CA 5546/97
CA 6417/97

**1. Local Building and Construction Committee Kiryat Ata**
**2. Kiryat Ata Municipality**

**v**

**1. Hanna Holzman**
**2. Yosef Miber**
**3. Anat Gov**
**4. Fia Kimchi (CA 5546/97)**

**1. David Bchor**
**2. Moshe Ben Peretz**
**3. Naftali Lifshitz (may his memory be a blessing#)**
**4. Keren Yaniv**
**5. Roni Mirkin**
**v.**
**Local Building and Construction Committee Haifa (CA 6417/97)**

The Supreme Court sitting as the Court of Civil Appeals
[12 June 2001]
*Before President A. Barak, Vice President S. Levin, and Justices T. Or, E. Mazza, I. Zamir, D. Dorner, I. Englard*

Appeal on the judgment of the Haifa District Court (Justice B. Gilor) dated 5 August 1997 in CC 57/94; and on the judgment of the Haifa District Court (Justice S. Vaserkrog) dated 27 August 1997 in HP 514/92. Appeal in CA 5546/97 was dismissed; the appeal in 6417/97 was partially upheld.

**Facts:** Two appeals (CA 5546/97 and CA 6417/97) were joined in this case due to the similarity of the legal question they raised. In both cases the question arose as to the authority to reduce compensation in the expropriation of land for public purposes and in particular the question arose whether a plot of land can be expropriated in its entirety with significant reduction in compensation.

**Held:** The appeal in CA 5546/97 was dismissed and the appeal in CA 6417/97 was partially affirmed. In that case the Local Planning and Construction Committee in Haifa was ordered to pay the appellants in the entirety for the parcel that was expropriated; other portions of the District Court decision were left as is.

**Basic Laws cited:**
Basic Law: Human Dignity and Liberty, ss. 3, 8, 10.

**Legislation cited:**

Lands Ordinance (Purchase for Public Purposes), 1943, ss. , 12(c), 20, 20(1)(b), 20(2), 20(2) (b).

Planning and Construction Law 5725-1965, ss. 190, 190(a) (1), third addendum, s. 4(5).

Law to Amend the Purchase for Public Purposes Laws, 5724-1964, ss. 1 (the terms 'Parcel' 'Original') 2, 3, 3(1).

Law to Amend the City Construction Ordinance, 5717-1957.

Interest and Indexation Determination Law 5721-1961.

Law to Amend Purchase for Public Purposes Laws, 5729-1969.

**Draft legislation cited:**

Draft Planning and Construction Law 5719-1959.

Draft Planning and Construction Law 5722-1962.

Draft Law to Amend Purchase for Public Purposes Laws, 5724-1964.

**Israeli Supreme Court cases cited:**

[1] CA 377/79 *Faiser v. Local Construction and Planning Committee Ramat Gan,* IsrSC 35(3) 645.

[2] CA 143/51 *Ramat Gan v. Pardes Yanai* IsrSC 11 365.

[3] CA 676/75 *Fred Chait Estate v. Local Construction and Planning Committee Haifa* IsrSC 37(3) 243.

[4] CA 474/83 *Local Construction and City Planning Committee v. Rishon L'Zion v. Hamami* IsrSC 41(3) 370.

[5] CrimMA 537/95 *Ganimat v. State of Israel* IsrSC 39(4) 197.

[6] LCA 5222/93 *Gush v. Binyan Ltd. Corp. Section 168 in Parcel 6181 Ltd.* (unreported).

[7] HCJFH 4466/94 *Nuseiba v. Minister of Finance* IsrSC 59(4) 68.

[8] HCJ 4541/94 *Miller v. Minister of Defense* IsrSC 34(4) 57.

[9] HCJ 5016/96 *Horev v. Minister of Transportation* IsrSC 51(4) 1.

[10] CA 1188/92 *Local Construction and Planning Committee Jerusalem v. Bareli* IsrSC 49(1) 463.

[11] CA 2515/94 *Levi v. Haifa Municipality* IsrSC 50(1) 723.

[12] CA 6826/93 *Local Construction and Planning Committee K'far Saba v. Chait* IsrSC 51(2) 286.

[13] HCJ 205/94 *Nof v. Ministry of Defense* IsrSC 50(5) 449.

[14] CA 336/59 *Biderman v. Minister of Transportation* IsrSC 15 1681.

[15] HCJ 2390/96 *Karsik v. State of Israel, Israel Lands Authority* IsrSC 55(2) 625.

[16] HCJ 4562/92 *Zandberg v. Broadcast Authority* IsrSC 50(2) 793.

[17] CrimFH 2316/95 *Ganimat v. State of Israel* IsrSC 49(4) 589.

[18] LCA 6339/97 *Roker v. Solomon* IsrSC 55(1) 199.

[19] LCA 7172/96 *Kiryat Beit Hakerem Ltd. v. Local Construction and Planning* Committee IsrSC 5292) 494.

**Israeli District Court cases cited:**

[20] CC (TA) 216/48 *Pardes Yanai Ltd. v. Ramat Gan Municipality* IsrDC 6 380.

**German cases cited:**

[21] *BVerfGE* 24, 367

**Israeli books cited:**

[22] D. Lewinsohn, *Injuries to Land Caused by Planning Authorities* (1995).

[23] A. Barak, *Interpretation in Law*, Vol. 3, *Constitutional Construction*, (1994).

[24] A. Barak, *Interpretation in Law*, Vol. 2, *Statutory Construction*, (1993).

[25] J. Weisman, *Law of Property -General Part* (1993).

**Israeli articles cited:**

[26] R. Alterman 'Land Expropriation for Public Purposes without Remuneration according to the Planning and Construction Law – Toward a New Preparedness' *Mishpatim* 15 (1985-1986) 179.

[27] H. Dagan 'Property, Social Responsibility and Distributive Justice' *Distributive Justice in Israel* (M. Mautner, ed. 2001) 97.

**Foreign article cited:**

[28] D. Sorace 'Compensation for Expropriation' 1 Italian Studies in Law (1992)

For the appellants in CA 5546/97 – Yosef Segel; Michael Betzer.
For the respondents CA 5546/97 – Meir Holtzman; Dr. Yifat Holzman-Gazit
For the appellants in CA 6417/97 – Moshe Lifshitz.
For the respondents CA 6417/97 – Ofra Zayad-Feldman
Zion Iluz, Assistant to the State Attorney for the Attorney General.

## JUDGMENT

**Justice D. Dorner**

We have before us two appeals, the hearings for both have been joined.

*The Facts, the Processes, and the Claims*

1. In 1987 the Local Planning and Construction Committee in Haifa expropriated two plots in Bat-Galim which were under the same ownership. One plot was expropriated in its entirety for the purpose of building sport and recreation structures on it. From the second plot a third of the area registered in the property logs after the land arrangement, was expropriated for the purpose of paving roads. The Committee paid the owners compensation in the amount of 60 percent of the value of the plot that was expropriated in its entirety, while for the partial expropriation it did not pay compensation at all under the claim that the area that was expropriated was not greater than 40 percent—a proportion that can be expropriated without compensation. This, on the basis of section 20 of the Lands Ordinance (Purchase for Public Purposes), 1943 (hereinafter: 'the Purchase Ordinance'), and section 190 of the Planning and Construction Law 5725-1965 (hereinafter: 'the

Planning Law').

The plot owners filed suit for compensation against the Local Planning and Construction Committee in Haifa, relying on the definition of 'original plot' in the Law to Amend Purchase for Public Purposes Laws, 5724-1964 (hereinafter: 'the Law to Amend Purchase Laws'). They claimed that they are entitled to compensation for the partial expropriation according to the original area of the plot before the land arrangement, part of which in the past was expropriated for the purpose of paving a road. According to the claim, the expropriation under discussion, when added to the prior expropriation, is greater than 40% of the overall area, and thus they are entitled to compensation for it. The owners further argued against the amount of compensation for each unit of land and for their right to full compensation for the plot that was expropriated in its entirety, since they would not benefit from the development resulting from the expropriation.

The District Court in Haifa (Justice S. Vaserkrog) dismissed the suit relying as to the amount of compensation on the opinion of an assessor that it had appointed, and as to the proportion of the expropriation, on the definition of 'plot' in the Law to Amend Purchase Laws . The claim against the reduction of compensation for the full expropriation was also dismissed. As to this matter the District Court relied on the ruling in CA 377/79 *Faiser v. Local Construction and Planning Committee Ramat Gan* (hereinafter: 'CA *Faiser*'[1]).

2. A suit for full payment for the expropriation of a plot in its entirety was also heard in the District Court in Haifa in another case. In that case, from 1992, the Local Planning and Construction Committee in Kiryat Ata expropriated a plot in its entirety for the purpose of building sport and recreation structures as well as paving an access road for a neighborhood. For the expropriation the committee paid the plot owners compensation at a proportion of only 60 percent of its worth, but the owners insisted on their right to full compensation.

In that case the Court entered judgment in favor of the plaintiff. The District Court in Haifa (Justice B. Gilor) decided to deviate from the case law that was established in CA *Faiser* [1] in reliance on the Basic Law: Human Dignity and Liberty [hereinafter: 'the basic law'], and the judgments of this Court that the basic law also impacts the interpretation of statutory provisions that came before it. The conclusion of the District Court in that case was that the interpretation which lessens the violation of the right to property established in the basic law by the payment of full compensation is to be preferred.

3. The Local Planning and Construction Committee in Kiryat Ata appealed against the judgment in CA 5546/97, while the owners of the plots in Bat-Galim appealed in CA 6417/97 against the dismissal of their complaint, and against the rate of interest and indexation that was awarded to them.

In the two appeals the appellants repeated their arguments in the District Court, while the respondents in each of these two appeals relied on the reasonings of the decisions of the District Court, which, as said,

contradicted each other on the question whether in expropriating a plot in its entirety the Committee is authorized to reduce the amount of compensation.

In light of the similarity of the central legal question in the two appeals and its importance, the hearing of the appeals was joined, the panel was expanded for hearing them, and the stance of the attorney general was sought.

The attorney general, in his brief, supported the case law established in CA *Faiser* [1]. In his opinion, there is not much substance to the distinction, which he sees as artificial, between partial expropriation and full expropriation. The Attorney General agreed that there may be exceptional cases in which reduction of compensation is not justified. In these cases it is possible, so he claimed, to turn to the Minister of Finance and ask him to evaluate new legislation in the area of the laws of expropriation of land in its entirety.

*The normative framework and the case law*

4. In section 20 of the Purchase Ordinance it was established:

> '(1). . .
>
> (2) Where any land was purchased according to this Ordinance in order to widen any existing road or part thereof or in order to expand any playground or recreation area, or in order to pave any new road or part thereof or in order to install any new playground or recreation area, the compensation paid based on this Ordinance will be subject to the following changes, meaning—
>
> (a)...
>
> (b) Where the area of the land taken which is comprised in a plot exceeds one quarter of the total area of the plot, the compensation shall be reduced by a sum which bears the same proportion to the value of the land alone comprised in the portion of the plot taken as one quarter of the total area of the plot bears to the total area of the land comprised in the portion of the plot taken
>
> (c) Despite the determinations in paragraphs (a) and (b) above, the Minister of Finance may grant—as he sees fit, if it has been determined to his satisfaction, that the reductions imposed in each of those paragraphs will cause suffering—that same compensation or additional compensation, as he shall see fit in consideration of all the circumstances of the case.'

In the early days of the State the District Court in Tel-Aviv-Jaffa justified the reduction of compensation with the fact that owners of the expropriated land benefit from the development of the land that was expropriated, which causes an appreciationn of the value of the lands that are left in their hands. Therefore the District Court distinguished partial expropriation which enables benefit, from full expropriation, in which the owners are not left with land that appreciates in value. In light of this

it was established that the provision, which permits a reduction of the compensation by a quarter of the value of the area that was expropriated, does not apply to casesin which of the entire plot is expropriated. See CC (TA) 216/48 *Pardes Yanai Ltd. v. Ramat Gan Municipality* [20]. It is to be noted, that an appeal that was submitted on this judgment was upheld, but that was for the reason that the plaintiff was not the owner of the land that was expropriated. The matter of reduction of compensation was not discussed in the appeal at all. See CA 143/51 *Ramat Gan v. Pardes Yanai* [2].

In 1965, the Knesset, in section 190 of the Planning Law, raised the permitted rate of reduction in compensation to 40 percent and broadened the purposes for which it is permitted to expropriate, without explicitly distinguishing between lands that were partially expropriated and lands that were expropriated in their entirety. But the reason for the distinction arises from the explanatory notes to the proposed Planning and Construction Law 5719-1959 and the proposed Planning and Construction Law 5722-1962, in which it was stated:

> 'The existing statute establishes that if land was expropriated for roads or open public areas, the expropriating authority will not pay compensation for the expropriation if the expropriated area is not greater than 25% of the total impacted area. Experience has taught that the benefit that land owners enjoy from implementing a road paving program and setting up public areas and the like is far greater than this 25% that they have to allocate without payment of compensation. Therefore it is proposed to raise the percentage that the land owner must allocate. . .' (Proposed Planning and Construction Law 5719-1959, at pp. 314-315; Proposed Planning and Construction Law 5722-1962, at p. 56).

The appreciation explanation was also noted in the Knesset deliberations. See *Divrei Knesset* 37 (1963) 1843-1844; *Divrei Knesset* 43 (1965) 2419. Similarly, when presenting the Draft Law to Amend Purchase for Public Purposes Laws, 5724-1964, the Minister of Finance explained to the Knesset that reduction of the compensation according to the various purchase laws is at the rate of the growth in profit to the land owner due to the development of the area. See *Divrei Knesset* 38 (1964) 758.

Similar words were said by the Minister of Interior and the Chairperson of the Knesset Interior Committee in discussions on the Law to Amend the City Construction Ordinance 5717-1957. See *Divrei Knesset* 22 (1917) 1970, 2336.

This Court also determined in CA 676/75 *Fred Chait Estate v. Local Construction and Planning Committee Haifa* [3] at p. 792, by Justice Etzioni, that '... the reason for the exemption [from the payment of full compensation]... is that the land appreciates and the former owners, meaning those from whom it was expropriated, benefit from this appreciation, in that the surplus land is left in their possession and they

benefit from the general development of the area.' His conclusion was that where land is expropriated in its entirety and the owners cannot benefit from any appreciation the compensation is not to be reduced.

The Supreme Court's conclusion was different in CA *Faiser* [1]. President Landau dismissed the claim of the appellants which was based both on the language of section 20(2)(b) of the Purchase Ordinance, which can be interpreted as permitting reduction in compensation for only partial expropriation, and on the objective of the provision as it arises from the explanatory notes to the Planning Law. He wrote as follows:

> '... two interpretations of section 20(2) are possible, but to these the claims are added of... [the appellants' counsel] as to general legal principles which rule out expropriation without fair compensation, and as to the constitutional reason, which is at the foundation of section 20 of the Ordinance and section 190 of the law. As to this it is to be said, that when the construction of a statute is in doubt, there will certainly be a tendency to prefer the construction which is in keeping with that general principle which embodies a basic right of a citizen with property rights in the land...
>
> As to the constitutional reason, which was mentioned in the judgment... meaning, the appreciation, which accrues to the remainder of the plot as a result of the accomplishment of the public purpose, such as widening a road near the plot, the explanatory notes to the draft law from 1963, are due appropriate respect, and perhaps were useful at the time in order to convince the members of Knesset to approve raising the percentage from 25% to 33.3%, which was proposed there (and they even went further and established 40%). These explanatory notes have some weight, but they cannot be the deciding factor, when we come to interpret the meaning of the section, as it was produced by the legislator.'

President Landau noted that 'perhaps it would have been appropriate to give decisive weight to the basic principle that there is no expropriation without fair compensation...' (**ibid**, at p. 653). But in his view, the language of section 3(1) of the Law to Amend the Purchase laws which establishes the date of purchase in expropriation by authority of the Purchase Ordinance of a 'plot or any portion of it' is determinative. From this language President Landau learned that the intention of the legislator in section 20(2) of the Purchase Ordinance was to also permit reduction of compensation when the land is expropriated in its entirety. His conclusion was that the reduction in compensation is to be seen as a quasi property tax. However, he commented that even if a plot is expropriated in its entirety, the owner enjoys a certain benefit, as in calculating the compensation for the remainder of the area in the proportion of the remaining 60% the rise in value of the plot as a result of the expropriation and the development around it is taken into account. See **ibid**, at p. 652.

Justice Barak, who joined the judgment of President Landau, commented that indeed '... logical fairness for denying the compensation for expropriation of a quarter of the plot is rooted in the fact, that with the expropriation of this part, the remainder appreciates in value...' (**ibid**, at p. 657). However, he explained that it is a general assumption, and in many cases the partial expropriation does not result in investment and may even reduce the value of the remaining portion. His view was that the remedy for the injured land owners is to turn to the Minister of Finance who is authorized to decide as to the payment of additional compensation. Justice Barak further wrote, that the Purchase Ordinance does not establish a ceiling for the portion that may be expropriated, and it is not logical that it will be possible to reduce the compensation when 90% of the land is expropriated, while granting full compensation for the entirety of the area.

Justice S. Levin added, that even if the payment of full compensation for the expropriation of an entire plot would be justified the language of the law does not enable it.

In a judgment handed down in 1987 President Shamgar qualified the case law determined in CA *Faiser* [1]. And he wrote as follows:

> 'I am willing to accept the assumption, that when it is a matter of the expropriation of a portion of a plot, in the framework of a city construction plan, it is possible that the remainder of the plot that is not expropriated, will go up in value following the development plan and in the expected appreciation of the remainder of the plot there is a moral-substantive quasi justification for the expropriation of part of the assets without payment of compensation. However, when the whole plot is expropriated, there is no appreciation of the remainder, as there is no remainder, as it is all expropriated. The assumption, that the rate of compensation for the entire plot will also reflect in its rate the change in the value of the surroundings. . . is not certain, with all due respect; the compensation is calculated according to the value of the land on the day of publication of the notice according to section 5... there is no certainty that at that stage, in terms of timing, it will be possible to accurately assess such developments and include them in the assessment. Even if it were possible to bring into account future surrounding appreciation there still is no certainty, that it is equal in value and significance to taking 40% of the expropriation without any compensation.' (CA 474/83 *Local Construction and City Planning Committee v. Rishon L'Zion v. Hamami* hereinafter: 'CA *Hamami*' [4] at p. 384).

The other judges in the panel refrained from relating to this question, such that the words of President Shamgar remained as *obiter dicta*.

5. As to the case law of CA *Faiser* [1], criticism has been voiced in the legal literature. Professor Rachel Alterman claimed that the reliance on the provision of section 3(1) of the Law to Amend the Purchase Laws

was erroneous. She pointed to the fact that while in this law 'plot' is defined in section 1 as '... a unit of registration in the property records...', the Purchase Ordinance deals with a 'lot' which is defined as '... the total land under a single ownership which constitutes one area' (section 20(1)(b)). A lot may therefore include several plots, and in the first expropriation 40 percent of the area can include an entire plot. Therefore this law, which deals with repeated expropriations from the same area unit, sought to be stricter with the authority by establishing a unit of land that is smaller for the purpose of calculating the compensation. In any case, it is a matter of two separate statutes that deal with different situations and measuring units, and the existence of the authority to reduce compensation in a full expropriation according to the Purchase Ordinance is not to be concluded from the Law to Amend the Purchase Laws.

Professor Alterman also rejected the reasoning of Justice Barak that it is not logical to adopt an interpretation which distinguishes between expropriation of 90 percent of the area of the land and expropriation of the entire area. She explained that in reality it is not possible to expropriate 90 percent of the plot and leave a remainder which enables development. In these circumstances the ending of section 190(a)(1) of the Planning Law prohibits expropriation—at reduced compensation or even at full compensation—of a portion of the plot. As indeed, such an expropriation will damage the value of the remainder. See R. Alterman 'Land Expropriation for Public Purposes without Remuneration according to the Planning and Construction Law—Toward a New Preparedness' [26], at pp. 220-227.

Dr. Daphna Lewinsohn-Zamir agreed with this criticism and its reasoning, in her book *Injuries to Land Caused by Planning Authorities* [22] at pp. 164-165. The author made the point that benefits to land owners which stem from the provision of public needs is not taxed. As, unlike the theory of President Landau, due to the rise in value of the land as a result of the development, the owners of expropriated plots are not entitled to increased compensation. It was thus established in sections 12(b) and 12(c) of the Purchase Ordinance, according to which appreciation which stems from the expropriation is not to be taken into account in calculating the compensation. See Lewinsohn-Zamir in said book [22] at p. 167. In the opinion of Dr. Lewinsohn-Zamir, even if the appreciation argument is ruled out, equal distribution of the burden among landowners necessitates that the owners of the expropriated land benefit from the development, at the very least, to some extent. From here her conclusion is drawn that one is not to reduce the compensation for an area expropriated in its entirety. See **ibid**, at p. 199.

6. In 1992 the basic law was passed in which it was established in section 3:

'a person's property is not to be injured'.

Injury to property is permitted today, as said in section 8 of the basic law (the limitations clause) only '... in a statute which is in keeping with the values of the State of Israel, that was intended for an appropriate

purpose, and to a degree which does not exceed that which is necessary or by law as said by authority of an explicit authorization in it'.

Expropriation of property in and of itself violates the right to property, but expropriation without compensation of equal value violates the right more severely.

And indeed, the rule practiced in democratic states is the payment of full compensation for the expropriation. See Lewinsohn-Zamir in her book *supra* [22] at p. 147. This rule applies in England itself, which bequeathed us the Mandatory Purchase Ordinance that permits expropriation without compensation. See Alterman in her article *supra* [26] at p. 181.

7. The Purchase Ordinance as well as the Planning Law preceded the Basic Law, and therefore its provisions cannot infringe on their validity (section 10 of the basic law). However, the status of a property right as a constitutional right necessitates interpreting these statutes in the spirit of the provisions of the Basic Law. The Basic Law has the power to grant prior statutory provisions '... a new meaning where there is an interpretive possibility of doing so' (Vice President Barak in CrimMA 537/95 *Ganimat v. State of Israel* [5], at p. 414). See also the words of Justice S. Levin in LCA 5222/93 *Gush v. Binyan Ltd. Corp. Section 168 in Parcel 6181 Ltd.* [6] at paragraph 5 of his decision; FHHCJ 4466/94 *Nuseiba v. Minister of Finance* [7], at p. 85; HCJ 4541/94 *Miller v. Minister of Defense* [8], at p. 138; HCJ 5016/96 *Horev v. Minister of Transportation* [9].

First and foremost, statutes are to be interpreted as consistent with the limitations clauses. Therefore, statutes will be interpreted as infringing on a right established in a basic law or authorizing an authority to infringe on it only if the infringement is established in a statute or is by power of an explicit authorization in it; they will be interpreted as in keeping with the values of the State; they will be interpreted as permitting infringement of a right only for an appropriate purpose and will be interpreted as permitting such infringement to a degree that is not beyond that which is necessary.

The passing of the basic law brought about significant changes to the interpretation that courts gave the Purchase Ordinance. And Justice Zamir wrote as follows:

> 'This basic Law establishes (in section 3) the right to property as a basic right, and prohibits the infringement on this right, *inter alia*, to a degree that is not beyond that which is necessary (section 8). Indeed, the Basic Law does not infringe on the validity of a law that existed on the eve of the start of the Basic law (section 10), and this includes the Planning and Construction Law. However, it certainly may impact the interpretation of the law. The interpretation, today more so than in the past, must operate in the direction of minimizing the infringement on the right to property... However, the specific public need, which justifies the infringement, still does not rule out compensation for the

> infringement unless it is clear that the infringement is within the range of the reasonable and there are no considerations of justice, which necessitate compensating the injured person. Such compensation can serve the purpose of the Basic Law: Human Dignity and Liberty, meaning, minimizing the infringement on the right to property so that it does not go beyond that which is necessary.' (CA 1188/92 Local Construction and Planning Committee Jerusalem v. Bareli [10] at p. 483.)

See also the words of Justice Beinisch in CA 2515/94 *Levi v. Haifa Municipality* [11] at p. 738.

*Interpretation of Provisions as to Reduction of Compensation*

8. Injury to property for public purposes generally is in keeping with the values of the State, and is for an appropriate purpose. Indeed, in order for an injury to property by expropriation of land to be to a degree which does not go beyond that which is necessary, there is a need for compensation that is fair and of fair value. Without such compensation the expropriation will violate equality. As, only the owners of lands needed for public use - which are distinguished from owners of other lands or assets - will need to bear the financing of the public benefit without there being a justification for imposing the financing on these owners only. Unequal violation of a right is a violation which goes beyond that which is necessary. See: the words of Justice Mazza in CA 6826/93 *Local Construction and Planning Committee K'far Saba v. Chait* [12] at p. 296; HCJ 205/94 *Nof v. Ministry of Defense* [13] ; A. Barak, *Interpretation in Law*, Vol. 3, *Constitutional Construction* [23], at pp. 545-547. Payment of compensation in a proportion which is less than the value of the lands that were expropriated would be justified only if as a result of the expropriation the value of the assets remaining in the owner's possession goes up or they enjoy another benefit of equal value. As mentioned, the law authorizes the expropriation for public purposes of up to 40 percent of an area that is in a person's ownership without payment of compensation. Against this background it can be claimed that the custom that has taken root of reducing the compensation by the maximum proportion without examining the impact of the expropriation on the value of the area that was not expropriated or on the owner's enjoyment of it, violates equality, and thereby violates the right to property to a degree that goes beyond that which is necessary. In any event, the injury to property is unequal and therefore goes beyond that which is necessary when the full area of the owners is expropriated, such that it is clear and apparent that no use or benefit results to them from the expropriation.

The explanation that was given in CA *Faiser* [1] that the expropriation without compensation is in the realm of a tax in a uniform rate of 40 percent, which is imposed on the owners of the land, is not satisfactory. **First**, this 'tax' is imposed, as said, only on the owners of the expropriated land and discriminates between them and the rest of the public. **Second**, the payment does not distinguish between owners who benefit from the expropriation and those whose assets are expropriated in

their entirety and they derive no benefit from it, or even those for whom the expropriation causes damage to the value of the remaining property. Imposing an 'expropriation tax' at a uniform rate thus discriminates between the owners of various different expropriated lands and between them and the broad public, which benefits from the expropriation without paying this tax.

And indeed, the legislative history that was described, including the explanatory notes to the proposed laws and things that were said in the Knesset, teach us of the intention to tie between the reduction of compensation and the benefit to the owners consequent to the expropriation. Justice H. Cohn described this:

> 'The intention of the legislator, which arises clearly from all those ordinances, is that for certain purposes—which by nature are not just the needs of the public except the owners of the land at issue, but to a great extent also the needs of the land owners themselves—it is permitted to expropriate one quarter from every land plot without the payment of compensation;...' (CA 336/59 *Biderman v. Minister of Transportation* [14] at p. 1690).

9. President Landau also based his construction in CA *Faiser* [1] on the assumption that the owners of the land that was expropriated in its entirety will also derive benefit from the expropriation in that the compensation they will receive, at the rate of 60 percent of the land, will be calculated based on the value of the land following the development that the expropriation will bring about. This assumption, as Dr. Lewinsohn-Zamir has shown in her book *supra* [22], has no basis. As the statute establishes that in the calculation of the compensation, the appreciation of the value of the land, which stems from the expropriation, is not to be taken into account. And see also the words of President Shamgar in CA *Hamami* [4] that were quoted above.

Against this background it is clear that consequent to the expropriation of the land in its entirety, the owners—who do not benefit from the development that the expropriation is intended to advance nor from compensation which would reflect this development—are not to expect any benefit at all, and there is therefore no justification for reduction of the compensation that is paid to such owners.

The example brought by Justice Barak in CA *Faiser* [1] of the expropriation of 90 percent of a plot, does not change this result. **First**, as was stated in the studies, it is not possible, and in any event, it is very doubtful that it is possible, to expropriate 90 percent of a plot, and even 70 percent, without lowering the value of the remainder, a harm which entirely prevents expropriation, and generally the proportion of an expropriation portion which will not harm the value of the remainder is not greater than 55 percent. See Professor Alterman in her article *supra* [26], at p. 225; Dr. Lewinsohn-Zamir in her book *supra* [22] at p. 165. **Second**, expropriation of the absolute majority of a plot, even if it were possible, would not leave in the possession of the owners an area that would benefit to a real extent from the development following the

expropriation.

**And finally,** the appropriateness of the custom of automatic reduction of the maximum proportion of 40 percent of the compensation for a portion—big and small—of a plot without examining each case on its merits and if and to what extent the owners are expected to derive utility from the development of the expropriated area, should be questioned. It can be argued, that the discretion given to the Minister of Finance to order the payment of additional compensation, to which Justice Barak pointed in CA *Faiser* [1], is not an appropriate replacement for the interpretation of the expropriation authority to begin with, in a manner which sits well with egalitarian protection of the right to property. The authority of the Minister of Finance to increase the rate of compensation applies in special cases, in which standard objective criteria for the calculation of compensation do not lead to a just result. Examples of such special cases may be expropriation of an area that has particular personal worth to specific owners for which the regular formulas for calculation of the value of a plot do not give expression, or when the expected development consequent to the expropriation in fact raises the value of the part of the plot that was not expropriated, but the specific owners do not benefit from this development, and it has been proven that they do not intend to trade the plot in the near future.

However, some will hold that the intensity of the potential injury to the right to property does not justify, in each and every case, legal discussion, based on speculative opinions, which may contradict each other, for the determination of the exact amount of damage. Either way, it is appropriate that the Knesset revisit the appropriate compensation arrangement where only a portion of the lot is expropriated.

10. President Landau, as well, was prepared ,when interpreting the statute, '... to give determinative weight to the basic principle, that one does not expropriate other than for fair compensation...' (CA *Faiser* [1], at p. 653). However, he saw in section 3(1) of the Law to Amend the Purchase Law, which determines the dates of the expropriation without compensation as to '... a plot or a portion thereof' 'determinative evidence as to the intention of the legislator' to permit reduction of compensation even when the parcel is expropriated in its entirety.

But, as explained in the article *supra* of Professor Alterman [26] the definition of 'plot' in the said statute is different from the definition in the Purchase Ordinance, and in any event we should not draw analogies from the law to the Ordinance.

Moreover, as a rule, a law is not to be interpreted as infringing on a right based on what is said in another law, and all the more so a later law which did not exist, and in any event did not stand before the Knesset when the statute that is being interpreted was passed. The principle of legality requires diligence in ensuring that the violation of a right, and all the more so an unjustified violation, will be clearly anchored in an authorizing statute and will be, as said in the limitations clause, '... in a statute... or by statute... by authority of explicit authorization in it.'

Indeed, as was established in CA *Faiser* [1] the language of the

statutes before us enables both interpretations. In my view, both in light of the intention of the Knesset and in light of constitutional principles which were strengthened with the passing of the Basic Law, and which require that the law be interpreted as violating a right only to a degree that does not go beyond what is necessary, the interpretation that should rightfully be adopted is that the authority to reduce compensation for expropriation of land for public purposes does not apply when the plot is expropriated in its entirety.

It is to be noted, that even according to the interpretation holding that there is discretionary authority to reduce the compensation, use of this discretion where the landowners do no derive any benefit from the expropriation is not proportional, and therefore is not appropriate.

*Additional arguments*

11. In my view, the arguments of the plot owners in Bat Galim, which relate to the right to compensation for the partial expropriation, and to the rate of compensation for an unit of land and to the rate of interest and the indexation, are to be dismissed.

Section 2 of the law to Amend the Purchase Laws establishes that the area that can be expropriated without remuneration out of a plot will be calculated based on the overall area of all the expropriations of that plot. For this purpose, the law defined 'plot' in section 1: 'in an area in which an arrangement of property rights according to the Lands Ordinance (Arrangement of Property Rights) was made—a registered plot which is registered according to that ordinance;' meaning after the lands arrangement. While 'original plot' has been defined as a 'plot as it was on the eve of the first purchase...' meaning as it was registered after the lands arrangement on the eve of the first purchase. We find that the relevant expropriations are those that were implemented after the lands arrangement. Given that there is no dispute that since the lands arrangement expropriations from the plot have not taken place, the owner's claim was properly dismissed.

Beyond that which was necessary the District Court found that the original owners from whom the plot was bought purchased their rights by power of a statute of limitations, on the basis of the cultivation of that same area which was registered as a 'plot' after the arrangement and from which, as said, expropriations were not made.

I have also not found grounds to intervene in the determination of the District Court as to the rate of compensation for a unit of land. This rate is determined by the opinion of an expert assessor, for which this matter is in his range of expertise. So too it is not proper to intervene in the rate of interest and indexation that the District Court determined on the basis of the Interest and Indexation Law 5721-1961.

12. Therefore I propose that we dismiss the appeal in CA 5546/97, and affirm the appeal partially in CA 6417/97 and require the Local Planning and Construction Committee in Haifa to pay the appellants for the entirety of the plot that was expropriated (parcel 70) the total of 70,920 dollars as the assessor determined in his opinion as per their value on the date of the handing down of the decision, and leave the other

portions of the decision as they are.

I also propose that under the circumstances no order be given for expenses.

**Justice T. Or**

I agree.

**Justice E. Mazza**

I agree.

**Justice I. Zamir**

I agree.

**President A. Barak**

I agree with the decision of my colleague Justice Dorner. Like her, I too am of the view that it is appropriate to deviate from CA 377/79 (hereinafter: 'the *Faiser* ruling [1]') Since I was part of the *Faiser* ruling[1] I would like to explain briefly the considerations which are at the basis of my agreement with my colleague's stance.

1. At the center of these appeals stands the provision of section 20(2)(b) of the Lands Ordinance (Purchase for Public Purposes) (hereinafter: 'the Purchase Ordinance') This provision establishes as follows:

> '(b) Where the area of the land taken which is comprised in a plot exceeds one quarter of the total area of the plot, the compensation shall be reduced by a sum which bears the same proportion to the value of the land alone comprised in the portion of the plot taken as one quarter of the total area of the plot bears to the total area of the land comprised in the portion of the plot taken'.

The interpretive question which arose in the *Faiser* case [1] and which is before us to be determined, is whether this provision applies only to the case of the expropriation of a part of a parcel or whether this provision also applies to the expropriation of the entire parcel. President Landau explained that from a textual perspective '... the two interpretations of section 20(2) are possible...' (**ibid**, at p. 651). President Landau went on to examine the purpose at the basis of the provision. He put the right to property at one end of the scales. He noted that '... when the interpretation of the statute is put in question, certainly the tendency will be to prefer the interpretation which fits with that general principle, which embodies the basic property rights of a land owner' (**ibid**, at p. 651). So to the President placed at this side of the scales the special 'legislative reason' which justifies reduction of 20 percent from the compensation amount. This reason is that the expropriation appreciates the value of the portion of the parcel that was not expropriated, and

therefore there is justification to reduce the compensation. This reason does not hold where the entire parcel has been expropriated On the other side of the scales President Landau placed two considerations: **first**, a line of precedents in which reduction of compensation was recognized for the expropriation of the entire parcel; **second**, the weakness of the legislative reason, as many are the situations in which expropriation of part of a parcel does not appreciate the value of the portion that was not expropriated. Against the background of these conflicting considerations President Landau was of the view that the scales are balanced. He noted that 'this survey that I conducted would ostensibly leave the conclusion at a 'tie', and perhaps it would be appropriate to give determinative weight to the basic principle, that one does not expropriate other than for fair compensation...' (**ibid** at p. 653). What tipped the scales in the eyes of President Landau was an additional consideration, which deals with sections 2 and 3 of the Law to Amend the Purchase for Public Purposes Laws (as it was amended in the Law to Amend the Purchase for Public Purposes Laws (amendment) 5729-1969; hereinafter: 'the Law to Amend the Purchase for Public Purposes Laws). This provision limits purchase without payment of compensation. (section 2) and establishes – as to date of purchase – a provision according to which in purchase by authority of the Purchase Ordinance the date of purchase is the date in which the notice was published as to the intent to purchase for public purposes '... the parcel or any portion of it' section 3(1). President Landau saw in this '. . . an authorized interpretation from the legislator himself, which lets us know, that taking the percentage, that is permitted to be taken without compensation, is possible even when a parcel is expropriated in its entirety' (**ibid,** p. 653).

2. Since the *Faiser* case [1] over twenty years have passed. The considerations which guided President Landau in the *Faiser* case [1] are still valid today. The weight of these considerations has changed since then. I will open with the consideration as to the right to property. Since the *Faiser* ruling[1] the right to property – along with some additional rights – has changed its status. It has become a constitutional supra-statutory right. Its weight in the interpretive balance has grown. I explained this in one of the cases, when noting:

> '... it is only natural in my eyes that our approach to the purpose of the expropriation Ordinance is different from the approach to it 50 years or 30 years ago. The central change occurred with the passing of the Basic Law: Human Dignity and Liberty. This law granted constitutional supra-statutory status to the right to property of the original owner. A change has occurred in the balance between the right to property of the original owners and the needs of the public. This change does not impact the validity of the Expropriation Ordinance. The validity of the Expropriation Ordinance is preserved. But this change leads to a change in the understanding of the Expropriation Ordinance. It is expressed in our new understanding of the purpose of the Expropriation Ordinance' (HCJ 2390/96 *Karsik v. State of*

*Israel, Israel Lands Authority* [15], at p. 713).

3. Against this consideration President Landau lined up a row of precedents, from which it arises, whether explicitly or implicitly that the payment of the reduced compensation also applies to the expropriation of the entire parcel. Since then the picture has changed. In the district courts the opinions are split (after the Basic Law: Human Dignity and Liberty). The Supreme Court (in the words of President Shamgar) sharply criticised the *Faiser* ruling[1] (**see:** CA 474/83, at p. 384). In academia as well it has been criticized (see Alterman, in her article *supra* [26]; Lewinsohn-Zamir in her book *supra* [22], at p. 164).

4. The reliance of President Shamgar on the Law to Amend the Purchase for Public Purposes Laws has also been the subject of criticism. It was emphasized that the Purchase Ordinance (that deals with a plot) and the Law to Amend the Purchase for Public Purposes Laws (which deals with a parcel) deal with different situations and with different measuring units, and one cannot learn from one to the other (see Alterman, in her article *supra* [26] at p. 223), but beyond this, President Landau relies on the provision in the Law to Amend the Purchase for Public Purposes Laws –which deals with the date of purchase for public purposes – according to which the date of purchase is the date of publication of the notice as to the intentions to purchase for public purposes '... the parcel or any portion of it'. Justice Landau saw in this 'decisive proof for the legislator's intent' which is 'as though the legislator is innocently digressing', and directs the interpreter to determine that also in expropriating the parcel in its entirety the rate of compensation is to be reduced. According to the approach of President Landau 'there is before us an authorized interpretation from the legislator himself...' (the *Faiser* ruling [1], at p. 653). This approach is difficult: **first**, a later law does not interpret an earlier law. The legislator deals in legislation and not interpretation. The task of interpretation is the task of a judge. He may learn from the later law as to the purpose of the earlier law. This is not 'decisive proof' as to this purpose. It is one of the 'proofs' that are to be used. Its weight is determined by its substance. The weight is small in our matter, since as President Landau noted, the legislator was 'innocently digressing'. Thought was not given to the question whether reduction of compensation will also apply in the expropriation of the entire parcel. The assumption must be that the determination of the basic question – whether it is possible to expropriate a parcel in its entirety with significant reduction of the compensation – will not be done in reliance on the digression of the legislator. Certainly this is so when it is a matter of violation of a basic constitutional right. (See A. Barak, *Interpretation in Law*, Vol. 2, *Statutory Construction* [24] at p. 594).

5. These considerations lead me to the conclusion that the balance that was made in the *Faiser* case [1] between the right to property and its violation in the expropriation of an entire parcel cannot stand today. It is possible, of course, that this balance was mistaken already at the time it was done. Be this as it may, now – following the legislation of the Basic Law: Human Dignity and Liberty – we no longer can look upon

legislation which violates human rights in the same manner we looked upon it in the past. I explained this in one of the cases, in noting:

> '... the text of the law has not changed. But, the purpose of the law has changed. The change may be minor. It may reflect a new purpose that can be reached – even if in actuality it was not reached – in the past. The change may be heavy. It may reflect a new purpose that could not have been reached in the past. Indeed, Radbruch's saying that – the law is always wiser than its maker – is particularly accurate during a time of constitutional changes. These change the normative expanse in which we continue to think. It is no longer possible after the legislation of the basic laws as to human rights to think about the general purpose of the legislation, in the same manner in which we thought of it prior to the legislation of the basic laws. Our normative world has changed. Our manner of thinking has changed (knowingly or unknowingly)' (HCJ 2390/96 *supra* [15], at p. 713).

6. Moreover, it is an interpretive presumption that the purpose of a statute does not come to oppose the constitutional provision found above it '... the aspiration of the interpreter [is A.B] to interpret a statutory provision as fitting with the Constitution...' (see HCJ 4562/92 *Zandberg v. Broadcast Authority* [16] at p. 810. See also: HCJ 5016/96 *supra* [9] at p. 42; CrimFH 2316/95 *Ganimat v. State of Israel* [17], at p. 653). From this we learn that we must interpret the provision as to the rate of compensation which is paid for expropriation in a manner that will be consistent with the provisions of the Basic Law: Human Dignity and Liberty. It is true that the validity of the Purchase Ordinance is not up for discussion before us. We are dealing with the meaning of the Ordinance. In giving this meaning, the interpreter must make every interpretive effort, within the limits of the interpretive rules, to reach a result which is consistent with the basic law.

7. What is the interpretive result – as to the payment of reduced compensation in the case of the expropriation of the entire parcel – which arises from the provisions of Basic Law: Human Dignity and Liberty? We must search for the answer to this question in the substance of the right to property on the one hand and the limitations that can be imposed on it on the other. The right to property is complex and entangled. Several reasons are at its foundation. One of the reasons is that property enables liberty (See J. Weisman, *Law of Property -General Part* [25], at p. 16). '... one of the important social roles of the right to property is to defend the individual from the claims of the public and the power of the regime; to preserve in the hands of the individual an area of negative liberty which constitutes a necessary condition of personal autonomy and self development.' H. Dagan 'Property, Social Responsibility and Distributive Justice' *Distributive Justice in Israel* [27] at p. 100). Indeed, 'property enables the individual to be free and to give expression to his character and liberty' (LCA 6339/97 *Roker v. Solomon* [18], at p. 281). In one of the central decisions of the Constitutional Court in Germany it

was decided:

> 'To be a property owner is a basic constitutional right which is to be viewed with a close tie to the protection of personal liberty. In the framework of the general method of constitutional rights, the role of the right to property is to ensure its owners a range of liberty in the economic field and thereby enable him to manage his own life.' 24 *BVerfGE* 367 [21], at p. 389; the case of the Hamburg Flood case; (translation from German to Hebrew by President Barak).

However 'property imposes duties (*verpflichtet*). Its use must serve the public interest' (Section 14(2) of the German Basic Law; compare also to section 42(2) of the Italian Constitution which establishes that private property has a social function (*funzione sociale*)). Dagan rightly noted that '… private property also constitutes a source for the special responsibility of the owners to other individuals and to society as a whole' (Dagan in said article [27] at p. 105). The fulfillment of this special responsibility requires legislation, such as planning and construction laws, laws to protect the environment, and legislation which protects works of art that the public has an interest in. The approach also stems from here that expropriation is not an illegal activity which drags after it compensation for behavior against the law. Expropriation is a lawful act which realizes the social responsibility of property. It carries with it suitable compensation for the property owner (see D. Sorace 'Compensation for Expropriation' [28]). This expropriation and the compensation paid following it of course must meet the requirements of the limitations clause.

8. Does legislation which establishes compensation at the rate of 60 percent of the value of the parcel that was expropriated in its entirety violate the right to property, and does this violation conform with the limitations clause? It appears to me that this legislation violated the right to property. It is not to be seen just as an (internal) realization of the social responsibility of property. The validity of this legislation must therefore fulfill the requirements of the limitations clause. The burden to prove this is imposed on the expropriating authority. The requirements of the limitations clause are not met in our matter. It is sufficient that I note that the legislation is not proportional. It takes advantage of the social responsibility of property beyond the necessary proportionality. If I am correct in this approach, then we have before us an additional interpretive reason which justifies the nullification of the *Faiser* ruling [1]. This ruling goes against the dictates of the Basic Law: Human Dignity and Liberty. An interpretation which is consistent with the basic law justifies the interpretation presented by my colleague Justice Dorner.

**Vice President S. Levin**

I agree with the decision of my colleague Justice Dorner and wish to join with the reasoning of my colleague the President and in particular the reasoning that relates to the legislation of section 3 of the Basic Law: Human Dignity and Liberty. However, I wish to add the following:

The application of the consideration of appreciation in the totality of considerations which justify reduction of the compensation due to expropriation of land raises the question of the compatibility between the obligation imposed on owners of land assets to pay an appreciation duty for the increase in value of the assets and the right of asset owners to compensation for expropriation of their lands. This matter has been discussed in this Court from the point of view of the arrangements which apply in relation to an appreciation duty against the background of the question of the appropriate construction of the provision of section 4(5) of the third supplement in the Planning and Construction Law in LCA 7172/96 *Kiryat Beit Hakerem Ltd. v. Local Construction and Planning* Committee [19]. This matter is pending in further hearing in this Court, and the parties have not related to it. Therefore, there is no place to discuss it in the framework of the appeals before us.

**Justice I. Englard**

I agree with the opinion of my colleague Justice Dorner and the comments of my colleague President Barak.

It was decided as per the decision of Justice Dorner.

21 Sivan 5761
12 June 2001