraklit* 182 (5713) (Hebrew)). The case law has held

that the purpose of the Law is merely to safeguard the property for the benefit of its absentee owners, but it is also aimed at achieving the State's interests in the property, including, so it has been held, "the ability to utilize it to promote the country's development, while preventing its exploitation by anyone who is an absentee within the meaning of the Law, and the ability to hold it (or its proceeds) until the formulation of political arrangements between Israel and its neighbors, in which the fate of the property will be decided on the basis of reciprocity between the countries" (HCJ 4713/93 *Golan v. Special Committee under Section 29 of the Absentees' Property Law*, IsrSC 48(2) 638, 644 (1994) (hereinafter: the *Golan* case). For a discussion of the Law's objectives, see also CF (Haifa District) 458/00 *Bahai v. Custodian of Absentees' Property*, para. 26 (Judge I. Amit) (September 19, 2002) (an appeal was filed against the judgment, but the judgment in the appeal did not require an analysis of the Law's purpose (CA 9575/02 *Custodian of Absentees' Property v. Bahai* (July 7, 2010) (hereinafter: the *Bahai* case)). This approach is also consistent with statements made at the time the Law was enacted (see Minutes 119, pp. 869-870).

It should be noted that the wording and title of the Law prominently emphasize the *absence* of the property owners (the "absentees"). Nevertheless, the background that led to its enactment and the nature of the arrangements prescribed in it might indicate that, in fact, the Law sought to determine the legal position in respect of the properties in Israel of nationals and residents of the *enemy* states. In any event, it appears that the Court has gained this impression in several cases dealing with these matters (see *Golan*, p. 645; HCJ 99/52 *Anonymous v. Custodian of Absentees' Property*, IsrSC 7 836, 839 (1953) (hereinafter: the *Anonymous* case); *Kleiner*, p. 2544 (*per* Justice A. Witkon), where it was stated that the Law is similar in character to the legislation on trade with the enemy, the consequence of which is the expropriation of the ownership of, and rights in, the property and their vesting in the Custodian. Support for this concept can also be found in the statement by the Minister of Justice, D. Libai, in the debate on the Peace Agreement with Jordan Bill (Minutes of Meeting No. 312 of the 13th Knesset, 5658 (January 23, 1995) (hereinafter: *Minutes 312*)). See also *Benvenisti and Zamir, Private Property*, pp. 13-14; para. 64 of the notice of appeal dated July 13, 2006 in CA 5931/06. Nevertheless, in the Appellants' summations in CA 2250/06 (the Respondents herein) to which the latter referred, it was asserted that the definition of "absentee" in the Law does not necessarily reflect a person's connection with an enemy state).

The Broad Application of the Absentees' Property Law

17. Against the background of the exceptional circumstances in which the Law was enacted, it can perhaps be understood why it is worded so sweepingly and strictly. In

any event, the way it is drafted, and especially the broad definitions of its underlying terms – with the emphasis on "absentee", "property" and "absentee property" – lead to the very extensive application of the Law (see HCJ 518/79 *Cochrane v. Committee under Section 29 of the Absentees' Property Law, 5710-1950,* IsrSC 34(2) 326, 330 (*per* Justice H. Cohn) (1980) (hereinafter: the *Cochrane* case; see also Minutes 123 and Minutes 119, pp. 870-872, which discussed the problems involved in the broad definition of "absentee", which embraces very many cases). Indeed, about 35 years ago this Court indicated that the broad definition of "absentee" is likely to lead to the Law's catching more and more people in its net, sometimes unnecessarily and contrary to its purpose. In the words of Justice H. Cohn, in *Cochrane* (p. 330):

> "In the geopolitical circumstances that existed upon the establishment of the State and at the time of the Law's enactment, it was necessary to define 'absentee' very broadly and sweepingly – despite the risk that the definition would include people who, in fact, had no legal connection with Israel's enemies, physically, ideologically or otherwise. And since the definition remains in force until the end of the state of emergency that has prevailed in Israel since the establishment of the State (section 1(b)(1) of the Law), innocent citizens who have nothing to do with absenteeism might frequently be added to the multitude of 'absentees' as defined in the Law (for example someone who is in part of 'Palestine' outside the area of Israel, - *ibid*., para. (ii))".

18. The Law's definitions of the various terms are likely to lead to rigid results that are inconsistent with common sense or even the purpose that the Law was intended to serve. Let us demonstrate this by means of several examples – and it should be emphasized that I do not mean to lay down strict rules in respect of the cases that will be referred to, which are cited merely for the purposes of illustration. According to the Law, it suffices if - at any time in the period between November 29, 1947 and the end of the state of emergency that was declared by the Provisional Council of State in 1948 – the owner of the rights fulfilled one of the alternatives in section 1(b)(1) of the Law (see sections 1(b) and 1(e) of the Law) for property that is in the area of Israel to be regarded as absentees' property. As aforesaid, since a declared state of emergency has existed in Israel ever since the State's establishment, any property in Israel that has been purchased in the last dozens of years by an "absentee" is, according to the wording of the Law, absentees' property. For example, a property in Israel that is purchased today by a national or subject of any of the countries mentioned in section 1(b)(1) of the Law (other than Jordan, as mentioned at the end of para. 13 above) will be regarded as "absentees' property" and immediately be vested in the Custodian. The self-evident difficulty involved in such a situation is aggravated in view of the broad

definition of "property" in the Law, which includes "immovable and movable property, monies, a vested or contingent right in property, goodwill and any right in a body of persons or its management" (excluded from "absentees' property" are "movable property held by an absentee and exempt from attachment or seizure under section 3 of the Civil Procedure Ordinance, 1938" (section 1(e) of the Law)). As prescribed, "property" includes, among other things, a right to the repayment of a debt, an obligatory right to receive land, bearer shares and also contractual rights and any right that is enforceable by a lawsuit (see *Bahai*, paras. 7-9 and the references there). One has to wonder about the logic of the result whereby a debt that is due to an "absentee" in respect of a transaction made by him in relation to property in Israel, for example, will automatically be vested in the Custodian (see MF 89/51 *Mituba Ltd v. Kazam*, IsrSC 6 4 (1952), where it was held that a debt might be absentees' property. See also CA 35/68 *Mualem v. Custodian of Absentees' Property*, IsrSC 22(2) 174 (1968) (hereinafter: the *Mualem* case), which concerned bills of exchange received further to a transaction made in Iraq that were endorsed by a resident of Iraq in favor of an Israeli national. It was stated in the judgment that when the bills, which were the property of an Iraqi resident, arrived in Israel they became absentees' property (*ibid*., pp. 176-177)). In addition, the simple language of the Law might lead to the conclusion that the absenteeism of the holder of any proprietary right in property suffices to make it "absentees' property". This is so even if the other holders of the rights therein are not absentees, and even if his right is "inferior" to their right. Thus, for example, the very fact that someone who "enjoyed" the property was an absentee apparently suffices for it to be regarded as "absentees' property", even if its owner is not an absentee (see the *Makura Farm* case, p. 15).

Other difficulties arise in view of the fact that "absentee" is an ongoing "status" that has no end (unless expressly otherwise prescribed or a step is initiated to release the property or its owners from their absenteeism. See CA 110/87 *Elrahim v. Custodian of' Absentees' Property (August 22, 1989)* (hereinafter: the *Elrahim* case)). Properties in Israel of whoever has fallen within the scope of the conditions for "absentee" *at any time* in the period between the end of 1947 and the end of the state of emergency, which is still continuing as aforesaid, are likely to be regarded as "absentees' property" and be denied him. As aforesaid, there is no automatic release from this situation, apart from a few exceptions that have been specifically defined in the Law. For example, a person will be regarded as an absentee merely because, at some stage during the said period, he was a national or citizen of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or Yemen or "was" there (as regards Trans-Jordan, see the end of para. 13 above). Hence, according to a strict interpretation of the Law, the properties in Israel of immigrants from Egypt, Iraq or Yemen that were purchased by them before or after they immigrated to Israel, are "absentees' property"

(and indeed, that was the case in the *Faraj* case; see also *Mualem*. Nevertheless, it does appear that section 28A of the Law, which is mentioned in the next paragraph, resolves that difficulty, at least in respect of properties that have been purchased since arrival in Israel). That is the law, at least prima facie, in respect of the properties in Israel of all those who have visited the said countries, regardless of the purpose or length of the visit. Thus, for example, anyone who went to those places on behalf of the State, for example soldiers in battle, are likely to be regarded as "absentees" (reality has proven that the question is not theoretical; see the *Anonymous* case, in which a Palestinian citizen, who left Israel for an enemy country as an emissary of one of the State authorities, was regarded as an "absentee"!!). Is it reasonable or acceptable that in the circumstances described, those people should lose their rights in their property in Israel?!

19. It should be noted that a solution has been provided in the Law for at least some of the difficulties arising from its broad wording. A salient example is the possibility of releasing absentees' property (sections 28-29 of the Law) and giving written confirmation that a particular person is not an "absentee" (section 27 of the Law. For a discussion of whether the section applies where a person can be defined as an absentee under section 1(b)(1)(iii) of the Law and also in accordance with one of the other alternatives prescribed in the section, see *Anonymous* and *Bahai*, paras. 11 and 13). It should be noted that according to Justice H. Cohn in the *Cochrane* case, those powers are the solution to the difficulties involved in the definition of "absentee" mentioned in the previous paragraphs (*ibid*., p. 330) (this was the position of the Court in *Elrahim* as well). Another example is the provision of the Law that was added in 1951, the purpose of which was to enable "absentees" who are duly present in the area of Israel to purchase rights in properties that did not constitute absentees' property on the date the Law took effect (section 28A of the Law; see Minutes of Meeting No. 234 of the First Knesset, 1254, (March 6, 1951)). Nevertheless, the Law is still far from being free of difficulties. One of the reasons is the fact that in the many years since the Law was enacted, significant geopolitical changes have occurred in the environment of the State of Israel, including Israel's wars and diplomatic arrangements that have been made with some of its neighbors. At the same time, substantial changes have also been made in Israeli law's treatment of human rights. In fact, today's circumstances are materially different from those that existed at the time of the Law's enactment some 65 years ago. Nevertheless, and despite the fact that the Law's application has been continuing all that time, not all the necessary adjustments to the changing times and circumstances have been made. This finds conspicuous expression with regard to property located in East Jerusalem, and in particular, property owned by residents of Judea and Samaria, as is the case in the appeals before us. Before we go on to consider the specific problems arising in these cases, another note is obliged.

20. In view of the foregoing, an argument might be made with regard to the invalidity of some of the Law's provisions for constitutional reasons. In other words, it could be argued that the provisions of the Law infringe the absentees' rights and in particular their constitutional right to property (section 3 of Basic Law: Human Dignity and Liberty), and that it does not fulfil the criteria that have been laid down in case law on the limiting paragraph of the Basic Law (section 8). In my opinion, it is certainly possible that at least some of the arrangements in the Law, were they enacted today, would not meet the constitutional criteria. Nevertheless, in the instant case, the provisions of the limiting paragraph are not such as to serve or to alter the conclusion with regard to the application of the Law in the cases under consideration here. This is in view of the "Validity of Laws" rule in section 10 of Basic Law: Human Dignity and Liberty, according to which the Basic Law does not affect the validity of any law that existed prior to its entry into force. This provision does not make it possible to find that any provision of the Law is void (see, for example, CFH 2316/95 *Ganimat v. State of Israel*, IsrSC 49(4) 589, 632-633 (*per* Justice T. Strasberg-Cohen), 642-643 (*per* Justice M. Cheshin), 653 (*per* President A. Barak (1995) (hereinafter: the *Ganimat* case); HCJ 4264/02 *Ibillin Breeders Partnership v. Ibillin Local Council*, para. 10 (December 12, 2006)).

The Absentees' Property Law and the Properties in East Jerusalem

21. Section 1(b) of the Law imposes two conditions for a person to be an "absentee": the first relates to the particular property and contains the requirement that the property is situated "in the area of Israel". In this respect, "the area of Israel" has been defined as an area where the law of the State of Israel applies (section 1(i) of the Law; for a discussion of that term, see Benjamin Rubin, "The Sphere of the Law's Application, the Area of the State and Everything in Between", 28 *Mishpatim*, 215, 226-227 (5755) (Hebrew) (hereinafter: *Rubin*)). The second condition relates to the owner of the rights in the property (the "absentee"). The "absentee" is someone who falls within one of the alternatives of section 1(b)(1) of the Law. The first alternative is defined according to the person's nationality or citizenship, and it concerns the citizens or nationals of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or Yemen (section 1(b)(1)(i) of the Law). The second alternative is defined on the basis of the location of the "absentee" and relates to anyone who was in any of those countries or "in any part of Palestine outside the area of Israel" (section 1b)(1)(ii) of the Law). The third alternative relates to Palestinian citizens who left their ordinary place of residence in Palestine for a place outside Palestine in the circumstances set out in section 1(b)(1)(iii) of the Law (section 27 of the Law nevertheless lays down cases in which an absentee will be exempted from his "absenteeism" according to this alternative; for the

controversy that arose between Justices M. Landau and Y. Olshan in respect of this section and the characteristics of the different alternatives, see the *Anonymous* case).

22. With regard to properties that are situated in East Jerusalem, until 1967 they were not "in the area of Israel", within the meaning of the Absentees' Property Law, namely the area in which the law of the State of Israel applies (section 1(i) of the Law). Consequently, until then they were not absentees' property. That changed with the Six Day War. In the War, East Jerusalem passed into the control of the State of Israel, and on June 28, 1967 the application of Israeli law, jurisdiction and administration was declared (see Order No. 1 that was promulgated by virtue of section 11B of the Law and Administration Ordinance, 5708-1948 (hereinafter: "the Law and Administration Ordinance"). See also section 5 of Basic Law: Jerusalem, Capital of Israel, which prescribes that East Jerusalem is included within the boundaries of the Jerusalem Municipality. See also HCJ 282/88 *Awad v. Prime Minister and Minister of the Interior*, IsrSC 42(2) 424, 429 (1988) (hereinafter:as the *Awad* case; CA 4664/08 *Mishal v. Custodian of Absentees' Property*, para. 8 (hereinafter: the *Mishal* case); HCJ 1661/05 *Hof Aza Regional Council v. Knesset*, IsrSC 59(2) 481, 512-513 (2005) (hereinafter:the *Hof Aza Council* case); *Rubin*, pp. 231-234; *Benvenisti and Zamir, Private Property*, pp. 23-24). In view of this, property in East Jerusalem must, of course, be regarded as situated in "the area of Israel" for the purpose of the Absentees' Property Law (see CA 54/82 *Levy v. Estate of Afana Mahmoud Mahmoud (Abu-Sharif), Deceased*, IsrSC 40(1) 374, 376 (1986) (hereinafter: the *Levy* case); HCJ 98/68 *Hadad v. Custodian of Absentees' Property*, IsrSC 22(2) 254 (1968)).

23. Consequently, all that remains for the owners of rights in property in East Jerusalem to be regarded as "absentees" is for one of the alternatives in section 1(b)(1) of the Law to be fulfilled. In view of the broad definitions in the Law, and given the fact that many of the residents of East Jerusalem were nationals or citizens of Jordan before 1967, it appears that this condition is fulfilled in many cases, and the properties of those people in East Jerusalem should be regarded as "absentees' property". In this context it should be borne in mind that after the Six Day War not only the property in East Jerusalem passed into the area of Israel and under its control, but also the local residents (the residents of East Jerusalem who were included in the census that was conducted in June 1967 obtained the status of permanent residents in Israel and could, in certain conditions, obtain Israeli nationality). As a result, quite a strange situation arose in which the Law applied both to properties and their owners in "the area of Israel". In fact, a person could, for example, remain at home without taking any action or changing his situation or the state of the property, and his home, where he resided in East Jerusalem, became "absentees' property". This difficulty was resolved in respect of the residents of East Jerusalem with the enactment of the Legal Arrangements Law

in 1970 (or to be more precise, in 1968, upon enactment of the Legal and Administrative Matters (Regulation) Law, 5728-1968, which preceded it). Section 3 of the 1970 statute prescribes as follows:

> "(a) A person who on the day of the coming into force of an application of law order [namely an order under section 11B of the Law and Administration Ordinance – A.G.] is in the area of application of the order and a resident thereof shall not, from that day, be regarded as an absentee within the meaning of the Absentees' Property Law, 5710-1950, in respect of property situated in that area.
>
> (b) For the purposes of this section, it shall be immaterial if, after the coming into force of the order, a person is, by legal permit, in a place his presence in which would make him an absentee but for this provision".

The section therefore excludes whoever were residents of East Jerusalem on June 28, 1967 – when Order No. 1 was issued, whereby the law, jurisdiction and administration of the State of Israel were applied to East Jerusalem – from the definition of "absentees" in respect of their property in East Jerusalem (see *Mishal*, para. 8; *Awad*, p.429; *Benvenisti and Zamir, Private Property*, p. 14, 26-28; *Zamir and Benvenisti, Jewish Land*, p. 87). In addition, the Absentees' Property (Compensation) Law, 5733-1973 (hereinafter: "the Compensation Law") was later enacted to enable residents of Israel, including the residents of East Jerusalem, who are "absentees", to claim compensation for certain property vested in the Custodian (see *Zamir and Benvenisti, Jewish Land*, pp. 90-91; *Benvenisti and Zamir, Private Property*, pp. 14, 28-29).

The Case of Judea and Samaria Residents

24. Let us now turn to the case before us, of residents of Judea and Samaria who have rights in property in East Jerusalem. As aforesaid, for the purpose of the Law, these properties are located in the area of Israel. The first condition for their "absenteeism" is therefore fulfilled. The second condition is that the owners of the rights in them fall within the scope of one of the alternatives of section 1(b)(1) of the Law. The alternative relevant to the instant case is that mentioned at the end of section 1(b)(1)(ii) of the Law, that an absentee is someone who at any time during the relevant period "was… *in any part of Palestine outside the area of Israel.*" In Judea and Samaria, unlike East Jerusalem, the law, jurisdiction and administration of the State of Israel have never been applied (see, for example, HCJ 390/79 *Dwikat v. Government of Israel*, IsrSC 34(1) 1, 13 (1979); *Hof Aza Council*, pp. 514-560; and also *Rubin*, pp.

223-225). It is, of course, therefore not the "area of Israel", which is defined in section 1(i) of the Law as "the area in which the law of the State of Israel applies". Some 30 years ago, this Court ruled in *Levy* that Judea and Samaria is "part of Palestine" within the meaning of section 1(b)(1)(ii) of the Law (*ibid.*, p 381 (Justice A. Halima); cf Crim. App. 5746/06 *Abbass v. State of Israel*, paras. 5, 8-10 (July 31, 2007), where the meaning of the same expression in the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 was considered in the particular context of that statute). It should be noted that in *Levy* the Court dismissed the plea that since Judea and Samaria is actually occupied by the IDF, it should be regarded as held territory in accordance with the Area of Jurisdiction and Powers Ordinance, 1948 and therefore also as an "area of Israel" for the purpose of the Absentees' Property Law. The Court's conclusion in the *Levy* case was that properties in East Jerusalem that were owned by the residents of Judea and Samaria should be regarded as "absentees' property". This concept is also reflected in later case law of this Court (see the *Golan* case, where the Court acted on the assumption that such property is "absentees' property").

25. The said conclusion with regard to property in East Jerusalem does not derive merely from the wording of the Law. It appears that this result also reflects the intention of the legislature, at least since the Legal Regulation Law was enacted. As aforesaid, while the residents of East Jerusalem were excluded by the Legal Regulation Law from the application of the Absentees' Property Law in respect of property located there, a similar step was not taken in respect of the residents of Judea and Samaria. In my opinion, the significance of that cannot be avoided. The very fact that the legislature considered it necessary to prescribe an express arrangement excluding the residents of East Jerusalem from the scope of the Absentees' Property Law (from the date prescribed) demonstrates that, according to it, without such a provision the Law would have applied to them. In other words, this indicates that in its opinion, the Law also applies where the particular property or the owner of the rights in it became "absentee" after the Law's enactment, namely after 1950. This assumption also finds expression in the need that the legislature saw expressly to exclude certain properties from the application of the Absentees' Property Law further to the peace agreement made with Jordan in 1994 (see section 6 of the Peace Agreement with Jordan Law; and also Minutes 312, p. 5658. See also *Abu Hatum*, para. K.) This approach is in fact consistent with the view that the application of the Law is ongoing and has not yet reached an end (see also *Golan*, p. 645, where it was stated that "the assumption embodied in the Law is that the fate of absentees' property will be determined in future as a possible consequence of political settlements between the State of Israel and its neighbors". It should also be noted that at the time the Law was enacted, it was stated that it was necessary to enact a permanent law instead of the Emergency Regulations because "it was clear to the members of the committee that even after the emergency

ends we shall have to deal with the absentees' property…" (Minutes 119, p. 868)). In view of the foregoing, in my opinion it is not possible to accept the argument that the definition of "the area of Israel" in the Law meant only the area in which Israeli law applied at the time of the Law's enactment, something of a "photograph" or freeze of a given situation that cannot change with time. The same applies to the argument that an express provision of the Law is necessary for it to apply to territory added to the area of the State of Israel after its enactment. The foregoing examples might demonstrate that, in truth, the opposite is the case. In addition, the failure of the legislature to prescribe a broader arrangement in the Legal Arrangements Law or another statute reflects, as I understand it, a conscious decision not to exclude others from the application of the Absentees' Property Law, like for example the residents of Judea and Samaria. That is also the impression that was gained by this Court in *Levy* (see *ibid*., pp. 382-383 (*per* Justice A. Halima). That is also the opinion of the learned authors Zamir and Benvenisti (see *Benvenisti and Zamir, Private Property*, p. 27; *Zamir and Benvenisti, Jewish Land*, p. 87)). Accordingly, I do not consider it possible to depart from the case law according to which the Absentees' Property Law does indeed apply to property in East Jerusalem, whose owners are residents of Judea and Samaria. It appears that any other finding would be contrary to the plain meaning of the Law and the intention of the legislature.

26. In this regard, a few words should be devoted to the Jerusalem District Court's judgment in the *Dakak* caseJudge B. Okon). In that judgment the court considered the difference between the reality in which the Absentees' Property Law was enacted and the circumstances that have arisen in Judea and Samaria following the Six Day War. According to him, "it is difficult to conceive" that the Law should be applied to residents who are under "effective Israeli control" rather than hostile control (*ibid*., paras. 4-5 of the judgment). Such being the case, it was held that section 1(b)(1)(ii) of the Law, which concerns a person who is "in any part of Palestine outside the area of Israel", does not apply to a resident of areas "that are actually subject to Israeli military control, as distinct, for example, from areas under the military control of a country mentioned in section 1(b)(1)(i) of the Law" (*ibid.*, para. 6). An appeal was filed against the said judgment (CA 2250/06, which is one of the appeals joined in these proceedings (see para. 1 above)). Ultimately, as aforesaid, the appeal was withdrawn after a settlement agreement was reached between the parties. Nevertheless, since the parties in the instant case did consider the said judgment, we have seen proper to explain our reservation as regards the way in which section 1(b)(1)(ii) of the Law was interpreted in *Dakak*. The said interpretation is not consistent with this Court's findings in *Levy* or the underlying assumption relied upon in *Golan*. This fact, *per se*, raises difficulty (as regards the departure of the trial courts from a binding precedent of the Supreme Court, see, for example, ALA 3749/12 *Bar-Oz v. Setter*, paras. 18-20 of my

opinion (August 1, 2013)). In addition, in my opinion, the interpretation also raises difficulties with respect to the crux of the matter for the reasons detailed above. Moreover, there is substance to the Respondents' arguments that the said interpretation will in any event not exclude from the application of the Law the residents of Judea and Samaria who were Jordanian nationals or citizens or were there at any time since 1947 and have property in Israel. This is in view of the other alternatives of section 1(b)(1) of the Law. According to the Respondents, it appears that a considerable proportion of the residents of Judea and Samaria are involved. However, the interpretation that "extends" the "area of Israel" beyond that provided in the Law raises substantial difficulties. This is in view of the clear wording of the Law, which expressly provides in section 1(i) that the area in which the law of the State of Israel applies is involved, and for other substantial reasons. Moreover, a finding of this type raises complex issues in respect of the exact nature of the terms "area of Israel" and "effective control". Thus, for example, the question could arise as to whether a distinction should be made among the areas of Judea and Samaria that are termed "areas A, B and C", according to the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip that was made between the State of Israel and the PLO on September 28, 1995 (for a discussion in a different context on the question of whether a certain area is under the control of the IDF further to the division of the said territories, see, for example, HCJ 2717/96 *Wafa v. Ministry Of Defense*, IsrSC 50(2) 848 (1996)). This complex question gained no consideration by those in support of using the term "effective control" in the context under discussion. In any event, it appears that this is not the proper place to decide those questions. Moreover, one should be aware that such an interpretation might lead to the Law's application to property not included in it until now. This is because the Law applies to properties in "the area of Israel" (section 1(b)(1) of the Law.) Hence, finding that Judea and Samaria is part of "the area of Israel" might lead to properties located there also becoming "absentees' property".

27. In view of all the foregoing, there is no alternative but to conclude that the Absentees' Property Law does apply to properties in East Jerusalem, the rights in which are owned by residents of Judea and Samaria. However, that is not the end of it. We must consider the way in which the Law is implemented in cases like these.

Exercise of the Powers under the Law in the Cases under Discussion

28. The finding that the said properties are "absentees' property" is very problematic, not only at the level of international law but also as regards administrative law. The Respondents do not deny this either. It should be borne in mind that those involved are residents of Judea and Samaria who have become "absentees", not

because of any act done by them but because of the transfer of control of East Jerusalem to Israel and the application of Israeli law there. In addition, persons are not involved who are under the control of another state, and they are in areas over which Israel has control – albeit only certain control. In this context, we should bear in mind that in the course of the Law's enactment it was explained that section 1(b)(1)(ii) of the Law meant "people who are in fact not in the area of the State of Israel" (as the Chairman of the Finance Committee, D.Z. Pinkas, MK, said in Minutes 119, p. 868). In this sense, there is indeed a certain similarity between the residents of Judea and Samaria and the residents of East Jerusalem, although an analogy should clearly not be drawn between the cases in view of the difference in the legal status of the two areas. It appears that there is indeed a difference between the case of residents of Judea and Samaria and the case of those for whom the Absentees' Property Law was intended (see also *Cochrane*, p. 330, where Justice H. Cohn mentioned a person who is "in part of Palestine outside the area of Israel" as one of the cases in which the Law applies to someone who has nothing whatsoever to do with absenteeism). Indeed, there are differences between the residents of Judea and Samaria, the citizens or nationals of the hostile states in section 1(b)(1)(i) of the Law, and a person who deliberately "left his ordinary place of residence in Palestine" in the circumstances described in subparagraph (iii). In fact, the absenteeism of the residents of Judea and Samaria in respect of their property in East Jerusalem derives from the broad wording of the Law and its continuing application, due to the prolonged state of emergency (see paras. 14 and 18 above). It is difficult to believe that this was the type of case intended by the Law, which was, as aforesaid, enacted against the background of specific and exceptional events. The results of applying the Absentees' Property Law in these cases is also particularly harsh having regard to the fact that the residents of Judea and Samaria are not entitled to compensation for their properties that are vested in the Custodian. This is because the right to claim compensation by virtue of the Compensation Law is granted only to residents of Israel (section 2 of the Compensation Law; see also *Benvenisti and Zamir*, *Private Property*, pp. 14, 28-29. It must be said that there is a certain similarity between denying a person's rights to his property because it has become absentees' property and the expropriation of land for public purposes (in which connection it should be noted that the view is expressed in the literature that laying down the ability to obtain compensation under the Compensation Law in the case of Israeli residents reinforces the argument that underlying the failure to release absentees' property is a rationale similar to that underlying the acquisition of land for public purposes (see, *ibid*., p. 14). See also Sandy Kedar, “Majority Time, Minority Time: Land, Nation and the Law of Adverse Possession in Israel,” 21 (3) *Iyunei Mishpat* 665, 727 (1998)). Nevertheless, while the grant of compensation is one of the major foundations of modern expropriation law (see, for example, CA 8622/07 *Rotman v. Ma'atz - Israeli National Public Works*

Department Ltd, paras. 65-71 of the opinion of Justice U. Vogelman (May 14, 2012)), as regards absentees resident in Judea and Samaria, the legislature has supplied no statutory arrangement to obtain compensation for the property taken from them. This further underlines the difficulty involved in applying the Absentees' Property Law in respect of them. This problem has not been ignored by the various different attorneys general over the years either. Thus, *inter alia*, on January 31, 2005, the Attorney General, M. Mazuz, wrote to the Minister of Finance, B. Netanyahu, who was the person responsible for the implementation of the Law (hereinafter: "the Mazuz Directive") as follows:

> "The absenteeism of property in East Jerusalem of residents of Judea and Samaria is of a technical character since they became absentees because of a unilateral act taken by the State of Israel for a different purpose, when both the properties and their owners were under the control of the State of Israel, and where it would appear that the purposes of the Law are not being fulfilled here. Involved are, in fact, 'attendant absentees', whose rights in their property have been denied due to the broad technical wording of the Law. Moreover, as regards residents of Judea and Samaria whose property in East Jerusalem has become absentees' property, the result is particularly harsh because applying the Law means the denial of the property without any compensation, because the Absentees' Property (Compensation) Law, 5733-1973 grants compensation only to absentees who were residents of the State of Israel at the time of its enactment" (*ibid*., para. 2).

29. In this context it should be noted that one should be conscious of the fact that the strict implementation of the Law in regard to the residents of Judea and Samaria is also likely to lead to the property in Israel of the residents of Judea and Samaria who are Israeli nationals being regarded as "absentees' property". Thus, for example, according to this interpretation, even a property in Tel Aviv whose owner is a resident of Ariel or Beit El is vested in the Custodian. As aforesaid, in this respect the Respondents argued that the Law can indeed be understood in this way but the Custodian does not apply its provisions in such cases, just as he does not apply them in other cases of persons who lawfully move outside Israel. Let us again emphasize matters because of the extreme result that emerges from the language of the Law: any property in Israel the owner of the rights in which is a resident of Judea and Samaria is absentees' property. Hence, for example, if a debt is owed to a person who resides in Judea and Samaria by a person who resides in Jerusalem as a result of a transaction currently made between them, prima facie the debt is vested in the Custodian. Perhaps it is not superfluous to mention that this is also apt in respect of real estate in Israel of

the residents of Judea and Samaria. It should also be emphasized that the Absentees' Property Law takes no interest in the religious characteristics, for example, of the "absentee" and the courts have applied its provisions to Jewish "absentees" more than once (CA 4682/92, *Estate of Salim Ezra Shaya, Deceased v. Beit Taltash Ltd,* IsrSC 54(5) 252, 279 (*per* Justice J. Kedmi) (2000)).

30. In view of the said difficulties, the State authorities, under the direction of the attorneys general, have seen fit to limit the exercise of the Custodian's powers in such cases. The chain of events in this context is described in the MazuzDirective, which was filed in the cases before us. Back in November 1968, not long after the Six Day War, it was decided in a forum headed by the Minister of Justice, under the guidance of the then Attorney General M. Shamgar, that the Law should not be implemented in respect of immovable property of residents of Judea and Samaria in East Jerusalem. Attorney General Shamgar explained the decision in the following way:

> "… We have not seen any practical justification for seizing property that has become absentees' property at one and the same time because its owner – who is a resident of Judea and Samaria – has become a subject under the control of the Israeli government authorities. In other words, since the property would not have been absentees' property before the date on which the IDF forces entered East Jerusalem and would not have become absentees' property had East Jerusalem continued to be part of Judea and Samaria, we have not considered it justified for the annexation of East Jerusalem, and it alone, to lead to taking the property of a person, who is not actually an absentee, but from the time his property came into our hands is in territory under the control of the IDF forces". (The letter of August 18, 1969 from Attorney General M. Shamgar to the Israel Land Administration, as cited in the Mazuz Directive).

Over the years, attempts have been made to erode the said directive. In 1977, a forum headed by the Minister of Justice and the Minister of Agriculture laid down a temporary arrangement "that would be reviewed in light of the experience of its implementation". According to this arrangement, the residents of Judea and Samaria would be required to apply of their own initiative to the Custodian to continue using their property in East Jerusalem. It later became apparent that the arrangement had not actually been reviewed and that "the Law was being abused" under cover of the arrangement (the Mazuz Directive, para. 4(b); for further discussion, see the Report of the Committee for the Examination of Buildings in East Jerusalem (1992) (hereinafter: "the Klugman Report")). The 1992 Report also described faults that had occurred in the proceedings to declare properties in East Jerusalem "absentees' property" and it stated

that "the functioning of the Custodian of Absentees' Property was very flawed, by any criterion" (*ibid.*, p. 24; see also pp. 12-13, 26). In view of that, it was recommended to make an immediate, comprehensive examination into the functioning of the Custodian. In addition, the Attorney General appointed a team to determine procedures for the exercise of the Custodian's powers (the Klugman Rport, p. 25). Further thereto it was decided to freeze the operation of the Law again and reinstate the previous policy in accordance with the 1968 directive. In 1997, the limitations that had been instituted were again eased and the Custodian was permitted to issue certificates in respect of vacant properties, with the authority of the legal adviser to the Ministry of Finance. As regards occupied properties, the authority of the Ministry of Justice was also required. According to the Mazuz Directive, it appears that only limited use of that power was actually made. In March 2000, a ministerial forum, with the participation of the Minister of Finance, the Minister of Justice and the Minister for Jerusalem Affairs, determined that any transfer of property in East Jerusalem by the Custodian to the Development Authority required approval by the said forum or such person as appointed by it in such respect. In 2004, the Ministerial Committee on Jerusalem Affairs made a decision declaring that it sought to remove all the limitations on the exercise of the Custodian's power in respect of properties in East Jerusalem. It was explained in the decision that the Custodian was vested with powers pursuant to section 19 of the Law, including to transfer, sell or lease real estate in East Jerusalem to the Development Authority (Decision no. J'lem/11 of June 22, 2004; the decision was granted the force of a government decision on July 8, 2004 (Decision no. 2207)). It should be noted that the decision was made contrary to the opinion of the Ministry of Justice and did not include in it the original proposal that the exercise of the said power would necessitate consultation with the legal adviser to the Ministry of Finance or his representative.

In response, at the beginning of 2005, Attorney General M. Mazuz made it clear that the said decision could not be upheld, that it was *ultra vires* and not within the power and authority of the Ministerial Committee on Jerusalem Affairs. He asked the Minister of Finance to order the immediate cessation of the Law's implementation in respect of the East Jerusalem properties of Judea and Samaria residents and he expressed his opinion that there was no alternative but to reinstate the previous policy, namely to determine that "in general, use will not be made of the powers under the Law in respect of the properties under consideration, except in special circumstances and subject to prior approval by the Attorney General or such person as authorized by him for the purpose" (the Mazuz Directive, para. 6). As we have been informed in these proceedings, that position has also been adopted by the current Attorney General, Y. Weinstein, and it is also the position of the Respondents in the appeals before us (the Respondents' notification of August 28, 2013).

31. Hence, there is in fact no dispute between the parties to these proceedings that the strict implementation of the Law in respect of properties in East Jerusalem, the owners of the rights in which are residents of Judea and Samaria, raises significant difficulties. This has been the opinion of the attorneys general for many years, and the Respondents do not deny it. As aforesaid, the Respondents' position is that the Law does indeed apply to East Jerusalem properties of residents of Judea and Samaria, but it is generally not to be applied in such cases. This is except in special circumstances, after obtaining authority from the Attorney General. The distinction between the application of the Law and its implementation has also found expression in the case law of this Court. Thus, in the *Levy* case, Deputy President Ben Porat concurred in the ruling that the Absentees' Property Law does apply to properties in East Jerusalem of the residents of Judea and Samaria. However, she noted that although those properties can be regarded as "absentees' property", the question might arise as to whether the powers of the Custodian in accordance with the Law ought to be exercised in the circumstances. This is given the fact that persons are involved are under IDF control and but for the annexation of their land for the sake of united Jerusalem, they would not have been regarded as "absentees" (*ibid.*, p. 390). This is also consistent with the approach in the *Cochrane* case. As aforesaid, in that case, despite the difficulties that Justice H. Cohn saw in the broad application of the Law deriving from its sweeping wording, he did not seek to find that the Law does not apply. Instead, he explained that the solution to the cases in which the problem arises is to be found in the power granted to the administrative authorities to exclude certain parties from the application of the Law or to release absentees' property (see sections 27-29 of the Law)).

32. This approach is also essentially acceptable to us. As we have detailed, it cannot be held that the Law does not apply to properties in East Jerusalem whose owners are residents of Judea and Samaria. Nevertheless, the powers that are granted by the Law in those cases should be exercised scrupulously and with extreme. In my opinion, in view of the difficulties mentioned above, *it is inappropriate* to exercise those powers in respect of the said properties, except in the most exceptional of situations. In addition, even where it is decided to take action in accordance with the Law – and as aforesaid, those cases ought to be exceedingly rare – the same will necessitate obtaining prior authority from the Attorney General himself, together with a decision of the Government or its ministerial committee approving the same. We thereby in fact adopt the restrictions in respect of the policy of implementing the Law that the Respondents have long been assuming. This is with the supplemental requirement that any act in accordance with the Law in respect of those properties should also be reviewed and approved by the government or a ministerial committee. Let us explain that we have considered it appropriate to entrench in case law the policy that has long been adopted,

according to the Respondents, in this respect and even to make it more stringent, since experience shows that the restraints prescribed have not always been observed and in view of the repeated attempts to erode them, as aforesaid. Moreover it should be borne in mind that any decision to implement the Law in a particular case is, in any event, subject to judicial review.

33. We would also note that insofar as the competent authorities believe that there is a justified need to acquire ownership of property of the type under consideration, they have available to them means other than the Absentees' Property Law that enable them to do so. Thus, for example, the Acquisition Ordinance and various provisions of the Planning and Building Law, 5725-1965 (see, for example, chapter 8 of the said Law, which concerns expropriations). Hence, the restraints that have been prescribed above do not block the way of the authorities to acquire rights in the properties under consideration by virtue of other statutory arrangements, provided that there is justification therefor, and that the conditions prescribed by law are fulfilled. Clearly, statutory tools like those mentioned are preferable to implementing the Absentees' Property Law. In other words, the Absentees' Property Law should only be applied, if at all, after all the other options under the various different expropriation statutes have been exhausted. This is in view of the problems that the Law raises and the fact that the other arrangements that we have mentioned are generally more proportionate.

34. Prima facie, a ruling similar to that reached by us could also have been reached by the course delineated in the *Ganimat* case, that is to say by adopting a new approach to the interpretation of the Absentees' Property Law along the lines of the Basic Laws, despite the Validity of Laws rule in section 10 of Basic Law: Human Dignity and Liberty. However, since the determinations with regard to the Absentees' Property Law and its interpretation do not depend upon the Basic Law, there is no need to consider a move based on section 10 as aforesaid (see HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel*, IsrSC 50(2) 769, 781 (*per* Justice M. Cheshin) (1996)). As aforesaid, my decision does not relate to the constitutional aspect or the *validity* of the provisions of the Absentees' Property Law, but is at the administrative level concerning the way in which the powers by virtue thereof are exercised. Incidentally, it should to be noted that human rights existed before the Basic Laws, and those rights are, in my opinion, more than sufficient to lead to the conclusion that we have reached.

The Application of the Judgment in Time

35. The final issue that is left for us to address is that of the of this judgment application in time. In our decision of September 11, 2013, we permitted the parties to supplement their briefs in regard to the application in time of a possible judicial finding

that the Law *does not apply* in respect of residents of Judea and Samaria who have properties in East Jerusalem. Ultimately, our conclusion is, as aforesaid, that although the Law does apply to such properties, it is subject to very stringent restraints with regard to its exercise. Nevertheless, in view of the possible implications of our other finding that, in general, the powers under the Law should only be exercised in very exceptional cases, we think it proper to consider the application in time of this judgment (see HCJ 3514/07 *Mivtahim Social Insurance Institute of the Workers Ltd v. Fiorst*, para. 33 and the references there (*per* President (ret.) D. Beinisch) (May 13, 2012)). Although the parties' arguments related to the commencement date of a (possible) rule that the Law does not apply in the instant situations, they are still relevant to the rule laid down with regard to the way in which the Law is implemented. Consequently, we shall briefly cite the parties' main arguments on the application in time, insofar as they are relevant to the ruling that we have ultimately reached.

36. The Respondents oppose the possibility that a case-law rule – if laid down – according to which the Law does not apply in respect of properties in East Jerusalem of the residents of Judea and Samaria would apply retrospectively. In their view, the practice of interpretation applied by them for many years, in accordance with the case law, should be respected. By that practice, the Custodian has been vested with many properties and he has transferred some of them to third parties over the years. According to them, at the present time it is difficult to produce accurate data on the number of properties, out of all the properties that have been transferred to the Custodian, which belong to the said category. In addition, they emphasize that various parties have relied on the said interpretation, and the Respondents also insist on the need for certainty and stability where rights in land are involved. They warn that adopting such an interpretation with retrospective application would lead to extensive litigation and might also have implications at the political level. The Appellants, for their part, reject the Respondents' position. They argue that there is nothing to stop applying a new interpretation to a statute that substantially harms a particular population merely on the ground that it was customary for many years. In addition, according to them, the position of the State authorities in this respect has not been consistent and uniform throughout the years, and at certain times it has departed from the "customary practice" asserted by the Respondents. In their view, following the judgment in the *Dakak* case, the practice changed and it cannot be said that a "customary regime that is clear to everyone" is involved. Moreover, the Appellants assert that the Respondents did not substantiate the plea that the rule should not be applied retrospectively, or supply any factual data in support of the argument that changing the rule of law "backwards" will infringe the interest of reliance. Furthermore, in the Appellants' opinion, under the circumstances, the interest of changing the law supersedes the interest of reliance. In this regard, they state that the

amount of land involved is fixed and is not going to change, and that third parties who, by the actions of the Custodian, have enjoyed property rights that are not theirs should be deemed as unjustly enricheds.

37. Having considered all the factors in this respect, we have reached the overall conclusion that the holdings of this judgment should only be applied prospectively (for a discussion on delaying the avoidance of an administrative decision and relative avoidance, see CFH 7398/09 *Jerusalem Municipality v. Clalit Health Services*, paras. 29 and 51 (April 14, 2015)). This is in the following sense: if by the time of the handing down of this our judgment, the competent authorities have not done any act in accordance with the Law in respect of a property in East Jerusalem whose owner is a resident of Judea and Samaria, then henceforth the powers by virtue of the Law should not be exercised, except in extraordinary cases and even then after exhausting other options, for example under the Acquisition Ordinance. If it is indeed decided to take action in accordance with the Absentees' Property Law, the same will necessitate obtaining prior authority from the Attorney General himself and also from theGovernment or its ministerial committee. As already mentioned, absentees' property is automatically vested in the Custodian from the moment that it fulfils the definition of "absentees' property", and the same does not necessitate the taking of any action by the Custodian. Consequently, the question of what is "an act in accordance with the Law" as aforesaid might arise. I mean the exercise of any power under the Law that is subject to judicial review, which has been performed by the competent authorities in, or in respect of a property, provided that there is *written* documentation thereof. It should be emphasized that "the requirement of writing" is a precondition for finding that a particular property is exempt from the application of the determinations in this judgment. The acts, the commission of which will lead to the conclusion that the property is subject to the previous law, will, for example, include steps to care for, maintain, repair or develop the held property, as mentioned in section 7 of the Law; moves that have been taken in the management of a business or partnership instead of the absentee (sections 8, 24, 25 of the Law); transferring the rights in the property to another, including to the Development Authority; discharging debts or performing obligations relating to absentees' property (as provided in section 20 of the Law); the Custodian's presenting written requirements in respect of the property to its owner (for example as provided in section 21(e) of the Law or section 23(c) of the Law; the issue of orders (for example of the type mentioned in section 11 of the Law); the giving of certificates (such as certificates under sections 10 and 30 of the Law); and incurring expenses and conducting legal proceedings in respect of the property. Moreover, the new rule will of course not apply to properties that constitute "held property", namely property that the Custodian actually holds, including property acquired in exchange for vested property (see section 1(g) of the Law). It should be emphasized that these are

mere examples of acts in respect of properties as regards which further to their commission this judgment will not apply, and it is not an exhaustive list.

38. The foregoing new requirements that are to be met henceforth will not apply where, prior to the award of the judgment, powers have already been exercised in accordance with the Absentees' Property Law in respect of particular property. In such cases, the law that applied prior to this judgment will apply. In such connection, the authorities will of course be bound by the restrictive policy that the Attorney General laid down with regard to the implementation of the Law in those cases. This means that where an act as described above has already been done in respect of a property of the type with which we are concerned, the mere fact that the new rules that we have laid down have not been performed will not be regarded as a defect, and certainly not a defect that would to lead to the avoidance of the decisions or acts that have been made or done in respect of the property. This finding is intended to contend with the concern that has been raised with regard to retroactive changes of the rules that applied to the land policy in East Jerusalem and to avoid "reopening" transactions made in respect of those properties, with the difficulties involved therein both materially and evidentially. In this context, we have taken into account the possibility that in a substantial proportion of cases, transactions that have long been completed and even "chains" of transactions will be involved. A different ruling might have led to ownership chaos, the flooding of the courts with lawsuits, the impairment of legal certainty and the infringement of a very large public's reliance interest. It should be noted that this approach is also consistent with the spirit of section 17 (a) of the Law, which provides that transactions that have been made by the Custodian in good faith in respect of property that was mistakenly regarded as vested property shall not be invalidated (for a discussion of this section, see, for example, *Makura Farm*, pp. 17-25; CA 1501/99 *Derini v. Ministry of Finance*, para. 4 (December 20, 2004); CA 5685/94 *Amutat ELAD El Ir David v. Estate of Ahmed Hussein Moussa Alabsi, Deceased*, IsrSC 53(4) 730 (1999), in which it was held that the Custodian had acted in an absence of good faith in respect of realty in East Jerusalem that he sold to the Development Authority, and the transaction was therefore invalid).

39. In any event, the cases concerning absentees' property, in respect of which action has already been taken as aforesaid by the Custodian, should be resolved by means of "the release course" prescribed in sections 28 and 29 of the Law. The problems of implementing the Law in respect of properties of the type under consideration should also be borne in mind by the competent entity when deciding on the release of properties (see also *Golan*, p. 646). In other words, where it is sought to release one of the said properties to which this judgment does not apply, the Special Committee and the Custodian ought to give substantial weight to the difficulties

involved in viewing them as "absentees' property", and also to the restrictive policy that is to be adopted, in accordance with which the Law is to be implemented in respect of them. Consequently, preference should be given to the release of property *in specie*. To complete the picture, we would mention that we have been informed by the Respondents in the hearings in these proceedings that rules have been laid down for the exercise of the Special Committee's discretion in accordance with section 29 of the Law with regard to the release of absentees' property in East Jerusalem of Judea and Samaria residents. According to them, the rules have been formulated along the lines of the Attorney General's position described above. The Respondents believe that a fitting solution will thereby be given in the majority of the cases under consideration, leaving room for the necessary flexibility in sensitive deliberations of this type. We have not considered it appropriate to relate to the actual rules that have been established, as they are not the focus of these proceedings, and bearing in mind that the power to address those matters is vested in the High Court of Justice (see *Lulu*, para. 8). Insofar as there are objections to the rules that have been laid down, they should be heard in the appropriate proceedings, rather than in the instant ones.

The Cases before Us

40. Against the background of these general statements, we shall now rule on the cases before us. Implementing the findings mentioned above in the concrete cases before us leads to the conclusion that the properties under consideration do indeed constitute absentees' property. Properties are involved that are situated in the area of Israel, within the meaning of the Law, whose owners are residents of Judea and Samaria. Hence, the alternative of section 1(b)(1)(ii) of the law is fulfilled in respect of them. Consequently, the Appellants' pleas in both appeals aimed against the finding that Property 1 and Property 2 are absentees' property are dismissed.

The Appellants' alternative application in CA 5931/06 is for us to order the release of Property 1 in accordance with section 28 of the Law. As a condition for exercising the power to release property, a recommendation of the Special Committee under section 29 of the Law is necessary (see also *Golan*, p. 641). As aforesaid, incidental to these proceedings, the Committee deliberated about the release of Property 1. According to the Respondents, the land involved in the dispute was sold to third parties on "market overt conditions" and the Custodian now only holds the proceeds of sale. The Special Committee recommended releasing the proceeds received for the property only to those of the Appellants who are residents of Judea and Samaria and still alive, and supplemental particulars in respect of the Appellants who have died were requested. As already mentioned, the way in which the Committee's powers have been exercised is subject to review by the High Court of Justice rather than this Court

sitting as a court of civil appeals (*Lulu*, para. 8). Hence, insofar as the Appellants in CA 5931/06 have complaints with regard to the Special Committee's decision, the instant proceedings are not the appropriate forum. In any event, and without making any ruling, we would comment that, under the circumstances, it appears that ruling on the rights in Property 1 necessitates factual enquiry and the consideration of legal questions that were not decided in the judgment of the District Court or argued before us. That being the case, the application to order the release of the property involved in CA 5931/06 is dismissed.

The Appellants in CA 2038/09 have applied for us to order the avoidance of Property 2's seizure and its restitution to them, *inter alia* in view of their arguments in respect of the Respondents' conduct in the case. As aforesaid, from the moment that a property fulfils the conditions for being "absentees' property", the rights in it are vested in the Custodian, including the power to seize the property. Having determined that "absentees' property" is involved it can only be returned to its original owners in the ways delineated in the Law, with the emphasis on the possibility of release under sections 28-29 of the Law. We would mention that the Special Committee also deliberated upon the release of Property 2. The Committee recommended the release of the parts of the property that had not been seized for the construction of the security fence, and to transfer the consideration for the part seized to the Appellants, who are residents of Judea and Samaria and, according to it, those who held it continuously until its seizure. In accordance with the foregoing, insofar as the Appellants in CA 2038/09 have complaints in such respect or with regard to the seizure of the property for the construction of the fence, the the instant proceedings are not the appropriate forum. Such being the case, the Appellants' application in CA 2038/09 that we order the avoidance of the seizure of the property involved in the appeal and its restoral to them is dismissed.

Conclusion

41. Accordingly, my opinion is that there is no alternative but to conclude that the Absentees' Property Law applies to properties in East Jerusalem owned by residents of Judea and Samaria who enjoy or hold them. This is despite the considerable problem raised by treating them as "absentees' property". In this context, we should be conscious of the fact that the strict implementation of the Law's provisions to residents of Judea and Samaria is also likely to lead to serious results as regards residents of Judea and Samaria who are Israeli nationals, whose property in Israel is prima facie regarded as "absentees' property". Alongside this, the substantial difficulties are of significance in the context of exercising the powers under the Law in respect of such property. Consequently, I would suggest to my colleagues to find that the competent

authorities must, in general, refrain from exercising the powers by virtue of the Law in respect of the properties under consideration. As such, I have not considered it appropriate to seal the fate of such property and prevent any possibility of implementing the Law in regard to that property. Our assumption is that there may be cases, albeit exceedingly rare, in which it might be justified to take such steps in respect of properties in East Jerusalem of the residents of Judea and Samaria. In those cases, the performance of any act in accordance with the Law will necessitate obtaining prior approval from the Attorney General himself and a decision of the Government or its ministerial committee. This amounts to the adoption of the restrictive policy assumed by the Respondents over the years, with a certain stringency in the form of adding the requirement for the Government's approval. This judgment, and in particular the finding with regard to the restrictions obliged when exercising the powers by virtue of the Law in respect of such property, will only apply prospectively, in the following sense:

(a) If by the time of the handing down of this judgment, the competent authorities have not done any act by virtue of the Absentees' Property Law in respect of a particular property in East Jerusalem owned by a resident of Judea and Samaria, the findings prescribed in this judgment will apply. Accordingly, the authorities will not be able to take steps in accordance with the Law in respect of the property without the prior authority of the Attorney General and without the approval of the Government or its ministerial committee. In mentioning an "act by virtue of the Law" we mean any act that is subject to judicial review and an act in accordance with the Law, like in the non-exhaustive list of acts contained in para. 37 above, provided always that there is written documentation.

(b) These requirements will not apply in cases where, prior to this judgment, acts in accordance with the Law were done by the competent authorities in respect of property in East Jerusalem owned by a resident of Judea and Samaria. In those cases, the previous law will apply, including the restrictive rules that have been laid down by the Attorney General in respect of the exercise of the said powers. This means that non-performance of the new conditions that we have just prescribed will not, *per se*, be regarded as a defect in the administrative act, and will not be such as, *per se*, to lead to the avoidance of the steps taken in respect of the property or to the "reopening" of transactions already made in respect of it. In such cases, the way is open to release the absentees' property along the course prescribed in sections 28-29 of the Law. When the competent authorities come to decide on the release of such properties, they must take into account the great problem involved in those properties being "absentees' property".

42. In the cases before us, I would suggest to my colleagues that we dismiss the appeals. Under the circumstances, there shall be no order for costs.

Justice S. Joubran

1. I agree with the thorough and comprehensive opinion of my colleague, President (ret.) A. Grunis, but would like to add a few words on the application of the Basic Laws as a tool in the interpretation of old legislation. In my opinion, a ruling similar to that of my colleague the President (ret.) could have been reached by an interpretation of old legislation "in the spirit of the Basic Laws", as I shall explain below, and as my colleague Deputy President E. Rubinstein has detailed in his opinion in these proceedings.

2. In my view, the Basic Laws give the judge an appropriate tool of interpretation when questions of interpretation in respect of the provisions of law arise. The Validity of Laws provision in section 10 of Basic Law: Human Dignity and Liberty provides that "this Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law". That is to say that so long as there was existing law prior to the commencement of the Basic Laws, its validity is preserved. However, in my opinion, it is not to be inferred from that provision that the Basic Laws are not to be used as a tool for the interpretation of existing law when that law is not clear and its validity is in any event dubious. The Basic Laws have given our legal system an arrangement of fundamental principles, which I believe can, and frequently should, be referred to when we are reviewing the proper interpretation or legal policy.

3. Using the Basic Laws as an interpretive tool can, in my opinion, give substance to the principles and rights that are under consideration in existing legislation, and properly analyze the balance between them. I believe that such will not impair the validity of the existing law but will conceptualize their substance in a more balanced and organized discourse (*cf.* CFH 2316/95 *Ganimat v. State of Israel*, IsrSC 49(4) 589, paras. 7-12 of the opinion of Justice M. Cheshin (1995) (hereinafter: *Ganimat*)). So too, for example, Basic Law: Freedom of Occupation distinguishes between the validity of provisions of legislation and the interpretation of the provisions that "will be made in the spirit of the provisions of this Basic Law" (section 10 of Basic Law: Freedom of Occupation). According to Justice (as he then was) A. Barak, this is obliged as an interpretive conclusion in the context of Basic Law: Human Dignity and Liberty even without an express provision (and see: *Ganimat*, para. 6 of the opinion of Justice A. Barak). In this respect, his statement there is apt:

> "The constitutional status of the Basic Law radiates to all parts of Israeli law. This radiation does not pass over the old law. It, too, is part of the State of Israel's law. It, too, is part of its fabric. The constitutional radiation that stems from the Basic Law affects all parts of Israeli law. It necessarily influences old law as well. In truth, the validity of the old law is preserved. The radiation of the Basic Law upon it is therefore not as strong as it is upon new law. The latter might be avoided if it is contrary to the provisions of the Basic Law. The old law is protected against avoidance. It has a constitutional canopy that protects it. However the old law is not protected against a new interpretative perspective with regard to its meaning. Indeed, with the enactment of the Basic Laws on human rights there has been a material change in the field of Israeli law. Every legal sapling in that field is influenced by that change. Only in that way will harmony and uniformity be achieved in Israeli law. The law is a set of interrelated tools. Changing one of those tools affects them all. It is impossible to distinguish between old and new law as regards the interpretative influences of the Basic Law. Indeed, all administrative discretion that is granted in accordance with the old law should be exercised along the lines of the Basic Laws; all judicial discretion that is granted in accordance with the old law should be exercised in the spirit of the Basic Laws; and in this context, every statutory norm should be interpreted with the inspiration of the Basic Law" (*Ganimat*, para. 7 of the opinion of Justice A. Barak).

My view is similar to that of Justice A. Barak and I believe, as aforesaid, that in the event that a question of interpretation arises in respect of the provisions of the law, recourse should be made to the Basic Laws, and inspiration drawn from them. In his opinion, my colleague the President (ret.) did not consider the said interpretative approach (and see para. 34 of his opinion, above) but since in the instant case we still reach a similar ruling by his method, I shall add my voice to his opinion.

4. Together with all the foregoing, I concur with the opinion of my colleague President (ret.) A. Grunis.

Justice Y. Danziger

I concur in the opinion of my colleague President (ret.) A. Grunis, who proposes to dismiss the appeals before us without any order for costs.

Like my colleague, I too believe that, as a rule, the competent authorities should avoid exercising the powers by virtue of the Absentees' Property Law, 5710-1950 in respect of properties in East Jerusalem whose owners are residents of Judea and Samaria and hold or enjoy them.

As regards those exceptional cases – "exceedingly rare" as my colleague defines them – when there might be justification for exercising the power, I concur with the solution proposed by my colleague, according to which the exercise of the power should be conditional upon obtaining prior approval from the Attorney General, accompanied by an approbative decision of the Government or its ministerial committee.

I therefore concur in the opinion of my colleague, including his findings with regard to the prospective application of the restraints therein, as set out in paras. 41(a) and (b) of his opinion.

President M. Naor

1. I concur in the judgment of my colleague President (ret.) A. Grunis. In my opinion, it is very doubtful whether there can, in fact, be an "exceedingly rare" case, in the words of my colleague, where it will be justified to implement the Law in respect of properties in East Jerusalem of the residents of Judea and Samaria.

2. I would explain that in my view, even someone whose case has already been considered in the past by the Special Committee is entitled to apply to it again further to the fundamental observations in this judgment. As my colleague has noted, its decision is subject to review by the High Court of Justice.

Deputy President E. Rubinstein

A. I accept the result reached by my colleague President (ret.) A. Grunis in his comprehensive opinion. This is a complex issue which involves the intricacies of the political situation in our region for which a solution has unfortunately not yet been found, and it touches on other issues involved in the dispute with our neighbors, including the refugee question, which is one of the most difficult issues, and the definition of "absentees' property" has a certain relevance thereto. As evidence of this is the fact that, over the years, various different parties have considered the matter, including attorneys general, as my colleague described, and they have sought a modus operandi that will be as fair as possible to all those concerned. That is to say that they will not go into the delicate political issues that go beyond the legal action but will be

cautious and moderate in the *operative* implementation of legal absenteeism; and as my colleague now proposes, the same should only be with the approval of the Attorney General and the Government or a ministerial committee. That is to say that it will be considered very carefully.

B. An example of the complexity and intricacy involved in the matter of absenteeism, which generally awaits the end of the dispute, is the need that arose when the peace agreement with Jordan was made in 1994 (and I would duly disclose that I headed the Israeli delegation in the negotiations on the peace agreement with Jordan) to enact the Implementation of the Peace Agreement Between the State of Israel and the Hashemite Kingdom Law, 5755-1995. The Law dealt with various matters, but section 6 prescribed as follows:

> "(a) Notwithstanding as provided in the Absentees' Property Law, 5710-1950, with effect from Kislev 7, 5755 (November 19, 1994) property shall not be considered absentees' property merely because of the fact that the owner of the right thereto was a citizen or national of Jordan or was in Jordan after the said date.
>
> (b) The provision of subsection (a) shall not alter the status of property that became absentees' property in accordance with the said Law prior to the date specified in subsection (a)"

(See CA 4630/02 *Custodian of Absentees' Property v. Abu Hatum* (2007), para. K, which my colleague also cited.)

Note that in section 6(b), as quoted above, it was provided that "the watershed" for the changes was the date of the peace agreement and no change was made to what preceded it; and in the explanatory notes on section 6 (*Draft Laws* 5755, 253), it was stated that "the status of properties that were absentees' property before the peace agreement will not alter". Section 6 therefore resolved difficulties that might have arisen in accordance with the legal position existing *after* making the peace agreement but not in respect of the past – "what was, will be" until times change. So too, *mutatis mutandis*, in the instant case, cautiously and moderately.

C. I would also concur in principle with the observation of my colleague Justice S. Joubran with regard to the use of the Basic Laws on rights as a tool for the interpretation of the legislation to which the Validity of Laws provision in Basic Law: Human Dignity and Liberty (section 10 of the Basic Law) applies. It provides that "this Basic Law shall not affect the validity of any law in force prior to the commencement

of the Basic Law". Basic Law: Human Dignity and Liberty has been with us for more than two decades. During that period, this Court has time and again repeated the rule laid down in *Ganimat* to which my colleagues have referred, to the effect that "the constitutional radiation that stems from the Basic Law affects all parts of Israeli law. It necessarily influences old law as well" (para. 7 of the opinion of Justice (as he then was) A. Barak; see also A. Barak, "Basic Laws and Fundamental Values – the Constitutionalisation of the Legal System Further to the Basic Laws and its Effects on Criminal Law," in *Selected Writings* I 455, 468-469 (5760) (Hebrew)).

D. Further thereto, this principle has been applied in the interpretation of ordinances, statutes and regulations that predate the Basic Law. Thus, for example, it has been held that the Contempt of Court Ordinance (1929) and the Religious Courts (Enforcement of Obedience) Law, 5716-1956 should be interpreted "in light of the provisions of the Basic Law", MCA 4072/12 *Anonymous v. Great Rabbinical Court*, para. 24 of the opinion of Justice Zylbertal (2013); so too the Crime Register and Rehabilitation of Offenders Law, 5741-1981 (CFH 9384/01 *Nasasreh v. Israel Bar*, IsrSC 59(4) 637, 670 (2004); The Execution Law, 5727-1967 (CA 9136/02 *Mr. Money Israel Ltd v. Reyes*, IsrSC 58(3) 934, 953 (2004); The Protection of Privacy Law, 5741-1981 (HCJ 8070/98 *Association for Civil Rights in Israel v. Ministry of the Interior*, IsrSC 58(4) 842, 848 (2004); the Defence (Emergency) Regulations 1945 (HCJ 8091/14 *Center for the Defence of the Individual v. Minister of Defense*, paras. 18 and 27 (2014); and so on and so forth. This is ethically anchored in what, in a different context, I happened to call "the spirit of the age" (AA 5939/04 *Anonymous v. Anonymous*, IsrSC 59(1) 665 (2004)), that is to say, giving case-law expression to the social developments in various spheres.

It should be emphasized that this has also been laid down concretely with regard to the right of property, which stands at the center of the instant case. In fact, even before the well-known finding of Justice Barak in *Ganimat*, and even prior to the "constitutional revolution" in CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, IsrSC 49(4) 221 (1995) [http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank], Justice – as he then was – S. Levin held as follows: "With the enactment of Basic Law: Human Dignity and Liberty the normative weight of the right of property has risen to the position of a fundamental right. The provision in section 3 of the said Law that 'there shall be no infringement of a person's property' also carries weight when we come to interpret existing provisions of law…" (ALA 5222/93 *Block 1992 Building Ltd v. Parcel 168 in Block 6181 Company Ltd*, para. 5 (1994); and see also A. Barak, *Legal Interpretation*, volume III – *Constitutional Interpretation*, 560-563 (5754) (Hebrew); S. Levin, *The Law of Civil Procedure (Introduction and Fundamentals)*, 33-35 (second edition, 5768-2008) (Hebrew)).

E. And now to the case before us. There can be no question that the language of the Absentees' Property Law, 5710-1950 is not consistent with the right of property in section 3 of Basic Law: Human Dignity and Liberty. That infringement is, in the instant case, compounded by section 2 of the Absentees' Property (Compensation) Law, 5733-1973, which, as the President (ret.) stated, does not permit residents of the territory of Judea and Samaria to claim compensation for the properties that have been transferred to the Custodian of Absentees' Property. Indeed, under the provision of section 10 of the Basic Law we do not set upon a review of the constitutionality of the infringement: whether it is consistent with the values of the State of Israel, whether it is for a proper purpose and whether it is proportional (section 8 of the Law); and my colleague discussed at length the purpose of the Law and its answer to a complex problem that has not yet been resolved, but it can be said that what is called the "right of return" argument, with all its extensive derivatives, cannot be resolved by judicial interpretation. At the Camp David Summit in 2000, I was a member of the Israeli delegation and chaired the subcommittee that dealt with the subject of the refugees, and there was no doubt in Israel's position (which was also supported by the USA) that denied the very basis of that right as being "national suicide". Indeed, based on the case law that the Court has restated numerous times as aforesaid, the provisions of the relevant statute are to be interpreted in accordance with Basic Law: Human Dignity and Liberty. In the instant case, it appears that my colleague the President, despite not expressing an opinion on interpretation along the lines of the Basic Law in accordance with that stated in *Ganimat*, did in fact draw, what in my opinion is, a proper balance in accordance with the Basic Law when he determined the application of the Absentees' Property Law to the properties involved herein, and that in the instant circumstances, *limited use* should be made of the Absentees' Property Law, subject to various authorizations and approvals, and after the options included in other statutes have been exhausted (para. 33 of the President's opinion). I have considered it proper to add the foregoing in order to emphasize the importance of the determination in *Ganimat* and the scope of its application.

F. Given the foregoing, I therefore concur in the opinion of my colleague President (ret.) A. Grunis, which balances between not upsetting a complex legal position, on the one hand, and great caution on the other, by means of a dual safety belt in operative decisions concerning the implementation of the Law in individual circumstances.

Justice H. Melcer

1. I concur in the opinion of my colleague President (ret.) A. Grunis and with the remarks of my colleagues. Nevertheless, I am allowing myself to add a few comments of my own.

2. My colleague President (ret.) A. Grunis writes in para. 20 of his opinion, *inter alia*, as follows:

> "In my opinion, it is certainly possible that at least some of the arrangements in the Law (*the Absentees' Property (Compensation) Law, 5733-1973 – my clarification – H. Melcer*), were they enacted today, would not meet the constitutional criteria. Nevertheless, in the instant case, the provisions of the limiting paragraph are not such as to help or to alter the conclusion with regard to the application of the Law in the cases under consideration here. This is in view of the Validity of Laws rule in section 10 of Basic Law: Human Dignity and Liberty, according to which the Basic Law does not affect the validity of any law that existed prior to its entry into force. This provision does not make it possible to find that any provision of the Law is void ".

In para. 34 of his opinion President (ret.) A. Grunis goes on to say, in respect of the conclusions reached by him:

> "Prima facie, a ruling similar to that reached by us could also have been reached by the course delineated in the *Ganimat* case, that is to say by adopting a new approach to the interpretation of the Absentees' Property Law along the lines of the Basic Laws, despite the Validity of Laws rule in section 10 of Basic Law: Human Dignity and Liberty. However, since the determinations with regard to the Absentees' Property Law and its interpretation do not depend upon the Basic Law, there is no need to consider a move based on section 10 as aforesaid (see HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel*, IsrSC 50(2) 769, 781 (*per* Justice M. Cheshin) (1996)). As aforesaid, my decision does not relate to the constitutional aspect or the *validity* of the provisions of the Absentees' Property Law, but is at the administrative level concerning the way in which the powers by virtue thereof are exercised. Incidentally, it should to be noted that human rights existed before the Basic Laws, and those rights are, in my opinion, more than sufficient to lead to the conclusion that we have reached."

Although it was not *necessary* in all the circumstances herein specifically to consider a move based on section 10 of Basic Law: Human Dignity and Liberty, the same was *possible*, and it also supports the result and is even proper, as was stated by my colleagues: Deputy President E. Rubinstein, Justice S. Joubran and Justice E. Hayut.

Prof. Aharon Barak recently developed an approach of this type in the interpretation given by him to section 10 of the said Basic Law in his paper, *Validity of Laws* (an article that is due to be published in the *Beinisch Volume* – hereinafter referred to as *"Validity of Laws"*). Further to Prof. Barak's said article, I too stated in my opinion in FH 5698/11 *State of Israel v. Mustfafa Dirani* (January 15, 2015), as follows:

> "Even if the 'Validity of Laws' section contained in Basic Law: Human Dignity and Liberty did apply here, in my opinion that does not mean that the law that has been assimilated as aforesaid, has been "frozen" and it can certainly be altered (according to its normative source and the power to do so) by interpretation or 'adaptation' to the normative environment that has been created further to the values of the Basic Laws, or due to changing times in the world (especially in a case such as this, which involves the war on terror), because 'validity is one thing and meaning is another', see HCJ 6893/05 *MK Levy v. Government of Israel*, IsrSC 59(2) 876, 885 (2005). In such a case, the "adaptation" or "alteration" should have regard to the 'respect provision' contained in section 11 of Basic Law: Human Dignity and Liberty, and the 'limiting paragraph' of the said Basic Law. See Aharon Barak *Human Dignity, The Constitutional Right and Its 'Daughter' Rights*, volume I, 392-396 (5774-2014) (Hebrew); Barak, *Validity of Laws*, the text at footnote 23, and also page 24 *ibid*. Along these lines, one should also read the development, made by my colleague the President, of the rule *that the lawsuit of an enemy national should not be tried* by 'adapting it' to the present day and the necessary war on terror, in accordance with the requirements of section 8 of Basic Law: Human Dignity and Liberty" (*ibid*., para. 16).

3. The practical difference between the foregoing two courses is of importance with regard to the future (in respect of the present, both ways lead to the same result, as aforesaid).

The constitutional course, just like the international-law course, might perhaps in future – if peace settlements are reached with our neighbors – open a way to special

arrangements at various different levels on a reciprocal basis, including mutual compensation, as part of a broader package, in view of "the regulatory takings" (to use the American terminology), and the taking of Jewish property in similar circumstances in Arab countries. A somewhat similar process was given expression in legislation further to the making of the peace agreement with Jordan in 1994, of which my colleague the Deputy President, Justice E Rubinstein was one of the architects (see the Implementation of the Peace Agreement Between the State of Israel and the Hashemite Kingdom Law, 5755-1995), and also in some of the countries of Eastern Europe after the changes of regime that occurred there.

Section 12 of the Prescription Law, 5718-1958 (hereinafter: "the Prescription Law") may be relevant in this respect in the appropriate conditions and with reciprocity. It provides as follows:

> "In calculating the period of prescription, any time during which the plaintiff was the guardian or ward of the defendant shall not be taken into account".

Also relevant are other provisions of the Prescription Law – section 14 of the statute (which specifically mentions property vested in the Custodian of Absentees' Property in the definition of "party"), and also section 16 of the same law which talks of extending the prescription period after the interruption has ended – in the instant case, according to sections 12 and 14 of the Prescription Law. (For an interpretation of the said sections, see Tal Havkin, *Prescription*, 213-216, 221-227, 239-240 (2014)(Hebrew)).

4. In conclusion, I would say that the future and the hope that it embodies for peace settlements at this stage raise nothing more than expectations, while the present unfortunately dictates, at most, the legal result that my colleague President (ret.) A. Grunis has presented, in which we have all concurred.

Justice E. Hayut

1. I concur in the judgment of my colleague President (ret.) A. Grunis and also the comment by my colleague Deputy President M. Naor, who casts great doubt with regard to the very existence of an "exceedingly rare" case that would justify the implementation of the Absentees' Property Law, 5710-1950, in respect of properties in East Jerusalem that belong to residents of Judea and Samaria. I also share her approach that persons whose case has been considered by the Special Committee in the past

should be permitted to apply to it again to review their case in accordance with the principles that have been delineated in this judgment.

2. The examples presented by my colleague President (ret.) A. Grunis in para. 18 of his opinion well illustrate the great difficulty raised by the Law because of its broad scope, alongside the great problems that arise at the international and administrative law levels with regard to its application in cases like those before us (see para. 28 of my colleague President (ret.) A. Grunis's opinion). These difficulties have led us to choose the course of "a rule that is not to be taught"[2] or, to be more precise, "a statute that is not to be taught". This course is perhaps an inevitable necessity given the rigid statutory position that currently exists (*cf.* Attorney General Directive No. 50.049 of January 1, 1972 with regard to the filing of indictments for an offence of homosexuality in accordance with section 152 of the Criminal Code Ordinance, 1936. Also compare Crim.App. 4865/09 *Adv. Avigdor Feldman v. Tel Aviv District Court*, paras. 7-8 (July 9, 2009)), but it is important to emphasize that it, too, raises considerable problems because in countries such as ours where the rule of law applies, the provisions of law and the values that the State seeks to apply and enforce are expected to be compatible.

3. Finally, I would concur with the comments of my colleagues Justice S. Joubran, Justice E. Rubinstein and Justice H. Melcer as regards the principles of interpretation to be applied in respect of the legislation that preceded the Basic Laws to which the Validity of Laws provision applies (see, for example, section 10 of Basic Law: Human Dignity and Liberty). These principles of interpretation were considered by this Court in CFH 2316/95 *Ganimat v. State of Israel*, IsrSC 49(4) 589 (1995), since when it has applied them again in its rulings more than once. In the instant case, my colleague President (ret.) A. Grunis, has, in his own way, reached a result that is consistent with these principles of interpretation, and I have therefore seen no need to expand on the matter.

Decided unanimously as stated in the opinion of President (ret.) A. Grunis.

Given this 26th day of Nissan 5775 (April 15, 2015)

The President (ret.) The President The Deputy

[2] Translators note: A talmudic concept, see, e.g: Babylonian Talmud, Tractate Shabbat 12b; Tractate Eiruvin 7a; Tractate Bava Kama 30b.

President

Justice Justice Justice Justice