Civil Further Hearing 1558/94

Petitioner: **Victoria Nafisi**

v.

Respondent: **Simantov Nafisi**

In the Supreme Court

[Aug. 25, 1996]

Before: President A. Barak, Deputy President S. Levin, and Justices E. Goldberg, T. Orr, E. Mazza, M. Cheshin, T. Strasberg-Cohen, Z. E. Tal, D. Dorner

Supreme Court cases cited:

[1] CA 2/77 Z. *Azugi v. M. Azugi*, IsrSC 33 (3) 1

[2] CA 6821/93, LCA 1908/94, LCA 3364/94 *United Mizrachi Bank Ltd. v. Migdal Cooperative Village et al.*, IsrSC 49 (4) 221 [English: http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village]

[3] CA 602/82, CA 628/82 *Estate of Omar Khalil Abdallah Abu-Nia et al. v. Mandelbaum et al.* and cross-appeal, IsrSC 37 (3) 281

[4] HCJ 243/88, HJCApp 168/88, HJCApp 170/88 *Consuelos v. Tourjeman*, IsrSC 45 (2) 626

[5] LCA 3920/90 – unpublished

[6] CA 65/88 *Aderet Shomron Ltd. v. Hollingsworth GmbH*, IsrSC 45 (2) 600

[7] CA 778/77 *T. Farkash v. M. Farkash*, IsrSC 33 (2) 469

[8] CA 126/80 *Guardian Eastern Insurance Co. Ltd. v. Rossman & Co. Ltd*. and cross appeal, IsrSC 36 (3) 296

[9] CA 1915/91, 2084/91, 3208/91 *A. Yaacobi v. N. Yaacobi et al.*; *E. Yaacobi v. A. Yaacobi*; *Moshe Knobler v. Mazal Knobler*, IsrSC 49 (3) 529

[10] CA 755/85 *Estate of the Late Salem Shaman v. Estate of the Late Saada Shaman et al.*, IsrSC 42 (4) 103

[11] CA 419/84 *S. Tuchmintz v. L. Carmel (Tuchmintz)*, IsrSC 39 (1) 287

[12] CA 45/90 *S. Abada v. T. Abada*, IsrSC 48 (2) 77

[13] CA 490/77 *D. Natzia v. A. Natzia*, IsrSC 32 (2) 621

[14] CA 753/82 *A v. B* and cross appeal, IsrSC 37 (4) 626

[15] CA 486/87 *M. Avidor v. L. Avidor, minor et al.*, IsrSC 42 (3) 499

[16] CA 370/87 *Estate of Tinka Esther Madjar v. Estate of Victor Madjar et al.*, IsrSC 44 (1) 99

[17] CA 291/85 *A. Awalid v. Z. Awalid*, IsrSC (1) 215

[18] HCJ 1000/92 *H. Bavli v. Great Rabbinical Court et al.*, IsrSC 48 (2) 221

[19] CA 767/77 *Ben Haim v. Cohen*, IsrSC 34 (1) 564

[20] CA 265/84 *Mizrachi v. State of Israel*, IsrSC 40 (3) 163

[21] CA 598/85 *Mastura Kahana v. Meir Kahana et al.*, IsrSC 44 (3) 473

[22] CA 587/85 *Stark v. Birenberg* and cross appeal, IsrSC 41 (3) 227

[23] CA 260/89 *Levi v. Hepner*, IsrSC 46 (4) 391

[24] CA 657/76 *The Authority under the Victims of Nazi Persecution Law, 5717 – 1957 v. Hisdai*, IsrSC 32 (1) 778

[25] HCJ 282/88 *Awad v. Prime Minister & Minister of the Interior et al.*, IsrSC 42 (4) 424

[26] CA 524/88, 525/88 *"Pri Ha'emek" – Cooperative Agricultural Assoc. & 30 others v. Sedeh Yaakov – Moshav Ovdim of the Po'el Hamizrachi for Cooperative Agricultural Settlement et al.*, IsrSC 45 (4) 529

[27] HCJ 98/69 *Bergman v. Minister of Finance*, IsrSC 23 (1) 693 [English trans: http://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance]

[28] CA 253/65 *Bricker v. Bricker* and cross appeal, IsrSC 20 (1) 589

[29] CA 595/69 *M. Afta v. A. Afta et al.*, IsrSC 25 (1) 561

[30] CA 718/89 *Haifa Quarries Ltd. v. Chen-Ron Ltd.* and cross appeal, IsrSC 46 (3) 305

[31] CA 4638/93 *State of Israel v. Apropim Housing and Promotions (1991) Ltd.*, IsrSC 49 (2) 265 [English trans: http://versa.cardozo.yu.edu/opinions/state-israel-v-apropim]

[32] HCJ 1601-1604/90, HCJApp 1890/90 *Shalit v. Peres et al.*, IsrSC 44 (3) 353 [English trans : http://versa.cardozo.yu.edu/opinions/shalit-v-peres]

[33] FH 29/84, FH 30/84 *Kossoy v. Bank Y.L. Feuchtwanger Ltd. et al.* ; *Filco Finance and Investment Co. v. Bank Y.L. Feuchtwanger Ltd. et al.*, IsrSC 38 (4) 505

[34] HCJ 1635/90 *Schereschewsky v. Prime Minister*, IsrSC 45 (1) 749

[35] CA 630/79 *Z.B. Lieberman v. E. (Mendel David) Lieberman*, IsrSC 35 (4) 359

[36] CA 6926/93 *Israel Shipyards Ltd. V. Israel Electric Co. Ltd. et al.*, IsrSC 48 (3) 749

[37] CA 806/93 *Y. Hadari v. S. Hadari (Darchi)*, IsrSC 48 (3) 685

[38] CA 300/64 *M. Berger v. Estate Tax Director*, IsrSC 19 (2) 240

[39] CA 135/68 *T. Bareli et al. v. Estate Tax Director*, *Jerusalem*, IsrSC 23 (1) 393

[40] CA 3095/91*Emanuel Lidor v. Director for the Land Appreciation Tax, 5723-1963*, IsrSC 47 (5) 816

[41] CA 3666/90, CA 4012/90 *Zukim Hotal Ltd. v. Netanya Municipality, Netanya Municipality v. Tzukim Hotal Ltd.*, IsrSC 46 (4) 45

[42] HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, IsrSC 17 225

[43] CrimA 4912/91, 5434/91, 5513/91 *Talmi et al. V. State of Israel*, IsrSC 48 (1) 581

English cases cited:

[44] *In re Egerton's Will Trusts; Lloyds Bank Ltd. V. Egerton* [1956] Ch. 593

[45] *Buchanan v, Rucker* (1808) 103 E.R. 546 (K.B.)

[46] *In re Annesley Davidson v. Annesley* [1926] Ch. 692

[47] *United Australia Ltd. V. Barclays Bank Ltd.* [1941] A.C. 1 (P.C.)

Further Hearing in a matter decided by a three-member panel of the Supreme Court (Justices D. Levin, E. Mazza, Z.E. Tal) on March 3, 1994, in CA 2199/91. Petition granted by majority opinion, Justices E. Mazza and Z.E. Tal dissenting.

T. Pardo for the Appellant

M. Cohen for the Respondent

Judgment

Justice E. Goldberg:

1. A judgment delivered in CA 2199/91[1] unanimously granted the appeal and reversed the judgment of the trial court that declared, on the basis of the community property presumption, that Victoria Nafisi (hereinafter: the Petitioner) and Simantov Nafisi (hereinafter: the Respondent) jointly own a store in Tel Aviv registered in his name, and a sum of $320,000 deposited in two bank accounts opened in his name.

2. The relevant facts in this matter are as follows:

In 1944, the Petitioner and the Respondent married in Iran, which was their domicile. In 1979, at the time of Khomeini's seizing power, the Respondent visited Israel. In the course of his visit, he purchased a store in Tel Aviv, which was registered in his name (hereinafter: the store). In 1983, the couple immigrated to Israel with their five children. They lived in an apartment in Holon, which was registered in both names. Soon after their immigration to Israel, the Respondent opened two bank accounts in his name – one in the Barclay's Discount Bank and one in Bank HaPoalim – and deposited money that he had brought from Iran, in the amount of $320,000.

In 1987, a rift developed in the marriage, following which the Petitioner sought a declaratory judgment stating that the store and the money deposited in the bank were jointly owned. We would further note that despite the souring of the relationship between the spouses, they did not dissolve the marriage, and they continue to live under the same roof.

3. The primary provision addressed by the appeal was sec. 15 of the Spouses (Property Relations) Law, 5733-1973 (hereinafter: the Law), which states:

> Property relations between spouses shall be governed by the law of their domicile at the time of the solemnization of the marriage, provided that they may by agreement determine and vary such relations in accordance with the law of their domicile at the time of making the agreement.

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[1] *S. Nafisi v. V. Nafisi*, IsrSC 48 (2) 89.

In the appeal that is the subject of this further hearing, my colleague Justice Mazza held, on the basis of the majority opinion in CA 2/77 *Z. Azugi v. M. Azugi* (hereinafter: the *Azugi* case [1]), that nothing in principle prevents the application of sec. 15 of the Law to spouses who married in a foreign country prior to the enactment of the Law, as long as there is no infringement of vested rights. In the case before us:

> While the spouses…indeed married prior to the Law's entry into force, they immigrated to Israel, and the properties in dispute were acquired in Israel after the Law went into force…Under these circumstances, they do not hold vested rights that would be subject to the choice-of-law that preceded sec. 15…and in any case, the community property presumption cannot apply to their relationship (*ibid*., p. 96).

Justice Mazza than proceeded to consider whether the Respondent had a clam to community property under sec. 15 of the Law. The possibility of a community-property claim by virtue of an agreement as stated at the end of sec. 15, was dismissed, inasmuch as:

> The Respondent did not premise her suit on an agreement as defined in the final clause of sec. 15 of the Law. Had she done so, she would have had to explain the substance of the agreement, the manner of its drafting, and the place it was formed. She would also have had to show that the agreement (in terms of its content and the manner of its drafting) were "in accordance with the law of their domicile at the time of making the agreement". I say this only to rule out the presumption (which, in the absence of such a claim, is only theoretical) that even an implied agreement may, under the circumstances, be deemed an agreement as defined at the end of sec. 15. To my mind, I am of the opinion that spouses (like the Appellant and the Respondent) who married abroad and immigrated after the Law's entry into force, who ask to apply the Israeli community property presumption to their financial relations, cannot suffice with less than the forming of a property agreement as defined by the Law, as only such an agreement would be "in accordance with the law of their domicile at the time of making the agreement".

> …
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> As stated, it is my opinion that an essential condition for the validity of an agreement as defined in the section – however it may have been drafted – is that it be in accordance with the law of the domicile of the spouses at the time of the making of the agreement. As for an agreement made in Israel, the fulfilment of this condition is derived from the question whether the agreement was made prior to the Law's entry into force or thereafter (*ibid*., pp. 96-97).

Similarly, Justice Mazza rejected the possibility of viewing the assets the that are the subject of the proceedings as community property by virtue of Iranian law, which was the law of the domicile of the spouses at the time of the solemnization of their marriage, as stated at the beginning of sec. 15 of the Law. This, as the Petitioner did not prove that Iranian law granted her community-property rights in property acquired by the Respondent and registered in his name. Justice Mazza further held that the legal vacuum created by not meeting the evidentiary burden as to Iranian law cannot be filled by the presumption of identity of foreign law[2] for two reasons:

> The first reason concerns its severance from the legal source of the presumption: after all, the presumption is but one of the rules of English private international law. In the present matter, which is governed (in sec. 15 of the Law) by a special choice-of-law provision, the said rules do not apply, and the presumption of identity, as one of those rules, does not apply.
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> However, that reason is not sufficient. At least, so it would appear according to Prof. Shava in his aforementioned book (M. SHAVA, PERSONAL LAW IN ISRAEL (Massada, 3rd ed., 5752 – E.G. (Hebrew)) p. 493. After summarizing the rules and conditions established by the case law for the application of the presumption of identity, the learned author notes the difficulty in relying upon the said presumption in matters of inheritance in view of the provision regarding the independence of the law under sec. 150 of the Succession

[2] Ed: a.k.a. the doctrine of processual presumption and the doctrine of presumed identity.

> Law, 5725-1965. But later, he further states "that this obstacle can be overcome if we say that the local court shall apply the provisions of domestic law (in our case, the provisions of the Succession Law) in a case in which the foreign law is not proved, not by virtue of the "presumption" derived from English law by means of art. 46 of the Palestine Order-in-Council, but rather by a creation of the domestic case law, according to which – in a case in which the foreign law is not proved, and upon the fulfilment of the above cumulative conditions – the domestic law should be applied as written". It appears to me (and this is an additional reason for my approach) that in spousal property relations subject to sec. 15 of the Law, even direct recourse to domestic law is not possible, inasmuch as sec. 15, itself (as part of the domestic law), directs us to the foreign law. In so doing, the legislature expressed its view that sharing (or non-sharing) of spousal property does not create (according to the well-known distinction of Prof. Levontin) "floating" rights in regard to which the presumption of the existence of an identical legal arrangement in all common law systems applies, but rather rights that by their very definition are anchored in the particular law in which they were created (for a detailed discussion of the distinction between "floating" rights and "anchored" rights in regard to recourse to the presumption of identity, see SHAVA, *ibid*., pp. 456-466). Under these circumstances, recourse cannot be made to the provisions of domestic law, inasmuch as such recourse to its provisions would be contrary to the express provisions of sec. 15 (*ibid*., pp. 98-99).

All the above led to the conclusion that the Respondent did not meet the burden of proving that she had a community property right, although Justice Mazza went on to express his dissatisfaction with the conclusion he had reached, stating:

> The result I have reached is required by law. However, it is not a desirable result. I, too, agree that in accordance with the criteria of Israeli law, were it not for the express instruction of sec. 15 of the Law, what was proven in regard to the "tenure and nature" of the Appellant's and Respondent's life

> together (the *Azugi* case, p. 30) would suffice for the application of the community property rule. The result is undesirable due to the difference derived by law in regard to the substance of the norm that will decide the existence of community property in regard to couples married in Israel, as opposed to couples who immigrated to Israel after marriage. The accepted, prevailing norm in Israel is that of community property. This norm applies to most couples married in Israel. In the absence of evidence to the contrary, it applies to couples married before the enactment of the Law by virtue of the community property presumption established by the case law. And in the absence of a property agreement, it applies to couples married after the enactment of the Law by the statutory arrangement for resource balancing. But this norm does not apply to spouses who married abroad, even if they immigrated to Israel immediately after their marriage, tied their future to it, and purchased all of their common property there (*ibid*., p. 100).

Justices D. Levin and Tal concurred, with the latter noting:

> …the question whether the end of sec. 15 of the Spouses (Property Relations) Law specifically requires an express agreement, or whether an "implied agreement" would suffice, can be left for the appropriate time, inasmuch as no argument in regard to an "implied agreement was raised in the present matter.

4. I share the view that nothing prevents applying the provisions of sec. 15 of the Law to spouses who married before its enactment, as long as their vested rights are not infringed. A choice-of-law principle is categorized as a procedural rule, and this character permits its application to proceedings occurring after its enactment, even if the event itself occurred earlier, as long as vested rights are not infringed as a result, as noted. In the present case, our starting point is that the assets were acquired after the enactment of the Law, and there is no fear of infringing vested rights. Thus, the Petitioner's community property right in regard to the assets will be examined in light of the legal system indicated by the choice-of-law principle established in sec. 15 of the Law.

A Claim of community property by virtue of the first clause of section 15 of the Law

5. The initial clause of sec. 15 of the Law establishes that, as a rule, the law of the domicile of the spouses at the time of the solemnization of the marriage will apply to their property relations (in the present case, Iranian law). The Petitioner did not prove the content of Iranian law. Does that necessarily lead to the denial of her suit (to the extent that it is premised upon that initial clause of the section), or can she enjoy the presumption of identity? As we know, foreign law is perceived as a fact that must be proved, and a failure to meet the burden of proof works against the party bearing that burden. Thus, the first question regards the circumstances in which it is appropriate to place the burden of proving the foreign law upon a party that seeks to rely upon it, and under what circumstances is it proper to place that burden upon the opposing party. On the proper allocation of the burden, it has been said:

> Several considerations apply to the division of this burden between the parties to a case. One consideration is that the existence of a fact or of a situation is more reasonable. In such a case, the tendency is to impose upon the person claiming the opposite of such a situation the burden of showing that the situation is different in the case under discussion. An additional consideration springs from the recognition that in conditions of uncertainty, the burden of proof will be imposed in a manner that will narrow the risk that the decision will be erroneous. Thus for example … in civil proceedings the burden of proof is placed on the person who is making a claim against another, as he is arguing for a change in the status quo… (CA 6821/93, LCA 1908/94, LCA 3363/94 *United Mizrahi Bank Ltd., v. Migdal Cooperative Village et al.*, [2] pp. 576-577 [English trans: http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village, para. 8 of the opinion of E. Goldberg, J.].

6. In the present matter, we should ascertain under what circumstances – if any – the presumption that the provisions of the foreign law are identical to the provisions of domestic law is more likely. For if it is, then the presumption of identity arises, which transfers the burden of proving the foreign law from the party seeking to rely upon it to the shoulders of the opposing party.

If the party seeking to rely upon the foreign law shows a "solid evidentiary basis" for the identity of the laws, for example, that the foreign law and the domestic law derive from the same system of laws, then it is possible to apply the presumption of identity (see: CA 602/82, 628/82 *Estate of Omar Khalil Abdallah Abu-Nia v. Mandelbaum et al*. and cross appeal [3] p. 288). However, it is possible that a petitioner who is unable to rely on the foreign law by establishing a solid basis in regard to the identity of the foreign law and the domestic law, may still enjoy the presumption of identity if he can prove that "the elementary concepts of justice in regard to the subject matter at hand are uniform and acknowledged throughout the world" (SHAVA, *ibid*., p. 487), as this uniformity serves to show that the provisions of the foreign law are consistent with the accepted arrangement in most states – including the state in which the dispute is adjudicated – and are not at variance with it. We should clarify by explaining that under such circumstances, applying the *lex fori* by virtue of the presumption of identity does not express recognition of the special status of the *lex fori*, but rather derives from the presumption that the provisions of the *lex fori* reflect a "universal principle accepted in all civilized countries" (HCJ 243/88 *Consuelos v. Tourjeman* [4] IsrSC 45 (2) 626, 635), including the country whose law is indicated by the choice-of-law rule. We would further note that the burden of proving this preliminary assumption grounding the presumption of identity – i.e., that we are concerned with a general principle of law – falls to the party seeking to rely upon the provisions of the foreign law.

I am not unaware of the approach that urges the general application of the presumption of identity as long as the content of the foreign law is not proven (see: LCA 3920/90 [5]; CA 65/88 *Aderet Shomron Ltd. v. Hollingsworth GmbH* [6] 606; CA 778/77 *T. Farkash v. M. Farkash* [7] 473; CA 126/80 *Guardian Eastern Insurance Co. Ltd. v. Rossman & Co. Ltd*. and cross appeal [8] 298). However, it is doubtful whether this approach has gained acceptance in the principles of private international law, which do not support a preference for domestic law, nor is it supported by the law of evidence. After all, if the presumption of identity is not more probable, what is the theoretical justification for shifting the burden of proof!? In his opinion that is the subject of this hearing, my colleague Justice Mazza points out our separation from the legal source of the presumption of identity. However, I am of the opinion that Foundations of Law, 5740-1980, does not present an obstacle before a party seeking to rely upon the presumption of identity in the sense we have discussed. Not only does sec. 2(b) of Foundations of Law instruct us that the repeal of art. 46 of the Palestine Order-in-Council, 1922, "shall not derogate from the law which was accepted

in Israel before the coming into force of this Law", but also – and this is the main point – the law indeed sought to unfasten the tether that bound the Israeli legal system to the Common Law, but not to prohibit adopting appropriate legal arrangements from the Common Law.

Similarly, I do not think that the provision of sec. 15 of the Law that establishes the choice of law in property relations presents an obstacle to implementing the presumption of identity. To my mind, it is doubtful that the special provision in regard to the choice-of-law rules severs the Israeli law of property relations from the principles of private international law in general, inasmuch as such a separation would create a large vacuum in the domestic law. Even were we to understand sec. 15 of the Law as creating such a vacuum, nothing prevents us from filling it by the theoretical principles for the proper attribution of legal burdens of proof – which we addressed above – by creating a presumption of identity.

7. What we have said thus far brings us to the second reason presented by Justice Mazza, according to which recourse to the provisions of domestic law contradicts the express provision of sec. 15 of the Law, which directs us to the foreign law. That view is justified, in my opinion, to the extent that is directed against the comprehensive adoption of the presumption of identity. However it is does not properly apply to implementing the presumption of identity when there is a basis for assuming that the provisions of the domestic law are identical to the provisions of the foreign law, inasmuch as we have already shown that the application of the provisions of the domestic law under such circumstances does not derive from recognizing the special status of domestic law, but rather results from the view, supported by the evidence, that its application is equivalent to applying the provisions of the foreign law.

8. Having established that nothing in principle prevents employing the presumption of identity in a case in which the assumption that the laws are identical is more probable, we must now examine whether there are grounds for assuming that the provisions of Iranian law are similar to the provisions of domestic law in the field of property relations. The legal provisions that establish the character of the property arrangements between spouses reflect a society's conception of distributive justice, and cultural conceptions regarding equality between the sexes. Therefore, there is no reason to assume that these represent a general legal principle. In CA 1915/91, 2084/91, 3208/91 *A. Yaacobi v. N. Yaacobi*; E. *Yaacobi v. A. Yaacobi*; *Moshe Knobler v. Mazal Knobler* (hereinafter: the *Yaacobi-Knobler* cases) [9] [1995] IsrSC 49(3) 529, the opinion was expressed

(under the heading "Other Legal Systems") that most western countries, among them Switzerland, West Germany, Scandinavia, the Common Law countries, including England, Scotland, Ireland, Canada, Australia, and forty-two states of the United States, as well as the District of Columbia, all chose the method of separation of assets and deferred distribution, in which the division of the couple's total property is deferred until the dissolution of the marriage, while some apply variations by which the division is not automatically equal, but rather the court has discretion to divide property in some other proportion, and applying special rules for the residence … such that in choosing a system of deferred community property, the Israeli legislature finds itself in the good company of the overwhelming majority of western countries" (*ibid*., 585-586).

In view of the above, it may be that no difficulty arises in regard to the identity of laws as far as the aforementioned western states are concerned. However, it is clear that the presumption cannot be applied when the choice-of-law rule points to the laws of a non-western state. Having rejected the basis for assuming that the social and cultural climate of this state is identical to that of western states, the presumption as to the identity of Iranian and Israeli law in regard to property relations lacks support. And once the assumption of similarity between Iranian and Israeli property-relations law is undermined, there is no justification for deviating from the rule that the burden of proving the foreign law falls upon the party that seeks to rely on it.

9. I am aware that in CA 755/85 *Estate of the Late Salem Shaman v. Estate of the Late Saada Shaman* (hereinafter: the *Shaman* case) [10] 107, the presumption of identity was applied by virtue of a presumption of identity between Israeli and Yemenite law, even though Yemen is not counted among the western states. This is what was stated there:

> Having been held that the foreign law was not proven, the Israeli law will apply by virtue of the presumption of identity. According to Israeli law, as stated, the community property presumption will also apply to the property acquired in Yemen.

Justice Mazza was of the opinion that the present case should be distinguished from the *Shaman* case, as:

> That case expressly held that sec. 15 cannot apply to the community-property dispute in regard to property of the late spouses. Under those

> circumstances, the burden of proof of the foreign law was upon the party that denied the presumption of community property and argued that there were vested rights on the basis of the foreign law. Indeed, in the present matter – as in the matter of *Shaman* – positive evidence was required for the content of the foreign law, but the situation was reversed: it was not the Appellant who had to prove that Iranian law (as it was at the time of the couple's marriage) established a different arrangement than the presumption of community property in Israeli law, but rather the Respondent (if she wished to base her right on Iranian law) had to prove that Iranian law granted her a right of community property (*ibid*., p. 98).

I do not believe that the "reversal" can serve to distinguish the *Shaman* case and the present case. The reversal of the burdens of proof is a direct result of the application of the community property presumption by means of the presumption of identity. In other words, the allocation of the burdens cannot serve as a criterion for the proper application of the presumption of identity, inasmuch as the allocation of burdens is a consequence of the application of the presumption. I am, therefore, of the opinion that it is possible to reconcile the willingness to apply the presumption of the identity of Yemenite and Israeli law in the property relations in the *Shaman* case, even though an adequate evidentiary basis was not laid for the identity of Yemenite law and domestic law, as the adoption of the approach that argues for universal application of the presumption of identity regarding which I expressed my doubts.

The result of all of the above is that the Petitioner cannot rely upon the presumption of identity, and her action for community property must be denied to the extent that it is based upon the initial clause of sec. 15.

A cause for community property on the basis of the end of sec. 15 of the Law – The validity of the form of the agreement

10. Having found that the Petitioner did not succeed in proving a community-property right in the property registered in the Respondent's name under Iranian law (the initial clause of sec. 15 of the Law), we will now consider whether she can claim community property by virtue of an

agreement made in accordance with the law of their domicile at the time of its making (as stated at the end of sec. 15 of the Law). On the factual assumption, on which I take no stand at this point, that a community property agreement was made at the time of the couple's immigration to Israel, there would be no doubt that their domicile would be Israel, and therefore the question of the validity of the agreement – including the validity of its form – would be decided in accordance with Israeli law.

Section 23 of the Contracts (General Part) Law, 5733-1973, states: "A contract may be made orally, in writing or in some other form, unless a particular form is a condition of validity by virtue of law … ". Section 23 thus establishes the principle of freedom as to form. However, that principle retreats before special enactments that establish a substantive requirement of form.

Section 1 of the Law states:

> An agreement between spouses regulating their property relations between them (hereinafter referred to as a "property agreement") and any variation of such an agreement shall be in writing.

Section 2 of the Law limits the freedom of contract of spouses by making the validity of a property agreement contingent upon confirmation by the institutions listed in the section. Section 3(a) of the law states:

> Where the spouses have not made a property agreement … they shall be regarded as having agreed to a resources-balancing arrangement in accordance with this chapter, and this arrangement shall be regarded as having been agreed upon by a valid property arrangement conforming to the provisions of section 2.

The writing requirement established under sec. 1 of the Law has been construed to be a substantive requirement (see: CA 419/84 *S. Tuchmintz v. L. Carmel (Tuchmintz)* [11]).

Therefore, there can be no doubt that the validity of an agreement that arranges the property relations between spouses who were Israeli domiciles at the time of their marriage, and who married after the enactment of the Law, is contingent upon the fulfilment of the provisions of the first chapter. Thus, the question we should focus upon is whether the validity of an agreement

arranging the property relations between such spouses who married prior to the enactment of the Law is also contingent upon the provisions of Chapter One.

Section 14 of the Law states that the provisions of Chapter Two shall not apply to spouses who married before the Law's entry into force. Therefore, facially, it would seem that the provisions of Chapter One should apply to them. However, it would be unreasonable to make the validity of the form of an existing contract – i.e., one made before the enactment of the Law – contingent upon meeting the conditions of Chapter One. That is so because it would retroactively invalidate the community property presumption, while the possibility of filling the void by a resource balancing arrangement under sec. 3 would be prevented by the provision of sec. 14 of the Law. The legislature should not be understood as trying to correct the distortion involved in retroactive application of sec. 3 by the even more egregious distortion that would result from the community property presumption no longer applying under sec. 1 of the Law, while the balancing arrangement would not apply due to sec. 14 of the Law. In other words, there is a close relationship between the provision of sec. 3 and the provisions of Chapter One. Not retroactively applying sec. 3, which addresses the consequences of not fulfilling the provisions of Chapter One, significantly supports the conclusion that the provisions of Chapter One do not apply retroactively. In this spirit, this Court indeed held that the community property presumption, which was developed by the case law, would continue to apply to spouses who married before the enactment of the Law, and it does not require a written instrument or the confirmation of any authorized body, as would be required under Chapter One (and see in this regard: the *Azugi* case [1]; CA 45/90 *S. Abada v. T. Abada* [12]).

11. The above refers to implied agreements made before the enactment of the Law. The Law preserves the property system that existed prior to its enactment, and does not retroactively annul agreements made before it was enacted. However, is an agreement made *after* its enactment, by spouses married *before* its enactment, subject to the provisions of Chapter One? In this matter, this Court held:

> Section 14 of the Law establishes that sec. 3 of the Law, as well as the provisions of Chapter Two of the Law, shall not apply to spouses who married prior to the Law's entry into force. The significance of this provision is that sec. 2, which is in the first chapter of the Law, applies even

> to spouses who married prior to the Law's entry into force. Therefore, a property agreement between such spouses, made after the Law's entry into force, is subject to the provisions of the first chapter of the Law, including sec. 2 (CA 490/77 *D. Natzia v. A. Natzia* [13] 623-624).

Also see: CA 419/84 *S. Tuchmintz v. L. Carmel (Tuchmintz)*, *supra*.

This conclusion is supported by examining the explanatory notes to the bill, which explain that the function of the transitional provision was that "the property relations between spouses who were wed before the entry into force of the new law would not change due to the enactment of the law, and the resource balancing arrangement will not apply to them unless they agreed to it in a marrital agreement made after the new law's entry into force, in accordance with sec. 2(c) [i.e., sec. 2 of the Law – E.G.]" (from the Spouses (Property Relations) Bill, 5729-1969, p. 337).

To summarize: the provision of sec. 14 of the Law subjugates an agreement arranging the property relations of spouses made *after* the enactment of the Law to the provisions of Chapter One. This is the case regardless of whether the spouses wed before the enactment of the Law, or whether they wed thereafter. In other words, the determining date for the application of the provisions of Chapter One to spouses who were Israeli domiciles at the time of the solemnization of their marriage is the date of the agreement, and not the date of the wedding.

12. Having established that every agreement arranging property relations made between local spouses subsequent to the enactment of the Law must meet the requirements of Chapter One, we will now consider whether there are grounds for negating this requirement for a property agreement made after the enactment of the Law by spouses who were foreign domiciles at the time of their marriage, regardless of whether they married before or after its enactment.

The traditional conception of the nature of choice-of-law rules is:

> Actually, the traditional rules do not choose between specific laws, but rather between legal systems as such. They only point us to the right address, i.e., to the legal system whose laws will decide the fate of the dispute. This referral, at least in theory, is made without consideration of the content of the specific law that will apply, and without regard for the substance of the concrete result of the litigation. The traditional school of

thought conceives choice of law as a purely mechanical process (A. Shapira, *Comments on the Nature of Choice-of-Law Rules in Private International Law*, 10 IYUNEI MISHPAT 275, 282 (5744-45) (Hebrew)).

However, even if there is a different view, the sole purpose of the choice-of-law rule in the matter before us is to point us clearly to a specific legal system, without purporting to change the scope of application of the legal provisions to which it refers. Thus, the question of the scope of incidence of the provisions of Chapter One of the Law will be answered in the course of ascertaining the purpose of those provisions in every case in which the agreement is made by Israeli domiciled spouses.

13. Is the application of the provisions of Chapter One to spouses who were foreign domiciles at the time of the solemnization of their marriage consistent with the purpose of restricting the freedom as to form and the freedom of contract of spouses who make an agreement arranging their property relations when they are Israeli domiciles? Our civil legislation comprises a number of provisions that restrict the principle of freedom of form. The form restriction is intended to ensure the resolve of the contracting parties when a fear of lack of resolve is inherent to the nature of the agreement (sec. 5(a) of the Gift Law, 5728-1968), or where the scope of the agreement and its consequences require that it be made without a looming doubt as to the resolve of the parties. In such circumstances, writing serves to guarantee the seriousness of the parties (sec. 8 of the Land Law, 5729-1969). The Spouses (Property Relations) Law goes even further, and in addition to the limitation on form, it also restricts the spouses' freedom of contract by requiring that the agreement be confirmed by a designated authority, as stated in sec. 2 of the Law.

The *scope* of a property agreement between spouses is very broad when what is concerned is the entirety of the assets accrued in the course of a marriage as a result of their joint efforts. However, it would appear that this, alone, would not suffice to justify the restrictions upon the form and freedom of contract. After all, the Law does not require that spouses who married prior to its enactment, and who are caught in the net of the community property presumption, put the implied community property agreement in writing. Additionally, the Law attributes *agreement* to its resource balancing arrangement to spouses who married after its enactment, as stated in sec. 3. The explanatory notes to the Law state in regard to this provision, which constitutes a statutory agreement (or if one prefers, a consensual fiction), that "the idea that spouses who did not make a

prenuptial agreement agree to the resource balancing arrangement brings the law closer to the Jewish law view that permits spouses to arrange their property relations" (Spouses (Property Relations) Bill, p. 334). It is further explained, at p. 335, that the provisions of the arrangement "are intended to correspond to the likely intent of most spouses, and to normal cases of harmonious, long-term married life". As we see, not only is an agreement on community property by means of balancing not required, despite its scope, to meet the provisions of Chapter One, but the law assumes the existence of such agreement as so natural that the "omission" of the spouses is viewed as agreement to share rights. They are required to draft an agreement, as defined in sec. 1 of the Law, only if they wish to change that agreement (on dispositive law as a means for saving the costs of contracting, see: U. Procaccia, *A Contract? A Thing? A Law! The Constructive Contribution of Economics to Blurring Fundamental Legal Concepts*, 18 MISHPATIM 395, 401-406 (Hebrew)).

As we see, the scope of the agreement itself does not justify imposing a general restriction upon the freedom of form and freedom of contract. Additionally, the justification for these restrictions should be derived from the nature and scope of the agreement, with emphasis on the former. Only when the agreement establishes an arrangement that deviates from the principle of community property through balancing, as expressed in the community property presumption and the resource balancing arrangement established in the Law, is there a fear of the oppression of the rights of one of the spouses that would, by means of the agreement, reduce his rights in property acquired by joint effort. It is the oppressive nature of such an agreement that raises the fear of a defect in the desire of the oppressed party that justifies "evidence" of resolve. In that spirit, Prof. Rosen-Zvi wrote:

> The writing requirement, the confirmation and authorization, are not merely of a formal and form-related nature. These are substantive requirements that are vital to the validity of such an agreement, such that a property agreement must be in writing and must be confirmed by a civil or religious court … these requirements derive from the special relationship between spouses, which, prima facie, create a fear of undue influence, and from the significant influence of a property agreement upon a broad spectrum of family relations for most of the Israeli population (A. ROSEN-ZVI, THE LAW OF MATRIMONIAL PROPERTY (Microsure, 1982) 302 (Hebrew)).

A proper social policy required that the doubt as to the spouses' real desire be removed before the law would recognize the power of an oppressive agreement to institute changes in the complex of the spouses' rights. Limiting the form of the agreement – and primarily, limiting freedom of contract – acts to guarantee that the spouse whose rights are prima facie oppressed, understood the nature of the agreement and its consequences. Inasmuch as the justification for limiting the freedom of form and contract is derived from the combination of the nature and scope of the agreement, there is no theoretical justification for imposing those restrictions when what is concerned is an *a priori* agreement to community property by means of balancing.

Deputy President Elon addressed this, *obiter dicta*, in stating:

> This careful, strict approach to drawing conclusions on a spouse's waiver of one of its property rights in favor of the other spouse can also be derived, by analogy, from the legislature's policy in the Spousal (Property Relations) Law, 5733-1973 … As we know, the Law establishes a resource balancing arrangement between spouses, the main thrust of which is that each of the spouses is entitled to half the value of the spouses' property (as detailed in the Law). An agreement between spouses that is intended to *change* this sharing established by the Law, must be set out in writing and confirmed by a civil or religious court, after the meaning of the agreement between them and its effects have been explained to the spouses (secs. 1 & 2 of the Law) (CA 753/82 *A v. B* and cross appeal [14], pp. 633-634).

In a similar spirit, a later judgment stated:

> The uniqueness of a "property agreement" as compared to a regular agreement between spouses is that the existence of a "property agreement" between the spouses overrides the application of a resource balancing arrangement under Chapter Two of the Spouses (Property Relations) Law (CA 486/87 *M. Avidor v. L. Avidor, minor et al.* [15] p. 506).

In conclusion, the content and nature of the agreement are closely tied to the scope of the provisions of the first chapter, such that the application of the provisions restricting the freedom

of form and contract should be limited to cases in which the agreement is intended to deviate from the system of community property by means of balancing.

14. When the spouses were foreign domiciles at the time of their wedding, the law of their domicile at the time of the solemnization of their marriage applies, rather than the Israeli community property arrangement, in accordance with the initial clause of sec. 15.

Similarly, the statutory agreement in regard to the application of resource balancing, under sec. 3 of the Law, does not constitute an agreement in accordance with sec. 15 of the Law, as the freedom to make an agreement, granted the spouses under sec. 15 of the Law, is inconsistent with the nature of the statutory agreement. President Shamgar addressed this in the *Yaacobi and Knobler* cases [9]:

> While the legislature attributes to the parties, *ex lege*, agreement to resource balancing when they have not made an arrangement, it is difficult to accept that under such circumstances of automatic reliance on statutory provisions, as opposed to simply making an agreement, we are concerned with full, real consent in the contractual sense. The resolve and understanding of the nature of the matter by the parties to whom the initial clause of sec. 3 applies, cannot be compared to those of regular parties to an actual contract, and they certainly should not be compared to those spouses who choose to deviate from the resource balancing arrangement and make a "property agreement" that in addition to the regular contractual requirements, comprises a substantive writing requirement (*ibid.*, 558).

The resource balancing arrangement does not apply to spouses who were foreign domiciles at the time of their marriage. Therefore, when an agreement is made between spouses who were foreign domiciles at the time of the solemnization of their marriage, and who became Israeli domiciles at the time of the making of the agreement, the agreement assumes a different character that changes it from an instrument that removes the spouses from the community property arrangement through balancing to an instrument that creates that arrangement. That change in the purpose and nature of the agreement removes the suspicion as to the resolve of the spouses. Therefore, the justification for restricting the freedom of form and contract is undermined.

In summary, the purpose for which limitations were placed upon the form of contracts and the freedom of contract does not justify extending those limitations to an agreement between spouses who married while they were foreign domiciles in order to create community property by means of balancing. The proper policy therefore supports limiting the scope of incidence of the provisions of Chapter One, such that they not apply to such spouses.

15. The provisions of Chapter One do not support a distinction between an agreement creating a community property regime and one that stipulates thereon such that they not so apply to the spouses.

Justice Mazza relied upon Justice Elon in the *Azugi* case [1], pp. 14-15, from which we learn:

> …in regard to spouses who married abroad and immigrated to Israel before the first of January 1974, that is, prior to the entry into force of the Spouses (Property Relations) Law, 5733-1973, if and when the factual circumstances indicate that the spouses intended, by implied agreement, to establish that their property relations be in accordance with the community property rules that apply in Israel in the manner that they apply to all spouses who are Israeli domiciles, then that community property agreement, although only implied, is valid, inasmuch as it was made in accordance with the law of their domicile, which was, upon their immigration to Israel, the community property regime.

This statement emphasized the possibility of creating an implied community property agreement between spouses who immigrated to Israel before the enactment of the Law. However, it should not be understood as saying that spouses who immigrate to Israel after the enactment of the Law must make a property agreement as defined under sec. 1 of the Law, inasmuch as that case concerned spouses who married in 1957, immigrated to Israel in 1967, and separated in 1969. In other words, all of the events that might possibly delineate the boundaries of Chapter One took place prior to the Law's enactment. For a similar reason, I do not believe that the statement, "the law that applies to the community property arrangement of the couple before us – who married abroad, immigrated to Israel, and purchased real property in Israel prior to the enactment of the Spouses (Property Relations) Law, 5733-1973 – is the Israeli case-law community property rule"

(CA 370/87 *Estate of Tinka Esther Madjar v. Estate of Victor Madjar et al*. [16], p. 101), requires the conclusion that spouses who immigrated to Israel after the enactment of the Law must make a property arrangement as defined under sec. 1 of the Law.

In CAA 291/85 *A. Awalid v. Z. Awalid* [17], p. 218, it was argued that upon the couple's immigration to Israel in 1981, they made a community property agreement. The argument was factually rejected on the merits, with the clarification that:

> The "agreement" addressed [in sec. 15 of the Law – E.G.], includes an implied community property agreement.

Thus, the case law did not preclude adopting the approach that spouses who were foreign domiciles at the time of the solemnization of the marriage need not make an agreement arranging their property relations as defined in sec. 1 of the Law. This is so if they made the agreement after the enactment of the Law, and all the more so if they made it prior to the enactment of the Law.

Community property by virtue of the end of Section 15 – An agreement made upon the spouses' immigration to Israel

16. We now arrive at the factual question (that was, until now, an assumption) whether the spouses made an implied agreement in regard to community property when they immigrated to Israel. Spouses who married in Israel prior to the enactment of the Law are subject to the community property presumption under which spouses who purchase property through their joint effort and from a common purse intend that ownership will be in common. President Shamgar addressed the background of the creation of the community property presumption in HCJ 1000/92 *H. Bavli v. Great Rabbinical Court et al.* (hereinafter: the *Bavli* case) [18] p. 254:

> The community property presumption became a legal principle by a combination of the value of equality as an expression of our general constitutional view, and particularly, the Equal Rights of Women Law, together with the principles of contract law – especially the rules concerning the creation of contractual relations and their conditions – and the Israeli approach to the laws of equity as seeking to give just, fair expression to the relationship between spouses and the property acquired by their joint effort, each in his own area.

> The Court developed the principles of the community property presumption on the basis of a socio-economic reality in which the separate but simultaneous, coordinated effort of each of the spouses leads to the creation of ownership that should be viewed as common and equally divisible … In other words, the law gives its seal of approval to a complex of relations that sprouted from the ground of our conception of interpersonal, moral and social relationships.

In the *Bavli* case [18], Deputy President Barak noted that the legal tool of the community property rule:

> … was intended to realize a social objective. It is intended to yield social justice. It is based upon the equality of the sexes. It is nourished by the idea that spouses contribute equally to the family's welfare (*ibid*., p. 229).

17. In these proceedings, we need not decide whether the theoretical basis of the community property presumption is the conjectured intention of the spouses (the *Bavli* case [18] p. 254), or perhaps, the imputed intention of the spouses (the *Yaacobi and Knobler* cases [9] pp. 579-580). It suffices that it is unanimously held to derive from our social and cultural conceptions, which hold up the standard of equality between the sexes. The right to equality, which led to the community property presumption, is what grounded the Law's resource balancing arrangement. The difference between the property regime under the community property presumption and the property regime established by the Law, which is expressed in the timing and character of the partnership, does not express a lowering of the status of the principle of equality, but rather reflects the need to balance the principle of equality and the principle of the certainty of ownership (see in this regard, the 1966 Report of the Public Committee on Community Property of Spouses, chaired by Justice Sussman). The deep-rootedness of the right to equality in Israeli society, from which the right to shared ownership derives, is what requires that spouses who immigrate to Israel are presumed to seek integration rather than separation from Israeli society, and therefore, they, too, adopt the principle of equality between the sexes and its derivative of shared ownership of property acquired in the course of marriage, in the absence of evidence to the contrary.

18. The assumption that the spouses intended to adopt the property regime prevalent in Israel, upon which the implied agreement is based, does not lead to an unambiguous conclusion as to the

character of the partnership and its timing, inasmuch as we have two coexisting forms of partnership in rights through balancing: one is the resource balancing regime, which is of a deferred obligatory character, while the second is the community property presumption, which is characterized by immediate ownership of rights. Here, we must take an additional step, and say that the conclusion in regard to an implied agreement derives from the presumption that, at the time of their immigration to Israel, the spouses seek to adopt its lifestyle, and it may, therefore, be assumed, absent evidence to the contrary, that the content of the agreement is consistent with the character of the property model that applies to local spouses of similar character. Since we are concerned with an implied agreement between spouses who married before the enactment of the Law, the assumption is that they – like local spouses who married prior to the enactment of the Law – intended to establish an immediate community property regime.

19. A separate question is that of the scope of the property included in the implied agreement. Inasmuch as the bank accounts were opened after the spouses immigrated to Israel, it can be said that the rights of the spouses to the money crystallized when the accounts were opened, at a time when they were already subject to the community property presumption, as explained above. While the agreement to sharing the monies is not reflected by the opening of the accounts solely in the husband's name, it is clear from the doctrine of implied agreement that the rights are not established on the basis of their formal registration. This, inasmuch as the trial court was not prepared to find that the Respondent held exclusive rights to the money prior to the couple's immigration to Israel.

20. That is not the case in regard to the store that was purchased in 1979, prior to the couple's immigration to Israel. In regard to this property, the question arises whether the above implied agreement also extends to property purchased prior to the couple's immigration to Israel, when the rights to that property then belonged entirely to one of the spouses.

The principle of joint effort, which is a necessary premise of the presumption in regard to the spouses' agreement to sharing the rights through resource balancing, indeed exists here. But I do not believe that this principle suffices for the retroactive imposition of the community property presumption upon property purchased prior to the couple's immigration to Israel.

When the rights to property are entirely vested in one of the spouses, evidence of his waiver is required. The proper fundamental approach is "that in order to infer a waiver from a person's

conduct, that conduct must be clear, resolute, and unambiguous" (CA 767/77 *Ben Haim v. Cohen* [19] p. 570; and CA 265/84 *Mizrachi v. State of Israel* [20] p. 167). This strict fundamental approach is inconsistent with the application of a presumption, which is an evidentiary leniency, in order to infer the existence of an implied waiver. The strength of the presumption that spouses seeking to integrate into local society adopt a community property regime is adequate when the initial division of rights to a property is concerned, but that presumption is undermined when evidence of a waiver of rights to a property that have already vested in one of the spouses is required.

21. The approach that recognizes the possibility of implied waiver of vested rights leads to an infringement of those rights. While it would seem that the *consensual* element blunts the sting of the possibility of unintentional infringement of vested rights, the doubt as to the resolve of the "implied waivor" – that we addressed above – raises the fear of allowing an infringement of vested rights without his consent. Thus, we find criticism of the retroactive application of the community property presumption:

> In effect, by means of a legal construct, the community property presumption is indirectly applied retroactively to assets acquired by the spouses when they were subject to the law of a foreign domicile … the fortress of vested rights is thus rendered theoretical and merely in principle. In practice, it cannot protect them. They are exposed to harm because the community property presumption applies even to them (ROSEN-ZVI, *ibid.*, p. 240).

We would further point out that Prof. Levontin's draft choice-of-laws bill also refrained from recognizing an implied waiver of rights vested by virtue of the prior law that applied to the spouses, even though it recognized the validity of an implied agreement. Thus, for example, it was suggested that sec. 9(5) establish that a resource balancing arrangement apply – like the balancing arrangement under the Law – only to assets acquired as of the outset of the couple's residency in Israel:

> …

> (4) If a resource balancing arrangement applies … it will apply to assets in Israel and abroad *that were acquired as of the beginning of its entry into force*, and it will be immaterial whether or not the spouses were Israeli domiciles at the time of their marriage, whether or not, at that time, they had a shared residence, whether or not they married in Israel.
>
> (5) An implied community property agreement attributed under Israeli law to spouses maintaining a shared household *will come into force as of the beginning of the residency of the spouses in Israel*, and it will comprise assets in every place.
>
> (A. LEVONTIN, CHOICE OF LAW – A DRAFT LAW WITH BRIEF INTRODUCTION AND EXPLANATORY NOTES (Ministry of Justice, 5747) 45; emphasis added – E.G.).

The Explanatory Notes to the draft (p. 46) explained:

> A defendant whose domicile was never in Israel (that is, that Israeli law was not his personal law), is not generally made subject to the balancing requirement of Israeli law, except in regard to his assets that were acquired as of the beginning of his domicile in Israel, *in order to prevent retroactivity*…
>
> Not only does the Israeli resource balancing arrangement, under the Spouses (Property Relations) Law, 5733-1973, begin in principle from the beginning of Israeli domicile, but that is also the case in regard to an "implied resource-balancing agreement imputed by Israeli law to spouses maintaining a shared household".

22. To this we should add that in the initial clause of sec. 15, the legislature revealed its intention that, *as a rule*, property relations between spouses should be governed by the provisions of the law of their domicile at the time of the solemnization of their marriage. An *exception* to this rule is was established at the end of the section, by which the spouses may make an agreement in accordance with the law of their domicile at the time of the solemnization of their marriage. Recognition of "implied waiver" of vested rights, when that waiver is inferred from the fact of the

change of the couple's domicile to that of a society in which the principle of equality prevails, deprives the initial clause of sec. 15 of any content, and in effect, turns the exception established in the second clause into the rule. Moreover, sweeping recognition that a change of domicile constitutes evidence of implied waiver of rights vested prior to the change of domicile effectively "rewrites" the connecting link established by sec. 15 of the Law, and turns it into the domicile of the spouses at the time of the proceedings. It is superfluous to say that such rewriting cannot be the result of judicial interpretation, but must result from express legislation. In this spirit, it has been stated:

> This approach would result, in the majority of cases before Israeli courts, in the automatic application of Israeli law, and is difficult to reconcile with the choice of law rules of sec. 15. Moreover, had the legislator wished to provide that change of domicile includes a change of the law relating to matrimonial property, surely he would have said so in so many words, and not left the matter to be inferred from a "notional agreement" between the parties. (C. Goldwater, *Some Problems Relating to Choice of Law in Matrimonial Property*, 16 IS.L.REV.368, 374 (1981).

Moreover, the problem with adopting this interpretation is obvious in view of the fact that the drafters of the The Individual and the Family Bill in which sec. 15 of the Law is sec. 192 of the Bill, knowingly rejected "imposing the 'community property by law' arrangement upon new immigrants". The reason for rejecting that arrangement was a fear that "this automatic change in property affairs that applied not only in regard to a foreign 'legal' arrangement, but also to an arrangement that that couple would have established by agreement prior to immigrating to Israel (The Family and the Individual Bill [*sic*] (Ministry of Justice, 5716-1955) 216-217).

The conclusion to be drawn from the above is that it would be improper to hold that an agreement of spouses to community property in regard to assets that belonged to one of the spouses is inherent in the very transfer of the couple's domicile to Israel, just as it would be improper to hold that spouses who uproot from Israel to a country in which property separation prevails, thereby agree to the application of property separation even to property acquired in Israel. We should note that our refraining from comprehensively adopting that view does not necessarily lead to the conclusion that a claim of community property in regard to assets acquired under foreign

law will never succeed, whether by proving the existence of an agreement to that effect, or by applying the community property or the resource balancing arrangement by virtue of the presumption of identity when the spouses were domiciles of a western country at the time of the solemnization of their marriage, as explained in para. 8, above.

23. The *Azugi* case [1] gave expression to the view that the community property presumption comprises assets acquired under the law of the domicile of the spouses at the time of the solemnization of their marriage. As Justice Barak wrote there, at p. 30:

> Inasmuch as the choice-of-law rules in the present case are premised upon the need to protect the vested rights of the spouses, there is no reason not to give full credit to an agreement – explicit or implied – between the spouses that might “infringe” these rights. The tenure and nature of the married life of the husband and wife, in the present case, can serve to lead to the inferring in Israel of an implied agreement between them to community property, not only in regard to new assets acquired in Israel after their immigration to Israel, but also to assets acquired in Morocco following their marriage, and prior to their immigration to Israel.

A crack in this comprehensive approach, and recognition that the “presumption of implied waiver” of rights acquired under the law of the domicile of the spouses at the time of the solemnization of their marriage must be buttressed by evidence, can be discerned in the *Shaman* case [10]. In that case, President Shamgar found support for retroactively applying the presumption in the special nature of the disputed property, which was a residential apartment. He stated, at pp. 108-109:

> In view of the facts of the present case, it can be said that even if, for the sake of argument, we were we to accept the Appellant’s claim that we are concerned with property that was completely owned by the late husband, from the circumstances of the case we can infer an intention of co-ownership thereof, which crystallized in the course of the marriage. We are concerned with a property that was the residence of the decedents. They lived in that apartment from the time of its purchase (1950) until their deaths (the husband in 1975, and the wife in 1983) …

> Under the above circumstances, it is my opinion that we can conclude the existence of an implied agreement in regard to community property – an agreement that crystallized at some point in the course of thirty years of married life in Israel – in regard to the disputed property, i.e., the residential apartment, which served as the late couple's residence that entire period.

I agree with this approach, which recognizes the weakness of imposing the community property presumption when its application is required in regard to rights acquired by one of the spouses in their entirety in accordance with a former law, and the need to find additional support in the evidence, as in this manner we can overcome the difficulties we addressed above.

24. In the absence of evidence as to the content of Iranian law in the area of property relations, we cannot decide that the rights to the store were acquired by the Respondent in their entirety by virtue of Iranian law, just as we cannot decide that they were community property by virtue of Iranian law. All that can be said is that the Plaintiff cannot rely upon the argument that the registration of the rights in the Respondent's name, in 1979, does not reflect a change in the status of the rights upon the couple's immigration to Israel in 1983, according to which the Respondent impliedly waived the exclusivity of his rights to the store, and agreed to their equal redivision. Thus, the examination must focus upon the spouses' state of mind *at the time of the acquisition of the property*, i.e., the original division of the rights.

Cause of action by virtue of the second clause of sec. 15 – An agreement made at the time of acquisition of the assets

25. Can the Respondent succeed in arguing that an equal division of the rights to the store was already agreed at the time of the purchase of the store (prior to the couple's immigration to Israel)? As noted, the second clause of sec. 15 of the Law recognizes the ability of the parties to stipulate in regard to the law of their domicile at the time of the solemnization of their marriage, as long as the agreement is made "in accordance with the law of their domicile at the time of making the agreement". However, no evidence was adduced to show that Iranian law recognizes the competence of spouses to regulate their property relations in a property agreement.

A review of Israeli statutes that comprise special provisions on the subject of private international law indicates a tendency to grant primacy to the principle of domicile in matters of personal status (see: sec. 17 of the Family Law Amendment (Maintenance) Law, 5719-1959; sec. 135 of the Succession Law, 5725-1965; sec. 6 of the Jurisdiction in Matters of Dissolution of Marriage (Special Cases and International Jurisdiction) Law, 5729-1969; sec. 80 of the Capacity and Guardianship Law, 5722-1962; as well as sec. 15 of the Law). The preference for the domicile principle over the nationality principle was explained in the explanatory notes to the Succession Law Bill, in that this principle –

> … is more just, and in the circumstances of Israel, more effective. The ties of a person who established his domicile outside the country of his nationality to the laws of his domicile are stronger and more concrete than his ties to the laws of the country that he abandoned, although remaining one of its nationals. This is all the more so in Israel, which is a country of immigrants (Succession Law Bill (Ministry of Justice, 5712-1952) 156).

The flexibility of the domicile principle thus expresses the individual's expectations inhering in the choice to dissociate from a particular social regime and adopt another in its place (see: CA 598/85 *Mastura Kahana v. Meir Kahana et al.* [21]).

26. Having addressed the justification for preferring the domicile principle in legislation on matters of family status – including sec. 15 of the Law – we will now turn to an examination of the meaning of the term "domicile" in sec. 15 of the Law. In this regard, we must determine whether weight can be attributed to the couple's intention to move their domicile to another country in the framework of "domicile", before they have realized their intention. In other words, can we, in such a case, view them as domiciles of the country they intend to establish as their domicile? Indeed, the case-law of this Court exhibits a tendency to transfer the center of gravity in the definition of "domicile" in sec. 135 of the Succession Law from the subjective to the objective. In other words, it is "not the person's intention or situations in the past that establish a person's domicile at a given time, but rather that place to which the person is tied form a factual-practical perspective, i.e., the place to which he is tied by the most factual connections" (CA 587/85 *Stark v. Birenberg* and cross appeal [22] p. 230; CA 260/89 *Levi v. Hepner* [23] p. 393). However, I do not believe that the said objective perspective is exhaustive in the present matter, in which "the

meaning of that term may vary when it appears in different laws, in accordance with the content of the law in its entirety, and its general purpose" (CA 657/76 *The Authority under the Victims of Nazi Persecution Law, 5717 – 1957 v. Hisdai* [24] p. 781). Justice Barak addressed this, stating:

> It is superfluous to state that it is often difficult to locate a specific point in time upon which a person ceases permanent residence in a country, and there is surely a period of time when the center of a person's life seems to float between his prior place and his future place (CA 282/88 *Awad v. Prime Minister & Minister of the Interior et al.* [25] p. 433).

In a similar vein, see A. Vita, *Private International Law: Nationality and Domicile*, 8 HAPRAKLIT 352, 358 (5712) (Hebrew), published before the enactment of the Succession Law.

27. The advantages and disadvantages of the approach that suffices with the future intentions of the spouses to settle in a particular country was addressed by the learned Dicey and Morris in regard to whether, in establishing the domicile of a couple, weight should be attributed to the intention of spouses to tie their future to another country at the time of the solemnizing of their marriage, stating:

> The second problem is whether one should have regard to the intention of the parties at the time of the marriage as to their future home. This concept is sometimes called the "intended matrimonial home" … Its advantage is that it looks to the future, to the country in which the marriage will be centred and which will have the greatest concern with the marriage and the property relations of the spouses. Its disadvantage is that it produces uncertainty. What happens if the parties change their minds or if they do not immediately move to the new country? What law governs their matrimonial property rights until they make the move? (A.V. DICEY AND J.H.C. MORRIS, ON THE CONFLICT OF LAWS (London, 12th ed., by L. Collins, 1993) 1069).

The answer to the question whether consideration should be given to the spouses' intention to settle in another country in the future should be derived, inter alia, from the weight that the statute attaches to their expectations and desires. If the statute respects those, why should it close

its eyes to the expression of their real intention to leave one social regime and adopt another in its place? In this spirit, the learned Dicey and Morris suggest, *ibid*., pp. 1069-1070:

> The weight to be given to the parties' intentions depends to a large extent on the answer to a third question. If the law of the matrimonial domicile is applied by reason of a fixed and independent rule, there is little scope for the intended matrimonial home. If, on the other hand, the basic rule is that the parties can choose the governing law, and the matrimonial home is no more than a pointer to what their choice is likely to be, there is no reason why the intentions of the parties regarding their future home – and the carrying out of those intentions – should not be regarded as indications of their intentions regarding the governing law.

The fundamental approach in the matter of personal status grants weight to the desires and expectations of the spouses, and this consideration underpinned the preference for the domicile principle. This approach deserves reinforcement where we are concerned with an agreement that arranges the property relations of spouses. Therefore, in establishing the definition of "domicile" of the spouses, weight should be given to their intention to tie their fates to another country, and adopt its lifestyle and social principles, as long as this intention is serious and clear.

28. The conclusion to be drawn from the above is that the subjective element, that is, the serious, clear intention of the spouses to establish themselves in another country, can serve as a criterion for establishing the "domicile" of the spouses in the present matter. The seriousness of the intention and its decisiveness can be expressed, inter alia, in the period of time that passed until the spouses moved to their intended destination. Thus, to my mind, it can easily be said that during the period immediately preceding the spouses' immigration to Israel, while preparing for immigration, Israel can be viewed as their domicile for our purposes, even though they did not yet *physically* live there (in this regard, see DICEY & MORRIS, *ibid*., p. 1070).

This legal construct can serve to overcome not only the problem of form and validity of the agreement. Having found, on the basis of the spouses' clear, serious intention to immigrate to Israel, that they should already be conceptually viewed as Israeli domiciles, the presumption follows that having formed that intention, they agreed to adopt the property regime prevailing in

Israel in regard to assets acquired thereafter from joint effort – both those that "immigrated" to Israel with them, and those acquired in Israel in anticipation of their immigration.

29. While, in the present case, some four years elapsed from the time of the purchase of the store and the date of the spouses' immigration to Israel, that does not require the conclusion that they had not formed a clear intention to immigrate to Israel at the time of the purchase of the store, and that Israel was not yet considered their "domicile".

It cannot be denied that four years is not a short time, and that English courts refused to declare the existence of serious intent to settle in another country when two years had passed prior to a couple's immigration to that country (see: *In re Egreton's Will Trusts; Lloyds Bank Ltd. v. Egerton* (1956) [44]). Nevertheless, in the present case, special weight should be given to the proximity of Khomeini's rise to power and the couple's decision to immigrate to Israel. We learn of the causal connection of those facts from the Respondent's statement that their property "was transferred to Israel primarily after the Khomeini revolution there, such that in 1983 we also fled for our lives from Iran" (para. 4 of the Respondent's affidavit), and that the spouses began to put their plan into motion with the purchase of the store. On the basis of this concrete intention to immigrate to Israel, there is no reason, in the present case, not to view Israel as their "domicile" at the time of the purchase of the property, and thus the provisions that recognize the spouses' competence to stipulate as to property relations apply to the implied agreement to community property in regard to the asset.

30. I would note that the Plaintiff explained her petition to the trial court in stating that "a clear intention to create full partnership in all the property was implied by the spouses' lifestyle and their relationship" (sec, 3 of her petition), and there is no reason not to grant the Petitioner the requested remedy on the basis of the developing this cause.

31. For the reasons stated above, I would grant the petition and declare that the Petitioner is entitled to half the ownership of the store, and to half of the sum deposited in the two bank accounts.

The Respondent will pay the Respondent's legal fees in the amount of NIS 10,000.

President A. Barak:

I concur with the conclusion of my colleague Justice Goldberg. I arrived at this result by a different route than that of my colleague. I will briefly explain my thinking.

1. The facts of the present case "activate" several legal systems and several property relations regimes. The parties married (in 1944) in Iran. At the time, they were subject to the Iranian property relations regime. The husband visited Israel (in 1979) and purchased a store, which was registered in his name. At that time, the Spouses (Property Relations) Law (hereinafter: the Property Relations Law) was in force. The question is whether that store is subject to Iranian law (as the law of the domicile at the time of the solemnization of the marriage), or the Israeli community property rule (as the law to which Iranian law points by *renvoi*, or as the law of the place where the store is located, or as the *lex fori*). The spouses immigrated to Israel (in 1983). Subsequent to their immigration to Israel, the husband opened two bank accounts in his name, in which he deposited money that he had brought with him from Iran. The question is whether that money is subject to Iranian law (as the law of the domicile at the time of the solemnization of the marriage), or whether it is subject to the Israeli community property rule (as the law to which Iranian law points by *renvoi*, or as the *lex fori*, or as the law of current domicile). Answering those conflictual questions, and others, raises the question of the scope of incidence of the Property Relations Law over the store and the bank accounts. In regard to the bank accounts, we can assume that they were opened with the husband's money, which he brought from Iran, But the accounts were opened in Israel after the enactment of the Property Relations Law. A question also arises as to the scope of rights vested under the foreign law, which the Property Relations Law does not infringe (in accordance with the interpretation given in the *Azugi* case [1]).

2. All these questions – some of which were addressed in the comprehensive opinion of my colleagues Justice Mazza (in his opinion in the judgment that is the subject of this Further Hearing) and Justice Goldberg (in this further hearing) – can be left for consideration at another time. The reason for this is that whatever the choice-of-law rule may be in regard to property relations between spouses married abroad prior to the enactment of the Property Relations Law, it is a dispositive law. It applies in the absence of an agreement between the parties. The parties are at liberty to decide upon a different arrangement, and Israeli law will credit that arrangement – subject to Israeli public policy and other specific Israeli law (see: LEVONTIN, *supra*, pp. 17-45, and see:

DICEY & MORRIS, *supra*, at 1068). The content of the agreement between the parties can be conflictual, that is, it may refer to a legal system that differs from that indicated by the rules of private international law. Thus, for example, the spouses before us could have agreed, after immigrating to Israel, that their property relations be established in accordance with Israeli law or Jewish law or English law or Iranian law. Similarly, an agreement between spouses need not refer to a foreign legal system, but rather to some content of a property relationship between them. Therefore, the spouses could have agreed, after immigrating to Israel, that the property relationship between them would be one of equality or some other division acceptable to them. And as noted, all subject to Israeli public policy or some other provision of a specific Israeli law.

3. The next step in my thinking is this: anything that the parties can agree to expressly, they can agree to impliedly. There is no requirement that the agreement be in written or any other form. All that is required is that it be an agreement between the parties (sec. 23 of the Contract (General Part) Law). Two arguments can be raised against this step. The *first* is that one might say that the agreement between the parties deprives one of them, or both of them, of rights that they had under the applicable law in the absence of the agreement. In view of the nature of the agreement, it is appropriate that it be made expressly and in writing. This argument fails. Every agreement comprises some change in the normative relationship between the parties, and in the absence of an express provision requiring a special form, the agreement of the parties suffices to achieve that normative change. The *second* argument is that the Property Relations Law requires that a property agreement be in writing (sec. 1), and must be confirmed by a judicial instance (sec. 2). This argument is incorrect. The requirements of writing and of confirmation by the court concern a "property agreement" as defined by the Property Relations Law, whereas we are not at all concerned with a "property agreement". After all, cases in which the conflictual law is decided in accordance with the general conflictual principles, and not by the Property Relations Law, are not governed by the Property Relations Law and the provisions of secs. 1 and 2 thereof. That is the situation, inter alia, in all those cases in which the Property Relations Law infringes rights vested in one of the spouses prior to the enactment of the Law (in 1973) (see the *Azugi* case [1]). In those cases for which the conflictual law is decided in accordance with the provisions of sec. 15 of the Property Relations Law – that is, in regard to property acquired after the enactment of the Property Relations Law by spouses married before its enactment – that provision itself establishes that the parties may determine their own normative regime "by agreement". Here I must take exception to

the approach of my colleague Justice Mazza that an "agreement" for the purposes of sec. 15 of the Property Relations Law means a "property agreement". In this matter, I agree with the approach of Justice Elon in the *Azugi* case [1], according to which:

> … the term "agreement" in sec. 15 has its general meaning, and need not be in writing – as required under sec. 1 in regard to a *property agreement* – rather, any agreement whatsoever, whether in writing or parol, whether express or implied, can serve to establish the property relations between the spouses, as long as the agreement is in accordance with the law of their domicile at the time of its making (*ibid*., p. 14).

Two reasons ground my position. *First*, from a linguistic perspective, the Property Relations Law clearly distinguishes between "agreement" (addressed by sec. 15) and "property agreement" (defined in sec. 1). Justice Elon correctly pointed out that "the second clause of sec. 15 states 'agreement', and not 'property agreement'" (*ibid*.). *Second*, in terms of the legislative purpose, this interpretation yields a just and proper result. Indeed, my colleague Justice Mazza himself noted that his conclusion "is not a desirable result". It infringes the equality of women (*cf*. the *Bavli* case [18]). It is at odds with the autonomous will of the parties. As opposed to this, my interpretation realizes the fundamental conceptions of Israeli society in regard to the autonomy of personal will and the equality of the sexes. These views are presumed to underlie the purpose of the Property Relations Law (see: CA 524/88, 525/88 *"Pri Ha'emek" – Cooperative Agricultural Assoc. & 30 others v. Sedeh Yaakov – Moshav Ovdim of the Po'el Hamizrachi for Cooperative Agricultural Settlement et al.* [26] p. 561). Indeed, equality "is the soul of our entire constitutional regime" (HCJ 98/69 *Bergman v. Minister of Finance* [27] *per* Landau, J.). We presume that it is the purpose of every law to advance and preserve this principle. In the judgment under review in this further hearing, my colleague Justice Mazza was of the opinion that this approach devoids sec. 15 of the Property Relations Law of all meaning. I am not of that opinion. It suffices to recall all those cases in which parties immigrated to Israel, and a dispute the arose in such a manner that the community property rule did not apply.

4. The final part of my legal construction is this: the community property rule accepted in Israel is one of partnership based upon the idea of an agreement between the parties. It is not a statutory (obligatory or dispositive) rule imposed upon the parties regardless of their will. It is a

case-law rule that is founded upon an agreement between the parties (see: CA 253/65 *Bricker v. Bricker* and cross appeal [28]; CA 595/69 *M. Afta v. A. Afta et al.*[29]). I addressed this in one of the cases, noting:

> This partnership derives from the resolve attributed to the parties, as reflected by their marital relationship. That marital relationship itself creates a presumption of community property … the community property presumption … employs a contractual construction that concerns an (implied) agreement between the parties, according to which they are equal partners in rights … (the *Bavli* case [18] pp. 228-229).

And note that the consensual view is not a fictional explanation of a statutory rule that draws its force from the legislature. It is a real explanation for a case-law rule that draws its force from the agreement. In the past, this view was founded upon the theory of implied condition. "The intention of co-ownership of the property can be inferred from the conduct of the spouses in accordance with the manner of their married life" (CA 253/65 [28] *ibid*., p. 599, *per* Agranat, P.).

We can now base this view upon the principle of good faith (established under sec. 39 of the Contracts (General Part) Law), which fills the gaps in an agreement between the parties (see: CA 718/89 *Haifa Quarries Ltd. v. Chen-Ron Ltd*. and cross appeal [30] p. 312; CA 4638/93 *State of Israel v. Apropim Housing and Promotions (1991) Ltd*. [31]). In accordance with this principle, we can give expression, first and foremost, to the subjective fundamental assumptions at the foundation of the relationship between the spouses, without need for recourse to a fiction concerning their real intentions. Where the fundamental assumptions of the parties are unproductive, we can employ objective criteria to fill in what the parties left out on the basis of the good-faith principle. Inter alia, these criteria draw upon the fundamental principles of Israeli law. One of those fundamental principles is that of equality. In this manner, we achieve a social objective that brings about social justice (see: the *Bavli* case [18] p. 229).

I am aware of the problems associated with basing the community property rule on contract (see: ROSEN-ZVI, *supra*, 249). I do not believe that those problems are relevant to the present matter. Indeed, if the contractual construct can deliver the community property rule across the raging sea of the provisions of the Land Law in particular, and civil codification in general, I see no reason why the it would lack the power to deliver the community property rule across the raging

river of conflict law. We can revisit this matter in the future, and consider whether we might base the community property rule upon the general power of an Israeli judge to develop the law in conjunction with the statutory law, without need for the contract construct. "The history of broad areas of our law – characterized as a mixed system – is a history of judicial creativity … in which the Court developed the law" (HCJ 1601-1604/90, HCJApp 1890/90 *Shalit v. Peres et al*. [32] pp. 366-367). "Just as a common law developed in England that did not consist merely of the interpretation of terms, we have also developed the independent possibility of developing common law that is not necessarily the product of the simple interpretation of terms" (FH 29/84, FH 30/84 *Kossoy v. Bank Y.L. Feuchtwanger Ltd. et al.* ; *Filco Finance and Investment Co. v. Bank Y.L. Feuchtwanger Ltd. et al*. [33] p. 511, *per* Shamgar, P.). Indeed, "we recognize the power of the Court to create and develop an 'Israeli Common Law'" (HCJ 1635/90 *Schereschewsky v. Prime Minister* [34] p. 859). That is judicial power that draws upon our legal tradition. By that means, it is possible – should it be found appropriate – to grant a more comprehensive character to the community property rule, in addition to its contractual character. That would be the mature fruit of "judge-made law, delivered on the birthing stool of this Court" (CA 630/79 *Z.B. Lieberman v. E. (Mendel David) Lieberman* [35] p. 368).

5. We can now proceed from the general to the specific. The spouses in the present case immigrated to Israel (in 1983). The trial court found that they met the conditions of the community property rule. They lived together, maintaining a regular lifestyle, in a joint effort. We infer that while in Israel, they (impliedly) agreed that their assets were community property. While it is true that part (perhaps most) of the property was brought from Iran, that is immaterial. The agreement between the parties does not distinguish between property acquired in Iran after the marriage, and property acquired in Israel after the marriage. Indeed, the spouses maintained a continuous, shared life for over forty years. Israeli law is ready to infer from that continuity – if based upon joint effort and a regular lifestyle – an agreement to community property. In the absence of special data, there is no reason to draw a distinction – a distinction that is particularly difficult in view of the difficulty in "trace" the property – between property acquired prior to immigration to Israel and property acquired thereafter. The very same agreement applies to the property in both cases. For my part, I ruled in the *Azugi* case [1] that the community property rule applies to property acquired before marriage. The present case is easier, as all of the property was acquired after marriage. I see no logic, in terms of the community property rule – and in terms of the consensual basis upon which

it is founded – to distinguish between property that the parties brought with them from abroad, and property accumulated in Israel.

6. In conclusion, upon arrival in Israel, spouses married abroad prior to the entry into force of the Property Relations Law who, when in Israel, satisfy the conditions for community property, are deemed as agreeing to maintain a community property regime in Israel. This agreement takes precedence over the application of conflict-of-laws rules, and establishes the regime for the division of their property. That regime applies to property acquired after their marriage but before their arrival in Israel, as well as to property acquired in Israel after the marriage. For these reasons, I concur with the result arrived at by my colleague Justice Goldberg.

Justice T. Strasberg-Cohen:

I accept the position of my colleague President Barak, according to which, in the circumstances of the present case, the spouses should be deemed as agreeing to maintaining, in Israel, a community property relationship, and that agreement – and not the choice-of-laws rules – decides the regime for the division of their property, including property acquired before their arrival in Israel.

I therefore concur with the result arrived at by my colleagues the President and Justice Goldberg.

Justice D. Dorner:

1. Section 15 of the Spouses (Property Relations) Law (hereafter – the Law) states:

> Property relations between spouses shall be governed by the law of their domicile at the time of the solemnization of the marriage, provided that they may by agreement determine and vary such relations such relations in accordance with the law of their domicile at the time of making the agreement.

The question that arises in this petition is whether an agreement pursuant to the aforementioned section 15 can also be an implied agreement, the existence of which is inferred on the basis of the community property presumption in regard to the couple's assets.

2. Like my colleague Justice Goldberg, and for the same reasons, I am also of the opinion that as far as this question is concerned, the date upon which the couple married – whether before or after the Law came into force – is of no relevance.

3. In the *Yaacobi and Knobler* cases [9], I expressed my opinion that the community property presumption applies to all couples that are residents of Israel. In the instant case, I am of the opinion that an agreement under sec. 15 of the Law – which allows spouses to establish and change their property relationship – can be an implied agreement, and it can be proven with the aid of the community property presumption. This is a desirable result. It can prevent the imposition of foreign law that does not recognize the community property presumption in upon a couple residing in Israel for many years, simply because they immigrated to Israel after the Law came into force.

It seems to me very doubtful that this result can be achieved on the basis of the approach that rejects the application of the community property presumption to spouses whose property relations are regulated by the Law, inasmuch as if the Law annulled the community property presumption in regard to spouses to which the Law applies, how can spouses who immigrated to Israel after the Law came into force continue to acquire rights on the basis of the presumption?

4. For these reasons, I concur in granting the petition, as stated in the opinion of my colleague Justice Goldberg.

Justice M. Cheshin:

I concur with the opinion of my colleagues Justice Goldberg and President Barak, and Justice Strassburg-Cohen and Justice Dorner. Their decision is my decision, and their conclusion my conclusion. But inasmuch as my way is my way, I will say some things about the tortuous path that I followed in reaching my destination. I will begin with the basic relevant facts.

The basic facts and the relevant law

2. The basic facts of the matter are as follows: The Petitioner and the Respondent married in 1944 in Iran, where they resided. They lived in Iran for nearly forty years, and they bore five children. In 1979, while visiting Israel, the husband purchased a store in Tel Aviv, and registered it in his name. In 1983, the family members immigrated to Israel, and purchased an apartment that was registered in the names of both spouses. About four years after immigrating to Israel, and after the rift in their relationship, the wife filed suit against her husband for co-ownership of the assets that the husband had registered exclusively in his name: the store, and two bank accounts in which over 300,000 dollars that the husband had brought with him from Iran were deposited.

3. Even those who have not been favoured with a vivid imagination will sense that we are dealing with a simmering cauldron of hard questions in the fields of family law and private international law, Israeli law and Iranian law, all stirred together. Bearing in mind that the Spouses (Property Relations) Law (hereafter – the Law) came into force in 1974 – against the background of the community property presumption that preceded it – we further realize that contract law and the provisions of case law and the Law are added to the stew. It is a complex maze, there are many traps, and who can find the way out? My colleagues Justices D. Levin, Mazza and Tal, sitting in the appeal, walked through the labyrinth and arrived at an exit on the south side. And now, my colleagues Justice Goldberg, President Barak, Justice Dorner and Justice Strasberg-Cohen, who also found their way through the tangle, exited in the north. I, too, stumbled about in the dark, and bumped my head against the walls. At the end of this examination, I will suggest what appears to be an appropriate path for resolving the issues that arise in this matter, but before charting a course for exiting the intertwining trails of the maze, I would like to make some preliminary observations, which set the groundwork for all the issues examined in my opinion, and in the opinions of my colleagues, as well.

The interim application of the Law and its application to couples married abroad

4. The Law is as its name states: It is intended to arrange the property relations between spouses, and its core is in its second chapter, which treats of the balancing of spousal resources. The resource balancing arrangement under the Law is different from the community property presumption created by the case law before the commencement of the Law (see the *Yaacobi and*

Knobler cases [9]), and a transition provision was inherently required to separate the past from the future. The transition provision is to be found in section 14 of the Law, which states:

> *Transitional provision*
>
> 14. Section 3 and the other provisions of Chapter Two shall not apply to spouses who married before the coming into force of this Law.

In other words: the balancing of resources established in the Law will apply only from the day that the Law enters into force. The date of entry into force was established as Jan. 1, 1974 (in accordance with section 19 therein). We thus know that spouses who married prior to the Law will be subject to the rule that existed prior to the Law (whether as a rule unto itself or whether as "vested rights") – at least insofar as assets that were acquired until the commencement of the Law – and the balancing of resources provisions of the Law will not apply to them. The rule prior to the Law was – and is – as we know, the community property presumption as created and developed by the case law: case law that predated the Law, and case law that developed, and that even gained force and intensity, after the Law.

5. Spouses in Israel are thus divided into two classes: those who married prior to the Law (i.e., prior to Jan. 1, 1974) – who are subject to the community property presumption that held before the Law, and those married following the Law (i.e., after Jan. 1, 1974) – who are subject to the provisions of the Law (and we will not here enter into the bitter debate conducted in the *Yaacobi and Knobler* cases [9] in regard to the parallel application of the community property presumption even after the entry of the Law into force). So much for the situation of Israeli residents.

And what of the case of couples who resided outside of Israel at the time of their marriage, and who became Israeli residents after their marriage? Are they subject to the rule that predated the Law or to the rule established by the Law? Some, it would appear, take the view that the rule that applies to "Israeli" couples also applies to couples who resided abroad at the time of their marriage and immigrated to Israel. In other words: the question of the application of the rule predating the Law (including the principle of vested rights) or the rule established by the Law will depend upon the question of whether they married prior to Jan. 1, 1974 or after that date. If they married (in Israel or abroad) before Jan., 1 1974, their rights will be mutually governed by the rule

that applied before the Law (at least in regard to assets acquired up until that date), whereas if they married after Jan. 1, 1974, they will be subject to the rule under the Law.

I reject this opinion from the outset. In my opinion, as regards spouses who married abroad and are not Israeli domiciles, the Law was never intended to apply to them, and indeed will not apply to them. Let us recall the words of Lord Ellenborough in the famous case of *Buchanan v. Rucker* (1808) [45] at 547:

> Can the island of Tobago pass a law to bind the rights of the whole world?
> Would the world submit to such an assumed jurisdiction?

With slight adjustments, and stated in the negative and not merely as a (rhetorical) question, the same can be stated in our case as well. Indeed, the substantive provisions of the Law were intended to apply only to those domiciled in Israel at the time of the solemnization of their marriage, and not to the residents of the entire world. This is clear from the provisions of section 15 of the Law (which we shall consider hereinafter) - which makes the application of the Law contingent upon "the law of their domicile" of the couple – and so is it clear from other laws that treat of the same material (for example, the Capacity and Guardianship Law), which also are contingent upon the place of a person's domicile (in the absence of any need, we will not now consider the distinction – if there is one – between a person's "place of residence" and "domicile"). And see also M. Shava, *Choice of Law in Property Relations between Spouses*, 6 IYYUNEI MISHPAT (1978-79) 247, 268ff (hereinafter – Shava, *Property Relations*); M. SHAVA, PERSONAL STATUS LAW IN ISRAEL, 3rd ed., (Massada, 1992) 355ff (hereinafter – SHAVA, PERSONAL STATUS).

6. What we have said leads to an ineluctable conclusion: the substantive provisions of the Law will apply only to spouses whose domicile at the time of the solemnization of their marriage is in Israel, whereas the provisions of the Law will not apply *ab initio* to spouses whose domicile at the time of the solemnisation of their marriage is not in Israel. In regard to the latter, it makes no difference whether they were married before or after Jan.1, 1974, inasmuch as their property relations are governed – ab initio – by a legal system that is not in force in Israel (*s.v.* Tobago, Island of). As for spouses whose domicile was outside of Israel at the time of their marriage, and who later became Israeli domiciles, these fall into two categories. One category comprises those who became Israeli domiciles before the commencement of the Law: These are governed, in principle, by the Israeli law in force prior to the Law, including the principle protecting vested

rights (and we will not now consider the dispute surrounding this issue in the *Azugi* case [1]). In other words: spouses who, at the time of their marriage, were domiciled outside of Israel, who subsequently – prior to the Law – became Israeli domiciles, litigating before an Israeli court *after* the Law, will be subject, in principle, to that law that would have applied to them had they litigated prior to the Law. The Law was not intended to change the mutual rights of such spouses, and the rights and obligations that existed prior to the Law will continue to exist as they were even in the period following that Law.

The second category comprises spouses who were domiciled outside of Israel at the time of their marriage (whether the marriage took place before the commencement of the Law, and certainly where the marriage took place after the commencement of the Law), and who became Israeli domiciles *after* the Law. As far as these are concerned, we must address ourselves to the provisions of the Law, and firstly, to the provisions of section 15 therein, which treats of private international law. Inasmuch as the property relations of these spouses involve a substantive foreign element, they and we must – first and foremost – pass through the gate of private international law established in section 15 of the Law, and this gate will direct our continued course.

7. And what of our case? True to our approach, we say that the decisive date is the day upon which the Nafisis became Israeli domiciles. That date was in 1983, that is, significantly later than the commencement of the Law (as noted, the law entered into force on Jan. 1, 1974). That being the case, we can conclude that in seeking the normative framework applicable to the property relations between the spouses, we will first encounter the Law, and first and foremost, the provisions of section 15 therein, which treats of private international law. Thus, the point of departure of my journey, and that of my colleagues, is to be found in section 15 of the Law. However, as we shall see further on, what we have said in regard to spouses married outside of Israel will be of particular importance.

Thus far, introductory remarks on the *interim* application of the Law.

The international application of the Law to spouses domiciled outside of Israel at the time of their marriage

8. The Nafisis were married in Iran, became Israeli domiciles after the Law came into force, and thus two legal systems can be involved in their matter: Iranian and Israeli. On the subject of the international application of the Law, that is, on the subject of the involvement of several legal systems claiming or that might claim primacy over the others, section 15 of the Law, which treats of "private international law", establishes:

> *Private International Law*
>
> 15. Property relations between spouses shall be governed by the law of their domicile at the time of the solemnization of the marriage, provided that they may by agreement determine and vary such relations such relations in accordance with the law of their domicile at the time of making the agreement.

Thus, according to the Law, in regard to the legal norms that will apply to property relations between spouses, we put before us two alternatives, respectively, in accordance with the precedence established by the Law: First and foremost, the "law of their domicile at the time of the solemnization of the marriage" will apply to the property relations between the spouses, however – and this is the second alternative – the spouses are free to determine or vary the regime established under the Law of their domicile at the time of their marriage, as long as the agreement is in accordance with the law of their domicile at the time of its making.

9. The source and legal nature of the alternative arrangements established by section 15 of the Law are different: whereas the first alternative is one that is imposed upon the spouses by virtue of the law (*ex lege*), that is: the property relations between them will be regulated by legal system A, over the contents of which they have no control, while the second alternative is one that derives from two sources. This alternative is primarily founded upon the agreement of the parties (*ex contractu*), but this agreement must be valid under the law of the parties' domicile at the time of its making. On the methodology of the two alternatives we will note that it first elaborates the alternative deriving from law, and afterwards elaborates the alternative of agreement, but this chronological arrangement does not testify to the legal priority of the first over the last. On the contrary, the legal preference is rather for the second alternative – the agreement alternative – while the first alternative - that of the law - will only hold subject to the second alternative.

10. Inasmuch as the provisions of section 15 of the Law instruct us that one of the two said alternatives will apply to the Nafisis, we must examine these two alternatives one at a time, and attempt to find the way to answer the questions that have been put before us.

"Property relations between spouses shall be governed by the law of their domicile at the time of the solemnization of the marriage"

11. This is the first alternative established in section 15 of the Law in regard to private international law: The property relations between spouses shall be governed by the law of their domicile at the time of the solemnization of the marriage. This requires the conclusion that the property relations between spouses will continue to be determined by the laws of that state even if their place of domicile changes (and until they make another agreement between them as stated in the final clause of section 15). This is the immutability doctrine, the doctrine that establishes a hard, rigid choice of laws, a doctrine that plants itself in the rules of one, single legal system. See, for example, DICEY AND MORRIS, *supra*, at 1066, 1081-1087; Shava, *Property Relations*, at 269-272. The Nafisis domicile was Iran at the time of the solemnization of their marriage. Section 15 of the Law therefore instructs that Iranian law governs their property relations. In other words: The property relations between the Nafisis will be decided according to this alternative - from now and forever – in accordance with the rules of Iranian law, unless they agree otherwise, as stated in the final clause of section 15.

12. If we are in agreement that the law of domicile of the Nafisis at the time of the solemnization of their marriage shall govern their property relations – and in the case of the Nafisis, this means the Iranian system of law – we still have not decided and do not know whether this referral to a foreign legal system is one of these three: one, to the *substantive domestic* part of that law, i.e., to the rules in force in Iranian domestic law in regard to the property relations regimen that applies to Iranian spouses; two, the reference is not just to Iranian domestic law but to that legal system, including its rules of private international law; three, the reference may be to the Iranian legal system – including its rules of private international law – but with various restrictions upon referring from the Iranian system to a third system (if we should encounter such a referral). The legislature did not enlighten us as to which of these it chose, and we must find our own way. As is well known, different legal systems take different routes – and for different matters – and a

variety of considerations can dictate whether we go straight, or to the right or left. We also know that, in principle, the following three doctrines are accepted in the world's legal systems: the doctrine that states that referral to a foreign legal system means referral to the *domestic* law of that system (the doctrine that rejects *renvoi*); the doctrine of partial *renvoi* (single *renvoi*); and the "The Foreign Court Theory", see, e.g., DICEY AND MORRIS, *supra*, at p. 70 ff; M. Shava, *The Position of Domestic Law in the matter of Renvoi in the area of Personal Status*, 5 IYYUNEI MISHPAT (1976-77) 268, 268-271 (hereinafter – Shava, *Renvoi*) (Hebrew); SHAVA, PERSONAL STATUS, p. 90 *ff*.

13. Some of my colleagues seem to assume that the provisions of sec. 15 of the Law are intended to refer us to foreign *domestic* law – in our case: Iranian law – which is to say that we are required to apply to the property relations between spouses those *substantive* rules that the foreign legal system applies to the people of that state, while rejecting possible *renvoi*. This would seem to be the view of our colleagues Justices Mazza and Goldberg, and it would seem that this was also the view of our colleague Justice Elon in the *Azugi* case [1]. This also appears to be the view of Prof. Shava (Shava, *Renvoi*, p. 279; Shava, PERSONAL STATUS, p. 396).

14. I am not comfortable with that conclusion, and unlike my colleagues, I do not view it as a royal decree. As for myself, I do not know why we should construe the referral (in sec. 15 of the Law) to "the law of their domicile" of the spouses at the time of the solemnization of the marriage as necessarily referring to the domestic law of that legal system. If we are ordained to anchor ourselves to a "historical" legal system, let us soften the blow somewhat. To my way of thinking, the foreign court theory, also known as "double *renvoi*" doctrine, or the "total *renvoi*" doctrine, is immeasurably preferable, and it is the doctrine established in English law in the famous case of *In re Annesley, Davidson v. Annesley* (1926) [46]. As we know, this doctrine establishes that the referral to the foreign legal system is to the legal system as a whole – including its rules of private international law – and the Israeli court will sit as if it were sitting in the state whose legal system we have turned, and in the very matter currently before the court. See, e.g., A.V. LEVONTIN, CHOICE OF LAW AND CONFLICT OF LAWS (Leyden, 1976) (hereinafter – LEVONTIN, CONFLICT OF LAWS). This doctrine does not plant us, as if for eternity, in the domestic rules of the foreign legal system – the legal system that was the legal system of the spouses at the time of their marriage, but which has since become foreign to them (and perhaps even repugnant) – it permits flexibility in establishing the property relations between the spouses, and is suitably adaptable to the changes

that have taken place in the lives of the spouses since they married (although it is not as flexible as the full-mutability method or the partial mutability method).

For example, at the time of their marriage the couple were domiciled is Ruritania, but it was their intention, at the time of their marriage, to leave Ruritania and settle in Utopia. That is what they intended, and that is what they did. Now they are litigating a matter of spousal property relations in Israel. Under Ruritanian law – including its rules of private international law – the property relations between the spouses are supposed to be decided in accordance with Utopian law, as the law of their intended matrimonial domicile. On the assumption that the property relations law under Ruritanian domestic law differs from the property relations law in Utopia, which law shall we apply? Under the doctrine that rejects *renvoi* – that is, if we construe the opening clause of section 15 as referring to the domestic law of Ruritania – we will have to apply the domestic law of Ruritania to the property relations of the spouses, whereas under "the foreign court theory" we will apply Utopian law. What shall we do? To my thinking, there is no good or proper reason to construe section 15 of the Law as if the legislature had commanded us to apply the domestic law of Ruritania, particularly when Ruritania itself instructs me to apply the law of Utopia. This is but an example of why we should prefer the "the foreign court theory" – and even the doctrine of single *renvoi* – over the doctrine that utterly rejects *renvoi*, a doctrine that construes the referral to foreign law as a referral to the rules of its domestic law.

It is not my intention to say – and I have not said – that the foreign court theory is flawless. All that I have said is that I find this doctrine to be preferable to the alternative doctrine of referring – as if "now and forever" – to the substantive rules of a foreign legal system: foreign to the forum, and at the time of litigation, foreign to the litigants, as well.

15. Having said all that, we are left where we started. The reason is that neither what the legal system in Iran established at the time the Nafisis married, nor what the legal system in Iran established when the couple left Iran and settled in Israel, was adequately proved to the trial court. That being the case, we cannot address the provisions of the opening clause of section 15, whether we construe it as referring to the domestic law of Iran, or whether we construe it as adopting the foreign court theory. Mrs. Nafisi cannot, therefore, rely upon the provisions of the opening clause of section 15 of the Law. The assets under discussion are registered in the husband's name, and in order to acquire half of them, she must point to some legal source that grants her a right. Not having

proved the Iranian law – as required by the opening clause of section 15 – Mrs. Nafisi cannot anchor her right in that rule. What remains, then, is for her to try to set anchor in the provisions of the concluding clause of section 15 of the Law – the one that treats of an agreement made between the spouses themselves, in the hope that therein she may find grounds for the right she is claiming.

"They (the spouses – M.C.) may by agreement determine and vary (property relations – M.C.) in accordance with the law of their domicile at the time of making the agreement"

16. The opening clause of section 15 of the Law provides that property relations between spouses shall be subject to the law of their domicile at the time of the solemnization of their marriage. However, the concluding clause of section 15 instructs us:

> …they may by agreement determine and vary such relations in accordance with the law of their domicile at the time of making the agreement.

This provision of the Law is the legal provision that is hotly disputed by my colleagues, and I shall now add to the dispute – for a noble purpose, of course. But before I shoot arrows from my quiver in every direction, I will say a few words about the construction of the term "agreement" in the concluding clause of section 15 of the Law.

17. My colleague Justice Mazza is of the opinion that in regard to those whose domicile is Israel, the meaning of this "agreement" (if made after the commencement of the Law) is a "property agreement" as provided by the Law, inasmuch as only thus will it be an agreement "in accordance with the law of their (the spouses – M.C.) domicile at the time of making the agreement". As opposed to this, my colleagues President Barak and Justice Goldberg are of the opinion that this "agreement" includes an "agreement" in accordance with the provisions and the meaning of contract law – including an implied agreement – and without all the "pomp and circumstance" associated with a "property agreement" as provided by the Law. We should further note that Justice Elon was the first to express his opinion – in the *Azugi* case [1], at p. 14 – that an "agreement" in the context before us means any "agreement", including an implied agreement. I concur with the latter view, and with the reasons expressed by my colleagues in its support, and I would like to add a note of my own to their sage words.

Here are two spouses born where they were born, and married where they were married, and one day they made their way to the land of Israel "to build and be built".[3] The couple immigrated to Israel prior to the commencement of the Law, established their domicile, and lived in Israel in peace and tranquillity for twenty years, until Satan came to their home. And once Satan came to dwell with them, discord grew and increased until it reached the courthouse doors. The couple had not made a property agreement, neither when they married nor in their previous domicile. It never occurred to them. They lived in peace and tranquillity, and why would such a couple make a property agreement? So it was in their domicile abroad, and so it was in Israel. Twenty years, and no property agreement. Needless to say, over time the couple became part of Israeli society: the husband pursued his pursuits, and the wife pursued her pursuits, and they became an inseparable part of their surroundings at work, in society, in joy and in sorrow. An ordinary Israeli couple. Until the dispute that began and the separation that followed. Had these spouses been Israelis from the outset, there would be no problem establishing that they had created an "implied agreement" to co-ownership of the assets that they had acquired in the course of their marriage. While they had not made a "property agreement" between them, they had indeed made an agreement – an "implied agreement". Now, in coming to construe the legislative act, in order to give substance to the "agreement" in the final clause of sec. 15 of the Law, the question arises: What reason is there to limit this "agreement" specifically to a "property agreement"? What justification can there be for such a restriction of the language of the Law? We have searched tirelessly and found none.

Such is the case in regard to spouses who immigrated to Israel before the Law, and so in regard to spouses who immigrated to Israel after the Law. Imagine, for example, that a certain asset was registered in the husband's name alone, and one day the couple went and registered it in both their names. There can be no doubt that such registration would be valid, and their co-ownership of that asset would be realized. What difference is there between this example and an "implied contract" based upon the circumstances of the case, by which the couple deemed the asset to be co-owned and so treated it? And if that be the case, why should we not say that the law should

[3] Ed: the quote is from the lyrics of the song "*Anu banu artza*" (lyrics: Menashe Ravina, ca. 1920) about immigration to Israel.

follow life, after all, was the law not given that we might live by it? If this is how life flows, should we not assume that the law is meant to go with the flow, down the river, and not against the current and up the mountain? The Law - at least in the case before us - was not intended to educate the country's residents, but rather to adapt itself to the prevailing views of Israeli society: to prefer the principle of equality and reject views that were common in past centuries – views still common today in certain societies – as to the inferior status of women in married life. All of this together must, in my opinion, lead us to interpret the law in the manner adopted by my colleagues Justices Elon, Barak and Goldberg, as saying that the term "agreement" in the concluding clause of sec. 15 of the Law comprises a plain agreement. And an implied agreement falls within that meaning.

Thus far I have walked arm in arm with my colleagues President Barak and Justice Goldberg, with whom I agree as to the construction of the term "agreement" in sec. 15 of the Law. At this juncture our paths diverge: If my colleagues' path is to the left, then I shall go to the right, and if they will take the right, then I will go to the left.

18. I agreed that the term "agreement" in the final clause of sec. 15 of the Law means an agreement in accordance with the general law of contract – a plain agreement – and an agreement, as we all know, also means an implied agreement. However, what is an "implied agreement" - particularly within the context of the final clause of sec. 15 of the Law? To my mind, I have no doubt that an agreement in the context before us - an agreement, including an implied agreement – means a real agreement, an agreement that can be understood from the circumstances of the case at hand. An implied agreement is like an express agreement – although it is created by conduct and actions rather than by speech and words. When Reuben gets on the bus, he no doubt impliedly agrees to pay the fare, and should he claim at the end of the ride: "I didn't know" that I was supposed to pay for the ride, we will dismiss his claim as false. If Simon fills a bag with vegetables laid out on a stand in the market, he no doubt impliedly agrees to pay for the vegetables, and a claim that "I didn't know" that I was supposed to pay for the vegetables, because I thought they had been put there as a gift for passers-by, will be dismissed as empty words. And the same will hold true for a person who calls a plumber to his home and refuses to pay when the work is done, claiming that there had been no advance agreement that he had to pay. These are all – all of these and others like them – examples of true agreements, agreements that meticulously and carefully fulfil the conditions required for forming agreements in accordance with the law of agreements.

They are called "implied agreements" – to distinguish them from express agreements – but this distinction between agreements of one type and agreements of another type is nothing but a distinction that describes the methods for creating the agreement. The distinction is of no legal consequence in regard to the very existence of the agreement, except insofar as the manner of proof is concerned. The agreement is implied in fact by the circumstances of each and every case.

19. Alongside the "real" implied contract – that contract that is implied in fact – we find the implied contract that is not "real", the one that is called an implied contract but is not an implied contract: it is neither a contract nor is it implied. It is a commonly known phenomenon that in developing the law, the courts made use of the method of implied contract in order to advance the creation of norms and in order to do justice to the parties. Thus, for example, English law developed the legal field of unjust enrichment, a field of law that for many years was based upon the technique of implied contracts that were called quasi-contracts. The nature of "quasi-contract" was hotly debated for many years, but on one thing all were agreed: whatever the scope of "quasi-contract" may be, a contract it is not (cf. CA 6926/93 *Israel Shipyards Ltd. v. Israel Electric Company Ltd.* et al. [36] at p. 768). That "quasi-contract" was a "contract" implied in law. In other words, it was a formal legal device that the courts employed to give (new) meaning to the law. It was not a "real" contract, a contract like all contracts, that is, a norm or a set of norms that Reuben and Simon sought to create for themselves – of their own will – in order to regulate their relationship. It was not a contract at all. It was a formal legal pretext for a system of facts that required an appropriate substantive solution.

Indeed, in those cases the courts did not examine the factual picture presented to them in an attempt to *infer* an agreement between Reuben and Simon, as courts do when they seek to examine and discover whether or not an implied agreement was formed between Reuben and Simon. The facts were clear, and all knew that no contract had been formed between the parties, not express and not implied. The question that the courts addressed was whether, on the basis of the agreed assumption that there was no contract between the parties, it would be proper to grant Reuben relief against Simon. Would it be proper to create a new legal entity, a right, that will wrap itself in a robe called contract (or "quasi-contract)? Here the court does not infer an intention to form a contract from the circumstances. However, since the form is that of contract (or quasi-contract), the court *imputes* to the parties an intention to form a contract, an intention that all are

aware did not exist and was created solely for the purpose of the formal legal pattern. A real implied contract derives from the circumstances of the case, whereas an implied contract that is not real is one that we apply to the circumstances of the case "for the glory of the law".

The unreal implied contract – or if you prefer: the fiction of the implied contract – served as a valuable tool in the development of the law, like every other fiction intended to improve and advance the legal system. However, every fiction – as good, beautiful and noble as it may be – is just what it is called: it is a fiction, it is not the truth. The day comes when every fiction must depart the legal stage. Legal wisdom is knowing when the appropriate time has come to ask a particular fiction to relinquish its place. And a fiction that walks among us after it has fulfilled its role will not only bring no benefit, it may even do harm.

20. My colleagues President Barak and Justice Goldberg are of the opinion – each in his own way – that the provision of the concluding clause of sec. 15 of the Law may be decisive in our matter, that is: the Nafisis agreed between them – impliedly, of course – upon co-ownership of their property, and therefore Mrs. Nafisi is entitled to what is hers. I strongly disagree with this. In my opinion, the provision of sec. 15 is concerned with a real agreement between the spouses, and in the matter of the Nafisis, there is no evidence of the forming of a real implied contract between them for the co-ownership of their property – a contract that is implied in fact – but the opposite.

The community property presumption and the spouses – the meaning of "agreement" in sec. 15

21. The question whether the Nafisis "agreed" to co-ownership of their property is strongly tied to the community property presumption created by the case law in regard to property relations between spouses, and we must therefore say a few words regarding the case law. Reading the case law will show us that a fine distinction must be drawn between the *substantive elements* that created the community property rule in regard to spousal property, and the *formal legal frameworks* into which the case law cast the substantive elements. Indeed, we find that, not infrequently, contract law provided the formal legal framework for advancing the law, however we do not find that contract law was – in truth – properly employed. We discussed this in CA 806/93 *Y. Hadari v. S. Hadari (Darhi)* [37], as we stated there, at p. 699:

3 … it is appropriate that we distinguish between the *substantive grounds* that give life to the community property rule – that give it life and nourish it – and the *formal legal frameworks* that serve us: between the contents of the bottle and the bottle itself, between the level of principle and the level of legal technique. Truth be told, it may be said that the areas nourish each other, and the distinction between them is neither sharp nor easy. Moreover, some principles are easily categorized both on the one level and on the other (like the element of intent), and at times employ the very same term ("intent") on one level or another without distinguishing between the two. It would nevertheless appear appropriate to distinguish between the principles that serve the system, and to add and locate the various levels of abstraction.

4. As for the substantive elements – those elements that create the law and steady it in place, these elements were not born under one roof, but came from different places. It would appear that the main principle is to be found in the need to act decently, fairly and justly with the wife who is, as a rule, the one who may end up disadvantaged in the absence of the community property rule. These three, each in it own right, gave birth to the principle of equality (equity is equality), and to this group the element of intent was added. Along with all of these resides the pledge of a life together that the spouses made (whether by marriage or not by marriage), which has existed from time immemorial, since God created man - male and female He created them: "Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh" (Genesis 2:24).

Thus it was in living together – under the warm sun and in the cold, in joy and in sorrow – and certainly thus in property. In our opinion, the substantive elements are not all to be found at the same level of abstraction, and there may be differences of opinion on the question of whether one element or another is to be located here or somewhere else.

As for the *formal legal framework*, it would seem that it lies somewhere between contract and property law (and with them the laws of trust in the broad sense), and

> through them all the main support is the element of intent, primarily the intention of the spouse who is the owner of the property (but not only his intention).

And also see what I stated there, at pp. 700-704.

22. However, a careful historical examination of the case law shows that since the emergence of the community property rule, the element of "implied contract" did not play a central role, but served as a *formal legal* refuge, and the substantive elements – the elements of equality, decency, fairness, justice and equity – crowded together, one beside the other, under its roof. The element of intent also came under that roof, but the element of intent did not play a primary role except in the *negative*, that is, when the circumstances showed that a spouse did *not* intend to join his spouse in his property. In the words of President Shamgar in the *Bavli* case [18], at p. 252:

> The law of Israel, as construed by this court, is that in regard to spouses who live together and maintain a common household, the property accrued in the course of their lives together is their joint property that divides equally between them, even if it is registered only in the name of one of them – as long there is no evidence that they formed some other intent. That is the community property presumption.

Indeed, unlike "real" implied agreements – regarding which we learn about the intention of the parties from the circumstances of each and every matter – in the case of community property, the courts attributed to the spouses the intention to share their property. Needless to say, attributing intention reflects a fiction. Thus, for example, in CA 300/64 *M. Berger v. Estate Tax Director* [38] – which is one of the early stages of the rule – Justice Berenson stated as follows, at p. 245 (emphases in this quotation and the following quotations are all mine – M.C.):

> *In the absence of an agreement, or when it is not clear what the intention of the parties was at the time of purchase, the court will impute to them the intention that the property belong to both of them in equal parts*…of course, if it is proven that at the time of purchase the intention was that the property belong to one of spouses, or held jointly but not in equal parts, then that intention should be realized. But in the absence of such evidence, it is presumed that when they live together and do not maintain a clear

> distinction between the property of each of them, their intention was to an equal partnership.

The fiction is clear. In CA 253/65 [25] President Agranat cites Justice Berenson's statement with approval at p. 598, and adds the following of his own, at p. 597:

> *Indeed, in most cases – it may be assumed – the properties are purchased without any express agreement between the spouses that addresses the question of their ownership of those properties, and without even giving consideration to the question at the time of purchase*. When the facts in such cases point to married life over a significant period, during the course of which the spouses did not distinguish income that each received from different sources but pooled it – if only conceptually – into a single fund from which the monies were drawn to purchase the properties, such that we can say that there was a kind of "aggregation of resources" and an absence of a "clear dividing line between the property of each of them", then *it is proper to impute to them the intention to share in equal parts*.

President Agranat adds, at p. 599:

> …in the absence of clear proof regarding the parties' intention on the said question of ownership, and the facts surrounding the marriage are like those described above*, it is justified to turn to the principle found in the laws of equity, that is the principle that supports equality*. In other words, the property should be divided equally between the spouses…

And also see CA 135/68 *T. Bareli et al. v. Estate Tax Director, Jerusalem* [39]. In CA 595/69 [29], the Court reiterates the rule, and Justice Y. Kahan says, at p. 568, that "the law in regard to community property of spouses is, at base, a creation of the decisions of this Court". In other words: not an implied agreement but rather a creation of the case law.

23. We intentionally brought early cases in order to show that from the very *outset* implied contract served only as a cover, a façade and a technique for expressing substantive principles. Those principles were: justice, equity, decency, fairness and equality for the wife. As for the later

case law, we will suffice with two quotes from the *Bavli* case [18]. This, for example, is what Deputy President Barak said, *ibid*., at p. 229:

> The community property rule is a creation of the Court. It is an "outstanding example of judge-made law, delivered on the birthing stool of this Court"… it employs a contractual construction that treats of an (inferred) agreement between the parties, by which they are equal partners in rights…the legal tool is intended to realize a social goal. *It is intended to bring about social justice. It is based upon equality between the sexes. It is nourished by the conception that spouses contribute equally to the family's welfare.*

President Shamgar spoke in the same spirit. We saw what he said in paragraph 22 above, and he continued to say, there [18], at p. 254:

> *The Court fashioned the principles of the community property presumption on the basis of the social and economic reality* in which the separate but simultaneous and coordinated endeavour of each of the spouses creates property that should be viewed as common and as dividing between them equally. The partnership is not created in the court but in the day-to-day lives of the spouses, and what is put before the court is in the realm of a result that the law recognizes and to which it grants legal force. Therefore, the court must view the right deriving from the community property presumption accordingly, that is, as a valid, existing right. In other words, *the law grants its seal of approval to a relationship grounded in our interpersonal, moral and social conceptions*.

We could cite many other examples from the case law, and whoever cares to take the trouble will find plenty of evidence for what we have said.

Professor Ariel Rosen-Zvi – who left us only recently, before his time, and his shoes will be hard to fill – considers the fiction of implied contract in his abovementioned book. He explains in clear, convincing language why and wherefore the phantom "implied contract" lacks the strength to bear the presumption of equality upon its shoulders. See his remarks, *supra*, at pp. 249-252. Thus, for example, he writes at pp. 250-251:

> The arrangement concerning the joint property of spouses is not predetermined; the conditions of the arrangement have not been decided by the parties, nor, for the most part, have they been determined by the Court. The arrangement is so vague and unclear that it is hard to see how one can infer the existence of any implied contract in such a case, and how one can infer a meeting of minds in all that concerns the sharing of property or an obligatory partnership between spouses…
>
> …
>
> It therefore appears to us, from every aspect that we have examined, that the rules and conditions have not been met for the making of an implied contract between the spouses by reason of their conduct in their married life and their shared lifestyle, alone. The intention of the parties, even if it be inferred from conduct, must find expression in a manifest, unequivocal declaration of desire in order for us to infer an implied contract based upon that joint intention that creates the certainty and meeting of minds between the spouses. Thus, although in principle the court is meant to weigh the facts of each case on an individual basis, it does so against a background and in accordance with a test that Justice Berenson created, and in reliance upon an a priori presumption, while deviating from an independent examination of the facts in accordance with contract law.

A word fitly spoken is like apples of gold in a setting of silver! And further see the great dispute among the justices in the *Yaacobi and Knobler* cases [9].

We thus find that the community property rule between spouses does not actually find support in the law of contracts and agreements. It draws its nourishment from the principles of justice, equality and fairness, while contract law was primarily intended only to serve as a legal framework and form for expressing those principles that create rights.

24. It would appear that the legislature itself did not manage to escape old idioms and mindsets, and so we find that it too speaks in fictional terms, and unnecessarily so. For example, the Law

sets out the necessary conditions for the existence of a "property agreement" in sec. 2, adding in section 3(a):

> *Application of an arrangement*
>
> 3(a) Where the spouses have not made a property agreement or where they have made such an agreement, in so far as it does not otherwise provide, they shall be regarded as having agreed to a resources-balancing arrangement in accordance with this chapter, and this arrangement shall be regarded as having been agreed upon by a valid property agreement conforming to the provisions of section 2 (emphasis mine – M.C.).

To what purpose does the legislature establish that spouses that have not made a property agreement "*shall be regarded* as having agreed to a resource-balancing arrangement in accordance with this chapter, and this arrangement shall be regarded as having been agreed upon by a valid property agreement…" (emphasis mine – M.C.)? What need does the Law have in adopting a fiction by which the spouses shall be deemed as having agreed to a resource balancing arrangement? ("the collocation 'shall be deemed as…' is the creation of a fiction": CA 3095/91 *Emmanuel Lidor et al. v. Director for the purpose of the Land Appreciation Tax Law*, 5723-1963 [40], at p. 823). And why did the Law not explicitly establish that in the absence of a property agreement the spouses will be subject to the resource balancing arrangement stated in the Law? You may say: the legislature has not yet freed itself of old thought patterns – whereas the courts needed to make recourse to fictions in order to maintain the law – thus resulting in the use of language that was once appropriate but has since become outmoded. And see: ROSEN-ZVI, *supra*, pp. 339-340; G. Tedeschi, *On Dispositive Law*, 15 IYYUNEI MISHPAT 5, 6 (1990); E. ZAMIR, INTERPRETATION AND GAP FILLING IN CONTRACTS, (The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1996) 17. In contract law, for example, the legislature freed itself of the mindset of implied contract – a thought pattern that was so characteristic of the development of contract law in English law – in establishing dispositive provisions, that is, provisions that apply to contracts in the absence of an alternative agreed to by the parties. Why should we not follow the same approach here? In CA 3666,4012/90 *Zukim Hotel Ltd. v. Netanya Municipality; Netanya Municipality v. Zukim Hotel Ltd.* [41] the provision of sec.

9 of the Contracts (General Part) Law [*sic*][4] is examined. Section 9 treats of restitution after the rescission of a contract, and the question arose as to the legal character of this provision. Some were of the opinion that the provision should be viewed as an "implied condition" between the parties, about which I said as follows, *ibid*., at p. 68:

> The statement that sec. 9 of the law is an "implied condition" between the parties to the contract – as long as not otherwise stated in the contract – is nothing but a fiction. It does not reflect a factual truth. Indeed, parties may think about sec. 9, and ponder what it says, but we all know that, as a rule, the parties to a contract do not consider the provision of sec. 9 as such. Fiction plays a decisive role in the development of the law, but why should we make use of a fiction when there is no real need? Indeed, the concept of "implied condition" – like the concept of "implied contract" – has caused us no insignificant suffering in the development of the law of unjust enrichment (and more precisely: in the development of the rules of quasi-contracts), and after having banished it from our presence in shame, shall we conjure it up it from the dead to learn the law from its ghost?

And form there to here.

25. It is, therefore, our opinion that the community property rule between spouses does not – in truth – rest upon an implied agreement between the spouses. That implied agreement of which the case law speaks is but the cover, the formal legal façade intended to hold social content. The core of the social content is the desire to treat the wife with equality, justice and fairness.

All of this regards the community property presumption, a presumption that was created and existed prior to the Law, and even after it. As for the "agreement" in sec. 15 of the Law, in our opinion the legislature is addressing a real agreement – even if an implied agreement – and not a fictitious agreement like that which served in the creation of the community property presumption.

[4] Ed: should be "Contracts (Remedies for Breach of Contract) Law".

Indeed, the very fact that the legislature expressly speaks of a fiction-agreement in sec. 3 shows us that the agreement in sec. 15 is a real agreement, an agreement that is "palpable".

26. What we have said in regard to the community property rule in general, applies to the Nafisis, and even *a fortiori*. The basic assumption is that, prior to immigrating to Israel, part of the property belonged exclusively to the husband, and the question that arises is: After their immigration – or pending their immigration – did the spouses *agree*, if only impliedly, upon co-ownership of that property, half and half. I perused the material and did not find the slightest evidence of such an agreement, or of the husband's (unilateral) consent to grant his wife co-ownership of the property that was registered exclusively in his name. Indeed, I am of the opinion that no agreement was made between the spouses in accordance with the provisions and meaning of the law of contracts and agreements. I will permit myself to add that even in the opinion of my colleagues, no real implied agreement was made by the spouses for the co-ownership of all their property. Indeed, the terms my colleagues use when speaking unguardedly speak for themselves. They speak of fictions. Thus, in construing sec. 15 of the Law, and in applying the said "agreement" to the Nafisis, my colleague President Barak says the following (in sec. 6 of his opinion):

> …upon arrival in Israel, spouses married abroad prior to the entry into force of the Property Relations Law who, when in Israel, satisfy the conditions for community property, *are deemed as agreeing* to maintain a community property regime in Israel (emphasis added – M.C.).

What is meant by "are deemed as agreeing"? Rather say: the spouses did *not* agree in the simple, true sense of agreement; we hereby "impose" an agreement upon them, by means of a fiction. And thus said my colleague Justice Strasberg-Cohen:

> … in the circumstances of the present case, *the spouses should be deemed* as agreeing to maintaining, in Israel, a community property relationship (emphasis added – M.C.).

And so even my colleague Justice Dorner, who speaks of an "agreement" in accordance with sec. 15 of the Law, about which she says (in para. 1 of her opinion):

> …the existence of which is inferred on the basis of the *community property presumption* in regard to the couple's assets (emphasis addes – M.C.).

Further on in her opinion, my colleague states (in para. 3 of her opinion) that an "agreement" under sec. 15 includes even an implied agreement, "…and it can be proven with the aid of the community property presumption".

Our colleague Justice Goldberg was the first among us to speak of the existence of an implied contract, so to speak, between the spouses as a fiction. And so, for example, he says (in para. 28 of his opinion):

> Having found, on the basis of the spouses' clear, serious intention to immigrate to Israel, that they should already be conceptually viewed as Israeli domiciles, the presumption follows that having formed that intention, they agreed to adopt the property regime prevailing in Israel in regard to assets acquired thereafter from joint effort – both those that "immigrated" to Israel with them, and those acquired in Israel in anticipation of their immigration (emphasis added – M.C.).

The element of fiction in the so-called "agreement" of the parties is clear to all. Did the spouses truly and honestly agree "to adopt the property regime prevailing in Israel"? What evidence was brought for this? Had the spouses been asked what their intention was – or what they had agreed to upon immigrating to Israel – I have no doubt that the husband, at the very least, would have replied that all that was is what will be. It is also possible that the wife would have said the same. Indeed, the spouses did not make any agreement between themselves in regard to the subject of property. It is, therefore, no wonder that my colleague does not speak about a real agreement between the spouses, but rather about "the *presumption* that…they agreed to adopt the property regime prevailing in Israel" (emphasis mine – M.C.). Had an agreement been proven, my colleague would not have made recourse to the presumption, and recourse to the presumption is a sign that *no* agreement was proven. The truth is, of course, that we are subjecting the spouses to a property relations arrangement that we deem to be appropriate. And if that is what we are doing – the good and proper – let us not attribute our acts to some "agreement" between the spouses, since we all know that they did not agree to what we are attributing to them. Indeed, my colleague is well aware that we are simply concerned with a rule that serves to "reflect a society's conceptions of

distributive justice and cultural conceptions regarding equality between the sexes…" (section 8 of his opinion). And further see what my colleague writes in sections 14, 16 and 17 of his opinion.

Here is the fiction. And who is he, and where is he, who would presume to say that it is not a fiction? And so, as we follow the path of justice, and meet the worn out fiction standing in the way, we should follow the advice of Lord Atkin in *United Australia Ltd. v. Barclays Bank Ltd.* (1941) [47] at 29:

> These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.

27. We thus find as follows: No *express* agreement for co-ownership of property was made between the Nafisis. Nor was any implied agreement – in its *real* contractual sense – made between the spouses. Knowing that the provision of the concluding clause of sec. 15 treats of a "real" agreement, whether an express agreement or an implied agreement – a real agreement as opposed to an agreement born of a fiction – we can conclude that the provision of the concluding clause of sec. 15 does not apply in the case before us.

28. To summarize thus far, certain property was registered in the husband's name alone, and the wife did not succeed in proving that she has a right to co-ownership. In order to prove a claim of community property, she had to pass through the portal of sec, 15 of the Law, and having found that she does not posses the appropriate keys – neither for unlocking the opening clause of sec. 15, nor for unlocking its concluding clause – the unavoidable conclusion is that matters remain as they were, and the wife is not entitled to take part of the property registered in her husband's name alone.

On equality and community property: foundational principle and public policy

29. Mrs. Nafisi claims a right to property that her husband purchased and registered in his name, and we have concluded, thus far, that she has not succeeded in grounding her claim of right

in any legal source. The couple were married in Iran, and thus the relationship is governed, first and foremost, by the provisions of sec. 15 of the Law. We examined and determined that the wife cannot pass through either of the portals established in the walls of sec. 15: neither through the portal of the opening clause – inasmuch as it was not proved that Iranian law grants her the right that she claims, nor through the portal of the concluding clause – inasmuch as the existence of a real agreement between the spouses – an express agreement or an implied agreement – for co-ownership was not proved. The required conclusion is, therefore, that the wife's claim should be denied. This was, in fact, the conclusion reached by our colleague Justice Mazza, with whom our colleagues Justices D. Levin and Tal concurred.

30. This conclusion that Mrs. Nafisi will be left bereft of properties acquired by her husband – while she saw to their common household and raised their five children over the course of 40 years of their marriage, troubled all of my colleagues, and it troubles me very much, as well. This difficult result was also clear to the Court in the *Azugi* case [1]. All of my colleagues gave expression to this grave difficulty, each in his own way and style: Justices Elon, Barak and Y. Kahan – each of them – in the *Azugi* case [1]; our colleagues Justices Mazza, in his opinion that is the subject of the Further Hearing, and my colleagues on the present bench, Justices Goldberg, President Barak, and Justices Strasberg-Cohen and Dorner. Section 15 of the Law stands at the centre of the ring, and we are all circling it and criticizing it. So we the judges, and so jurists in their publications. See, e.g., Shava, *Property Relations*, at pp. 268-288; SHAVA. PERSONAL STATUS, at pp. 385-405.

It is not common that a provision of a particular law garners so much criticism from all who cross its path, without exception. The question that must be asked is – why? Moreover, in the *Azugi* case [1] the judges took different paths – Justice Elon followed his path, and Justices Barak and Y. Kahan followed theirs – and it seems to me that there was not a single legal question upon which the judges did not disagree. Yet amazingly, at the end of the day, all the judges were united and rendered their decision unanimously in favour of the community property presumption and in favour of the wife. All three – each one of them – expressed open and concealed criticism of the provisions of sec. 15 of the Law, and did their utmost to find ways around it. We would add that this tendency in regard to sec. 15 can also be seen in the following cases: CA 291/85 [17]; the *Shaman* case [10]; CA 370/87 [16], each in its own way and style. The drama repeats itself yet

again in the present case: we are divided in our opinions, but we are all critical of sec. 15 of the Law.

31. And so I ask: what has caused my colleagues to go out of their way, each one of them, in order to express severe criticism of this legislative provision in sec. 15 of the Law? Why are the learned uncomfortable with an order, so to speak, given us by the legislature, directing us to the law of the domicile of spouses at the time of their marriage? I do not think that we need look very far, as the answer is laid out at our doorstep. The criticism is directed in all its fury at the message conveyed – or that may be conveyed – by sec. 15 of the Law, according to which it is possible that the husband will prevail, and the wife will be deprived inappropriately. This possible gain and loss – at the expense of one another – bare a sensitive nerve and wound our sense of justice. In legal parlance, we would say that sec. 15 of the Law may infringe an accepted basic principle of Israeli law, the principle of equality between male and female, between man and woman, between spouses. It may infringe – and indeed it does infringe. Note: we are not concerned merely with some law that may, in the opinion of the Court, cause injustice in certain circumstances. We are speaking of a law that undermines a central pillar of the Israeli legal system. Only thus can we understand and explain the great distress that weighs so heavily upon us all, and our outcry against the provisions of sec. 15 of the Law.

32. Having arrived at this point, we can correctly understand the attempts of the judges – each in his own way – to expand the scope of the concluding clause of sec. 15 of the Law, while at the same time adapting the scope of the opening clause of sec. 15 of the law to our accepted basic principles. That is what my colleagues are doing. Thus my colleagues Justice Goldberg and President Barak hold that the Nafisis should be deemed as if they made an agreement for the co-ownership of all their property, even though we all know that the Nafisis never made such an agreement between them at all – in the real sense of the concept of agreement – not expressly and not impliedly. In this regard, my colleague president Barak states (in para. 4 of his opinion):

> Indeed, if the contractual construct can deliver the community property rule across the raging sea of the provisions of the Land Law in particular, and civil codification in general, I see no reason why the it would lack the power to deliver the community property rule across the raging river of conflict law. We can revisit this matter in the future, and consider whether we might

> base the community property rule upon the general power of an Israeli judge to develop the law in conjunction with the statutory law, without need for the contract construct … That is judicial power that draws upon our legal tradition. By that means, it is possible – should it be found appropriate – to grant a more comprehensive character to the community property rule, in addition to its contractual character. That would be the mature fruit of "judge-made law, delivered on the birthing stool of this Court" (CA 630/79 *Z.B.Liberman v. A. (Mendel David) Liberman* [35], *per* Elon, J., at p. 368).

So indeed. My colleague the President admits, in fact, that we have created a fiction of an agreement, and by the bridge of this fiction he seeks to cross the Sambation.[5] For my part, I do not wish to walk on the bridge of fiction. I take a different path.

33. The point of departure of my journey is to be found in the principle of women's equality, a principle that has been accepted and taken root in Israeli law – in statute and in case law. We shall not expand upon this principle, so as not to appear to be carrying coal to Newcastle. Indeed, the declaration of the founding of the state proclaimed what it proclaimed; the Women's Equal Rights Law, 5711-1951, stated what it stated, and we will put primary emphasis upon the decisive contribution of the case law in grounding, deepening and bolstering the principle. Any attempt to challenge this principle of women's equality would be the equivalent of heresy in our society. The community property presumption between spouses – a presumption created by the courts – is like a branch that sprouted from the tree of equality, and it is from equality that it draws its strength. This is also true of the provisions of the Law and its resource balancing agreement, which were also derived from the principle of equality. In the *Bavli* case [18] - as we are all aware – the Court gave strong support to the community property rule between spouses as an outgrowth of the principle of equality, whether as a derivation of the Women's Equal Rights Law, or whether as an independent rule in its own right. And see, e.g., Y. Mendelson, *Property Rights between Spouses*,

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[5] Ed: a mythical river that can only be crossed on the Sabbath, when Jews are not permitted to travel (See, e.g., Genesis Rabbah (Vilna) 11:5).

in F. Raday, C. Shalev & M. Liban-Kooby, eds., WOMEN'S STATUS IN LAW AND SOCIETY IN ISRAEL (Schocken, 1995) 437.

Moreover, the principle of equality between men and women and between spouses has assumed the status of overarching principle in Israeli law – or, if you prefer, a fundamental principle – and within its prescribed boundaries all other normal provisions and rules will kneel and bow. That same overarching principle gave birth – truth be told – to the implied contract that is not an implied contract at all. It breathed life into the dry bones of the implied contract formula; it raised the bridge fiction; and those of my colleagues who make recourse to the implied contract construction are speaking of the same overarching principle even if they do not say so. The implied-contract mask is the thinnest of all, and now we shall remove it. And when we remove the mask, our eyes will see the overarching principle of equality in all its grandeur.

34. The community property presumption in property relations between spouses derives from the same overarching principle of equality between spouses, and it had two spiritual fathers: one, Israeli society's views on the appropriate norms that should – and do – apply to property relations between spouses, and the other, the courts, as those meant to express society's views. These two created the community property presumption, and the give and take between the law and reality continues to this very day.

35. What is the scope of incidence of the principle of equality in property relations between spouses? The answer is almost self-evident. Inasmuch as the principle is Israeli – it is a principle that arose from the reality of Israeli society – it is straightforwardly clear that, in principle, it was intended to apply only to those who are domiciles of Israel. Of course, we are all aware that the principle of the equality between spouses is not exclusively ours and we did not create it. However, once the principle was naturalized in our country, it became ours: we are dealing with one of our own and we apply it to our own.

36. How strong is the community property presumption between spouses, and where is it located in the Israeli normative hierarchy? In the *Azugi* case [1], at p. 9, Justice Elon placed the community property rule between spouses in the realm of public policy in Israel. Justice Barak disagreed with that view, being of the opinion that it would be incorrect to categorize the community property rule as one of public policy. In his own words, at p. 28:

> In my opinion, the rules of community property developed by this court should not be viewed as part of Israeli public policy. If that were our approach, then we would not recognize an agreement between spouses that rejected co-ownership. It seems to me that my distinguished colleague (Justice Elon – M.C.) extends the concept of "public policy" beyond its natural borders. I agree that the provision of secs. 1 and 2 of the Women's Equal Rights Law, 5711-1951, reflects Israeli public policy, and therefore we would not give effect to a foreign law that contradicts those rules. However, this does not mean that the community property rules developed by this court are themselves part of Israeli public policy.

In the decision that is the subject of this appeal, our colleague Justice Mazza agrees with Justice Barak's statement.[6]

Initially, I was of the opinion that the community property presumption was located in public policy, but I then changed my view for two reasons. First, we are speaking of external public policy (*ordre public externe*), and the nature of such public policy is that it can mercilessly crush any inconsistent norms. See, e.g., A. LEVONTIN, CHOICE OF LAW – DRAFT BILL WITH BRIEF EXPLANATORY NOTES (Ministry of Justice, 1987) (hereinafter – LEVONTIN, CHOICE OF LAW), sec. 67 at p. 118 and sec. 4 at pp. 33-34; DICEY AND MORRIS, *supra*, at p. 88*ff*; LEVONTIN, CONFLICT OF LAWS, at pp. 122-124. As for the presumption of equality in property relations between spouses, it is not to be located in this framework. Indeed, by its nature, this presumption is unlike those grand principles that are part of public policy: first, being merely a presumption, it can be rebutted. Thus, for example, a basic assumption in this regard is that spouses can contract out of the community property presumption. We would have to agree that it is difficult to categorize such a dispositive provision as being one of public policy. Second, the community property presumption limits itself, from the outset, exclusively to Israeli domiciles. It does not presume to apply to foreign residents, even if they litigate before an Israeli court. In so limiting itself, it removes itself from the realm of (external) public policy, inasmuch as external public policy obliterates any norm that stands in its way.

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[6] IsrSC 48 (2) 99.

Therefore, in my opinion, while the community property presumption between spouses is an overarching principle in our law in its application to Israeli domiciles, it does not reach the level of (external) public policy. This overarching principle is a sort of internal public policy (*ordre public interne*) according to the classification of the great jurist Friedrich Carl von Savigny, as opposed to external public policy. See, for example, HCJ 143/62 *Funk-Schlesinger v. Minister of the Interior* [42], at p. 256.

We are dealing with a quasi-internal public policy, inasmuch as the overarching principle applies only to Israeli domiciles, but that overarching principle holds Israeli domiciles in its grasp with full force and will not relent.

Having reached that conclusion, we can proceed on our course.

37. The community property rule between spouses applies, so it would seem, to all spouses domiciled in Israel. That will be the basic assumption in every case treating of property relations between spouses. Whoever seeks to deviate from that rule – a rule that derives from an overarching principle of the Israeli legal system – will bear the heavy burden of explaining and persuading that his case should be treated differently. This would be the case, for example, if a different agreement is made by the spouses – a real agreement – as stated in sec. 15 of the Law. And such would be the case if a husband were to prove that according to a foreign law that applies in accordance with the opening clause of sec. 15 of the Law, a different arrangement is to apply – one that is not a community property arrangement as we expect, but is nevertheless an arrangement that is based upon the principle of equality as accepted in our legal system. However, if the court finds that the foreign law that is applicable under the provision of the opening clause of sec. 15 of the Law does not recognize the principle of equality from the outset, that law will be rejected as repugnant to an overarching principle of the Israeli legal system, an overarching principle that applies to all Israeli domiciles. In such a case, the community property rule will stand, and the case will be decided accordingly.

The conclusion in the matter before us is obvious. The community property presumption applies to the Nafisis. From the moment that they immigrated to Israel, they became ours and one of us. If Mr. Nafisi wishes to be an exception, he bears the burden of proving why he is to be exempted from the presumption. Mr. Nafisi did not succeed in removing himself from the ambit of the overarching principle. Therefore, the parties remain at the end as they were in the beginning.

The community property presumption continues to apply as it did from the outset. Mrs. Nafisi is entitled to share the properties that her spouse acquired in the course of the marriage, half and half.

38. With great caution I will add – as the matter requires further consideration – that it may be possible to achieve the same conclusion by recourse to the famous distinction made by our teacher Professor Avigdor Levontin between "vested" rights and "floating" rights. See A.V. Levontin, *Conflict of Laws with reference to Transnational Contracts*, ISRAEL ACADEMY OF SCIENCES AND HUMANITIES PROCEEDINGS, vol. 3, no. 2 (Jerusalem, 1968) (hereinafter – Levontin, *Contracts*); and see M. Shava, *The Presumption of the Identity of Foreign Law*, 4 IYYUNEI MISHPAT (1975-76) 583, at p. 587 *ff* (Hebrew); M. SHAVA, PERSONAL STATUS, at p. 456, 460*ff*.

We will briefly explain: Property relations between spouses can be classified with the family of "floating" rights. They are rights that are created between the spouses themselves (*inter partes*), and do not derive from the status of marriage *per se*. See, e.g., the *Bavli* case [18], at pp. 233-234 *per* Barak, D.P.). Being what they are, at the first stage we will apply – as to other "floating" rights – the *lex fori*, that is, Israeli law and the principle of community property of spouses, which represents the accepted Israeli idea of justice. If one of the spouses claims that the principle of community property does not apply to him by reason of the law of domicile at the time of the solemnization of the marriage, *he* will have to bear the burden of proving that law. If we find that that law does not recognize the principle of community property – unfairly discriminating against women – we will reject it as repugnant to an overarching principle that applies in Israel to Israeli domiciles. By this approach, too, we find that the community property principle will apply to spouses whose domicile was not Israel at the time of the solemnization of their marriage, but who became Israeli domiciles. It may also be possible to present that same result in terms of the application of the presumption of the identity of foreign law (see SHAVA, *ibid.*).

39. My colleague Justice Mazza says (in the appeal that is the subject of this Further Hearing) that the doctrine of "floating" rights – which leads to the application of domestic law – cannot apply to our case. Why?

> … inasmuch as sec. 15, itself (as part of the domestic law), directs us to the foreign law. In so doing, the legislature expressed its view that sharing (or non-sharing) of spousal property does not create (according to the well-known distinction of Prof. Levontin) "floating" rights … but rather rights

> that by their very definition are anchored in the particular law in which they were created … Under these circumstances, recourse cannot be made to the provisions of domestic law, inasmuch as such recourse to its provisions would be contrary to the express provisions of sec. 15.

I find it difficult to agree with this. In my opinion, by their very nature, property rights between spouses give rise to "floating" rights, and that is the initial assumption in construing sec. 15 of the Law. Therefore, the referral to the law of the spouses' domicile at the time of their marriage is – from the outset – a referral that is required due to the nature of the rights as "floating" rights (as opposed to "anchored" rights). In other words, in doing what we are doing, we are not rebelling against the legislature. As we know, even in regard to contracts, for example, private international law refers us to a particular legal system. Should we therefore conclude that contractual rights are not "floating" rights? If we were to say that, then it is like saying that the distinction between "floating" rights and "anchored" rights is no distinction at all (one may legitimately reject this distinction, of course, but our assumption here is that we agree with the distinction).

40. What we have said about "floating" rights, we say with extreme caution. The water is deep, and we should beware. Thus, for example, if we were to classify the right to community property as a "floating" right, then there would be nothing to prevent us from construing the provision of the opening clause of sec. 15 of the Law as referring to the domestic law of the couple's domicile at the time of the solemnization of their marriage, while relinquishing *renvoi*. See and compare Levontin, *Contracts*, p. 85*ff*. (67*ff*.). And see LEVONTIN, CHOICE OF LAW, p. 59*ff*. We shall leave all this for the future.

41. It may seem that what we have said conflicts with the doctrine of vested rights that Justices Elon and Barak speak of at length - and apply – in the *Azugi* case [1]. In fact, had the spouses litigated their claims in Iran, then the husband would have succeeded in keeping the properties registered in his name, since Iranian law does not recognize, *ex hypothesi*, the community property of spouses. And now, having immigrated to Israel, we recognize – as if by *deus ex machina* – community property. Doesn't the path we are following infringe the doctrine of vested rights (a doctrine expressed in sec. 22 of the Interpretation Law, 5741-1981, and prior to that, in sec. 14 of the Interpretation Ordinance [New Version])? This argument will not succeed, in our opinion, for

several reasons. First, inasmuch as in our case it contravenes an overarching principle of the Israeli legal system, which applies to all Israeli residents. At the end of the day, we must bear in mind that we are concerned with Israeli society – with the fabric and quality of life in Israel as expressed in the property relations between spouses. We are concerned with a "local" rule, a rule that arose from within Israeli society – with the active help of the courts – and created an overarching principle. Against this background, a claim of "vested rights" can only be spoken in a whisper. Indeed, whoever comes to rest in the shade of Israeli law should know that he must accept it as a package deal, and the package may contain some norms that he will not like. "Domicile" is a status or quasi-status. It is a status or quasi-status desired due to the nature and character of Israeli society, and a person who wishes to settle in Israel places himself under the burden of that status or quasi-status of domicile.

Secondly, a claim of "vested rights" is not germane from the outset, inasmuch as we have not rejected any right that was acquired. All that we have done is to shift the burden of proof and place it upon the spouse who claims that the arrangements under a foreign legal system differ from the community property presumption accepted in Israeli law. And where those arrangements deny the rights of women to equality, we will not grant them recognition because they are repugnant to an overarching principle of Israeli law.

Third, a claim of "vested rights" is liable to spin us around in a kind of vicious circle whose beginning is its end and whose end is its beginning. The claim that by following our approach we deny "vested rights" – that we deny rights or detract from rights – assumes that a person "acquired rights", and that all that remains for us to do is to "recognize" those rights. But presenting the matter in this way creates a distorted view, if only because we are assuming what we seek to prove. Indeed, the question is whether or not the husband acquired "vested rights", or more precisely: should we recognize the "vested rights" that the party claims. This question is given to our decision, and our decision will be made in accordance with the values that we adopt. The spouses are residents of Israel, and where recognition of "vested rights" will infringe an overarching principle that applies to Israeli residents, it should be clear that we will not recognize their existence and will not adopt them into our system. We have discussed this elsewhere, see CrimA.5513, 5434, 4912/91 *Talmi et al. v. State of Israel* [43] p. 158*ff*; A. Levontin, *Choice of*

Law in Torts: Labyrinth and Exit, in A. Barak & E. Mazuz, eds., SEFER LANDAU, vol. 3 (Boursi, 1995) 1349*ff*. (Hebrew).

We will further ask: Doesn't that fictional "implied agreement" attributed to the Nafisis infringe "vested rights"? Moreover, was not the construction of the fiction of "implied agreement" intended from the outset to infringe "vested rights"? Indeed, in that "implied agreement" approach, and in our approach, as well, we all intend to infringe "vested rights". The difference between the two approaches is only this: The implied agreement approach is nothing but a technique for (indirectly) recognizing an overarching principle of the Israeli legal system, whereas our approach directly recognizes the substantive element that takes us to our objective.

Fourth, it can be argued (and I will not express my opinion on this) that a claim of "vested rights" was never intended to apply between spouses themselves. It is a valid claim between strangers – in sales, leasing, commercial transactions – but in the ongoing relationship between spouses – and in marriage – it is possible that it should not be recognized, and surely not with the same force with which it may be made between strangers. As we see, where couples can move from country to country, the "marriage climate" changes as if by itself, and it would be strange if we were to bind them to the property relations of the country that they left, as if they were *adnei hasadeh*[7] of that land. After all, the two left the land that was their domicile (at the time of the solemnization of their marriage) because they no longer wished to be tied to it. And see and compare: DICEY AND MORRIS, in their aforementioned book. In order to clarify and alleviate doubt we will add that we are speaking, of course, of a situation in which the husband claims "vested rights" by law (e.g., that in accordance with some legal system "all that a woman acquires is acquired by her husband"). We are not speaking of "vested rights" by virtue of an agreement made by the spouses, by which they decided, of their own free will, to arrange their property relations in a particular way.

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[7] Ed: mythical creatures bound to their place of birth by their umbilical cord (see: Mishna Kilayim 8:5 and Bertinoro commentary, *ad loc.*, *s.v.* "adnei hasadeh".

Conclusion

42. Our journey is at an end. We now know that the wall of sec. 15 stands at the crossroad, and Mrs. Nafisi cannot pass through, not through the portal of the opening clause, and not through the portal of the concluding clause. However, while that is the case in regard to sec. 15, relief and deliverance will rise for Mrs. Nafisi from another quarter, from an overarching principle of Israeli law. The overarching principle instructs us that the principle of equality is of primary importance. And the principle of equality – which gave birth to the community property presumption in regard to property relations between spouses – will come to the wife's aid and tip the balance in her favour.

43. The question nevertheless arises: will the couple be subject to the community property rule that held sway prior to the Law, or will they be subject to the resource balancing arrangement established by the Law? Neither the parties not the Court addressed this question in depth, but the long shadow of the decision in the *Yaacoby and Knobler* cases [9] covers us.

My colleagues have concluded that the community property rule – and not the resource balancing arrangement of the Law – governs the matter of the spouses. How so? My colleagues (Justice Goldberg, President Barak and Justice Strasberg-Cohen) say, whether expressly or implicitly, that the resource balancing arrangement commenced – according to sec. 14 of the Law – on Jan. 1, 1974. The Nafisis married before that date (when the community property rule was in effect), and so they fall within the scope of the community property rule and not the resource balancing arrangement. I disagree with that line of reasoning. The Nafisis' domicile at the time they were wed was not in Israel, and therefore Israeli law did not touch them, and they did not touch Israeli law (*q.v.* Tobago, Island of). It is of no legal significance that the couple married before the commencement of the Law. The only relevant date is the date of their immigration to Israel, which was in 1983, after the Law came into force. I addressed this at length in my opinion above (see paras. 4 through 7), and I will not add to it.

Moreover, I do not wish at this time, at the end of a wearying journey, to take up the yoke of this difficult issue that has not been argued before us. I join in the opinion of my colleagues that Mrs. Nafisi is entitled, as a matter of principle, to share in the property of her spouse. I view the issue of whether the community property rule or the resource balancing arrangement applies as a

secondary question. And inasmuch as my colleagues have concluded what they have concluded, I will not dissent.

Deputy President S. Levin:

I concur with the opinion of the President.

Justice T. Orr:

I agree with the result according to which the petition is to be granted, and I concur with the opinion of the President.

Justice E. Mazza:

I expressed my position as to the law applicable to the property relations of the litigating couple and explained it at length in my decision in the appeal. Examination of the reasoning of my esteemed colleagues, who are of the opinion that the petition should be granted, has not persuaded me to retract from what I wrote there. Then as now, I am of the opinion that in the absence of a claim – and all the more so, evidence – of an agreement between the parties determining or varying the property relations between them, they are bound by "the law of their domicile at the time of the solemnisation of their marriage", as prescribed by the opening clause of sec. 15 of the Law. In fact, the Petitioner before us, who based her claim in the District Court solely upon the community property rule, did not assert and did not prove that any agreement was made between her and her husband (the Respondent). This is so not only in regard to a property agreement in particular (according to its meaning in the Law), but to any other express or even "implied" agreement.

I am not dismayed by the result arrived at by my colleagues. In my decision I stated that the result that I had reached was not desirable. I therefore again reminded the legislature of the need to amend the arrangement in sec. 15, which this Court already criticized in the *Azugi* case [1]. But I am dismayed by the *manner* by which my colleagues arrived at their decision. Indeed, my colleagues arrived at their mutual decision by three distinct approaches, utterly different one

from another. To my mind, not one of those approaches is consistent with the clear provision of sec. 15, and each of them, in its own way, effectively devoids the provision of sec. 15 of any real content. For my part, I am also not sure that, by their decision, my colleagues have not indirectly and impliedly modified the rule recently set down in the *Yaacobi and Knobler* cases [9], in which it was held (by the majority) that the community property rule does not apply to spouses whose property relations are decided by the Law. Justice Dorner (who was in the minority in the *Yaacobi and Knobler* cases [9]) appears correctly to question the basis for the decision in this Further Hearing: "…if the Law annulled the community property presumption in regard to spouses to which the Law applies, how can spouses who immigrated to Israel after the Law came into force continue to acquire rights on the basis of the presumption?"

In the decision in the appeal, it was emphasized that "the result that I have reached is required by the law".[8] That remains my opinion. Indeed, the existing law is not the desirable law. In my decision in the appeal I pointed out that "a rigid choice of laws, like that established by the provision of sec. 15 of the Law, is inappropriate to the conditions of a state that absorbs immigration, like Israel, inasmuch as it subjects the property relations of spouses who married abroad (unless they managed to arrive at an agreement between them) to the laws of the state from which they have severed relations".[9] But since the provision regarding choice of law is established by statute, and as long as the legislature does not act to amend it, I do not consider myself at liberty to ignore its existence and decide the rights of the litigants in accordance with a law that differs from that dictated by the choice of law. It might be noted in this regard that the call to amend sec. 15, which was included in the decision in the appeal, did not go unheeded. In fact, about a year after the decision was handed down, the memorandum for the Spouses (Property Relations) (Choice of Law) (Amendment) Law, 5755-1995, was published. The memorandum included a recommendation for replacing sec. 15 with a provision that establishes a new arrangement for the subject of choice of law. The text of the recommended law is based upon the choice-of-law rules established in the Hague Convention of 1978, the principles of which were decided at an

[8] At p. 100.

[9] *Ibid.*

international conference (in 1976) in which Israel participated. Examination of the recommended law satisfies me that it appears to correct the distortions that plague the existing legal arrangement. At least under these circumstances – so I naively thought – it would be appropriate that the Court refrain from making a decision that appears to disregard the existence of an express statutory provision, and leave it to the legislature to carry out its task. I hope that the decision in this Further Hearing will not delay the legislative process, as the need to amend the Law remains unchanged.

In my opinion, the petition should be denied.

Justice Z.E. Tal:

While I follow the path and principles set out in President Barak's opinion, I refrain from his conclusion.

I begin with the assumption, required by the majority opinion in the *Azugi* case [1], that sec. 15 of the Law applies to couples married before the commencement of the Law. I agree that, according to the concluding clause of the said sec. 15, the spouses can jointly agree upon a property arrangement, whether by choosing a legal system or by establishing a property regime between themselves. I agree that such an agreement can also be made impliedly.

But I refrain from making the final, great leap: the finding that every couple that immigrates to Israel with a history that is appropriate to the community property presumption is deemed to have impliedly agreed to a community property regime. As President Barak states in para. 6:

> In conclusion, upon arrival in Israel, spouses married abroad prior to the entry into force of the Property Relations Law who, when in Israel, satisfy the conditions for community property, are deemed as agreeing to maintain a community property regime in Israel.

This is a far-reaching conclusion that effectively confers a "status" upon the spouses on the basis of their very immigration to Israel. However, the community property presumption no longer requires the support of "conjectured" intent and "attributed" intent that supported and maintained it when the rule was not yet secure. The community property presumption now stands in its own right on the strength of justice and equality between spouses. Nevertheless, the community

property presumption is not a conclusive presumption. The creation of the circumstances for its application must be proven, and it can be rebutted (although this is becoming more difficult with the development of the case law).

An implied agreement is created by conduct, that is, by actions. Is a couple's very immigration to Israel sufficient to be deemed an implied agreement?! I do not think so. The conduct from which we infer legal conclusions must be claimed and proven. In this case, as Justice Mazza points out, an implied agreement was neither claimed nor proved.

Like my colleague Justice Mazza, I too am not dismayed by the result reached by the majority. But "hard cases make bad law". The hard case before us and the desire to grant justice and equality to the Petitioner lead to the generalization of the community property rule and its application in the absence of sufficient grounds.

Therefore, even if I agree with President Barak in regard to the principles, I do not think that a basis has been laid for their application in the instant case.

I therefore concur with the opinion of Justice Mazza that the petition should be denied.

Decided, by majority, as stated in the decision of Justice Goldberg.

Delivered this day, 10th of Elul 5756 (Aug. 25, 1996).