CA 3798/94

A

v.

1. B

2. Attorney-General

3. Child Welfare Service

The Supreme Court sitting as the Court of Civil Appeals

[3 October 1996]

Before Vice-President S. Levin and Justices G. Bach, M. Cheshin, I. Zamir, D. Dorner

Appeal on the judgment of the Jerusalem District Court (Justice S. Brenner) dated 16 June 1994 in AC 64/93.

Facts: The appellant and his wife were married for many years but remained childless. The appellant began a relationship with a 15 year-old girl, the first respondent, in order to have a child by her, and she did indeed become pregnant and bear his child. When the child was born, the girl wanted the child to be adopted by a third party, but the appellant wanted to raise the child with his wife.

The main witness in the trial court was Mr Rami Bar-Giora, an expert psychologist, who testified that if the child were raised by the appellant and the appellant's wife, he foresaw major risks to the emotional health of the child because of the circumstances of the child's birth, whether these were revealed to the child or concealed from him.

The trial court held that the child was adoptable for two reasons: under section 13(7) of the Adoption Children Law, the appellant was 'incapable of looking after the child properly because of his behaviour or situation', and under section 13(8) of the Law, his refusal to give his consent to the adoption derived 'from an immoral motive' or was 'for an unlawful purpose'.

Held: (Justices D. Dorner, I. Zamir, G. Bach) The case fell within the scope of section 13(7) of the Adoption of Children Law. The appellant was incapable of looking after the child properly because of the unique circumstances of the case, as described by the expert in his opinion. Section 13(8) of the law was not applicable, since the refusal to consent to adoption was in itself not immoral or unlawful.

(Vice-President S. Levin) The case did not fall within the scope of any of the grounds in section 13 of the Law that allow a child to be declared adoptable. Nonetheless, the law should be read to include an additional rule, which provides that a parent may not object to his child being declared adoptable if this is contrary to reasons of public policy with respect to acts which led to the birth of the child.

(Justice M. Cheshin) The case did not fall within the scope of any of the grounds in section 13 of the Law that allow a child to be declared adoptable. Nonetheless, a fundamental and independent principle of Israeli law is the principle: 'Have you committed murder and also taken the inheritance? (I Kings 21, 19). Under this principle, which has the same status as statute, a person may not be allowed to benefit from his misdeeds.

Appeal denied.

Basic Laws cited:

Basic Law: Administration of Justice, s. 6.

Basic Law: Freedom of Occupation.

Basic Law: Human Dignity and Liberty.

Statutes cited:

Adoption of Children Law, 5720-1960, s. 11(3).

Adoption of Children Law, 5741-1981, ss. 1(b), 8, 8(a), 13, 13(2), 13(4), 13(5), 13(6), 13(7), 13(8).

Broadcasting Authority (Approval of Validity of Radio and Television Fees) Law, 5753-1992, s. 1.

Foundations of Justice Law, 5740-1980, s. 1.

Inheritance Law, 5725-1965.

Judges Law, 5713-1953, s. 11.

Legal Capacity and Guardianship Law, 5722-1962, s. 15.

Penal Law (Amendment no. 39) (Preliminary Part and General Part), 5754-1994.

Penal Law, 5737-1977, s. 1.

Registrars Ordinance, 1936, ss, 8, 8(a).

Israeli Supreme Court cases cited:

[1] CA 549/75 *A v. Attorney-General* [1976] IsrSC 30(1) 459.

[2] CFH 7015/94 *Attorney-General v. A* [1996] IsrSC 50(1) 48.

[3] CA 436/76 *A v. State of Israel* [1977] IsrSC 31(2) 239.

[4] CA 577/83 *Attorney-General v. A* [1984] IsrSC 38(1) 461.

[5] CA 212/85 *A v. B* [1985] IsrSC 39(4) 309.
[6] CA 301/82 *A v. Attorney-General* [1983] IsrSC 37(4) 421.
[7] CA 623/80 *A v. Attorney-General* [1981] IsrSC 35(2) 72.
[8] CA 232/85 *A v. Attorney-General* [1986] IsrSC 40(1) 1.
[9] CA 211/89 *A v. Attorney-General* [1989] IsrSC 43(2) 777.
[10] CA 418/88 *A v. Attorney-General* [1990] IsrSC 44(3) 1.
[11] CA 437/85 *A v. Attorney-General* [1990] IsrSC 44(3) 18.
[12] CA 604/89 *A v. Attorney-General* [1991] IsrSC 45(1) 156.
[13] CA 50/55 *Hershkovitz v. Greenberger* [1955] IsrSC 9 791; IsrSJ 2 411.
[14] CA 493/88 *Attorney-General v. A* [1988] IsrSC 42(4) 860.
[15] CA 3199/90 *A v. Attorney-General* [1991] IsrSC 45(3) 488.
[16] CA 228/62 *Tzemach v. Attorney-General* [1963] IsrSC 17 306.
[17] CA 339/71 *Kommemi v. Attorney-General* [1971] IsrSC 25(2) 795.
[18] EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [1965] IsrSC 19(3) 365.
[19] HCJ 4562/92 *Zandberg v. Broadcasting Authority* [1996] IsrSC 50(2) 793.
[20] Mot 337/68 *Malloyds v. Yaakov Yeffet & Co. Ltd* [1968] IsrSC 22(2) 470.
[21] CA 6106/92 *A v. Attorney-General* [1994] IsrSC 48(4) 221.
[22] CA 1212/91 *LIBI The Fund for Strengthening Israel's Defence v. Binstock* [1994] IsrSC 48(3) 705; [1992-4] IsrLR 369.
[23] CrimApp 537/95 *Ganimat v. State of Israel* [1995] IsrSC 49(3) 355.
[24] CrimApp 1986/94 *State of Israel v. Amar* [1984] IsrSC 38(3) 133.
[25] CA 3077/90 *A v. B* [1995] IsrSC 49(2) 578.
[26] CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589.
[27] CA 4628/93 *State of Israel v. Apropim Housing and Promotions (1991) Ltd* [1995] IsrSC 49(2) 265; [1995-6] IsrLR **Error! Bookmark not defined.**.
[28] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.
[29] HCJ 337/81 *Miterani v. Minister of Transport* [1983] IsrSC 37(3) 337.
[30] EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset* [1985] IsrSC 39(2) 225; IsrSJ 8 83.
[31] LCA 7504/95 *Yasin v. Parties Registrar* [1996] IsrSC 50(2) 45.
[32] LCA 2316/96 *Isaacson v. Parties Registrar* [1996] IsrSC 50(2) 529.
[33] CA 522/87 *A v. Attorney-General* [1987] IsrSC 41(4) 436.

Israeli District Court cases cited:

[34] AC (Hf) 9/70 *A.B. v. Attorney-General* IsrDC 71 326.

American cases cited:

[35] *Riggs v. Palmer* 22 N.E. 188 (1889).

[36] *Craig v. Mia W* 500 N.Y. Supp. 2d 568 (1986).

[37] *LaCroix v. Deyo* 437 N.Y. Supp. 2d 517 (1981).

[38] *Hines v. Sullivan* 431 N.Y. Supp. 2d 868 (1980).

English cases cited :

[39] *In re F. (T.) (An Infant)* [1970] 1 W.L.R. 192 (C.A.).

Jewish Law sources cited:

[40] Ezekiel 18, 2.

[41] Jeremiah 31, 28.

[42] II Samuel 13, 11-13.

[43] Babylonian Talmud, Tractate *Baba Metzia*, 38b.

[44] Psalms 16, 7; 103, 13.

[45] Isaiah 49, 15.

[46] Deuteronomy 32, 11.

[47] Lamentations 4, 3.

[48] Jerusalem Talmud, Tractate *Berachot*, 1, 5.

[49] Babylonian Talmud, Tractate *Yoma*, 85a-b.

[50] I Kings 21, 17-19, 23-24; 22, 37-38.

[51] II Kings 9, 30-37.

[52] M. Silberg, *Kach Darko Shel Talmud* (2nd ed., 1964).

[53] Babylonian Talmud, Tractate *Sukkah*, 45b.

For the appellant — A. Yemini.

For the first respondent — I. Cahan.

For the second and third respondents — O. Reuveni, Senior Assistant to the State Attorney and Director of Civil Matters at the State Attorney's Office.

JUDGMENT

Justice D. Dorner

1. On 22 June 1995 we decided to deny the appellant's appeal on the judgment of the Jerusalem District Court, in which his son was declared adoptable. The following are our reasons for denying the appeal.

2. The appellant, who has been married for many years, had no children. The prolonged medical treatments that the appellant and his wife underwent did not help. The desire for a child became the centre of the couple's lives and caused tension between them. In her statement to the police, the appellant's wife said that after the doctors — who had despaired of treating her — raised the possibility that the appellant was the infertile one and suggested using a donor's sperm, the appellant said to her on several occasions that he 'will try with someone else to find out if he is alright, and should that girl becoming pregnant, then we will take the child away from her and raise it'.

He did exactly that. The appellant began to court a 15 year-old girl (hereafter — the girl), a daughter of a neighbouring family with whom he was friendly. The girl, whose mother had died of cancer shortly before, found in the appellant, who was twenty years older than her, the warmth and love that she needed. The girl was responsive to the appellant and had sexual relations with him; as a result, she became pregnant. When she told the appellant about her pregnancy, he did not inform her of the possibility of terminating the pregnancy, but he calmed her with conflicting promises. On one occasion he promised her that he would divorce his wife and marry her; on another occasion he told her that he and his wife would raise the baby. When the girl's family found out, from an anonymous telephone call, about the intimate relations between her and the appellant, she was sent for a medical examination, and then it transpired that she was in the twenty-ninth week of her pregnancy and it was not possible at this late stage to terminate the pregnancy.

The family made a complaint to the police, and a month after the complaint was made, the appellant informed the Child Welfare Service that he intended, together with his wife, to raise the child that was about to be born. Meanwhile, criminal proceedings were begun against the appellant. He pleaded guilty and was convicted of the offence of having intercourse with a minor, and on 14 April 1993 he was sentenced to eighteen months'

imprisonment, of which six were a custodial sentence and the remainder was a suspended sentence.

3. The child was born on 4 September 1993. Three days after the birth, on 7 September 1993, the girl signed a form consenting to adoption. She further said that she opposed giving the child to the appellant and his wife. The child was therefore placed with a foster family.

4. The appellant filed an application in the Jerusalem District Court, in which he asked that the child be given to him. The Attorney-General, for his part, petitioned to have the child declared adoptable. The two applications were heard together. The parties agreed that the parenting skills of the appellant and his wife should be examined by a court-appointed expert. For this purpose the court appointed the psychologist Rami Bar-Giora. Mr Bar-Giora found that, in the circumstances, both the appellant and his wife were unable to act as parents, and that if they raised the child they would cause him serious damage. His conclusion was that the child should be placed for adoption. He wrote, *inter alia*, that:

> '… the intensive campaign of the [appellant] and [his wife] to "get a baby" does not necessarily imply, in my opinion, a guarantee of the parental skills required for the baby to be raised by [the appellant] — he will grow up deformed by two major scars: that he is the child of his father only, and that he is the product of a relationship marred by accusations and bitterness: the mental health of this child, should he be raised by his biological father, will not allow him to live under a veil of secrecy, while the scars that he bears are known to everyone around him but are hidden from him…
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> With regard to the mental health considerations, I therefore regard all these potential dangers as a cause of probable disaster which should in no way be encouraged…
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> … I foresee many problems with regard to the ability [of the appellant's wife] to tell the child, if she is indeed allowed to raise him, the truth about his mother and his father and the circumstances of his birth; *I foresee many difficulties for the child if as stated she is allowed to raise him…* It will be far more difficult for her **[**the appellant's wife] if she is forced to leave the supportive environment of her family, if the family

> moves away. Should the baby be placed for adoption, he will be able to confront the circumstances of his birth when he is an adult and not dependent on those who gave birth to him: dealing with these circumstances when he is a child seems to me too complex and too hard a challenge [for the appellant and his wife] who want to raise him.
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> …
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> Therefore I recommend that the baby not be given to his biological father, despite his strong desire to raise him, because of the many serious potential dangers arising from this; these should certainly not be imposed on a newborn child whose future — which will not be easy — is still before him, and we should search for the least dangerous and most promising option for his healthy development: there is no alternative other than closed and anonymous adoption' (parentheses and emphasis supplied).

The District Court (Justice S. Brenner) found, on the basis of the evidence brought before it, that the appellant planned to father a child for himself and his wife by having intercourse with the girl. Its conclusion was that this fact in itself showed — as a matter of law —that the appellant was incapable of raising the child, and that in the circumstances his refusal to allow the child to be adopted derived from an immoral motive. In relying also on the psychologist's opinion and the welfare officers' report, the Court decided to deny the appellant's application to give him the child, and it declared the child adoptable under sections 13(7) and 13(8) of the Adoption of Children Law, 5741-1981. In his judgment, Justice Brenner wrote, *inter alia*, the following:

> 'The case is exceptional and unique in its nature and circumstances. According to the expert's opinion — which is strengthened by the report and testimony of the welfare officers for adoption (and even by the various answers given by the petitioner and his wife) — the inability of the appellant [and his wife] to raise the child has been clearly proved… The possibility of the respondent submitting an opinion (additional to, and different from, that of Mr Rami Bar-Giora) was raised by the respondent, during the trial, more than once. But no such opinion was actually submitted… I will add that I believe, from a legal viewpoint, that anyone capable of planning and fathering a child for himself and his wife by means of a girl who is a

> minor, as happened in this case, shows *prima facie* that he and his wife are both unfit to be parents. For… there is sufficient evidence to find that the pregnancy and birth of the child were planned (by the respondent and his wife) and I do not accept their explanations, in cross-examination, about the reply [of the appellant's wife] at the police station, which was quoted above' (square parentheses supplied).

An appeal was filed against this judgment

5. The main argument of counsel for the appellant, Advocate Yemini, was that the Adoption of Children Law does not recognize immoral behaviour of a parent resulting in the birth of the child as a ground for adoption. The Law contains an exhaustive list of eight grounds for adoption, and the behaviour of the parent prior to the birth of the child is not one of them. He argues that the psychologist's opinion does not rely on an objective lack of parenting ability on the part of the appellant and his wife, but merely on the best interests of the child, and the best interests of the child in themselves do not constitute a ground for adoption.

In the reply to the appeal, counsel for the Attorney-General, Advocate Reuveni, argued that the finding of the District Court that the appellant is not fit to raise the child is founded on the report of the welfare officers and the expert's opinion, and there is no reason to set this finding aside. Alternatively it was argued that the Adoption of Children Law contains a lacuna, which the court may fill by relying on the basis of the fundamental principle — which reflects the purpose of the law — that a person cannot acquire a right by carrying out a criminal act. The appellant, who planned to father for himself a child by means of intercourse with a minor, lost his natural right to raise the child that was born from this forbidden intercourse.

6. As stated, the District Court considered both applications together: the appellant's petition to deliver the child into his custody and the Attorney-General's application to declare the child adoptable. The Attorney-General's argument regarding the filling of a lacuna in the Adoption Law, although argued in the alternative, is an independent argument. According to this argument, the appellant lost his right to raise the child in any case, even if the child is not given over for adoption — for example if the mother raises him herself — and even if being brought up by the appellant does not harm his best interests.

I cannot accept this argument.

7. In my opinion, the moral principle underlying the argument does not apply to parental relationships and it is applicable only to property rights. For this reason, in comparative law and our case-law the principle has been applied only to such rights.

In the famous judgment of the Court of Appeal of the State of New York in *Riggs v. Palmer* (1889) [35], at p. 190, it was held that, in the absence of a statutory provision, a beneficiary under a will, who murdered the testator to prevent him from changing it, cannot inherit from him. Justice Earl wrote as follows:

> 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are directed by public policy, have their foundations in universal law administered in all civilized countries, and have nowhere been superseded by statutes.'

In our law, the rule *ex turpi causa non oritur actio* (no action can be based on a disreputable cause) is applied only with regard to property rights and is accepted in the laws of contracts and torts (G. Shalev, *The Laws of Contracts*, Din, 2nd edition (1995), 355; A. Barak, 'Denying the claim of an injured person for reasons of the Public Interest', *The Law of Torts — General Principles of Torts*, Magnes, second edition, G. Tedeschi ed. (1977), 340).

8. The law is different when we are concerned with the rights of a parent to raise his child. The rule established in American case-law is that the principle laid down in *Riggs v. Palmer* [35] should not be applied to this right of a parent. This was explained by Justice Weiss in *Craig v. Mia W* (1986) [36], at pp. 569-570:

> '… the rule delineated in *Riggs v. Palmer*… should not apply here. Rather, that rule should be limited to situations involving property rights, or economic or monetary gains, obtained as a result of wrongdoing… The commission of the crime of statutory rape does not preclude petitioner's rights to maintain the paternity and custody proceedings. That conduct is to be considered only as it relates to the child's best interest at the custody hearing…'

See also *LaCroix v. Deyo* (1981) [37], at p. 522.

It is possible that the case before us, in which the appellant committed the offence with the intention of fathering the child, could have been distinguished from the cases considered in American case-law, and that the rule that a person may not benefit from the fruits of his forbidden act could have been applied. But the right of the natural parent that he, rather than someone unrelated, should raise his child is also a duty. See the remarks of Justice H. Cohn in CA 549/75 *A v. Attorney-General* [1] and my remarks in CFH 7015/94 *Attorney-General v. A* [2], at pp. 65-66.

This duty of the parent must be weighed against the right of the child that his natural parents should provide for his emotional and material needs. See section 15 of the Legal Capacity and Guardianship Law, 5722-1962; CA 436/76 *A v. State of Israel* [3], at p. 243; CA 577/83 *Attorney-General v. A* [4], at pp. 467-468; and CA 212/85 *A v. B* [5], at p. 312).

The right of the child takes precedence. This priority is also reflected in the Adoption of Children Law, in which the best interests of the child are of prime importance. See section 1(b) of the Adoption of Children Law; CA 301/82 *A by her guardian v. Attorney-General* [6], at p. 424; *Attorney-General v. A* [2], at pp. 65-66). This right of the child is independent. It does not derive from the parent's right. The child is not the property of the parent. He is an independent entity, and he has interests of his own (CFH 7015/94 *Attorney-General v. A* [2], *ibid.*). Where the best interests of the child so demand, he should not be denied his right to be raised by his natural parent — even if that parent acted wrongly in the way in which he fathered him. The criminal behaviour of the parent in the manner of fathering his child cannot affect the right of the child to be raised by the parent when being raised by the parent is in the best interests of the child. Of this the Bible literally says: 'Shall fathers eat unripe fruit and their sons' teeth be blunted?' (Ezekiel 18, 2 [40]; see also Jeremiah 31, 28 [41]).

9. Of course, the best interests of the child are not in themselves a ground for adoption. See, for example, CA 623/80 *A v. Attorney-General* [7], at p. 75. Notwithstanding, there is a correlation between the grounds set out in section 13 of the Adoption Law and the best interests of the child, since these grounds are merely a list of cases in which the best interests of the child are harmed because the parent does not carry out his duty towards him or is incapable of doing so.

It is indeed true that the eight grounds for adoption set out in section 13 are an exhaustive list; in other words, any case not included in section 13

cannot be a ground for adoption. See CA 235/85 *A v. Attorney-General* [8], at p. 13; CA 211/89 *A* v. *Attorney-General* [9], at p. 779.

Nonetheless, we should note that one of the grounds for adoption is a catch-all provision — namely the ground under section 13(7) which concerns a parent who is incapable, because of his situation or behaviour, of taking proper care of his child, i.e., of ensuring his welfare. The 'situation' or 'behaviour' that constitute a ground for adoption under section 13(7) are therefore determined according to the result they create, which is harm to the welfare of the child. This was discussed by Justice Cheshin (in CFH 7015/94 *Attorney-General v. A* [2], at pp. 108-109):

> 'Knowing all of this, we can also know that the ground of parental incapacity derives *solely* from the duties of the parent to his child; the *rights* of the child vis-à-vis the parent; the recognised *interest* of the child; the *best interests* of the child. Can we honestly and wholeheartedly say that section 13(7) is not concerned with the "best interests" of the child? Admittedly, section 13(7) of the Adoption Law does not speak of a ground for adoption that is based on the "best interests of the child" *per se* — the best interests of the child on their own, the best interests of the child *in vacuo.* But I believe that if we examine more carefully the "incapacity" of a parent to "care properly for his child", this will lead us to the best interests of the child and the welfare of the child in their purest sense...
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> We can therefore see that the best interests of the child and the welfare of the child are not expressly mentioned in section 13(7) of the Adoption Law, but they are the heart and soul of this ground for adoption: without these, the ground will not exist, and these are the essence of the ground from beginning to end.'

Indeed, whenever the best interests of the child are likely to be seriously harmed as a result of the situation or behaviour of the parent, to an extent that it can be said that the parent is incapable of looking after the child properly because of his situation or his behaviour, a ground for adoption comes into being.

10. A child is likely to be seriously harmed by being raised by a father who fathered him by means of illicit intercourse with his mother, and, what is more, did so in pursuit of a preconceived plan, in order to acquire a child

for himself and his infertile wife. A child born in such circumstances is likely — because of the situation created thereby — to suffer serious harm.

11. In our case, the court appointed its own expert, with the appellant's consent, to examine the appellant's parental capacity. As stated, the expert found that, in the special circumstances of the case, the appellant did not have parental capacity, because of his situation that he created by fathering the child by means of a criminal offence. The appellant did not present a contrary opinion; consequently the opinion of the court expert is currently the only one before us. This opinion is logical and persuasive, and I see no reason not to accept it.

12. Even so, I can conceive of cases of illicit intercourse where the best interests of the child will require us to leave him with his parent. Indeed, the existence of a ground for adoption is not the final word on the subject, and the decision whether to declare a child adoptable after a ground of adoption has been proved depends on whether such a declaration is in his best interests.

In our case, I am persuaded, on the basis of the aforementioned opinion of the psychologist and because of the special circumstances of the case, that the best interests of the child require him to be placed for adoption. Once it has been proved that a ground for adoption exists, and that the best interests of the child are that he should be declared adoptable, I believe that the appeal should be denied.

Vice-President S. Levin

1. The appellant and his wife, who have been married for many years, had no children. Therefore the appellant decided to seduce the daughter of his neighbours (a girl who was fifteen years old), whose mother had recently died of cancer, so that she would bear him a child, who would be raised by himself and by his wife. The girl found in the appellant, who was twenty years older than her, support and love. She became pregnant from the appellant. He did not appraise her of the possibility of terminating the pregnancy, and when her family found out, it was already too late to terminate the pregnancy. On 4 September 1993, the joint child of the appellant and the girl was born. The girl signed a consent form for adoption. The appellant asked for the child to be given to him. The girl said that she was completely opposed to the appellant and his wife being given the child. The Jerusalem District Court declared the child adoptable, on the basis of

paragraphs (7) and (8) of section 13 of the Adoption of Children Law (hereafter — the Law). This led to the appeal before us, which we denied. These are my reasons for denying the appeal.

2. It is hard to find words to describe the deeds of the appellant, who unashamedly made use of the body of a young girl in order to exploit her as an instrument for gratifying his desire for a child, while humiliating her feelings, her innocence, her dignity and the dignity of her family. The case is unparalleled throughout the world, and the parties could not find a similar case in all the vast literature in this field, and even my own research found nothing. Does the case fall within the scope of paragraphs (7) and (8) of section 13 of the Law?

The rule set out in section 8 of the Law is that an adoption order may not be given without the consent of the parents of the child under discussion. Under the aforementioned section 13, the court may declare a child adoptable even without parental consent, if it finds that one of the following exists:

> '(7) The parent is incapable of looking after the child properly because of his behaviour or situation, and there is no chance that his behaviour or situation will change in the foreseeable future, even with reasonable economic assistance and help of the kind usually provided by the welfare authorities for his rehabilitation;
>
> (8) The refusal to give the consent derives from an immoral motive or is for an unlawful purpose.'

3. As was stated in the Report of the Commission for Examining the Adoption of Children Law (1979), headed by Justice Etzioni (at p. 20), a report that served as the basis for the Law, the duties of natural parents to their children were defined on two levels: the first duty — the material one — to feed, maintain and take care of the material needs of the child, and the second duty — the spiritual one — to give the child the affection and love that cannot be bought with money, and to satisfy his psychological and emotional needs. A plain reading of the aforeaid section 13(7) shows that the court may declare a child adoptable if there is no parent that is able to take care of the child in both of the aforesaid two meanings, subject to the last part of the said paragraph. It is established case-law that this section should be used only with extreme caution: (CA 418/88 *A v. Attorney-General* [10]; CA 437/85 *A v. Attorney-General* [11]; CA 604/89 *A v. Attorney-General*

[12]). Only in rare cases will the court declare a child adoptable merely because of the *possibility* that leaving him with his natural parents may cause the child harm as a result of a severe, serious and dangerous disability of his parents, and the best interests of the child are not usually taken into account, on their own, as a factor for declaring the child adoptable. It has been further held that the list of grounds set out in section 13 of the Law is a closed list: CA 235/85 *A v. Attorney-General* [8]). All these rulings, which justify a narrow interpretation of section 13(7), indicate that a heavy onus of proof rests with the party requesting that a minor be declared adoptable, in order to override the 'blood ties', within the meaning of this expression in the remarks of the late Vice-President S. Z. Cheshin in CA 50/55 *Hershkovitz v. Greenberger* [13], at p. 800 {420}; in other words, the presumption is that a child's proper place is with his natural parents.

As stated in CA 232/85 *A v. Attorney-General* [8], the court must examine, in the first stage, whether the parent is indeed incapable of taking proper care of his child because of his behaviour or situation, both in the present and in the future, and, in the second stage, whether the child should be declared adoptable (see also CA 493/88 *Attorney-General v. A* [14]); note that we are concerned with the behaviour of the parent in the present and the future and not with behaviour in the past. In my opinion, it cannot be doubted that the appellant's behaviour in the present or in the foreseeable future does not justify denying him his natural paternal right. Nor does it seem to me that the appellant's 'situation' justifies this either. No-one questions the ability of the appellant to feed and support the child and to provide for his physical needs, and in my opinion it has not been proved that the appellant, who took such 'pains' to obtain a child by illicit methods, is incapable of giving the child the love and affection that a father normally gives his child.

4. The learned judge relied on an *obiter dictum* of Vice-President Elon in CA 3199/90 *A v. Attorney-General* [15], at p. 491, that in especially serious cases — and this case is one of these — the court may declare a child adoptable even if there is no evidence that the parent has *de facto* been unable to look after his children improperly (cf. also CA 604/89 *A v. Attorney-General* [12], at pp. 161-162); I do not dispute this ruling, and if the condition of parental incapacity in the aforementioned sense existed, I would not disagree with the District Court's reasoning. In this respect, the District Court relied upon the opinion of the expert Mr Rami Bar-Giora, from which it concluded that, in the present case, there exists a combination of personal

characteristics of the appellant and his wife together with the unique situation that has been created, which was even unforeseen by the Etzioni Committee, and the appellant's parental incapability was determined on the basis of this combination of factors. In this regard, the expert wrote in his opinion that dealing with the circumstances of the child's birth seemed to him too complex and too great a challenge for the appellant and his wife who wished to raise the child; the appellant avoided answering whether he would tell the child the circumstances of his birth, and it emerged that he would not oppose a meeting between the child and his mother, leaving the consequences of this in the hands of fate. The District Court also quoted the following paragraph from the expert's opinion:

> 'If the family [of the appellant and his wife] raises the child, it must go into "exile" and it will always be in danger of discovery of the secret. In any event, the sensational story will pursue the child and whether it reaches the child before his parents' explanations or reaches him after them, it will, because of the outlook of society, create a disturbing and problematic source of pressure on all the persons concerned' (square parentheses supplied).

In the expert's opinion, the raising of the child by the appellant's family would constitute a trap:

> 'In other words, there will be difficulties on all sides. It they tell him the truth, that is very complex, and if they hide it from him, that is very dangerous.'

The expert also considered the physical proximity of the homes of the two families, the appellant's family and the family of the mother, the acquaintance between them and the fact that, over time, it would be impossible to hide from the child the circumstances of his birth. The expert testified in cross-examination also that he had:

> 'nothing whatsoever to say against the parental capacity of both of them [the appellant and his wife]. All that I wrote, I wrote in connection with their potential parenting of this child with his unique circumstances' (square parentheses supplied).

The learned judge did not ignore the case-law rule that the best interests of the child cannot constitute a ground for adoption on its own; but when he reached the conclusion that a ground for adoption had been proved, he

thought that this consideration should be taken into account when the court exercised its discretion. The expert said as follows:

> 'The mental health of this child, should he be raised by his biological father, will not allow him to live under a veil of secrecy, while the scars that he bears are known to everyone around him but are hidden from him. The possibility that his father will be arrested "because of him or because of the desire to bring him into the world" may be another immediate and burdensome scar that should not be imposed on [his wife] who will be obliged to raise him alone for a decisive and critical period of time for the bonding of mother and child. With regard to the mental health considerations, I therefore regard all these potential dangers as a cause of probable disaster which should in no way be encouraged.'

With regard to the aforementioned opinion and what the expert said in cross-examination, I accept that the complications likely to be caused to the child by keeping or disclosing the secret are likely to harm his best interests, but were it not for the special circumstances surrounding the background of his birth, and were we concerned with another secret arising from other circumstances, which could exist in many families, where the keeping or disclosing of the secret could harm the child, I am not sure that the expert would have recommended taking the child from the custody of the natural parents. Since everyone agrees that the best interests of the child cannot be considered a sole criterion for declaring a child adoptable, the special circumstances of this case do not, in my opinion, fall into the scope of section 13(7) of the Law. No matter how 'vague' the wording of this section (see CA 418/88 *A v. Attorney-General* [10]), it does not allow a child to be removed from the custody of his natural parent merely because of circumstances that are unrelated to the present or future situation or behaviour of the parent, when it has been proved that, apart from considerations relating to keeping or disclosing the secret, the appellant is capable of providing the child's physical and emotional needs, and in any case there is no proof of the contrary. As for the period that the appellant was likely to spend in prison, it transpires, in retrospect, that the appellant was imprisoned only for a short time, and therefore this consideration should not be taken into account.

5. The court's reliance on the expert's opinion is legitimate in so far as it relates to the best interests of the child, and as I shall show below, this in my

view is not insignificant; however, the opinion does to some extent confuse considerations of the best interests of the child, on the one hand, with ethical considerations, on the other, and in this respect the expert is no more authoritative than the court.

I have therefore reached the conclusion that the case before us does not fall within the scope of section 13(7) of the Law.

6. I have reached the conclusion that the case before us also does not fall within the scope of section 13(8) of the Law. In this respect, the learned trial judge was of the opinion that the immoral motive lay in the 'original sin' of the plan to 'acquire' the child by illicit means, and the refusal to hand the child over for adoption could only be expressed after the child's birth.

Section 13(8) has been considered by the Supreme Court in only two instances: in CA 228/62 *Tzemach v. Attorney-General* [16]), the appellant divorced his wife, the mother of seven children, who was pregnant, and became involved with an unmarried woman aged 19, whom he made pregnant and who bore him a daughter. The two parents decided to place their daughter for adoption, but when the Attorney-General filed an application to have the child declared adoptable, the appellant revoked his consent and demanded that the child should be given to him, provided that his former wife consented to this. The District Court held that the appellant's desire to have custody of the daughter and to remarry his former wife did not derive from paternal feelings and concern for the child. Originally the appellant had made his former wife pregnant with the intention of creating strife between the two rivals, and even now he was not prepared to return to his former wife and his seven children out of a desire to take care of them, but he made his return contingent upon her accepting the girl and used it as a threat so that she would agree to take in an additional child, the daughter of her rival, and look after her. In denying the appeal, the Supreme Court held that 'a father, who ignores the fate of his daughter and regards her merely as a means of creating strife between his wife and his mistress, and who does not care if the child of this strife will be thrown in amongst his other neglected children, is necessarily acting out of immoral motives...' (see at p. 307). The second case (CA 339/71 *Kommemi v. Attorney-General* [17]), arose when section 11(3) of the Adoption of Children Law, 5720-1960, which was replaced by section 13(8), was still valid. The case concerned a child born out of wedlock. The mother agreed to adoption and the father objected, but he did not express any readiness to support the child, and even gave notice that he would be prepared to give up the child if he were paid a

sum of money to pay off his debts. It was held that the father's refusal to hand over the child for adoption derived from immoral motives or was for an unlawful purpose.

Counsel for the appellant brought before us the minutes of a meeting of the Constitution, Law and Justice Committee of the Knesset on 29 April 1981, in which (on p. 20) the members of the Committee were told of a case in which a girl, who was a minor, had a child with a married man. The man wished to continue his affair with the girl, and therefore offered to take the child into his home and raise her with his wife, provided that the affair with the girl would continue. The Committee members were told that this case led to the ground of the 'immoral motive'. I have also examined the case law of the District Courts and have not found any case similar to the one before us. The question of the interpretation of section 11(3) of the previous law arose incidentally in AC (Hf) 9/70 *A.B. v. Attorney-General* [34]. The case considered there was of a father who murdered his wife and was sentenced to life imprisonment. It was held in that case that, by committing the murder, the husband had chosen to place himself in a position in which he would be unable to discharge his obligations to his child. President Etzioni was doubtful as to whether the case could be included within the scope of section 11(3) of the previous law, nonetheless he was prepared to rule that the father, the murderer '…had denied himself the right to be called a father, and had severed the paternal relationship with the boy' (at p. 328). A similar case came before the court in England in the case *In re F. (T.) (An Infant)* (1970) [39]. Here too the father was convicted of killing his wife, and the Court of Appeals was called upon to consider whether his refusal to give the child up for adoption was unreasonable, under section 5(1)(b) of the English Adoption Act of 1981. It was decided that the refusal was indeed unreasonable, as Justice Harman said (at p. 197):

> 'It seems to me that a father, who has done the greatest wrong to his young daughter that a man can do, has small right to be heard in the choice of replacement so far as possible of the parent of whom he has deprived her.'

A study of the legislative history and the overall structure of section 13 in general of the language of paragraph (8) in particular, shows, in my opinion, that the present case does not fall within its scope, since it is of a narrower scope than its corresponding English section. Note that paragraph (8) is the only paragraph in section 13 that discusses a refusal to give consent, whereas the other paragraphs require positive proof of a ground for declaring a child

adoptable. In my opinion, paragraph (8) should not be used unless the Attorney-General has proved the existence of a ground for adoption under one of the previous paragraphs, and the court is required to decide — in the second stage — whether to exercise its discretion in favour of the applicant; for if we do not say this, the result is that the Attorney-General may remove a child from the custody of his natural parents for the purpose of adoption, without any factual basis, unless the parents prove — and the burden of proof is on them — that the refusal to hand over the child for adoption does not derive from an immoral motive and is not for an unlawful purpose. Therefore, since we have held that the appellant's case does not fall into any of the previous paragraphs, the aforesaid section 13(8) cannot apply.

Moreover there is no basis for the claim that the appellant's refusal has an unlawful purpose or derives from an immoral motive, and in my opinion we must detach (for the purpose of interpreting the said paragraph) the events that led to the birth of the child from the said purpose or motive; there is nothing unlawful in the appellant receiving custody of the child (if the Court grants his application), and the motive for the appellant's refusal to consent to adoption is his desire to raise him in his own family. This reason, in itself, does not contain any moral defect.

It follows that the appellant's case does not fall into the scope of any of the sub-paragraphs of section 13.

7. In the case before us, the appellant exploited a young girl, seduced her, made her pregnant, and now he wishes to receive her child in order to complete his plan. Will the law assist him in doing so? Are we compelled to surrender to the language of the law, deny the application of the second respondent and deliver the child into the custody of the appellant? It is indeed true that the list of grounds for declaring a child adoptable is a closed list, but are there no legitimate methods of interpretation or other techniques that allow us to prevent the said result, which is manifestly undesirable and unjust? It seems to me that we may reach the desired result either by means of interpretation or by means of filling a concealed lacuna. I will begin with four examples from the legal literature and case-law, I will then proceed to draw general conclusions and in the third stage I will apply my conclusions to the facts of the case before us.

(a) In EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18], this court held that even in the absence of a specific provision of statute, the Central Elections Committee was not compelled to approve a list of candidates that was unlawful, since its founders denied the

integrity of the State of Israel and its very existence. In denying the appeal, Justice Sussman said (at p. 390):

> 'Just as a person is not bound to consent to being killed, so too a State is not bound to consent to its own extermination and being wiped off the map. Judges may not sit idly and despair of the lack of positive law when a litigant is asking them to help him in order to bring about the destruction of the State.'

It was held that the case involved 'super-constitutional' principles that derive from the right of the organized society in the State to defend itself, whether this is called natural law or whether it is called by any other name. There was no positive provision of law that authorized the court to do what it did, but notwithstanding this the appeal was denied.

(b) HCJ 4562/92 *Zandberg v. Broadcasting Authority* [19]) considered section 1 of the Broadcasting Authority (Approval of Validity of Radio and Television Fees) Law, 5753-1992, which provided, *inter alia*, that:

> 'In order to remove doubt, it is hereby determined that the fees for maintaining a radio or television receiver, which were determined under the Broadcasting Authority Law, 5725-1965, for the years 1985 to 1992, are valid under every law and for all intents and purposes from the day that they were determined; …'

This was a validation law, the wording of which was, *prima facie*, clear. But notwithstanding what was stated in the wording of the law, the court held, by means of purposive construction, that the fees charged in the years 1985-1992 would be given retroactive force, together with the linkage differentials thereon, but there would be no retroactive validity to any fine for arrears on those amounts.

(c) Legal literature and case-law have raised the question whether, in the absence of a specific provision of statute in this regard, an heir who murdered someone that bequeathed him his property in a will is entitled to inherit him. This was what happened in the well-known case of *Riggs v. Palmer* [35], and the court ruled in the negative.

(d) Section 8(a) of the Registrars Ordinance, 1936 was considered in Mot 337/68 *Malloyds v. Yaakov Yeffet & Co. Ltd* [20]. This provision states that a judgment given by a registrar 'under section 6, paragraphs (b) (b1)' is, for the purposes of an appeal, of the same status as a judgment given by the court,

and the Supreme Court held that the limitation should be ignored and that every judgment of a registrar could be appealed before the Supreme Court.

In all of these cases, the court ruled contrary to the literal text of the law or by adding provisions to the law that it did not contain. In the first case (*Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18]), it was held that the express wording of the statute was accompanied, by implication, by 'super-constitutional' principles with regard to the right of society to protect itself against those who act to destroy it; in the second case (*Zandberg v. Broadcasting Authority* [19]), the Supreme Court reached the conclusion that the application of the validation law was retroactive, except with regard to fines for arrears. The reason for this decision was, *inter alia*, that the statute is accompanied by constitutional principles concerning the non-retroactive nature of a penal provision and of harm to property rights, and that the interpretation that leads to integration and creates harmony between the laws should be preferred to the interpretation that creates a conflict between them. In the third case (*Riggs v. Palmer* [35]), the Court of Appeals of the State of New York held that the general wording of the statute did not preclude the application of a universal principle that prevents a person from benefiting from the profits of his crime. As Justice Earl said (at p. 190):

> 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are directed by public policy, have their foundations in universal law administered in all civilized countries, and have nowhere been superseded by statutes.'

This case was considered extensively in H. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge (1958), at pp. 93 *et seq.*, as an example of the inclusion of restrictive clauses in the general wording of a statute. It was also considered in R. Dworkin, *Taking Rights Seriously*, London (1977) at p. 23) and in A. Barak, *Interpretation in Law*, vol. 1, *The General Theory of Interpretation*, Nevo (1992), at p. 482, as an example of an application of the doctrine of the hidden lacuna. In this regard, Justice B.N. Cardozo said the following in his book, *The Nature of Judicial Process*, New Haven (1921), at pp. 40-42:

> 'Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing

> of the estate of a testator in conformity with the law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limits of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in the universal sentiments of justice, the principle that no man should profit from his own iniquity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing that really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight.'

In the fourth case (the appeal on a decision of the registrar), the court ignored the express wording of the legislation, which it held was 'only written as an oversight', in order to adapt section 8 of the Registrars Ordinance to the overall structure of the division of powers between the court and the registrar.

8. In *Zandberg v. Broadcasting Authority* [19], the court reached its conclusions both by means of interpretation and on the basis of the doctrine of the concealed lacuna, which it left undecided. According to this doctrine, as explained by President Barak (at p. 814):

> 'The lacuna in this case is of a special character. It finds expression in the absence of an exception. In Continental legal literature this lacuna is called a "concealed (or latent) lacuna". The lacuna is "concealed", since from the general language of the statute itself it may be inferred that the language applies to the situation that requires a decision. Only by studying the purpose of the statute can one conclude that the general language should not be applied to the circumstances of the special case.'

The source for using the technique of filling lacunae is in the Foundations of Justice Law, 5740-1980.

As Professor Barak wrote in *Interpretation in Law*, vol. 1, at p. 477, there is in principle a possibility of filling a lacuna in all fields of law, including family law, since it is a general doctrine. However, I do not need to say anything further about this, since it is possible to reach the proper result not only by virtue of the said doctrine but also by virtue of the rules of broad interpretation.

9. Statutes are not enacted in a vacuum. They form part of an integral system that includes fundamental principles. They are presumed to have been enacted within the framework of these principles, which they are intended to realize (cf. Barak, *Interpretation in Law,* vol. 2, *Statutory Interpretation*, Nevo (1993), at pp. 479 *et seq.*). It is presumed that they operate in order to achieve justice and equality, and their application will prevent outcomes that are inconsistent with public policy. One of the rules of public policy is that the wrongdoer should not benefit from his misdeed. Indeed, the force of the said principle is likely to change from case to case and from time to time. We are not concerned with the individual assessment of a specific judge, but with special circumstances in which there exists a common social factor that assumes that a specific outcome is inconceivable because it conflicts with fundamental principles, and that the legislator never thought of it, and had he been asked, he certainly would say that it is not subject to the rule, or that it is subject to another rule.

If we apply the aforesaid to the area under consideration in this appeal, it emerges that we must read into section 13 of the Law an additional rule, which provides that a parent may not object to his child being declared adoptable if this is contrary to reasons of public policy with respect to acts that led to the birth of the child. This rule will apply irrespective of the grounds mentioned in section 13 of the Law, and it constitutes an application of the universal principle that a wrongdoer should not benefit from his misdeeds. The District Court and my esteemed colleague, Justice Dorner, found a way to reach this result within the framework of paragraphs (7) and (8) of section 13. I did not find a way to do this, and I was therefore compelled to complete the text by means of an additional rule. In doing so, I did not depart from the principle that the judge must be faithful to the statute, since I applied another principle that the legislator is presumed to have intended to follow, without affecting the closed list of grounds for adoption

listed in the first seven paragraphs of section 13 of the Law. I could have reached the same result by invoking the doctrine of the concealed lacuna.

10. It seems to me that the case before us falls within the scope of the rule mentioned in the last paragraph, where the outcome of entrusting the child to the appellant is contrary to basic principles of public policy; the legislator did not foresee this, and had he been asked, he certainly would have said that it is subject to a rule that prevents this outcome.

In order to avoid misunderstandings, I wish to add the following two remarks:

a. My opinion does not relate at all to the question of the right of unmarried fathers to prevent a girl or a woman, who became pregnant with their child, from placing their child for adoption (in this respect, see the recent survey written by Prof. Mary Shenley: 'Unwed Fathers' Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy', 95 *Col. L. Rev.* (1995) 60), nor to every case where the birth of a child occurs as a result of an offence. From the material before us, it appears that there are legal systems that distinguish different levels of offences for this purpose. Thus, for example, the laws of the State of New York provide that there is a justification for denying the right of a father who committed first-degree rape to oppose his child being placed for adoption, but this rule does not apply to second or third degree rape. I do not intend to adopt any position with regard to any cases other than the present one, in which the birth of a minor was the result of an offence. Nor do I intend to consider the ruling of the Family Courts in the State of New York, which holds that the ruling in *Riggs v. Palmer* [35] applies only to property matters. Not only are there extensive case-law to the contrary in the State of New York itself (see, for example, *Hines v. Sullivan* (1980) [38] (and conflicting judgments in this matter cannot serve as a precedent, even in their country of origin), but there is no reason or logic in limiting the rule in *Riggs v. Palmer* [35], as a rule of interpretation, merely to property law.

b. As in any case of declaring a child adoptable, even when it has been proved that the circumstances of the child's birth justify denying the natural father of his paternal rights, the matter is subject to the court's discretion. In this I agree with the outlook of my esteemed colleague, Justice Dorner, that if, despite the existence of circumstances that in principle justify denying the natural father's right to oppose adoption, it is possible to show that in the specific case giving the child over to the father is clearly in his best interests,

the court may decide that the best interests of the child override conflicting reasons of public policy.

For these reasons, I also agreed with the outcome that the appeal should be denied.

Justice M. Cheshin

It is the law of nature that a child grows up in his home of his father and mother: they are the ones who will love him, give him food and drink, educate him and support him until he grows up and becomes a man. This is the right of a father and mother, and this is the right of the child. I have written this elsewhere, in greater detail: CA 6106/92 *A v. Attorney-General* [21], at p. 235; CFH 7015/94 *Attorney-General v. A* [2]. This right of a father and the mother came into being before there was a law and constitution. It is the law of nature, the law inscribed in our hearts. Even if these things are stated in a law or a constitution, they will only be an echo and a shadow of that natural right. This right came into existence at creation, and many branches of law are founded on it. The law of the State therefore follows in the footsteps of the law of nature. This is the source for the provision of section 8(a) of the Adoption of Children Law (hereafter — the Law), which says:

> 'A court shall not make an adoption order unless it is satisfied that the parents of the adoptee have agreed that the child may be adopted or unless it declares him adoptable under section 13.'

2. There are only two ways by which a child may be separated from his mother and father by means of adoption: one way is by the consent of the mother and the father that he may be adopted, and the other way is a separation by force of law, when there exists one of the grounds listed in section 13 of the Law for declaring a child adoptable. In our case, the mother consents to adoption; what is more, she requests and demands that her son is taken for adoption. The father, however, wishes to exercise his natural right and duty as a father to raise his child as a father raises a child.

3. I must admit that after the facts were set out before me in full, I knew that I would not be a party to delivering the child into the custody of his natural father, the appellant. In my opinion, the appellant is as one who raped a minor — even if his act was not an act of 'rape' under the provisions of the Penal Law, 5737-1977 —and after the rape he misled the girl with lies and deceit until the embryo became viable and could no longer be aborted. He

then deserted the girl while she was still pregnant, and when she gave birth to a living child, he came forward and staked a claim as if he had come into his own. The girl, the mother, requests and pleads that the child is adopted by strangers. She wants to escape from this trauma that she has undergone, to erase these terrible months from her memory. But the appellant insists that the child should be given into his custody, and he demands that he is allowed to raise him as a father raises his son. The appellant committed an act more despicable that almost any other. It is an act like that of Amnon and Tamar:

> 'And he took hold of her and said to her: Come lie with me, my sister. And she said to him: No, my brother, do not force me, for such thing should not be done in Israel; do not do this shameful act. For where shall I take my shame? And you shall be like one of the most contemptible persons in Israel…' (II Samuel 13, 11-13 [42]).

Amnon paid for his crime with his life (II Samuel 13, 28-33 [42]), whereas the appellant, who raped the body of the girl, stole her innocence and youth, trampled and violated her dignity, stands before a court in Israel, claiming rights, as someone who asks to be rewarded for committing a crime.

When the true facts became clear to me, my initial reaction was a strong instinctive reaction, that the appellant is not entitled to any relief. This feeling has not changed. It seems to me that the trial judge felt as I do, and so do my colleagues in this case. The differences between us only concern the *reason* for denying the application of the appellant. We differ on questions of legal theory, in the purest sense. I therefore wish to make several remarks.

Does the ground of parental incapacity apply in this case?

4. As stated, adoption may not take place, nor may a child be taken from his father and mother for adoption, unless both of them consent to the adoption of their child by strangers, or if one of the grounds listed in section 13 of the Law exists. The father — the appellant before us — insists upon exercising his right to raise his son, and he vehemently opposes the adoption of the child by strangers. The question before us is therefore whether one of the grounds in section 13 applies. The main ground for our purposes is the one set out in section 13(7) of the Law, according to which the court may declare a child adoptable if it is satisfied that:

> 'The parent is incapable of looking after the child properly because of his behaviour or situation, and there is no chance that his behaviour or situation will change in the foreseeable future,

> even with reasonable economic assistance and help of the kind usually provided by the welfare authorities for his rehabilitation.'

This ground is concerned with 'parental incapacity', and the question is whether the appellant is 'capable' of taking proper care of the minor or whether he is not 'capable' of doing so 'because of his behaviour or situation'. With regard to this ground, I said elsewhere that *prima facie* it is talking about the mother and father (in our case — about the father only), but a close examination will show us, unsurprisingly, that it is the child who stands in centre-stage and that his status is what will ultimately determine the question whether the mother and father are 'capable' of 'taking care' of him 'properly' (see my opinion in CFH 7015/94 *Attorney-General v. A* [2], at pp. 108-109; see also the opinion of my colleague, Justice Dorner, at pp. 65-66). Where it is proved that the mother and father are incapable of taking proper care of their child, then a ground for adoption based on 'parental incapacity' will apply.

What is the connection between the ground of incapacity and 'the best interests of the child'? Everyone agrees that 'the best interests of the child' — in themselves — do not constitute a ground for adoption. However, where the 'best interests of the child' are very seriously harmed, i.e., where the parent's behaviour or situation harms the child to the extent that the parent can be assumed to be 'incapable of taking care of his child properly' — and where there is no chance that his behaviour or situation will change in the foreseeable future — then the ground is established.

The trial court judge was of the opinion that this ground of incapacity applied to the appellant (and his son), and some of my colleagues also think this. Notwithstanding their opinion, the Vice-President, my colleague Justice S. Levin, is of the opinion that the ground of incapability does not apply to the appellant. I agree with the Vice-President.

5. What led my colleagues to think that the ground of parental incapacity has been proven? The ground of parental incapacity for adoption is invariably proved by the opinion of experts. Of course, an opinion given by an expert does not bind the court to rule according to the expert's opinion. The responsibility for declaring a child adoptable rests with the court, which bears the responsibility even when ruling in accordance with the expert's opinion. Moreover, the question of parental incapacity is a combined question of law and fact, and while the expert may determine a question of fact, this is not so with regard to the question of law that the court must

decide. However, we know that the opinion of an expert usually has very great weight — even if it is not decisive — and it constitutes the essence of the judgment. I would add to all this that I have yet to hear of a case in which a child was declared adoptable on the ground of parental 'incapacity' notwithstanding the opinion of an expert submitted by the Attorney-General, according to which the parents have parental capacity. Nor will there ever be such a case, for in the absence of an expert opinion that the parents do not have parental capacity, no application will be filed to declare the child adoptable.

In our case, an opinion was given by the well-known expert Rami Bar-Giora, who is an adult and child psychoanalyst, an expert with considerable reputation, a person of many achievements and great experience. According to the expert, the child should not be given to his biological father, the appellant, and in his written opinion he gives reasons for this opinion. I respect the opinion of Mr Bar-Giora, but I must be mindful that the responsibility for entrusting — or not entrusting — the child to strangers is mine. I cannot therefore avoid responsibility merely by relying on the opinion. I must examine the opinion itself, and only a careful examination of this kind will guide me onto the right path. My colleague, Justice Dorner, and my colleague, Vice-President S. Levin, quote parts of Mr Bar-Giora's opinion, and each of them reaches his own conclusions. I will go further than my colleagues, and I will take the unusual and circuitous step of quoting the opinion of Mr Bar-Giora in full. I will let the expert speak in his own words and style, and we will listen to these words very carefully. This is what Mr Bar-Giora says in his opinion:

> '1. For the purpose of preparing this opinion, I examined R.Y. [the father] and his wife A, I met with the biological mother, her father and her older sister in their home… and I studied the documents that were submitted to me by the parties. All of these are sufficient, in my professional opinion, for preparing this opinion.
>
> 2. The issue under discussion here raises many questions:
>
> a. What are the best interests of the child — that he should be adopted without any relationship with his blood relations, or that he should have a relationship with at least one of his parents?

b. Is the child guaranteed wholehearted motherly love by the wife of his biological father, even though he is the result of his infidelity?

c. Will revealing the circumstances of his birth be possible for the child at any stage when he grows up, and what will be the consequences of this?

Questions of a moral nature also arise:

d. Should the father be allowed to commit rape (according to the mother) and also benefit from it?

e. Does a mother who places her child for adoption have the right to stipulate conditions for his adoption?

3. First, I would like to describe the personality of R.Y. and his wife A. Both of them are obsessed with a strong desire for a child. On the personality test that I gave them (the Rorschach test), there was clearly an abnormal occurrence of elements such as wombs, reproductive organs and fertility. In R.Y. I noticed an emotional state in which the desire for a child of his own flesh was so great that it could easily override other considerations, in the sense of the end justifying the means, or necessity knowing no law. A, his wife, seems to me doomed to depression and dejection because of her infertility, and she therefore has difficulty in saying what she really feels and has the attitude that she will do what her husband wants because she is dependent on him. When I asked her whether her maternal love would not be soured by the thought that the desired child was the result of his infidelity to her, she answered: "One forgets". The essential point, for our purposes, is that both of them desperately need, each for his own reasons, a child to raise so that they can feel "normal", whereas without a child they literally feel disabled and deficient.

4. Without expressing an opinion about the indictment for rape that is pending against R, I find from my examination of him that receiving the proof that he is fertile and can produce a child and the yearning for a child of his own could have been very active factors in the relationship that he had with the biological mother, and they were certainly active in his request to take the child born from this relationship into his custody. I have no

doubt that had he made a surrogacy agreement with a fertile woman, the situation would have been very different for his wife A, and in such a situation the likelihood that her future maternal capabilities would become more difficult and burdensome would have been far smaller than it is likely to be in the circumstances that will prevail if the child is given to her to raise.

The desire of R for the child is so great that he is prepared to promise that he will move away from the place where he grew up and do anything provided that he is given the child, whereas his wife A submits and gives in to his desire without properly considering the potential damage that such a move would cause her and the distance it would place between her and her family and the wishes of her family.

Although we have here a rare picture where nothing stands in the way of the child, underneath the surface there lies a strong possibility of complications, difficulties and pathology for the child and how he is to be brought up, if he is indeed brought up by R and A.

5. R's behaviour reminds me very much of what happens to single mothers whose desire for a child can lead them to do terrible and extreme things that are inconsistent with everyday behaviour and logic; but this emotional state of an obsession for one thing that overrides everything that stands in its way, an emotional state that leads to having a child, is not easily reconciled with the problems of raising the young child over the many years that come thereafter.

In any event, even though many single mothers succeed in the task of parenting, it is clear that from the viewpoint of the best interests of the child this kind of parenting is full of dangers in comparison with the normal parenting situation.

In other words, the intensive campaign of R and A to "get a baby" does not necessarily imply, in my opinion, a guarantee of the parental skills required for the baby to be raised by R — he will grow up deformed by two major scars: that he is the child of his father only, and that he is the product of a relationship marred by accusations and bitterness. The mental health of this

child, should he be raised by his biological father, will not allow him to live under a veil of secrecy, while the scars that he bears are known to everyone around him but are hidden from him. The possibility that his father will be arrested "because of him or because of the desire to bring him into the world" may be another immediate and burdensome scar that should not be imposed on [his wife] who will be obliged to raise him alone for a decisive and critical period of time for the bonding of mother and child.

6. With regard to the mental health considerations, I therefore regard all these potential dangers as a cause of probable disaster which should in no way be encouraged, which is not reduced by the eagerness of the desire for the child and which does not exist in the circumstances of adoption, even though adoption involves difficulties of another kind but on a much smaller scale; in any event, the effect of these is not felt in the period of early childhood which is a fateful and critical period for human development.

7. Now I will try to answer the questions that I raised in paragraph 2 of my opinion.

Question a: *When all other things are equal*, it is probable that there is a benefit to biological parenting; but the biological aspect in itself is not as important as psychological benefits or the absence of psychological risks (see the major and accepted contribution on this subject by J. Goldstein, A. Freud and A.J. Solnit, *Beyond the Best Interests of the Child*, 1979, at pp. 17-20, 98).

Questions b and c: Although I do not doubt A's hunger for motherhood, I foresee many problems with regard to her ability to tell the child, if she is indeed allowed to raise him, the truth about his mother and his father and the circumstances of his birth; I foresee many difficulties for the child if as stated she is allowed to raise him and he remains her only child, or he is joined by adopted brothers or her own children, as she hopes. In any event, major differences can be anticipated between the relationship of his father and that of his mother to him and to his future brothers.

In any event, I foresee serious difficulties for the relationship with A if the father is sent to prison. In any event, many difficulties will stand in the way of A's love, and it will be far more difficult for her if she is forced to leave the supportive environment of her family, if the family moves away. Should the baby be placed for adoption, he will be able to confront the circumstances of his birth when he is an adult and not dependent on those who gave birth to him. Dealing with these circumstances when he is a child seems to me too complex and too hard a challenge for R and A who want to raise him.

Question d: In order not to be persecuted by this question, if the family of R and A raises the child, it must go into "exile" and it will always be in danger of discovery of the secret. In any event, the sensational story will pursue the child and whether it reaches the child before or after his parents' explanations, it will, because of the outlook of society, create a disturbing and problematic source of pressure on all the persons concerned.

Question e: Should the child be given to the biological father to be raised by him, this will inflict a serious and painful blow on the family of the biological mother which, *inter alia*, includes an adopted daughter whose best interests demand that "placing for adoption" is regarded as an ideal solution by all those involved. In the situation under discussion, the inevitable contact between the members of all the families and the lack of confidentiality and anonymity that normally characterize adoption, may lead — should the child be given to his biological father to be raised by him — to unpredictable situations that cause problems for the child under discussion.

8. Therefore I recommend that the baby not be given to his biological father, despite his strong desire to raise him, because of the many serious potential dangers arising from this; these should certainly not be imposed on a newborn child whose future — which will not be easy — is still before him, and we should search for the least dangerous and most promising option for his healthy development: there is no alternative other than closed and anonymous adoption.

> At the same time, I wish A success in her attempts to become a mother and that her hands that hunger for a child will hold her own child, to the joy and pride of her husband R.'

6. Let us read and reread the opinion of Mr Bar-Giora. Let us read and ask ourselves: are we really persuaded that the ground of parental incapacity exists in the case of the appellant? Does the opinion really show that the appellant 'is incapable of taking proper care of his child because of his behaviour or situation' such that we should take away a child from his father forever? The expert recommends that we should not give the child to the appellant. But does he present a reasoned finding that the appellant is 'incapable' of taking care of the child? Indeed, because of that heinous crime that was committed, the expert foresees 'many difficulties', 'serious difficulties', 'a strong possibility of complications', 'difficulties and pathology for the child', etc.; but are these difficulties sufficient for us to say that a child should taken away from his biological father and entrusted to another? Do difficulties — even if they are 'serious difficulties' — establish a ground for adoption? In my opinion, the answer to the question is no.

Indeed, Mr Bar-Giora makes extensive use of terms and concepts that are intended to give expression to not a few obstacles and 'complications' that will stand in the way of bringing up the child, but in each case he is careful — so it seems to me — not to attribute to the father, the appellant, 'incapacity' with regard to raising his son, in the simple meaning of the term and as this concept is understood by the law. Mr Bar-Giora is an expert with a direct approach and rich experience. He knows the law of adoption thoroughly, but all that we hear from him is about 'difficulties' or 'many difficulties' (and similar expressions) that will be involved in raising the child. We have heard nothing about 'incapacity' or about difficulties that clearly amount to 'incapacity'. Indeed, even had the expert spoken expressly of 'incapacity' (and he hints of this in his oral testimony), the mere use of the word would not be decisive. But the absence of words to this effect calls for our attention, and the silence is full of meaning. We can only conclude that while Mr Bar-Giora made the recommendation that he made, this was not for reasons of the father's 'incapacity' to raise his son, i.e., incapacity in the technical sense as understood by the law.

For my part, I will add, that I too — like Mr Bar-Giora — have not been persuaded that the ground of 'incapacity' applies to the father, the appellant, in the sense in which that term has been understood and interpreted by the law until now. What did I do? I assembled all the facts of the case and

combined them into one unit. I put the framework of the ground of parental 'incapacity' next to that unit. As a judge, I tried to fit the facts into the framework of the ground of incapacity. I tried once and failed; I tried again and failed again. After that I tried to work backwards, and to fit the framework around the facts. Once again I failed. So I concluded that the two cases are distinct and unlike one another. When I tried to fit our case into the scope of section 13(7) of the Law, I compared myself to the sages of Pumpeditha, whose intelligence was so great that they could 'put an elephant through the eye of a needle' (Babylonian Talmud, *Tractate Bava Metzia*, 38b [43]). When I discovered that an elephant will refuse to go through the eye of the needle, I said: if even the smallest of elephants cannot pass through the eye of a needle — whether because of the size of the elephant or the smallness of the eye of the needle — so too our case cannot fall within the scope of section 13(7) of the Law.

7. In view of all this, I knew that it had not been proved to the court — by the experts — that the ground of incapacity to take proper care of the child applied to the appellant. We can at least say that that there is a doubt — and it is a big doubt — as to whether the ground of incapacity has been established. In these circumstances, in the absence of an unambiguous opinion as to the incapacity of the appellant to raise his child properly, the finding that the father falls within the scope of the ground for adoption stated in section 13(7) of the Law seems to me problematic. Indeed, before we decide that a child should be taken away from his biological father and place him for adoption only because of his father's incapacity to take proper care of his son, we expect — as a rule — that an expert whose opinion is respected by the court will express an opinion to this effect. The opinion of psychoanalyst Rami Bar-Giora is respected by us as that of a top expert, but we did not clearly and unequivocally hear from him that the appellant is *incapable* of raising his son. From all this we know that the ground stated in section 13(7) of the Law has not been proved.

The ground of adoption under section 13(8) of the Adoption Law

8. With regard to the ground set out in section 13(8) of the Law, which is the second ground discussed by the trial court, in the absence of a parent's consent, the court has jurisdiction to declare a child adoptable in circumstances where:

> 'The refusal to give the consent derives from an immoral motive or is for an unlawful purpose.'

I have tried, but failed to see how our case can fit into the scope of this ground. Indeed, no matter what we do to the statute and however much we stretch the language in each direction, we will not succeed in fitting the case before us into the framework determined by the legislator in section 13(8) of the Law. We all agree that the appellant's deed with respect to the girl, the mother, was scandalous. Moreover, the statement that his behaviour towards the girl resulted from 'an immoral motive or for an unlawful purpose', in the words of section 13(8), is a mere understatement that does not tell us even half the story. But it is important that we are precise with regard to the wording of the Law, which does not refer to the act that led to the birth of the child, but to the refusal of the parent to give his consent to a declaration that his son is adoptable. The relevant question is therefore whether the appellant's *refusal* to give his consent to the adoption of his son derives from an illicit motive or is for an unlawful purpose. I have difficulty in answering this question in the affirmative. The behaviour of the appellant towards the girl was worse than bad, literally an act of infamy, but we cannot say that his *refusal* to give his consent to a declaration that his son is adoptable derives from an immoral or unlawful motive.

9. In this context, my colleague, the Vice-President, says that the ground set out in section 13(8) has no independent existence, and that it is a mere adjunct of one of the other grounds set out in section 13 of the Law. I have difficulty in agreeing with the opinion of my colleague, but since we heard no argument on this subject, I am merely giving my initial thoughts. First, the provision of section 13(8) of the Law is *prima facie* stipulated as an independent ground, with its own parameters, and I have not found in the Law even a hint that it is merely derivative and an adjunct of one of the other grounds. Second, I fail to understand why this ground should be regarded merely as a derivative ground. A case that calls for the application of this ground is one where a father asks for a substantial sum to be given to him in return for his consent that his son is declared adoptable (cf. *Kommemi v. Attorney-General* [17]). In this case it is possible that the ground of incapacity will also be proved, automatically (since a father who is prepared to 'sell' his son may be regarded, because of his very act, to lack the capacity to raise him), but each of the two grounds — the ground of incapacity and the ground of the unlawful or immoral refusal — has its own existence, and I do not see why the one should be conditional on the other.

Indeed, it is possible that in these and other circumstances only the *beginning* of another ground will be proved. For example, one of the grounds

listed in section 13 of the Law is the one in section 13(4), according to which a parent '… refrains, without reasonable cause, from maintaining personal contact with him [the child] for six consecutive months'. Let us assume that the father fulfils the requirements of section 13(4), but his inaction has lasted only three months, and after those three months the father demands payment in return for his consent to the adoption of his son. The ground in section 13(4) has therefore not matured, whereas the ground in section 13(8) — according to our assumption — does apply. See also the facts that were proved in *Kommemi v. Attorney-General* [17], which we mentioned above. It is true that one may almost assume that when the ground in section 13(8) exists, there will also exist one of the other grounds listed in section 13 of the Law. But it does not seem right to me that the ground in section 13(8) is a ground that depends on the existence of one of the other grounds. Quite the opposite; I think that the ground in section 13(8) has its own independent existence.

Whichever is correct, our opinion is that in our case the appellant does not fall within the scope of the ground set out in section 13(8) of the Law.

Should the law run its course?

10. No-one argued that one of the other grounds set out in section 13 of the Law applies to the appellant. From this we can draw two conclusions: first, the appellant did not give his consent to his son being declared adoptable in accordance with section 8 of the Law; second, in consequence of our remarks hitherto, none of the grounds set out in section 13 apply to the appellant. *Prima facie*, the application of the Attorney-General to have the child declared adoptable is therefore defeated.

It is the law of nature — so we said at the beginning of our remarks — that a child should be in the custody of his mother and father, or, to expand slightly, in the custody of his mother or his father. This is the basis on which the Law is built. Now that we have seen that the Law does not contain any permission to take the child from his father, we return to our starting point, and the child should therefore be in the custody of his father, the appellant. If this is so in principle, it is definitely the case in view of the well-established case-law that the grounds for adoption set out in section 13 of the law are the only grounds, and there are no others: CA 549/75 *A v. Attorney-General* [1], at p. 468; CA 232/85 *A v. Attorney-General* [8], at p. 13; CA 211/89 *A* v. *Attorney-General* [9], at p. 779. This is the law, and rightly so: a child should not be taken from the custody of his parents — or from the custody of one of his parents — unless the law permits this, and only within the scope of that

permission. It could also be said that the law of adoption is similar to criminal law, for both concern the lives of human beings. Since in criminal law no punishment can be given without first declaring the law — or in the language of the law: 'There is no offence nor is there any penalty therefor unless they are prescribed in the law or thereunder' (section 1 of the Penal Law, after the Penal Law (Amendment no. 39) (Introductory Part and General Part), 5754-1994) — so too in the law of adoption, a child may not be taken permanently from his father or mother except in accordance with the express provision of statute. Since we have concluded that the statute does not permit this child to be taken from his father, the inescapable conclusion is that we are forbidden to take the child from his father.

11. The formalist — or let us be more extreme and say: the heartless formalist — would stop here and say: this is the law, this is what the legislator has laid down, and let the law run its course. *Fiat iustitia et pereat mundus*: let justice (?) be done though the world perishes. The companion of that formalist — also a formalist, but one with some heart in him — would sigh and say, *dura lex, sed lex*: (what can we do?); the law is hard, but it is the law. He might even go further and say that the legislator should take note of the matter and consider whether the law should be changed.

I do not know these formalists, and let me not be counted among them. Confronted with this conclusion, a conclusion that we cannot accept, since — in the words of my colleague, the Vice-President — it is 'manifestly undesirable and unjust', a harsh and difficult conclusion, let us arise and ask: are we judges indeed bound to adopt this conclusion and declare it to be law? When we were elevated to the bench, each of us took an oath to '… be faithful to the State of Israel and its laws, to do justice, neither to pervert justice nor to show partiality' (section 6 of the Basic Law: Administration of Justice; in the previous version, under section 11 of the Judges Law, 5713-1953 the judicial oath was couched in the same language, except that the judge took an oath to do justice 'to the people'; for our purposes, there is no difference between the earlier version and the later version). Oaths are meant to be kept, and our oath was to be faithful to the law and to do justice. Is it really the law of the State that this appellant before us should have custody of his child? Would justice be done if this were our decision? In my opinion, we would not be faithful to the law of the State not would we be doing justice, but injustice, if this were our decision. What then should be our course, the right course?

12. Were we to grant the appellant his desire, so we have said in our hearts, we would suffer a painful feeling that we have done something wrong. Even if our intentions — the intention of the formalist — were praiseworthy, our actions would not be, and our actions would lead us astray. How is it then that the flame so burns in our hearts and is imprisoned in our bones — to punish the villain according to his villainy, and not to reward a wrongdoer with the fruits of his wrongdoing — whereas the statute binds our hands in bonds and chains and compels us, seemingly, to leave the child in the custody of his biological father? Is it really the intention of statute — or to be more precise, the intention of the law — that we should decide in despite of our conscience and our expert instincts? I think not, and I will give my reasons below.

13. First we should say that we must distinguish at the outset between the substantive law — with its principles and rules — and the legal technique that we will adopt, or if you prefer, the well from which we will draw the substantive provisions up to the surface of the law. My colleague, the Vice-President, discussed this (in paragraph 7 of his opinion), and I agree with him (subject to what I shall say below). Indeed, it is possible that drawing substantive provisions from one well or another may affect the quality and the sphere of applicability of the substantive provisions — even if only in marginal cases — but the distinction, in itself, is an important one that we should recognize. It need not be said that our main concern is with the substantive law, and the technique for recognizing the substantive law is merely subordinate to the main goal. Let us therefore begin with the substantive law.

The law of nature and human instinct: the right of a parent to his child and the loss of that right; have you committed murder and also taken the inheritance?

14. We began our opinion by saying that it is the law of nature that underlies our deliberations, and that it is the law of nature that nourishes the right of a mother and father to custody of their child. We said of this that every mother — in as much as she is a mother — is entitled to have custody of her small child, to love him, caress him, give him food and drink, hold him in her arms and walk with him hand in hand (CA 6106/92 *A v. Attorney-General* [21], at pp. 235-236). This is the right of a mother and it is the right of a father. Is this right that derives from nature an absolute right? Did God create it as a right that cannot be gainsaid? Is it a right without exceptions — exceptions that also derive from nature? The answer to this question is that

there are indeed exceptions to the right, exceptions that are built of the same material that created the right itself. The right itself, as my colleague the Vice-President remarked, is based on 'blood ties' (in the words of Vice-President Justice S. Z. Cheshin in *Hershkovitz v. Greenberger* [13]), and it is '… that primeval yearning of a mother for her child, a bonding of hearts that has neither beginning nor end…' which cries out unceasingly (CA 6106/92 *A v. Attorney-General* [21], at p. 235). But there are cases where the system breaks down. 'A mother may lose her right, and her behaviour may show us that the blood ties are severed' (*ibid.* [21], at p. 236). The 'blood ties' establish the right and the 'blood ties' that are severed can take the right away.

Just as nature establishes the right of a mother and father to their child, so abandoning and neglecting the child can invalidate the right. We discussed this subject at length elsewhere and there is no need to add to it. See CFH 7015/94 *Attorney-General v. A* [2], at pp. 109 *et seq.*. Indeed, the grounds of abandoning and neglecting a child are expressly included in section 13 of the Law, in sub-paragraphs (2), (4), (5), (6) and (7). But the Law did not create the *substance* of these grounds. The source of these grounds lies in the law of nature, just like the right of a parent to have custody of his child. Both of these — the right and loss of the right — are the result of nature, and they are like the two sides of a coin. All that the Law does is to define the *boundaries* of these grounds. It does this, both by establishing specific and clear boundaries — for example, non-compliance with obligations towards the child during six consecutive months, and not a day less — or by establishing general grounds such as the ground of incapacity.

15. The legal system recognizes the right of parents to their children: the right itself and the exceptions thereto. In recognizing the right and the exceptions thereto, the legal system chooses to acknowledge a phenomenon of nature that is deeply rooted in human and animal nature. With regard to man: 'As a father has mercy on his children, the Lord has mercy on those who fear him' (Psalms 103, 13 [44]); or 'Can a woman forget her baby and not have mercy on her offspring? Even these may forget, but I will not forget you' (Isaiah 49, 15 [45]) (note the rule accompanied by the exception). The same is true of animals and birds: 'Like an eagle that rouses her nest, hovers over its young, spreads it wings, takes them, bears them on its plumage', (Deuteronomy 32, 11 [46]); or 'Even jackals extend the breast, give suck to their cubs…' (Lamentations 4, 3 [47]). This is the desire for life and the survival instinct of all living things, and the law is, as it were, compelled to

embrace it (with various qualifications). This is merely an example of the recognition of human nature as a foundation of the law.

An additional example — which is moulded from the same material — is found in the doctrine of self-defence. The desire for life and survival in man (and the animal) induces a person to defend himself against someone who attacks him — even by attacking the attacker — and the recognition of the doctrine of self-defence as a defence in the criminal law is merely the law's recognition of a phenomenon of nature. Criminal law has since earliest times recognized the doctrine of self-defence as a defence against a criminal indictment, and thereby it has acknowledged the instinct inherent in all of us to protect ourselves against those who attack us. This is the principle of self-defence with regard to the individual. The rule established in *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18] is, in essence, an application of the doctrine of self-defence also to the State and society or, if you prefer, an extension of the doctrine of self-defence recognized in the sphere of the individual to the right of the State to protect itself against those rising up against it to destroy it. Just as the individual is entitled to defend himself against those who attack him, so is the State entitled to defend itself against those who attack it, whether from without or from within. Another example in this context can be found in the defence of necessity. This defence also constitutes a recognition of the human instinct, the instinct to take action to defend oneself (or another). In this context we ought to mention the commandment of observing the Sabbath, which is one of the most exalted commandments: 'this is the commandment of the Sabbath which is equivalent to all of the commandments of the Torah' (Jerusalem Talmud, Tractate *Berachot*, 1, 5 [48]). Notwithstanding, this commandment withdraws before the saving of life:

> 'Rabbi Yishmael and Rabbi Akiva and Rabbi Eleazar ben Azarya were going on a journey and Levi the net-maker and Rabbi Yishmael the son of Rabbi Eleazar ben Azarya were walking behind them. The following question was asked of them: From where do we know that saving life overrides the Sabbath?
>
> … Rabbi Yehuda said in the name of Shemuel: … "and you shall live by them" — and not die by them…' (Babylonian Talmud, Tractate *Yoma*, 85a-b [49]).

The Torah and its commandments were given for people to live by them, and not for people to die by them. Let a person therefore transgress a

prohibition of observing the Sabbath and live. This is the desire for existence and survival and this is the cloak that envelops it. See also CA 1212/91 *LIBI The Fund for Strengthening Israel's Defence v. Binstock* [22], at pp. 721 {387} *et seq.*).

Finally we should mention the doctrine of protecting property, which also is supposed to give expression to the human instinct. Thus, in the words of Oliver Wendell Holmes in his book on English Common Law: W. Holmes, *The Common Law*, Boston (1881), at p. 213:

> 'Those who see in the history of law the formal expression of the development of society will be apt to think that the proximate ground of law must be empirical, even when that ground is the fact that a certain ideal or theory of government is generally entertained. Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality.'

The remarks of the wise judge admittedly refer to the protection of property, but it need not be said that the logic of them applies also to other human instincts. The codeword is the human instinct, an instinct that the law acknowledges, embraces within its protection and cloaks in the form of a right.

16. We have spoken until now of human instinct as a factor in the creation of rights (and duties) in law. In addition to human instinct, and with the same degree of force, human behaviour is directed by morality: basic principles of morality, forces, feelings and modes of behaviour between human beings. Some of the moral duties take the form of legal rights and duties — rights and duties that are defined and can be easily identified — while others hover in the atmosphere of our world, the world of law, without attaching themselves to defined and recognized rights and duties. Our case belongs to

the second group of moral duties. Note that we judges do not purport to invent moral obligations, or create duties with mere words and cloak them up in legal garb. All that we do is to give legal expression to the feelings of members of society, strong feelings built on moral foundations common to all mankind and moral principles that characterize the society in which we live.

17. We are concerned with a feeling that troubles us, an acute feeling of a moral wrong that we would do — to the young mother, her family, the society in which we live and even ourselves — if we but grant the appellant's request and hand over his son to him. The difficulty is that if we give the appellant custody of his son — notwithstanding the desperate pleas of the young mother — we will be rewarding a villain with the fruits of his villainy, to our own shame and the shame of the society in which we live. 'Have you committed murder and also taken the inheritance?' So God instructed Elijah the Tishbite to cry out before Ahab on account of Naboth the Jezreelite. Thus Elijah indeed cried out, and the punishment of Ahab and of Jezebel his wife was determined accordingly:

> 'And the word of the Lord came to Elijah the Tishbite, saying: Arise, go down to meet Ahab, king of Israel, who is in Samaria: behold he is in the vineyard of Naboth, whither he has gone down to inherit it. And you shall speak to him, saying: Thus says the Lord: Have you committed murder and also taken the inheritance? And you shall speak to him, saying: Thus says the Lord: Where the dogs licked the blood of Naboth, the dogs shall also lick your blood: … And also to Jezebel the Lord spoke, saying: the dogs shall eat Jezebel by the wall of Jezreel; whoever dies of Ahab in the city shall be eaten by the dogs, and whoever dies in the field shall be eaten by the birds of the sky' (I Kings 21, 17-19, 23-24 [50]).

Ahab's punishment was as God had spoken. Ahab was killed in the war with Aram, and his end was as the prophecy foretold:

> 'So the king [Ahab] died, and was brought to Samaria, and they buried the king in Samaria. And they washed the chariot by the pool of Samaria and the dogs licked up his blood and washed the armour according to the word of the Lord that He spoke' (I Kings 22, 37-38 [50])

Jezebel too, who initiated and perpetrated the legal murder of Naboth the Jezreelite, met her fate, according to the word of God spoken by Elijah the Tishbite:

> 'And then Jehu came to Jezreel, and Jezebel heard and she painted her eyes and straightened her hair and looked out from the window. And Jehu came into the gate, and she said Is it peace, Zimri, killer of his master? And he looked up towards the window, and said: Who is with me, who? And two or three servants looked out in his direction. And he said: Throw her down, and they threw her down, and some of her blood splashed onto the wall, and on the horses and he trampled her. And he came and ate and drank, and he said: Please go to the accursed woman and bury her, for she is a king's daughter; and they went to bury her, but they only found her skull and her feet and her hands. And they returned and told him, and he said: It is the word of the Lord that He spoke by means of His servant Elijah the Tishbite, saying: On the land of Jezreel the dogs will eat the flesh of Jezebel, and the dead body of Jezebel shall be as dung lying on the field on the land of Jezreel so that people will not say: This is Jezebel' (II Kings 9, 30-37 [51]).

It can never be that a person will commit murder and inherit his victim. This moral imperative long ago became an accepted legal imperative, ever since the time of Adam. Cain murdered Abel, but even when he alone remained, Cain did not receive the Divine blessing that was given only to Abel.

This was also the case of David, Bathsheba and Uriah the Hittite. Bathsheba became pregnant with David's child while she was married to Uriah the Hittite. In order to escape being convicted by a court, David ordered his soldiers as follows: '… Put Uriah in the front line of the fiercest battle, and retreat behind him, so that he is hit and dies (II Samuel 11, 15 [42]). Uriah was killed in battle and after the period of mourning ended, 'David sent and gathered her into his house and she became his wife and bore him a son, but what David had done was evil in the sight of the Lord' (II Samuel 11, 27 [42]). After this, Nathan the prophet told David the parable of the pauper's lamb and David's punishment was decreed as follows: '… the child born to you shall surely die' (Samuel II 12, 14 [42]). And the punishment was not slow in coming:

> '… And the Lord made the child that Uriah's wife bore to David sick, and it was on the point of death. And David entreated G-d for the child, and David fasted, and when he went in to sleep, he lay on the floor. And the elders of his household protested to make him arise from the floor, but he refused, and he would not eat with them. And it happened on the seventh day that the child died…' (II Samuel 12, 16-18 [42]).

David loved his child — as a father loves his son — yet his child was taken from him and he did not see him again. In olden times, it was decreed that the child would die. In our times, the child will live. But just as the king of Israel did not have his child, so too the appellant will not have his child. Have you committed murder and also taken the inheritance?

18. In our society it is inconceivable that a person will commit murder and inherit his victim, and we will not accept — in principle — that a person can do wrong and profits from his wrongdoing. A clear and decisive legal expression of this moral imperative was given in *Riggs v. Palmer* [35], where it was held that a grandson who murdered his grandfather would not receive his inheritance from the grandfather under the will that the grandfather made in his grandson's favour. According to the text of the law, the grandson was entitled to inherit his grandfather, for the grandfather had written a will in his favour. Nonetheless, the court held that by the act of murder the grandson had lost his right to inherit his grandfather. Why was this? Justice Earl made the following remarks, which have become a lesson for all time. My colleague, the Vice-President, cited his remarks and I will repeat them:

> '… all laws, as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are directed by public policy, have their foundations in universal law administered in all civilized countries, and have nowhere been superseded by statutes' (*ibid.*, at p. 190).

Justice Earl went on to say the following:

> 'He therefore murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of

> his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy.'

Let us consider the four question marks in the remarks of Justice Earl; these question marks follow four rhetorical questions. It is the practice of courts to make rulings and decisions. It is not the practice of courts to ask rhetorical questions, certainly not four rhetorical questions one after another. Indeed, these rhetorical questions indicate the judge's state of mind, the stormy emotion within him, his firm decision not to allow the legal system to transgress the moral prohibition of 'Have you committed murder and also taken the inheritance?' (See also H. R. Hahlo, 'When can a Murderer Inherit', 16 *Mod. L. Rev.* (1953), 100-102).

Justice Earl relied on the statements of various scholars and on court rulings. He did not mention the tragedy of Naboth the Jezreelite, nor the tragic drama of Uriah the Hittite. We mention them, for they are part of our heritage. In our childhood, our fathers told us these ancient stories in our childhood and later we read them in our book, the Bible. We have grown up with them. They are our heritage. Their morality is our morality, and they are the pillar of fire and pillar of cloud that show us the way.

In conclusion I will cite what I said elsewhere with regard to the nature of the Basic Law: Human Dignity and Liberty. This Basic Law — so we thought then, and so we think even now — was mainly intended to give expression to rights that each and every one of us received directly from nature. Even after the Basic Law came into existence, the basic rights do not derive their moral and social strength from the Law but from the light, the heat and the strength hidden in them by virtue of their being the products of nature:

> '… In the future, we will mention the Basic Law — mention it and rely on it — as a document that incorporates basic rights.

> But we will know and remember the following two things: first, that those rights did not come into being with the Basic Law, and that the Basic Law, in principle, merely purported to give expression in statute to "natural" rights that existed before it. Second, the basic rights derive their moral and social strength not from the Basic Law as such but from themselves — from the light, strength and the heat hidden in them. They are like the bush that burned with fire but was not consumed. That bush has been with us since the earliest times. Others will say that the basic rights are the product of our moral and social outlook, and this is the source of their strength. Whichever is the case, the basic rights had strength and force before the Basic Law came into existence, and even then there was nothing that "forced" the courts to decide as they did, or prevented them from deciding otherwise. In *substance*, I have found nothing to have changed from then until now, even after the Basic Law came into existence' (CrimApp 537/95 *Ganimat v. State of Israel* [23], at p. 401).

See also CrimApp 1986/94 *State of Israel v. Amar* [24], at p. 141; CA 3077/90 *A v. B* [25], at pp. 592, 594; M. Minervi, 'Jus Naturale', 3 *HaMishpat* (1996) 403.

19. All of this concerns the substance of the issues being addressed. We asked a question, and this is the answer: in principle, we will not allow a ruling to be made whereby a person may commit murder and also inherit, or do a wrong and benefit from his wrong. Another question — a separate question — is how will this moral imperative of 'Have you committed murder and also taken the inheritance?' find its way into Israeli law? This question arises particularly in view of the case-law rule that the grounds for adoption listed in section 13 of the Law constitute a closed list of grounds, unless a father gives his consent to the adoption of the child by a stranger, and the appellant has not given his consent. My colleague, the Vice-President, spoke of two methods of incorporating the rule in Israeli law, the first by way of interpretation and the second by filling a lacuna. Let us consider these two methods, one by one. We will begin with the method of interpretation

'Have you committed murder and also taken the inheritance' as a rule of interpretation

20. Those following the interpretative method — the method of broad interpretation — will say the following: the statute does not provide that the murderer will not inherit, but in interpreting the statute, we must do our best to try and ascertain what is the purpose of the statute, or in other words, what do we suppose the intention of the legislator would have been? What would the legislator have determined, had a set of facts like the one before us been placed before him? If we do this, we will know that the legislator would have determined — *ab initio* — that the murderer would not inherit. Therefore we will rule accordingly. In the words of Justice Earl in *Riggs v. Palmer* [35], at p. 189, citing from Bacon's *Abridgment*:

> 'In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given.'

And further on (*ibid.* [35]):

> 'If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?'

Let us again note the question mark at the end of the rhetorical question.

He also says (*ibid.*, at p. 190):

> 'What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.'

The method of broad construction is therefore the following: interpretation of the law, according to its language, leads us to a certain conclusion (that the murderer will inherit; that the father, the appellant, will be given his son). This conclusion defies justice, morality and common sense, and it is hard to assume that the legislator intended this to happen. Let

us therefore consult the legislator — conceptually and normatively, of course — and ask him what would he have decided had he known what we know now. We know what reply the legislator would make, and we will determine the case accordingly. It need not be said that the personification of the legislator and our appearing before him for a consultation are merely a metaphor for interpreting the statute. The meaning is simply this, that we study the various provisions of the statute — in case we find a finger pointing in one direction or another — we look at the environment in which the statute was enacted and at the legal system as a whole, and first and foremost we consult our scruples and conscience, lest they reproach us at night. Last of all, we 'interpret' the law that requires interpretation by integrating it, as best we can, into the legal system as a whole and making it consistent with the basic principles of the legal system and our lives.

This method of broad interpretation is apparently accepted by Professor Ronald Dworkin (in his discussion of *Riggs v. Palmer* [35]: Dworkin, *supra*, at p. 23; R. Dworkin, *Law's Empire*, Cambridge (1986), at p. 15 *et seq.*). Professor Dworkin summarizes the case of the murderer-heir: as follows (*Law's Empire*, *supra*, at p. 20):

> 'It was a dispute about what the law was, about what the real statute the legislators enacted really said.'

This, then, is broad interpretation and this, then, is the interpretation of the statute.

21. Personally, I find the interpretive approach in our case to be a path fraught with obstacles. Obviously, I agree with all of Justice Earl's rhetorical questions — both the question and their implied answers. I also agree with the replies we assume that the legislator would have given us had we consulted him. I also agree that it is inconceivable that a person may inherit as a result of murdering the testator violently in order to gain an inheritance, and that we should come, after the murder, and give him his inheritance. I agree with all this. But I find it difficult to agree that, in the absence of a specific provision to this effect in the Inheritance Law, the *interpretive approach* is what leads us to this conclusion. Indeed, with respect to the case of the murderer-heir, the Inheritance Law, 5725-1965, expressly states that the person entitled under a will inherits. I therefore have difficulty in understanding how the 'interpretation' of that law can lead to a result which is the opposite of the one that the legislator directs. Indeed, it would be immoral and unjust were the murderer to inherit, and as we have said there is no doubt what the legislator would have replied had he been asked about the

status of the murderer-heir. But none of this can change the wording of the law, even though it leads to an immoral, unjust and manifestly improper result; the words are clear. This same is true in the case before us, where according to the wording of the Law, the father, the appellant, is entitled to custody of his child. 'Your intentions are desirable, but your actions are undesirable,' said the angel to the king of the Khazars. I would say the same: the *intentions* of those advocating the use of the interpretive approach are desirable, but the actual use of the interpretive approach is undesirable.

22. I have difficulty following the interpretative approach, for the path is really not one of interpretation at all. The interpretation of a text that is before us involves the clarification and explanation of that text, idea and purpose. The text is in centre stage, and we the interpreters revolve around it. Indeed, the interpretation of a text is not merely the interpretation of the words in it, word by word. Letters form words, words combine into sentences, sentences organize themselves into a complete text, and the meaning of the words, the sentences and the text as a whole — the idea and purpose — are derived from all of these and whatever surrounds them, in many circles, some nearer and some not so near. But ultimately our intention is *interpretation*, and no matter how far out we go in those concentric circles — circles that surround and orbit the text — we will always return to the text. Indeed, we are concerned with *interpretation* of a text and with no other cognitive activity. Each word and each concept have their own spheres of subsistence, and even if the limits of those spheres of subsistence may be somewhat blurred, we know what they are in essence. Thus language is formed and this is the way that human beings communicate with one another. I said of this in another context, and I will be forgiven for repeating it (CrimFH 2316/95 *Ganimat v. State of Israel* [26], at pp. 639-640):

> 'Language and speech, all language and all speech — language and speech in their broadest sense — are the creations of nature and man, and their purpose is to serve as a means of communication between human beings. This is true of animals, birds and the creature of the deep, and it is also true of man. Nor have we forgotten the Tower of Babel:
>
> > "And the whole earth was of one language and of common speech. And it came to pass when they journeyed from the east that they found a valley in the land of Shinar, and they dwelt there. And they said to one another: let us make bricks and burn

> them thoroughly; and they had brick for stone, and clay for mortar. And they said: let us build ourselves a city and a tower whose top is in heaven, and let us make ourselves a reputation, lest we are scattered over the face of the earth. And the Lord came down to see the city and the tower which the men had built. And the Lord said: behold it is one people and they all have one language, and this they have begun to do, and now they will stop at nothing that they conspire to do. Let us go down and we will confuse their language there, so that no-one understands the other's language. And the Lord scattered them from there over the face of the whole earth and they stopped building the city. Therefore it was called Babel, for there the Lord confused the language of the whole earth, and from there the Lord scattered them over the face of the whole earth" (Genesis 11, 1-9).'

And in the words of the *Midrash* (*Bereishit Rabba* 38, 10 on Genesis 11, 7):

> 'One of them would say to another: "Bring me water", and he would bring him earth. He would hit him and smash his skull. "Bring me a spade", and he would give him a rake; he would hit him and smash his skull. This is what is written: "and we will confuse their language there"…'

In their application to legal texts, the concepts of 'interpretation' and 'meaning' have their own significance, like every other abstract concept. These too have their own sphere of subsistence, and they also have limits that define their boundaries. Knowing all of this, I believe that those who adopt the interpretive approach in our case take the concept of 'interpretation' out of its proper context and give it a meaning which is entirely different. This is the case with the murderer-heir and it is the same with the case of the father-appellant before us. How can a text be 'interpreted' by reaching a conclusion that is inconsistent with the language of the text? How can we interpret 'no' to mean 'yes' or 'yes' to mean 'no'? 'No' means 'no' and 'yes' means 'yes' whichever way we look at them, from below, from the side or from above.

A verdict that a murderer-heir will not inherit — even though the conclusion implied by the statute is, *prima facie*, that it is his right to inherit — may be a desirable verdict, and it is indeed desirable; it may be a moral verdict, and it is indeed moral; it may be a correct verdict, and it is indeed correct. But it is not an 'interpretation' of the statute, unless we go on to say that the concept of 'interpretation' encompasses also what is not 'interpretation' in the language of human beings, even if they are human beings involved in the law. If this is said, then we must regard ourselves as having climbed the Tower of Babel. Let the 'interpretationalists' come out and say openly: we describe as 'interpretation' of a text even what is not interpretation, for we are compelled to do so. We are creating an 'interpretive' fiction because this is the only way that we can do justice. Were they to say this, I would understand (but not agree). But to dress up as 'interpretation' what is not interpretation, and to bow to a naked emperor with a label reading 'interpretation' on his sceptre — I would rather compare myself to that small boy who says: 'I do not understand and I do not agree'. Moreover, were they to say that they wish to extend and stretch not the concept of interpretation, but rather the *subject* of the interpretation — in other words, the interpretation is indeed interpretation, in spirit and letter, but the *subject* of the interpretation is no longer a specific *statute*, but rather the *legal system* that includes the statute — I would understand this. But if so, I think that the concept of 'interpretation' is inappropriate and another concept should be used, one which evokes different connotations and associations than those evoked by the concept of 'interpretation'.

23. The result is that we find it problematic to adopt an interpretive approach that is not interpretive at all — in the simple and normal meaning of the concept of interpretation — but only in the language of the people of the Tower of Babel. And we all know what happened to the Tower of Babel.

'Have you committed murder and also taken the inheritance?' as a rule for filling a lacuna

24. We began by saying that we knew our goal, namely the purpose of the law. The question before us now is which way should we go in order to achieve the purpose of the law. We tried to follow the interpretive approach; we started upon it until we found that it was impassable. Therefore we turned around and returned to our starting point. Let us now try to go a different way, the way of the lacuna. In his work, *Interpretation in Law* (vol. 1, at p. 432), President Barak compares the legal system to a stone wall, and a

lacuna in the legal system to a gap in the wall. As he puts it (following Prof. Canaris):

> 'Just as there can be a gap in a stone wall where the builder forgot to place one of the stones needed to complete the wall, so too can there be a lacuna in the legal norm, or in the legal arrangement, which are built by the legislator (by his legislation)… when the creator of the norm forgets to complete them.'

It is clear and agreed that initially the interpreter — which means, for our purposes, the judge — should interpret the text that requires interpretation, and that only when he has finished the work of interpretation will he know whether there is a lacuna in the text. President Barak goes on to point out — following other legal scholars — the distinction between a 'manifest' lacuna and a 'concealed' lacuna. A 'manifest' lacuna will be seen to occur where the statute — if we are speaking of a statute — does not supply an answer to a set of facts that requires an answer and should be decided by that statute:

> 'A manifest lacuna exists where the judge is confronted with the choice of whether to fill the lacuna or remain in a situation where there is no norm by which he is required to judge, and therefore he must refrain from judging. With this type of lacuna, the legal norm is incomplete, since it does not include situations that, in view of its purpose, should have been included in it. Because of this lacuna, the judge cannot apply the norm without completing it… the judge must fill the lacuna, for otherwise he is unable to give judgment… without filling the lacuna, the judge has no norm with which to decide the dispute, and he faces the choice of filling the lacuna or refraining from giving judgment… the lacuna is "manifest", since from the language of the legal norm it is manifest that it does not apply to the situation which the judge is required to decide' (*ibid.*, at p. 481).

A 'manifest' lacuna is therefore literally a lacuna: the judge must decide certain disagreements, but there exists no norm that provides an answer to the question (nor does the statute's silence indicate a negative arrangement). Neither the statute nor the legal system as a whole include a norm that applies to the set of facts. See also CA 4628/93 *State of Israel v. Apropim Housing & Promotions (1991) Ltd* [27], at pp. 316-318, 323 *et seq.* {**Error! Bookmark not defined.-Error! Bookmark not defined.**, **Error! Bookmark not defined.** *et seq.*} (*per* President Barak).

Alongside the manifest lacuna, there also exists the 'concealed' (hidden) lacuna. The definition of this lacuna is more subtle than the definition of the manifest lacuna (see Barak, *supra*, vol. 1, at pp. 481-482):

> '… A concealed lacuna exists where the norm, according to its language, applies to a situation that requires a decision. Notwithstanding, according to the purpose of the norm, an exception or limitation should be recognized with regard to this situation. The norm is defective because the exception or the limitation are not recognized by it, and the judge fills the lacuna by recognizing them. In these circumstances, the judge is not confronted by a choice of completing the lacuna or refusing to give judgment. Even without completing the norm, it applies to the situation that requires a decision, since its language extends to this situation. Notwithstanding, applying the norm to that situation is contrary to the purpose of the norm. The lacuna is "concealed" because from the language of the norm itself one can conclude that it applies to the situation requiring a decision, and only by studying the purpose of the legislation can one conclude that the norm should not be applied to that situation.'

As an example of a concealed lacuna, Barak discusses *Riggs v. Palmer* [35] (although he does not mention it by name), and he says, in his aforesaid book (vol. 1, at p. 482):

> '… Suppose that the Inheritance Law did not provide that someone who murders the testator cannot inherit. It could be said, that according to the (general) language of the statute, even the heir-murderer inherits. This is contrary to the purpose of legislation, which incorporates, *inter alia*, the principle that a person should not benefit from the fruits of his forbidden acts. The absence of an express exception in this regard is a concealed lacuna, which will be filled by a (judicial) recognition of an exception with regard to the heir-murderer.'

From these remarks we can see that an inheritance law that does not rule out the inheritance of an heir-murderer contains a 'concealed' lacuna. The same can also be said in our case, that the statute contains a 'concealed' lacuna in so far as it says that the child should be given to the appellant, his biological father.

24. I said that the definition of 'concealed' is a more subtle definition than the definition of the 'manifest' lacuna. The definition is so subtle that one could argue that a 'concealed' lacuna is not a lacuna at all. Indeed, in my opinion the 'concealed lacuna' is a framework that appears to be different from what it really is. The bottle has a label with the words 'concealed lacuna', but the drink in the bottle does not taste like a lacuna. Let me explain.

As we have seen, a 'manifest' lacuna is apparent to everyone (even though even in our case arguments can be made that are similar to those that we make in a case of the 'concealed' lacuna). You look at the stone wall and see that a stone is missing. You want to find in a statute an answer to a question that should be regulated by that statute, and you find that the statute does not have a provision that answers the question. The 'concealed' lacuna is different. A 'concealed' lacuna can exist even where, *prima facie*, there is no 'genuine' lacuna in the statute. On the contrary, the statute provides a full and complete answer to the question, but the answer is not exactly to our liking, such as, for example, the answer of the inheritance law that the heir-murderer will inherit, or that the appellant should be given his child because he is his biological father. We do not like these answers, and we think that the legislator should have stipulated an exception in these cases. Thus, for example, in the case of the heir-murderer, 'it is inconceivable' that the legislator intended — in principle — to give him the estate of the murder victim. The same is true of the appellant before us, who trampled and violated the body and soul of the mother of his child, and made her into a kind of test tube and womb on demand, to satisfy his desire for a child. Did the legislator seriously intend to give the appellant his child? This is our question, and following Justice Earl (in *Riggs v. Palmer* [35]) the answer lies hidden in the question. Now that we have equipped ourselves with the answer, let us turn back, return to our point of departure, and say: we have now discovered a 'lacuna' in the statute, and the 'lacuna' is that the legislator did not prescribe an exception in the case of a murderer-heir and in the case of someone like the appellant before us. Let *us* therefore fill that 'lacuna' — like a lacuna that was manifest from the outset — and let us prescribe an exception to the rule.

If we regard the 'concealed' lacuna in this way, we will also realize that our case does not involve a 'lacuna' in its simple and normal meaning in human language. A 'concealed' lacuna is not a lacuna, unless we overextend the concept of the 'lacuna' and widen its scope inappropriately. Indeed,

whereas a 'manifest' lacuna is indeed a lacuna, in the simple sense, a 'concealed' lacuna can be described as a 'purposeful' lacuna, a 'fitting' lacuna, a 'required' lacuna, a lacuna that we see in our minds because we think that we *ought* to see a lacuna. It is as if we said: there *should* be a lacuna and therefore there *is* a lacuna. We create a 'concealed' lacuna with mere words, and we create it simply in order to inject into the legal system the norms that we deem proper, norms that we think are lacking in the legal system. Such a lacuna is not a 'genuine' lacuna at all; it is an illusion, like laser beams wandering through space, a mirage. It looks like a lacuna, but is not a lacuna. See also *Zandberg v. Broadcasting Authority* [19], at p. 824, *per* President Barak). We should also point out and clarify that the concealed lacuna is different from the basic principles that we use regularly in interpretation. The latter help us to choose from among the variety of possible interpretations that method of interpretation that is consistent with basic principles, whereas in our case they purport to dictate to us a solution that the statute does not prescribe at all, and, what is more, that solution proposed to us conflicts with the *prima facie* stipulation of the statute.

Let us conclude by saying that in the opinion of Kelsen, the concept of the 'lacuna' in the legal system is nothing more than a fiction. According to Kelsen, in a functioning legal system there are no lacunae — neither manifest nor concealed. See H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg, Cambridge (1949), at pp. 146-149. Unlike Kelsen, we are only attacking the 'concealed' lacuna.

25. We therefore conclude that the path of the lacuna will also not succeed, and it too will merely lead us into a vicious cycle, with no beginning and no end. Let us therefore return to our starting point and try to choose our path.

26. As we said at the beginning of our opinion, we must distinguish between substance and the legal technique used to inject that substance into the legal system, or to be more precise, the method of recognizing that substance — the incorporation of that substance — into the legal system. With regard to the substance, I believe that my colleague, the Vice-President, and I agree, and I share his opinion that we should do our utmost to ensure that the wrongdoer does not profit from his wrongdoing. The disagreement between us merely concerns the legal technique for recognizing the existence of that principle in Israeli law, whether we can integrate that principle into Israeli law by means of interpretation or by means of filling a 'concealed' lacuna. My colleague believes that the principle of 'have you committed

murder and also taken the inheritance?' — as a general principle — can be recruited by our law both into the ranks of interpretation and into the ranks of the concealed lacuna, whereas I believe that neither interpretation nor the concealed lacuna — neither the one nor the other — can sustain the burden of a proposed solution. Not only is that solution not implied by the language of the statute, but it even contradicts, *prima facie*, the provisions of the statute.

'Have you committed murder and also taken the inheritance?' as a substantive principle of law

27. If we do not follow the way of interpretation nor the way of the lacuna, what path shall we take? In order to discover the path, let us go back somewhat and remember what we said in our opening remarks, namely that we knew from the beginning that the appellant was unworthy to be given his son. Legal intuition — the conscience and instinct of the expert — inspire a judge at all times, and it is a major factor in his judicial work. See Cardozo, *supra*, at pp. 165 *et seq.*; Dworkin, *Law's Empire*, *supra*, at p. 10; A. Barak, *Judicial Discretion*, Papyrus (1986), at pp. 196-198. In our case, that intuition is acute to the point of being painful, exactly like the feeling of Justice Earl, in *Riggs v. Palmer* [35], and the feeling of all of us with regard to the case of Naboth the Jezreelite and the case of Uriah the Hittite. After we discussed the substance, we set out on a journey to search for a way to integrate that substance into Israeli law. As we stand at the crossroads, knowing clearly where we wish to go, I think that it is proper that we should be honest with ourselves and with others, for frank speech may in itself map out our path. This, in truth, is our opinion; the same substance that dictates our decision will also pave the path that we are trying to find.

Prima facie, the matter is simple: that substance is, in truth, a binding legal norm in Israeli law, an independent fundamental principle, a creature that stands on its own feet, speaks with its own voice and its own language. This creature speaks for itself and does not need a mouthpiece to announce its message to Israeli law, neither the mouthpiece of interpretation nor the mouthpiece of a lacuna. This basic principle exists independently in the sphere of Israeli law, alongside other fundamental principles and alongside statutes, Basic Laws and other elements that comprise Israeli law in its entirety. This basic principle is on a level with statute, and it is a companion to statutes. It is, in essence, neither a rule of interpretation, nor a rule of lacunae (even though in its application it may assist also in interpretation and

in filling a lacuna). It has independent existence, stands on its own feet and speaks to statutes as an equal amongst equals.

If an analogy is required, we will mention the principle of the freedom of occupation before the enactment of the Basic Law: Freedom of Occupation. The freedom of occupation, it will be remembered, was established in HCJ 1/49 *Bajerno v. Minister of Police* [28], and its status was the status of statute. In other words, the freedom of occupation was recognized as a fundamental principle in Israeli law — as if written expressly in statute — and only statute could override it. See, for example, HCJ 337/81 *Miterani v. Minister of Transport* [29], at p. 363, *per* Vice-President Shamgar. Indeed, it is obvious that only a statute can set aside or restrict a right that also has the force of statute. This was the status of the freedom of occupation before the enactment of the Basic Law: Freedom of Occupation. This is the status of the basic rights today, even if they have not found themselves a home in the Basic Laws; and this is the force of that substance in our case. The fundamental principle that a murderer may not inherit his victim — a principle expressed in the cry 'Have you committed murder and also taken the inheritance?' — is a fundamental principle which has the status of statute, and its relationship to the Inheritance Law is like the relationship of a *lex specialis* to a *lex generalis*. It is the law when someone has committed an infamous act, an act that — as a matter of principle — must not benefit him. This principle is also a fundamental principle of Israeli law, and its status is that of statute. It stands together with statutes, regarding them as an equal among equals.

In other words, the doctrine of 'Have you committed murder and also taken the inheritance' in its broad sense does not need to hide behind other basic legal principles or rules. It is no credit to us nor to it to reveal it to us with a mask of interpretation or filling a lacuna. It is not proper for us to do this, either to it or to ourselves. Is it fitting — is it creditable — that a fundamental doctrine like the doctrine of 'Have you committed murder and also taken the inheritance?' should enter into Israeli law only by virtue of an alleged 'lacuna' that appears in the law? We cannot say this. Let us walk together with the doctrine openly in the street, since it is a living creature that is independent. We are not ashamed of it, and let it not be ashamed of us. Let us not call it a rule of interpretation; let us not reduce its stature so that it becomes merely a minor force in the law. Let us not regard it as a kind of understudy called onto the stage only when there is a 'lacuna'. There is no justification for doing so.

28. Let us confront the issue squarely. In *Riggs v. Palmer* [35], under the provisions of the statute — interpreted literally — the grandson, the murderer, would have inherited from his grandfather, the murder victim. Notwithstanding, the court ruled — albeit by majority opinion, but without hesitation — that the grandson would not inherit from his grandfather. The court therefore ruled, *prima facie*, contrary to the provisions of the statute. The same is true in our case. According to a literal interpretation of the statute, the father, the appellant, should be given his child as he wishes. Nonetheless, we are ruling that by his infamous act the father has lost his right to his child. Thus we are proposing to rule — exactly like Justice Earl in *Riggs v. Palmer* [35] — *prima facie*, contrary to the provisions of the specific statute. In both cases the statute is clear. Nonetheless, Justice Earl made his decision, and we too are making our decision. Assuming that our decision is 'correct' — and that is now our assumption — is it right, is it reasonable, is it creditable, is it sufficiently persuasive that we should say that we are making our ruling on the basis of rules of 'interpretation' or by filling a 'lacuna'? The answer to this question, in my opinion, is emphatically no. The force of the reasons that led Justice Earl to make his ruling, the force that leads us to make our ruling, is too great and powerful to be included in rules of 'interpretation' or to be called upon to fill a supposed 'lacuna'. The force is, at least, the force of statute, and if this is so, then we are obliged to proclaim this publicly.

29. The matter can also be presented in the following manner: we are dealing with a rule and an exception to the rule. The rule is that a beneficiary under a will inherits; the exception to the rule is that a murderer may not inherit from his victim. The question is merely who has the 'burden' of establishing the exception. Shall we say that the legislator has the duty of prescribing both the rule and the exception thereto, and when he did not prescribe the exception to the rule the rule will apply and the heir-murderer will receive the inheritance? Or should we say, the rule is universally accepted, but to the same extent — and with the same force — the exception to the rule is also accepted as an accepted principle of Israeli law, namely that the murderer-heir may not inherit. Thus, if the legislator nonetheless wanted the heir-murderer also to inherit, he should have legislated this expressly. And if he did not legislate to this effect, the exception will apply as if automatically, like the rule itself. Our opinion is consonant with the second alternative, since it has the force of an independent rule.

30. Our opinion is therefore that the principle of 'have you committed murder and also taken the inheritance?' — in its broad sense — is an independent principle in Israeli law, and it has the status of statute. Indeed, this principle — alongside other similar principles — is one of the sources of Israeli law, alongside statute and the other sources of law.

Concerning the Foundations of Justice Law

31. Here we wish to make a remark on our methodology, as a continuation of what we said above with regard to the 'concealed' lacuna, which in our opinion is merely a lacuna that we ourselves created by calling it such. Under the Foundations of Justice Law, 5740-1980, when a judge is confronted with a question of law that requires a decision, the court is supposed to seek for an answer to the question in statute, case-law or by way of an analogy. If the court finds in one of these sources an answer to the question of law that came before it, so much the better; but if it does not find an answer to the question, then — and only then — the court will decide the question 'in view of the principles of liberty, justice, equity and peace in Jewish heritage', as stated in the Foundations of Justice Law:

'Supplementary sources of law

> 1. If the court identifies a question of law that requires a decision, and it does not find an answer to it in statute, case-law or by way of an analogy, it shall decide it in the light of the principles of liberty, justice, equity and peace of Jewish heritage.'

This formulation of the sources of law and the order of priority between them not only beckons and invites the reader to the conflicts between them (which we will not consider now), but it itself contains a kind of unanswered question. The question is this: when, and in what circumstances, will the court identify a 'question of law that requires a decision'? To emphasize the point: *When and in what circumstances* will it be said of the court that '… it does not find an answer to it [the question of law] in statute, case law or by way of an analogy…?'. This is precisely the case of *Riggs v. Palmer* [35]: is the murderer-heir entitled to come into the inheritance? The statute does not make any special provision for the murderer-heir, and, reading the text literally, he too is supposed to inherit from his victim, the testator. This is what the murderer-grandson argued before that Court. Then the party opposing this stood up and argued: indeed, we intend, and we are commanded, to respect the wishes of the deceased in his will. That is indeed the law as a rule, but it is not the law with regard to a murderer who murders

the testator in order to come into an inheritance under the will. Each party makes his argument, and thus a 'question of law that requires a decision' presents itself before the court: is the heir-murderer entitled to come into the inheritance?

32. The Court therefore sets out on a journey — to try and find '… an answer to it [a legal question] in statute, case-law or by way of an analogy…' — and first it encounters 'statute', i.e., the Inheritance Law. As commanded by the legislator, the court enters into the edifice of the Inheritance Law, going into its different sections, exploring its rooms and lighting up its passages. Has the court 'found' or has it not 'found' an answer to the question? One party (on behalf of the grandson) argues that the Court has indeed found an answer to the question, and the answer is this: the grandson, the murderer, is supposed to inherit under the will of his grandfather, the murder victim. This is the plain meaning of the text and the law contains no provision that *denies* the grandson this right. It follows that the statute provides an answer to the question. The court has 'found an answer to it [the question] in statute…'. The grandson will receive his grandfather's estate and the court will not even consider the other sources listed in the Foundations of Justice Law — case-law, analogy, and certainly not the principles of liberty, justice, equity and peace of Jewish heritage. A simple answer.

But is this really the case? Is it really true that in the case of the grandson-murderer the Inheritance Law provides an 'answer' and the grandson inherits? There are those who think that this is indeed the law, and they cannot be dismissed lightly. See, for example, the article published by the great Roscoe Pound on the case of *Riggs v. Palmer* [35]: 'Spurious Interpretation', 7 *Colum. L. Rev.* (1907), 379 [56]. Pound refers to the path adopted by Justice Earl in his decision as 'spurious interpretation' (or, if you prefer, contrived interpretation or unlawful interpretation) and vehemently criticizes the decision on the merits. (Incidentally, I will point out that I agree that the decision in *Riggs v. Palmer* [35] is not based, in truth, on 'interpretation' of the statute — we have discussed this at length — but I do not agree that the decision was wrong. It is possible that this is the difference between the academic whose thoughts are merely theoretical, no matter how brilliant and learned he is, and the judge — even in the lowest court — whose decision will rest on his conscience: 'Even at night my conscience tortured me': Psalms 16, 7 [44]). This is the argument of one party.

33. The other party oppose this and say: the combination of words 'a question of law requiring a decision' creates a loaded formula. The formula is not concerned only with a question that arises from a study of the words of the statute that require interpretation, as if we are dealing with a technical question and a technical answer. The formula (also) concerns a question that — in itself — is a question *worthy* of coming before the court for a decision. The formula is not merely a technical-mechanical formula. It also includes an ethical message, as if the statute were saying to us: 'a question of law that requires a decision' is a question of law that is *worthy* of being decided. This is said of a *question* that comes before the court for a decision, and the measure of the question is also the measure of the answer. The combination of words '… and it does not find an answer to it in statute' does not mean the naked statute, as if the statute existed alone in a world of its own. Were we to say this, then in *Riggs v. Palmer* [35] we wound find an answer in the statute, and the answer is that the grandson-murderer will inherit from his grandfather, the victim. But when we start with a question of law that is *worthy* of being decided in its own right — should we give the grandson, the murderer, the estate of his victim — it is only natural that we should expect the statute to provide a *worthy answer, a specific answer* to that question. For it can be presumed that in his legislation the legislator will give worthy answers to worthy questions, specific answers to specific questions. We have found a worthy question, but we have not found a worthy and specific answer. Therefore the second party will say in conclusion: '… the court has not found an answer to it [the question] in statute…', i.e., the Inheritance Law.

34. According to the second party, is the meaning of their remarks that we should now consider the other sources of Israeli law, including 'the principles of liberty, justice, equity and peace of Jewish heritage"? The answer to this question is not simple and we will not be drawn into it. We will merely hint at the following: we said that the combination of words 'a question of law that requires a decision' is a 'loaded' phrase, and it refers to a question that is *worthy* of coming before the court for a decision. In classifying the question as a 'worthy' question, it is as if we have added, in a whisper or a wink, that an heir-murderer is not worthy of inheriting from his victim. The answer to the question lay in the very classification of the question as a 'worthy' question. Moreover, how do we 'know' that the question is a 'worthy' one, and how do we also 'know' in our sub-conscience the answer to the question? The answer to this is that it is because of who we are, because we are motivated by feelings of morality and integrity that beat

violently within us. And these derive from the principles of liberty, justice, equity and peace of Jewish heritage. This source of Israeli law is admittedly the last source according to the Foundations of Justice Law, yet we found it inside us at the beginning of our journey. The 'law of nature' and Jewish heritage are like one; we have come full circle and east meets west.

Law and morality and the difference between them

35. We have said that the principle 'Have you committed murder and also taken the inheritance' is numbered among the sources of Israeli law; its status is that of a principle, its stature is that of statute. We all know that this principle is a moral one, and that morality directs our actions and thoughts, as though inherent in our genetic code, and it is a force whose intensity may be compared — in its normative sense — to the intensity of the desire for existence and survival. It would appear that shortly after we recognized that Cain acted wrongly in killing Abel, we also recognized that we would not permit a murderer to inherit from his victim. Nonetheless, in its important parts statute ought to give normative-legal expression to moral imperatives that we have been commanded to observe. In the words of Prof. M. Silberg, a justice of the Supreme Court of Israel, in his book *Kach Darko Shel Talmud*, 2nd edition (1964), at p. 67:

> 'The realms of morality and law form two concentric circles that overlap only partially — the more that the dividing line between them retreats, the greater the moral area and content of the law. The ideal position is that the two circles will overlap totally, as water covers the sea.'

(Personally, I believe that law and morality are like two excentric circles that create three areas; the two circles move back and forth all the time like the movement of continents. But we will not expand).

Morality and its imperatives are like a lake of pure water, and the law and its imperatives are like water lilies, spread over the surface of the water and drawing life and strength from the water. Morality nourishes the law at the roots and it surrounds the law. Some of the water lilies give legal force to moral imperatives; other water lilies act as basic legal concepts that are filled with content by the imperatives of personal and social morality, such as with the concepts of 'morality' and 'justice', and also the concept of 'good faith'. Sometimes morality finds its place amongst us as is, without needing any intermediaries, and there are water lilies that exist without any basis in morality. The water lily known as the Adoption of Children Law — and the

same is true of the water lily known as the Inheritance Law — are both nourished by the waters of morality, and these waters surround them. Thus we 'know' that the question 'Have you committed murder and also taken the inheritance' is a 'worthy' question; thus we 'know' that this question has no answer in the Inheritance Law; thus we 'know' that this question does have an answer in the *law* of inheritance. Thus we also 'know' that the question whether a particular question is a 'worthy' question, and whether it has an 'answer in statute', is a question — it may be called: the ultimate question — that nourishes itself with the principles of morality that beat within us, principles of morality that are derived from the principles of liberty, justice, equity and peace of Jewish heritage. As we have said elsewhere ('Jewish heritage and the Law of the State', *Civil Rights in Israel, Articles in Honour of Haim H. Cohn*, The Association of Civil rights in Israel, R. Gavison, ed. (1982), 47 [50], at p. 97):

> '… legislation of the Knesset — together with case-law made by the courts in the past and the present, from time to time, without any basis in express legislation — are nothing more than trees planted by streams of water, islands in the sea, plants in a greenhouse; someone who is supposed to determine the law must bathe himself in the stream, sail on the sea, experience the atmosphere of the greenhouse.'

36. My colleague, the Vice-President, and I have chosen a difficult path. The path is easy for the moralist, but it is not so easy for persons involved in the law. The moralist will do as his heart tells him, and live. Persons involved in the law cannot always do what their heart tells them. Sometimes he is compelled by words, and sometimes he is compelled by circumstances. The question of whether he is compelled by words (which words?) or not is also a difficult decision that a judge must make. These issues struggle with one another inside his heart, and his path is a hard one. The case is a hard one and the path is a hard one.

Hard cases make bad law

37. Our case is a difficult one and we are know that 'hard cases make bad law'. We must therefore go cautiously and consider our remarks very well. Ours is a 'hard case' and caution is needed in case we decide and make 'bad law'. Why do people in the law fear that 'hard cases' will lead to 'bad law'? The people who say this are not referring to the result of the specific case before the court. Quite the opposite, a 'hard case' in our context is a case where the decision is difficult because statute points, *prima facia*, to the

north, whereas the heart of the judge points to the south. It is as though the law has not 'adapted' itself to the special set of facts before the court. This is the source of the apparent gulf between the law and the heart, and the source of the difficulty experienced by the judge. At the end of the trial in that 'hard case', the judge decides according to the dictates of his heart, but that decision has difficulty in finding a place within the framework of the specific statute or within the framework of the general law. Justice is done in that case — this is agreed by all — and the fear is merely that perhaps in the future, in circumstances that are not identical to the circumstances of the case in which the ruling was made, the courts will follow the ruling that was made, and the law will become absurd in the extreme. I do not have any suggestion or solution for all kinds of 'hard cases', but with regard to our case I will say a few words.

38. Without doubt, our case presents us with an unique and special instance of two disciplines that affect one another and overlap with one another: the discipline of law and the discipline of morality. It can be said that legal authority has stated its position, seemingly, but we have said that moral authority will make legal authority complete. The decision is an unique and special decision, literally a 'royal edict'. If, then, it is a royal edict — and this is indeed what it is — let us give it a place in the room where royal edicts are kept. In this room we will find, for example, the decision in *Riggs v. Palmer* [35]. Here too we will find the decision made in *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18]. The decision in *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18] was the only child in its family, and the proof of this is that subsequently the court refused to apply the ruling in *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18] — the case-law rule of defensive democracy — in similar, possibly very similar, cases, but cases that were similar but not identical. Indeed, it was in EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset* [30] that the court refused to extend the case-law rule regarding defensive democracy and apply it also to a racist political party. See also CLA 7504/95 *Yasin v. Parties Registrar* [31], and CLA 2316/96 *Isaacson v. Parties Registrar* [32].

As a 'royal edict', our decision in this matter is subject to the law of kings, and not to the law of the common people, and we cannot derive the law of the common people from the law of kings. The royal edict may be likened to those 'noble' elements of nature, elements that constitute a kind of

closed order that no others can enter. 'I have seen the noble people, and they are few' (Babylonian Talmud, Tractate *Sukkah*, 45b [52]). If we regard this ruling as such — and this is how it should be regarded — we will not fear for the future. The case is a hard one, but there is no fear that the ruling is a bad one. If in the future a case similar to this one arises, we will examine it on its merits and decide it as it ought to be decided.

The judge as an interpreter of life

39. The life of the appellant and his wife has not been an easy one. Despite their many efforts, they did not succeed in producing a child. The appellant's strong desire for his own child put into his mind a perverse idea as to how he could have his own child and continue his family life as before. He thought and acted. Now he asks that we too shall be accessories to his act, if only accessories after the fact.

Elsewhere I compared a judge to a writer and poet, a painter and sculptor, a composer and a playwright. I went on to say that the judge, like all of these, 'is also an interpreter of life, a creative interpreter' (M. Shamgar — A President of Judges — A Judge and Man', 26 *Mishpatim* (1995) 203 [51], at pp. 206-207). We have interpreted the life of the father-appellant. We have interpreted the life of the young mother. We have looked around us and interpreted our own life. The conclusion that we reached is the only conclusion that we could have reached. There is no other.

Justice I. Zamir

I agree with the opinion of my colleague, Justice Dorner.

My colleagues, Vice-President S. Levin and Justice M. Cheshin, also agree that the list of grounds for declaring a child adoptable, as set out in section 13 of the Adoption of Children Law, is a closed list. This is apparent from the wording of the section and this has been held in case-law. Notwithstanding, Vice-President S. Levin adds (in paragraph 9) an additional ground not mentioned in the list, namely 'that a parent is not permitted to refuse to have a minor declared eligible for adoption if doing so contradicts public policy regarding the deeds that lead to the birth of the minor'. Justice Cheshin, in his own way, adds as a ground (by way of analogy) that a murderer may not inherit. It therefore follows that, in the opinion of my colleagues, although in theory the list is a closed one, they have in practice a key that allows them, if and when they think fit, to open up the list to other grounds. How is this so?

Indeed, the appellant behaved like a wretch, and from a moral viewpoint, and perhaps also from the viewpoint of public policy, he is not entitled to benefit from the fruits of his wrongdoing. But immorality, of whatever kind and to whatever degree, is not included in the list of grounds for adoption set out in section 13 of the Adoption of Children Law. There are parents who have committed abominable crimes, and there are other parents whose behaviour is immoral in the extreme, but these in themselves are not a ground, in theory or in practice, for taking away their children for the purpose of adoption. This is not because the legislator was oblivious to morality: section 13(8) of the Adoption of Children Law provides that a refusal to give consent to adoption for an immoral motive is a ground (whether an independent ground or a supplementary ground) for adoption. But the statute does not provide that *immoral* behaviour in the past is also a ground for adoption, unless, of course, this behaviour establishes one of the grounds stipulated in section 13.

It is true that the wording of a statute, in any statute, does not necessarily constitute an insuperable barrier before the court when it seeks to do justice in accordance with the purpose of the statute. There are situations in which there are especially powerful reasons of justice or necessity, public or personal, that may induce the court to rely upon a hidden intention or a presumed intention of the legislator, not only to interpret a text other than in accordance with its literal meaning, but even in order to turn the text on its head. This is what happened, for example, in the famous case of *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [18]. Nonetheless, it is clear to me that Vice-President S. Levin and Justice Cheshin, who cite this case as an example, both agree that the court should only take this path in a rare case, when all other paths are unavailable.

In my opinion, in the case before us there is no need to take this path, and it is immaterial whether we call this broad construction or filling a lacuna, according to the method of Vice-President Levin, or a fundamental principle, according to the method of Justice Cheshin. In the case before us there is no justification for breaking out of the framework of the list of grounds prescribed in section 13, since the case falls within the scope of this section, without it being necessary to distort the language of the section or to depart from the case-law that has held that this section provides a closed list of grounds. The following is the wording of section 13(7):

> ‘The parent is incapable of looking after the child properly because of his behaviour or situation, and there is no chance that

> his behaviour or situation will change in the foreseeable future, even with reasonable economic assistance and help of the kind usually provided by the welfare authorities for his rehabilitation.'

Even though case-law provides that the best interests of the child, in themselves, are not a ground for adoption, but rather a ground for adoption among the grounds set out in section 13 of the Adoption of Children Law must be found, it is clear that all the grounds in this section are merely, as Justice Dorner says (in paragraph 9), 'a list of cases in which the best interests of the child are harmed because the parent does not carry out his duty towards him or is incapable of doing so'. Moreover, subsection 13(7) of the Adoption of Children Law, more than any other subsection, clearly and firmly places the best interests of the child within the framework of the ground stated there; for under this subsection, a child may be declared adoptable if 'the parent is incapable of looking after the child properly'. In other words, if the parent is incapable, because of his behaviour or situation, of ensuring the best interests of the child. This is also what Justice Cheshin says (paragraph 4). See also the remarks of Justice Cheshin in CFH 7015/94 *Attorney-General v. A* [2], at pp. 104-109.

The incapacity of the parent may derive, as stated in section 13(7), from two factors: the behaviour of the parent or the situation of the parent. 'Behaviour' and 'situation' are broad and flexible terms. They include many strange circumstances, and perhaps it may be said that they include every circumstance that relates to a parent, if it leads to his incapacity to take proper care of his child. The following was said by the Commission for Examining the Adoption of Children Law, whose report first recommended the legislation of this subsection, at p. 35 of the aforesaid report:

> 'The idea underlying this provision is that it is impossible for the legislator to define, in pure legal language, all the situations and elements that must be taken into account in the considerations of the court, for life is usually more complex and varied than anything that the legislator can imagine.'

It follows that subsection 13(7) of the Adoption of Children Law is, in fact, a kind of 'catch-all' provision. As Justice Bach said in CA 522/87 *A v. Attorney-General* [33], at p. 440, 'the words "or his situation" refer to all aspects of the objective circumstances'.

Admittedly, as a rule, when referring to the 'situation' of a parent, we mean his personal situation, or one might say his subjective situation, i.e., his own physical, emotional or mental situation. The most common case in which use is made of subsection 13(7) of the Adoption of Children Law is the case where a parent is addicted to drugs, or he is emotionally or mentally disturbed, or he has a disability or a defect that prevent him from caring properly for his child. But the term 'situation' is not limited and ought not to be limited, either with regard to the language of the statute or with regard to the purpose of the statute, to the subjective situation of the parent. It also includes the parent's objective situation, namely the situation in which he finds himself, including his environment, especially if he finds himself in that situation because of his behaviour. If the situation, in this sense, makes him incapable of caring properly for his child, and there is no chance that the situation will change in the foreseeable future, this constitutes a ground under subsection 13(7) of the Adoption of Children Law. Admittedly, the court must be particularly careful when it determines that the objective situation of a parent causes parental incapacity, but with regard to the language and the purpose of the statute, the main point is the result and not the cause: the parent is incapable of properly caring for the child.

I believe that, in the case before us, there is sufficient evidence before the court that the appellant is incapable of properly caring for his child. It may perhaps be said that he is incapable of this because of his behaviour in the past, and in any event he is incapable of this because of his situation today, and also because of his situation in the foreseeable future. It is clear that in this special situation there is no reason to expect that reasonable economic and welfare assistance, of the kind normally provided by the welfare authorities, will change the situation, from the viewpoint of the anticipated harm to the child. Such help is irrelevant to the danger to which the child would be exposed, were he to grow up in the appellant's home.

The court-appointed expert explained succinctly, and there is no need to repeat the quotes from his opinion, that as a result of the situation in which the appellant found himself, and in which he finds himself, he foresees disaster, complications and many difficulties for the child. The expert says that if the child grows up with the appellant, he will be exposed to risks in terms of his mental health. These risks derive from the home in which he would be raised, and particularly from the difficulties inherent in the situation of the father's wife, who is supposed to raise him, and the environment in which he would live, in the shadow of the 'sensational story'.

As the expert says, 'underneath the surface there lies a strong possibility of complications, difficulties and pathology for the child and how he is to be brought up, if he is indeed brought up by R and A.'

The duty of a parent towards his child includes, as Vice-President S. Levin explains (in paragraph 3), also the duty to provide the psychological and emotional needs of the child. The appellant, however, is incapable, because of his behaviour in the past and his situation in the present, of properly providing for these needs. Try as he may, he is incapable, because of his situation — both now and in the foreseeable future — of ensuring that his child can live and develop properly, like children who do not have, in the words of the expert, such a scar, which has come about because of the appellant's behaviour. On the contrary, if the child grows up with the appellant it is foreseeable, on the evidence, that the appellant will involuntarily warp the child's psyche and cripple his emotions. The child is likely to grow up with an incurable emotional disability, all of which as a direct result of the situation in which the appellant finds himself because of his behaviour. This led to the expert's conclusion:

> 'Therefore I recommend that the baby not be given to his biological father, despite his strong desire to raise him, because of the many serious potential dangers arising from this; these should certainly not be imposed on a newborn child whose future — which will not be easy — is still before him, and we should search for the least dangerous and most promising option for his healthy development: there is no alternative other than closed and anonymous adoption.'

If so, there is a basis for holding that the child is adoptable under section 13(7) of the Adoption of Children Law, and there is no need or justification to search for any other ground beyond this section.

In cases where all the judges agree on the same outcome, as in the case before us, the method is the message. The court can, and sometimes should, follow the path of judicial legislation, entirely divorced from the language of the statute, and perhaps even contrary to the language of the statute, in order to achieve the purpose of the statute or to protect basic values. But this is a method for emergency cases, which involve dangers to the legal system and the administration of justice. It is therefore preferable, if at all possible, for the court to take the safe, paved road of interpretation that arises from the language of the statute. In the case before us, it is possible and desirable to follow this path.

Therefore I do not share the view of Vice-President Levin or Justice Cheshin. Even were one were to say, and I do not say this, that there remains a doubt as to whether, in the circumstances of the case, incapacity has been proved within the framework of section 13(7) of the Adoption of Children Law, I still prefer to rule under the shadow of that doubt, rather than to break open the framework to create a new ground which undoubtedly falls outside the scope of section 13. This is especially true in view of the fear that other grounds will try, in the name of basic principles or public policy, to enter through that breach. I am therefore in agreement with the opinion of Justice Dorner.

Justice G. Bach

1. I agree with the opinion of my colleagues that the appeal should be denied and that the decision of the Jerusalem District Court, declaring the child of the appellant adoptable, should be confirmed.

2. The different approaches in the opinions of my four colleagues concern the ground on which it is possible to base the said decision under the law. My colleagues, Justices Dorner and Zamir, are of the opinion that the court's decision to declare the child adoptable can be based on section 13(7) of the Adoption of Children Law, whereas my colleagues Vice-President Levin and Justice Cheshin are of the opinion that one cannot make such a declaration on the basis of any one of the grounds listed in section 13 of the Adoption of Children Law, and that it is therefore necessary to add, by means of judicial legislation, to the grounds for adoption in the statute an additional ground that suits the special situation outlined in this case.

3. With regard to the issue in dispute, I agree with the opinion of my colleagues Justices Dorner and Zamir. I also accept the reasoning set out in their opinions and would like to add to this several remarks of my own.

Both the Vice-President and Justice Cheshin point out that one cannot declare a child adoptable unless his mother and father consent thereto, or unless one of the grounds listed in section 13 of the Adoption of Children Law, which *prima facie* constitutes a closed list, is fulfilled. But they argue that none of these grounds exist in this case. The father, the appellant, does not consent to the adoption, and in their opinion none of the grounds set out in section 13 are applicable.

I agree that this is the case with regard to each of the grounds in section 13 of the Adoption of Children Law, with the exception of the ground set out

in section 13(7) of the Law. I especially agree with my colleagues that there is no basis for applying to the case before us the ground in section 13(8) of the Law, on which, *inter alia*, the District Court relied, and which refers to cases where 'the refusal to give the consent derives from an immoral motive or is for an unlawful purpose'. It is also my opinion that the immorality or the illegality for the purpose of this section must relate to the refusal to give the consent to adoption, and not to the circumstances which led to the birth of the child.

4. We must therefore focus on the question whether facts have been proved that justify the determination of the District Court that there is a ground for declaring the child adoptable under section 13(7) of the Law. In order to facilitate comprehension of the matter, let us quote once more the language of this subsection:

> 'The parent is incapable of looking after the child properly because of his behaviour or situation, and there is no chance that his behaviour or situation will change in the foreseeable future, even with reasonable economic assistance and help of the kind usually provided by the welfare authorities for his rehabilitation.'

The last part of the subsection is irrelevant for our purposes; so the question remains whether it is possible to determine that the appellant is a parent who 'is incapable of looking after the child properly because of his behaviour or situation…'.

My colleague, Justice Cheshin, quotes extensively in his opinion from the opinion of the expert psychologist, Mr Rami Bar-Giora. He notes that Mr Bar-Giora points out serious difficulties that the child will face if he is raised in the appellant's home, but he says that 'we have heard nothing about "incapacity" or about difficulties that clearly amount to "incapacity".' But my colleague adds: 'Indeed, even had the expert spoken expressly of "incapacity" (and he hints of this in his oral testimony), the mere use of the word would not be decisive'.

Before we try to draw conclusions from the expert's opinion, let us first examine what that expert actually said in his testimony before the court, evidence that in my opinion is of no less weight that what is stated in the initial written opinion of that witness.

Inter alia the expert testified as follows:

> '… I say once again, the most serious matter is that the raising of this baby by the family of Y poses a dilemma, not a dilemma — a trap. This is to say, difficulty on all sides. If they tell him the truth, it is very complex, if they hide the truth from him, it is very dangerous. In any case, this casts a shadow on the parenting…'

And when he was asked directly in cross-examination:

> 'I understand that you do not have anything to say against the parental capacity of Mr Y, unconditionally, in principle. You wrote nothing about this, and I believe that this is the case.'

The witness replied:

> 'I wish to point out and I said to Mr Y and his wife… I have no problem at all with the parental capacity of the two of them; all that I wrote was written with regard to the possible parenting of this baby with his special circumstances.'

And further on the expert refers to another case that he treated, and explains:

> 'Of all the dozens of my opinions about parental capacity, one case sticks in my memory. This case was about a father and mother with five children where two were literally outcasts within the family, and with regard to one of them I was asked to write an opinion. I encountered a family that had raised, with relative success, the children that were in their home, yet at the same time there was obvious, blatant and clear incapacity with regard to two special children, and since then this case has become the model and classic example that parental capacity is examined with regard to a specific child, and only in rare cases can it be said that it does not exist *a priori*; for this a person needs to be retarded, crazy. Then it is possible to say that it is not worthwhile trying one way or the other.'

In my view, it is clear from the expert's opinion, together with his testimony in Court, that in his view the appellant lacks parental capacity with respect to the specific child in this case. This does not mean that the appellant is incapable of being a parent at all. There are no indications of this. But because of the difficulties that the child can be expected to encounter if he is raised in the appellant's home — difficulties that the appellant cannot prevent or neutralize — he lacks parental capacity with

regard to this child. This position seems to me reasonable and persuasive, and I see no reason not to adopt it.

5. My colleague Justice Zamir mentioned in his opinion the decision in CA 522/87 *A v. Attorney-General* [33], at p. 440, where I wrote that, with respect to section 13(7) of the Adoption of Children Law, 'the words "or his situation" refer to all aspects of the objective circumstances'.

To elucidate this position of mine, we should mention the facts to which that appeal referred. The case concerned a married couple, the parents of three minor children, who had been declared adoptable. It was proved that the mother was a mentally-ill person who endangered her children's welfare, and it was universally agreed that she was incapable of raising the children. It transpired that the father, on his own, did not lack parental capacity, but since he believed that his wife would recover and was not prepared to leave her, and since it was inconceivable that the children's health should be endangered by leaving them in their parents' home, it was decided that they should be declared adoptable vis-à-vis both parents, despite the fact that the father, on his own, could have had parental capacity. This shows that a person's parental capacity in a specific situation is not determined merely on the basis of the general capabilities of that person and his ability to function in principle as a father, but by taking into consideration all the facts and circumstances in which he finds himself, which constitute 'his situation', within the meaning of section 13(7) of the Adoption of Children Law.

In our case, because of his conduct, the appellant finds himself in a situation in which he does not have the capacity to raise the child under discussion, in conditions in which the child is entitled to be raised, namely without being exposed to serious psychological risks and traps as described by the expert psychologist.

I therefore see no difficulty, nor even any artificiality, in applying the provisions of section 13(7) of the Adoption of Children Law to this case.

6. My colleague, Vice-President Levin, wrote in his opinion that we must read into section 13 of the Law an additional rule, which provides that a parent may not oppose a declaration of a child as adoptable if this conflicts with reasons of public policy relating to the acts that led to the birth of the child. He adds that this possibility did not occur to the legislator, but that, had he been asked, he would certainly have provided that such a rule should be applied in order to prevent the child being given to the appellant.

To this I must say that, if indeed we may assume that the legislator would have been prepared to include an additional rule in section 13 that is not included in it in its current wording, then it certainly can be assumed, *a fortiori*, that had he been asked, the legislator would have agreed to a construction of the existing section 13(7) that parental incapacity because of a parent's 'behaviour or situation' may be applied to the facts in cases like the one before us.

I too do not wish to rule out the possibility that, in rare and exceptional cases, the court will find it necessary to add to the specific provisions of a statute a provision not included therein, by means of a kind of implied construction, in order to prevent results that are inconceivable or that make a mockery of the law or that are manifestly contrary to public policy. But in this case I do not think there is any need to consider resorting to such methods.

Therefore it is my opinion that the decision of the District Court declaring the child adoptable on the ground included in section 13(7) of the Adoption of Children Law should be confirmed.

Appeal denied.

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3 October 1996.

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