C.A. 311/57

ATTORNEY-GENERAL

v.

M. DIZENGOFF & CO. (NAVIGATION) LTD.

In the Supreme Court sitting as a Court of Civil Appeal

Goitein J., Landau J. and Berinson J.

Administrative Law—Retroactivity of subordinate legislation—Regulations imposing lighterage charges and contributions to the Ministry of Finance—Analogy with local authority bye-laws and other delegated legislation—Criteria of reasonableness and legislative intention—Invalidity on grounds of ultra vires, lack of good faith, extraneous considerations and abuse of power—Ports Ordinance—Ports (Lighterage Charges) Order, 1953*—Interpretation Ordinance.*

Three different rates of exchange were introduced as a result of the variation of the official rate of exchange of Israeli currency in 1952. The rate applicable to shipping matters necessitated an increase in the charges for port services, including those for Israel shipping, in order to avoid the charge of discrimination in favour of such shipping. The excess earnings made by the port service companies in respect of Israel shipping was, at first by agreement and later by Order, made transferable to the Ministry of Finance. The respondent resisted this arrangement in respect of its own Israel ships and refused to pay the transferable amount. The Order embodying the arrangement was given retrospective effect but as a result of doubts as to the adequacy of the Order the authorities published a Defence Regulations Order. The respondent persisted in its refusal to pay the Ministry's portion of the port charges due from it. Instead the lighterage company involved assigned the debt of the respondent to the Government which unsuccessfully sued the respondent, the District Court rejecting the Government's claim on the grounds that the retrospective effect of the Defence Regulations Order and the new scales payable thereunder was not binding.

Held: The Ports' Ordinance under which the Ports' Order was made contains no express prohibition upon giving retroactive force to any Order made thereunder. References to retroactivity in the Ordinance did not touch the subject matter of the Ports' Order. Notwithstanding the views sometimes expressed in English case law, there was no reason in principle for distinguishing between delegated legislation of the type of the Ports' Order and local authority bye-laws, when it came to testing the validity thereof. The question of reasonableness is one aspect of excess of authority and, therefore, there can and ought to be a close parallel in the manner of judicial scrutiny of all types of delegated legislation. All the various tests employed—unreasonableness, lack of good faith, having regard to improper considerations, extraneous objects—are merely different forms of testing

excess of authority or abuse of power. In the instant case, the retroactive force given to the obligation to pay the increased charges was not in the circumstances unreasonable by itself. It did not constitute an invasion of the contractual relations between the parties, since any rate that was imposed depended upon the law and not upon the bargaining powers of the parties. The period of one and a half years of retroactivity was, however, unreasonable since it involved reopening transactions wholly completed. Likewise, the contributions to the Ministry of Finance were unreasonable since they constituted an indirect and camouflaged collection of an impost which had nothing in common with the purpose of the legislature when it authorised the fixing of port charges.

Palestinian cases referred to:

(1) *Cr. A.* 69/38—*Attorney-General v. Rousseau, Ticket Cashier of the Tel-Aviv Service, Jerusalem* (1938) 2 *S.C.J.* 43; (1938) 4 *C.L.R.* 233.

(2) *Misdemeanour Appeal* 18/28—*Attorney-General v. Abraham Altshuler* (1920-1933) 1 *P.L.R.* 283; (1919-1933) 4 *C.O.J.* 1314.

(3) *Cr. A.* 5/46 *Tel-Aviv—Hassia Trachtenberg v. Attorney-General* (1946) *S.C.D.C.* 447.

(4) *Cr. Leave Application* 26/47 *Haifa—Sami Abdalla Bahaj v. Attorney General* (1947) *S.C.D.C.* 225.

Israel cases referred to :

(5) *H.C.* 21/51—*N. Binenbaum and others v. Tel-Aviv Municipality* (1952) 6 *P.D.* 375.

(6) *C.A.* 10/55—*"El-Al" Israel Air Lines Ltd. v. Mayor of Tel-Aviv-Jaffa and others* (1956) 10 *P.D.* 1586.

(7) *C.A.* 43/53—*Kfar Ata Local Council v. "Ata" Textile Company Ltd* (1955) 9 *P.D.* 869.

(8) *H.C.* 98/54; 105/54—*Eugen Lazarovitz and Saada George Saad v. Food Controller (Avinoam Halevi) Jerusalem* (1956) 10 *P.D.* 40.

(9) *H.C.* 72/55, 117/55—*Siegfried Freidy and Shmuel Mendelson and others v. Tel-Aviv Municipality and others* (1956) 10 *P.D.* 734.

(10) *H.C.* 129/57—*Michel Ben Kosta v. Minister of Interior and others* (1958) 12 *P.D.* 209 *(infra p.* 10).

(11) *Cr. A.* 247/55—*Sharlo Ben-Bassat v. Attorney-General* (1956) 10 *P.D.* 716.

(12) *C.A.* 222/56—*Mayor, Councillors and Townsmen of Holon Municipality v. Zelig Shwartz* (1957) 11 *P.D.* 214.

(13) *Cr. C.* 91/55 *Jerusalem—Attorney-General v. Sharlo Ben-Bassat* (1955) 11 *P.M.* 46.

(14) *C.A.* 55/51 *Haifa—Yoqneam Local Council v. Dr. Manfred Meir Lehman* (1952-53) 8 *P.M.* 34.

(15) *C.C.* 1143/57 *Tel-Aviv—Citrus Marketing Partnership (Shoham Agency) v. Tel-Aviv-Jaffa Municipality and others* (1958) 15 *P.M.* 39.

(16) *C.C.* 48/53 *Jerusalem—Jerusalem Municipality and others v. Yihye ben Yihye Kahah* (1955) 10 *P.M.* 58.
(17) *C.C.* 121/53 *Jerusalem—Jerusalem Municipality v. Rahamim A. Israelin and others* (1955) 10 *P.M.* 98.
(18) *C.A.* 261/55—*Tel-Aviv-Holon Municipality v. Zelig Shwartz. Real Estate Agent, Holon* (1956) 12 *P.M.* 240.

English cases referred to:

(19) *Harrison v. Stickney and others* (1858) 9 *E.R.* 1033.
(20) *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1948] 1 *K.B.* 223; [1947] 2 *All E.R.* 680.
(21) *Attorney-General for Alberta v. Attorney-General for Canada and others* [1939] *A.C.* 117.
(22) *Berney v. Attorney-General* (1947) 176 *L.T.* 377.
(23) *Kruse v. Johnson* [1898] 2 *Q.B.D.* 91.
(24) *Sparks v. Edward Ash, Ltd.* [1943] 1 *K.B.* 223; 1 *All E.R.* 1.
(25) *Taylor v. Brighton Borough Council* [1947] 1 *K.B.* 736.
(26) *Short v. Poole Corporation* [1926] *Ch.* 66.

Australian case referred to:

(27) *Arthur Yates and Co. Pty. Ltd. v. The Vegetable Seeds Committee* (1945) 72 *C.L.R.* 37, cited in Keir and Lawson, Cases in Constitutional Law, 4th Edition, Oxford, 1954, pp. 299-312.

Gillon, State Attorney, and *Weiss,* Deputy State Attorney, for the appellant.
Firon and *Bar-Navon* for the respondent.

BERINSON J. The only question which arises in this appeal is the retroactive effect of the Ports' (Lighterage Charges) Order, 1953, which fixed higher tariffs for lighterage in the ports of the country for a period antedating the publication of the Order. The Order was published on May 14, 1953 and it contains higher tariffs for two earlier periods: one from July 1, 1951 to February 13, 1952, and the other for the period commencing February 14, 1952. Of the latter period, the interval of time between February 14, 1952 and May 14, 1953 is of interest to us.

The principal facts are these. On February 14, 1952, a change occurred in the official rate of exchange of the Israel Lira. Up to then there had been one rate of exchange of 2.8 U.S. dollars to the Lira. On that date, three rates of exchange were introduced, namely, Rate A—2.8 U.S. dollars to the Lira, Rate B—1.4 U.S. dollars to the Lira, and Rate C—1 dollar to the Lira. Rate C was fixed for shipping. As a

consequence of this variation in the rate of exchange, Treasury officials found it necessary to introduce changes in the existing scale of lighterage charges in the ports of the country, and this mainly in order to ensure that the amounts theretofore paid by foreign companies in foreign currency should continue to be paid notwithstanding the new exchange rate. But in order, on the one hand, to avoid a charge of discrimination in favour of Israel ships by foreign shipping companies and, on the other hand, to absorb the increased profits which would accrue without justification to a division of Savar Co. Ltd., which provided lighterage services in the port of Haifa, it was decided to introduce a new uniform tariff 2.8 times higher than the preceding one, in respect of all ships, foreign as well as Israel. Along with this it was agreed that the difference in income between the previous and new tariffs, after deducting a definite amount which was approved as the increase for Savar Co. Ltd., should be transferred by the latter to the Treasury. The different shipping companies and their agents in Haifa accepted this agreement and acted accordingly, except that the respondents resisted it to some extent. As agents for foreign ships they paid the increased lighterage charges in full, but as owners of Israel ships they agreed to pay and paid only the increase which had been approved for Savar Co. Ltd. but refused to pay the remaining sums intended for the Treasury on the ground that the demand of these sums was illegal.

This arrangement was put into operation without any legal formality. Only on May 14, 1953 was this omission supplied by the publication of the Ports' Order which purported, as I have indicated, to fix increased lighterage charges retrospectively. The respondents were not deterred and continued to be refractory. When doubts apparently arose in the minds of the competent government authorities whether the Ports' Order was adequate for achieving its avowed purpose, a Defence Order was also issued pursuant to Regulation 46 (b) of the Defence Regulations, 1939, directed to the Savar Co., Ltd. ordering it to accept for its lighterage services the amounts fixed by the Ports' Order in force retrospectively from February 14, 1952, and to remit thereout to the Treasury certain designated sums. The respondents did not retreat from their position even after the issue of the Defence Order, with the result that they continued to owe Savar Co. Ltd. substantial sums. That company was not interested in litigating with the respondents about the money earmarked for the Treasury and accordingly assigned its rights to the Government of Israel, notice to this effect being sent to the respondents. Since these sums have not been paid, the present action was commenced.

Counsel for the defendant respondent endeavoured to upset the claim by a number of different arguments, but all of them were rejected except for two which were decided in its favour. It was held that the retroactive force given to the said Defence Order and to the new scale of lighterage charges in the Ports Order was not binding and the action failed for this twofold reason. The learned State Attorney agreed before us that the Defence Order directed by a competent authority to the Savar Co. Ltd. could impose no obligations upon other persons and for this reason could not serve as grounds for an action against the respondent, and he concentrated his criticism upon that part of the decision which related to the lack of retroactive force of the lighterage charges fixed by the Ports Order.

The question of the retroactive force of secondary legislation is not new to us. It has been dealt with a number of times in our courts in connection with local council bye-laws which purported to impose taxes, fees or other payments retrospectively. These decisions have established the principle that generally such secondary legislation with retrospective application is not proscribed but is to be tested by the accepted criterion with reference to bye-laws, i.e., by the test of reasonableness. In the leading case of *Binenbaum v. Municipality of Tel Aviv* (5), Agranat J. says (at pp. 385-6):

> "We have found no legal authority which declares that in no event is it permissible for a local authority to give retroactive force to a bye-law enacted by it, and it is our opinion that in law this matter also, like that of the effect of bye-laws generally, is always to be tested by the standard whether the retrospective provision is unreasonable or unacceptable."

> "There is no rule which prohibits a retrospective rate. That depends upon the intention of the legislature and the question is whether the Law under which each rate is made does so expressly or impliedly."

This rule, which was laid down by Baron Parke in the case of *Harrison v. Stickney* (19), was cited with approval by Agranat J. in the *Binenbaum* case.

> "What requires to be made out is not the permission but the prohibition to levy a retrospective tax (by a local authority)" :

El Al v. Municipality of Tel-Aviv-Jaffa (6); and see also *Local Council*

of Kfar Ata v. Ata Ltd. (7) in which no irregularity was found in the imposition retrospectively of a fee for a service rendered by a local authority, in the absence of any prohibition in the Order pursuant to which the fee was imposed.

These rules were established in cases with reference to bye-laws enacted by local authorities for the collection of taxes, fees or other local payments, but I see no reason, and none was brought to our attention, why they should not be equally applicable with reference to any other kind of delegated legislation prescribing government or other compulsory payments.

The next question is whether anything can be learned from the provisions of the Ports Ordinance, under sec. 10(1) of which the Ports Order was made, about the existence of a prohibition on the retroactivity of the Order. There is no express prohibition, but is it to be implied. Notwithstanding Mr. Firon's interesting arguments, I have come to the conclusion that no such prohibition can be spelled out from the provision of the Ordinance.

In the first place, Mr. Firon argued, the fact that sub-secs. 3(b), 3(c) and 3(d) expressly mention the question of retroactivity shows that the legislator was not oblivious to this problem and even if he passed it over in silence in sec. 10, he did not wish lighterage charges to be fixed with retrospective effect. I am not persuaded by this argument. These subsections were added to the original Ordinance of 1926 by Ordinance No. 44 of 1946, after the Government of the time had recognized the independent existence and separate administration of the Port of Tel-Aviv by Jewish public bodies and it became necessary to place certain acts of the Government Port Authority with regard to this port on a legal basis, as appears from the official explanatory notes which accompanied the draft of the Ordinance of 1946. The fact that for this purpose the legislator directed his attention to the matter of retroactivity in so far as it was necessary to achieve this special purpose, does not prove that he intended at the same time to deny the possibility of making retroactive use of other provisions of the Ordinance which were originally part of it. From a positive regarding the new provisions you may not infer a negative regarding the early provisions.

Mr. Firon argued secondly that sub-secs. 10(2) and 10(3) of the Ordinance, when read together with sub-secs. 15(1) (a) and 15(1) (g), patently demonstrated the intention to establish rates for lighterage services which were to be rendered in the future and not for those which had already been rendered. Sub-sec. 10(2) requires anyone

in charge of a vessel which renders a service in port for which a rate has been fixed to keep a copy of the rates available and to produce it upon demand to anyone who receives the service or to the customs officials or police. The question then arises—when a rate is later fixed retrospectively, how can these duties be carried out literally with regard to a period of time which has already passed? We must not forget that under sub-sec. 15(1) (g) non-compliance with any provision in the Ordinance constitutes a criminal offence. The same applies to the collection of the charge for the service. If after a while a rate is fixed different from the one which has existed for some time, how is it possible lawfully to carry out in respect of that time, the provision found in sub-sec. 10(3) that no charge is to be collected other than the one authorised by the rate then actually in force? Here also the collection of a payment higher than the one fixed by the rate in force at the time constitutes an offence under sub-sec. 15(1) (a).

It seems to me that it is possible to answer the questions which Mr. Firon has put to us. The new rate comes into being and takes effect upon the publication of the Order prescribing it. Only then do the various duties arise with regard to having available and producing the new rate and the collection of the charges for the services prescribed therein for any past period and until then non-compliance with these duties is not to be regarded as an offence. In other words, as long as the new rate has not been published, although it relates to a period already past, the duty to keep and produce a copy of it and to act in accordance therewith, does not arise, and a person carries out his duties in the matter by fulfilling them in respect of the past period from the date of publication of the new rates and thereafter. In this respect, the Ports Order is phrased in a special form. It provides that fees shall be paid for lighterage services in accordance with those set out in the Schedule, and the Schedule specifies the higher payments payable for the past periods. The order does not provide that the new rates should be regarded as if they had also been in force in the past. It merely creates an obligation for the future in respect of the past. Mr. Firon's questions do not, therefore, in fact arise.

The conclusion, then, is that the Ports Ordinance does not preclude the fixing of retrospective rates and in this regard there is nothing objectionable in the Ports (Lighterage Charges) Order, 1953.

But is not the retroactivity of the Order ultra vires or otherwise invalid? Is not this a case of lack of good faith, or an exercise of authority in an unreasonable manner or for an extraneous purpose? Generally,

any one of these is sufficient to invalidate an act of an administrative body. I have said "any one of these", but we must not lose sight of the fact that the truth of the matter is that the lines of demarcation are far from clear and well-defined, and they overlap considerably, as Lord Greene M.R. explained at length in *Associated Provincial Picture House Ltd. v. Wednesbury Corp.* (20). I shall have occasion to revert to this case when I deal in detail with the test of reasonableness.

Before that, there is another preliminary question to be answered. Is it generally a matter for the court to examine the legislation of an administrative body from these aspects, and has it the power to in-invalidate this legislation should such a flaw be found? As far as extraneous purpose is concerned, a clear answer was given in *Lazarovitz* v. *Food Controller* (8), where it was said at p. 47 that—

> "This court may certainly interfere upon the application of an injured person and also invalidate legislative provisions of the authorities promulgated under statutory power, not only for reasons of formally exceeding the strict letter of the Law conferring the power, but also for other reasons, such as improper motive, or use of the power for a purpose unrelated to the matter."

Thus, a bye-law of the Municipality of Tel-Aviv was later invalidated by this court for the reason that "a body having the power to enact secondary legislation of a local character must not be enabled to settle religious problems under the guise of regulating the sale of meat in a particular place": *Freidy v. Municipality of Tel-Aviv-Jaffa* (9).

The very same has been done by the Privy Council in England in deciding more than once to invalidate Laws of the provincial parliaments in Canada, which although dealing with subjects and matters within their formal jurisdiction were exploited for attaining an unrelated purpose: *A.G. for Alberta v. A.G. for Canada* (21), where it was said (at p. 130):

> "It is not competent either for the Dominion or a Province under the guise or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers, and a trespass on the exclusive powers of the other."

At this point I think it is proper to quote the words of Lord Goddard L.C.J. (spoken, it is true, obiter) in the case of *Berney v. A.G.* (22) (at pp. 381-382), which point out that a change or distortion of purpose

by a government body in delegated legislation made by it, is simply excess of authority:

> "It may be, though it is not necessary to decide it, that if the competent authority, in this case a government department, uses the powers given by an order made under a Defence Regulation for some purposes wholly unconnected with the regulation or under the order, they could not justify their action under the regulation or under the order, as the answer would be that they were not acting under it."

In Canada, South Africa, India and Australia, the courts act according to this principle, as was explained, with numerous precedents from these countries, in the Australian decision of *Yates v. Vegetable Seed Committee* (27), passages of which are quoted in Keir and Lawson, Cases in Constitutional Law (4th ed.) pp. 299-312. In the *Lazarovitz* case above, the question whether administrative legislation is to be subjected to the test of reasonableness did not arise. But in the course of a general and comprehensive analysis of the topic of judicial interference with the action of public officials and bodies, the following was said in passing on this question (at p. 51):

> "We have already seen that the degree of necessity of a certain act by an authorised body, the decision as to which is committed to its discretion, is no concern of the court, which will uphold the act if done in good faith. It would seem that the court will not, in like manner, inquire into the degree of efficacy or reasonableness of such an act, with the exception of the test of reasonableness of bye-laws: *Kruse v. Johnson* (23)."

In two cases, *Sparks v. Edward Ash Ltd.* (24) and *Taylor v. Brighton Borough Council* (25), the court expressed its opinion that it was not within its jurisdiction at all to examine the question of the reasonableness of legislative acts of a competent authority, although in both cases the court dealt with the question on the merits and reached the general view that the legislative act concerned was not unreasonable.

In the *Sparks* case it was argued that certain regulations issued by the Minister of Transport for regulating traffic at pedestrian crossings were so burdensome and absurd as to be unreasonable and invalid. Scott L.J. who dealt with this question at length considered first the meaning of the concept of unreasonableness which may invalidate delegated legislation, in view of the norms laid down in the well known case of *Kruse* v. *Johnson* (23) and then he added (at pp. 229-30):

"If it is the duty of the courts to recognize and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses...and can be annulled in the usual way.

For the above reasons, this court has, in my opinion, no power to declare these two regulations invalid for unreasonableness, certainly not on any ground submitted in argument before us."

The last phrase "certainly not on any ground submitted in argument before us" does, nonetheless, contain an intimation that possibly other grounds for establishing unreasonableness could have been advanced to invalidate the regulations.

Similarly, in the *Taylor* case (25) referred to in the *Lazarovitz* case (8), the court considered a proposed provision which the Brighton Borough Council intended to insert in its town planning scheme, under which the erection of a fun fair within the planning area without the consent of the council would be forbidden. A landowner who was about to put up such a fun fair upon his land argued inter alia that it was not within the power of the council so to provide, since it had to exercise the discretion which had been given to it in this matter in a reasonable manner. Lord Greene M.R., answered this argument (at pp. 748-9) as follows:

"It was said that some restriction ought to be read into the language of the Act prohibiting this particular provision on some principle of what is called reasonableness and that a delegated power such as this must be used reasonably rather on the same principle as the power to make a by-law. In my judgment, the analogy of the by-law, even if it could carry the appellant as far as suggested, is quite out of place in the present circumstances. We are dealing with a totally different class of subject-matter and one in which the ultimate arbiter is the Minister himself. In my judgment, not only does the argument of unreasonableness break down on the facts, but the attempt made is to introduce it into a subject-matter for which it was never designed."

On the other hand, Wrottesley L.J., who merely added one short paragraph, did not reject the test of reasonableness as such but construed it in the accepted manner in the following words:

> "As to the last matter, if what is sought to be introduced under the heading of reasonableness is that the use of the power must be reasonable in the opinion of judges of the High Court, I think that argument is not well founded."

It is, therefore, possible to sum up the situation by saying that the attempts which have been made in English courts to prove that certain administrative actions of a legislative character are unreasonable and for that reason invalid, have not succeeded and the opinion has been expressed not once in the course of dealing with the problem that such legislative action, as distinguished from bye-laws which may be declared invalid for unreasonableness, is not subject to the test of reasonableness.

As far as I know, no case has yet occurred in this country in which the court has been asked to put an act of administrative legislation, not a bye-law of a local authority, to the test of reasonableness, except one extraordinary instance in this court in the period of the Mandate, *Attorney-General* v. *Rousseau* (1), and another case in the Haifa District Court, which was cited by way of dissent by Judge Lamm in *Citrus Marketing Partnership v. The Municipality of Tel-Aviv-Jaffa* (15).

As for municipal bye-laws, I summarized my views about a year ago in *Kosta v. Minister of the Interior* (10). I still believe in the correctness of what I said there, and I take the liberty of stating here the substance of my views:

> "The many decisions given by the courts in this country since the establishment of the State, as well as during the period of the Mandate, which have dealt with this question, have almost always and consistently proceeded upon the assumption that the test of reasonableness of municipal bye-laws which prevails in this country is in accordance with the rules laid down in the leading English case of *Kruse v. Johnson* (1898) (23), which they have followed in practice...
>
> During the period of the Mandate this question was in fact decided in several judgments in which municipal bye-laws were held to be invalid on account of unreasonableness...
>
> Since the establishment of the State no municipal bye-law has indeed been invalidated for unreasonableness (and,

> as we are told, neither for excess of authority), but the question has arisen more than once and the courts generally have regarded themselves competent to decide it and deny validity to such a bye-law, even though, as we know, this will in practice be done only in rare and very extreme cases, especially when the bye-laws of an elected body are involved, bye-laws which should be supported, if possible.—They ought to be, as has been said, 'benevolently interpreted.'"

Although Baker J., the Relieving President of the District Court of Jerusalem, came to the opposite conclusion in *Attorney—General v. Ben-Bassat* (13), viz., that the courts in this country do not need to resort to the test of the reasonableness of the bye-laws of elected local authorities which receive the approval of a Minister authorized for that purpose and are subject to the scrutiny of the Knesset, and in an appeal from that judgment this court avoided a decision on the question as being unnecessary *(Ben-Bassat v. Attorney-General* (11)), the prevailing opinion of those District Judges who have had an opportunity to give their views on the subject in recent years, including my honourable colleague Witkon J. (when still a District Judge), is to the contrary and accords with my own view as above stated. See *Yoqneam Local Council v. Lehman* (14); *Municipality of Jerusalem v. Kahah* (16); *Municipality of Jerusalem v. Israelin* (17), *Municipality of Holon v. Shwartz* (18); *Citrus Marketing Partnership v. Municipality of Tel-Aviv-Jaffa* (15); and to the same effect Cohen J. of Haifa in the present case. Some of them, such as Lamm J. in the *Citrus Marketing Partnership* case and Cohen J. in the present case, have even clearly stated their opinion that this test applies generally to all kinds of delegated legislation.

I also see no reason for distinguishing in this respect between municipal bye-laws and other secondary legislation.

One of the reasons for the distinction made in England between bye-laws and other delegated legislation, a reason which was brought to the fore and specially emphasized in the judgment of Scott L.J. in the *Sparks* case (24), is that delegated legislation in the form of regulations enacted by virtue of a provision in an Act of Parliament must be laid before both Houses of Parliament and may be invalidated in the usual manner—a procedure which is non-existent here. In some respects it is possible then to regard such delegated legislation which is not set aside by Parliament as having indirectly received tacit Parliamentary approval, which is not the case in this country. As is known, the actions of a sovereign legislature are not subject to the supervision of the courts

at all. But I do not wish to attach undue importance to this difference of procedure between this country and England as regards secondary legislation, for I do not regard this as the crux of the matter.

As I see it, the principle is that the matter of reasonableness is essentially only one of the aspects of excess of authority. In this regard there can and ought to be a close parallel, if not an absolute identity, in the manner of scrutinizing bye-laws and other secondary legislation. Lord Russell's remarks in the case of *Kruse v. Johnson* (23) about the nature of the test of the reasonableness of bye-laws conclude with the following:

> "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded."

Matters of unreasonableness and of excess of authority are then interconnected and, as was observed, the question of lack of reasonableness can properly be raised only in the sense that Parliament never intended to grant authority for such regulations. In that sense, and in that sense only, is it possible, in my opinion, also to raise the question of the unreasonableness of delegated legislation of whatever kind, except in those cases where a different provision exists or where a different intention is to be inferred on the part of the primary legislator which confers the authority for delegated legislation.

I have already pointed out that the boundaries between excess of authority for reasons of unreasonableness and for other reasons are frequently blurred, and it is difficult to distinguish between them. Thus, for example, in *Holon Municipality v. Shwartz* (12), the District Court found the blemish of unreasonableness in a municipal bye-law, which sought to impose upon property owners an obligation to share in meeting the costs incurred by the Municipality for street paving several years before the enactment of the bye-law. The Supreme Court affirmed the invalidity, but where the District Court saw unreasonableness,

the Supreme Court saw the usual excess of authority. In the case of *A.P. Picture Houses v. Wednesbury Corp.* (20), the complex concept of reasonableness with regard to action taken by an administrative authority was analysed by Lord Greene in the following instructive words (at p. 229):

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly. there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority, Warrington L.J., in *Short v. Poole Corporation* (26), gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

Thus, it is difficult to distinguish substantially between the test of reasonableness and other tests which are accepted as grounds for invalidating an administrative act, such as lack of good faith, having regard to improper considerations, achievement of an object extraneous to the matter etc., all of which are merely different forms of testing excess of authority. Probably the common descriptive term to fit all these categories of excess of authority is what the French call "detournement de pouvoir" and the English "abuse of power".

If this is really so, then not only does the Interpretation Ordinance not stand in the way of laying down the rule that the test of reasonableness applies equally to all manner of delegated legislation by an administrative body, and not merely to the bye-laws of local authorities, but the opposite is true. The term "regulation", as defined in sec. I of the Inter-

pretation Ordinance* does not distinguish between a bye-law and other types of delegated legislation and if the test of reasonableness applies to one type, why should it not also apply likewise to the other types?

What does the test of reasonableness involve? If we are to reconcile the words of Lord Greene in the *Associated Picture Houses* case (20) with those of Lord Russel in *Kruse v. Johnson* (23), I would say that if the court finds that the delegated legislation is so illogical, unreasonable and intolerable that a sensible person would not conceive that a reasonable Minister would be capable of making it, one would then have to say that the legislature never intended to grant such power to the Minister. Such delegated legislation is unreasonable and *ultra vires*. As I have already indicated, I have found in this country one judgment of the time of the Mandate *(Attorney-General v. Rousseau* (1)), in which the Supreme Court deals with the question of the force of one of the Road Transport (Routes and Tariffs) Rules which were made by the High Commissioner by virtue of the Road Transport Ordinance. After deciding—contrary to the opinion of the District Court—that the rule was not *ultra vires,* in the sense that it was expressly covered by the Ordinance, it proceeded to deal with the question of the reasonableness of the rule, saying that if it suffered from unreasonableness it would have to be set aside, but reached the conclusion that it was not unreasonable.

It is well to emphasize again that if in interpreting local authority bye-laws the courts act with restraint and the utmost toleration and would not deny their effect because of unreasonableness except in the most extreme case, this is even more true with regard to departmental secondary legislation made by a Minister who is subject to the direct criticism of the Knesset, or by a subordinate of a Minister likewise subject through his Minister to such criticism. One thing is beyond all doubt, and that is that the court will not attempt to substitute its discretion for that of the competent authority nor impose its views on

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*Interpretation Ordinance, sec. 1:

In this Ordinance and in every enactment currently in force and in every enactment to be made hereafter each word and expression in this section shall be interpreted as hereafter stated alongside thereof...

"regulation"—regulation, rule, bye-law, proclamation, declaration, order direction, notice, announcement or other document made by every authority in Palestine or Israel... including an order, direction, notice, announcement or other document made by virtue of a regulation, rule or bye-law as aforesaid.

those upon whom the legislature intended to rely for their understanding and logical powers, their knowledge and experience in the practical affairs of life, in short, their discretion based on a thorough knowledge of all aspects of the situation and the conditions which, in their opinion, demand the enactment of certain secondary legislation and none other.

In the course of his submissions, when the State Attorney was questioned by the court on the matter of reasonableness with extreme illustrations on the face of them unacceptable (such as, for example, the retroactive prescription of rates for travelling in public transport services), he agreed that it was quite possible to apply the test of reasonableness to departmental delegated legislation, but obviously in the most extreme cases alone. After he had time to reflect, he retracted what he had conceded in a moment of weakness. Clearly we do not wish to hold the learned State Attorney to his admission and I have only recalled the fact in order to demonstrate that there is much to be said on the whole question and that one must not exclude the possibility of cases in which unreasonable use is made of authority by a non-sovereign legislator, including a Government department, to such an extent that the court's interference may be required.

Let us now turn to the facts and see whether they are sufficient to rebut the presumption of the Ports Order, 1953, in point of reasonableness, in the above sense. From one aspect it is difficult seriously to take issue with the argument of the learned State Attorney that the Order was made for attaining a proper and reasonable purpose. As indicated, the arrangement was made with the knowledge of all the interests involved, the Port Authorities and Foreign Exchange Control Authorities on the one hand, and the Savar Co. Ltd., and the ship owners and the agents, on the other, under which the increased lighterage charges were in fact brought into operation beginning on February 14, 1952, and the Order was only introduced to give them the seal of legality. The respondents alone refused to fall into line. From this aspect it is impossible not to regard as an eminently reasonable measure the act of the Minister of Transport, intended to bring the respondents into the circle of those who were voluntarily bearing the increased charges. It is indeed possible that the publication of the Order after so long a delay points to defective and weak administration—and we should not like to encourage such administration—but this is not a consideration relevant to the matter in litigation before us.

For the other side, Mr. Firon contended that in substance the Order constitutes interference with the contractual relationships between the ship owners and the suppliers of lighterage services, and that a retroactive determination of rates for such services could seriously affect the orderly course of business and generally have undesirable effects. This argument was acceptable to the District Court but with all due respect does not impress me in the circumstances of the special case before us. The relations between the lighterage contractors and their customers are indeed contractual but the service charges are not included among them. This detail depends entirely upon the provisions of the law, as to which the parties have no binding voice and from which they are not free to deviate. Changes in the rates are in the absolute discretion of the Minister of Transport. The exercise of this authority, even in a retrospective manner affecting past transactions, does not in itself constitute an unlawful interference or one so unreasonable that it could be regarded as in excess of authority.

Whether or not the period of time in relation to which the retrospective application was prescribed is within reasonable limits, according to the rules adopted by the courts in such cases, is a different question. On this point I agree with the conclusion reached by the District Court that because of the unduly long period of retroactivity the Order is defective for obvious unreasonableness.

The period is one and a half years. And I do not see how it is possible after the lapse of so long a time to order that concluded transactions be reopened without causing "manifest wrong and injustice" to those who are now required to make the higher payments (see the *Binenbaum* case (5) at p. 386) or without creating "confusion and uncertainty" (see the case of *Holon Municipality v. Shwartz* (12) at p. 218). For this reason, the retrospective application of the Ports (Lighterage Charges) Order, 1953, appears to me to be invalid.

A further reason for invalidating the retroactive application of the Order, and in reality the Order itself, is this. It appears to me that the instant case comes within the range of the principles which serve as grounds for invalidating an administrative act, including administrative legislation, on account of the extraneous purpose which it aims to achieve. We are told, and this is not disputed, that in order to avoid a loss in State revenue of foreign currency from foreign ships, there was need to raise the rates for the services provided to accord with the change in the exchange rate of the Israel lira. To forestall the argument of discrimination in their favour, the rates were likewise raised for Israel

ships and uniform service charges were fixed for all ships, foreign and Israel alike, and in order to absorb the surplus profits of the lighterage contractors thereby created, it was decided and agreed that they must pay over these surpluses to the Treasury.

Accordingly it is clear that such arrangement and the consequent Ports Order were both intended to achieve purely fiscal purposes of the Treasury. The increased service charges were not entirely fixed as remuneration for the contractors who supply the lighterage services, but a part thereof was earmarked from the outset as a payment for the benefit of State funds, in respect of which the lighterage contractors were merely a conduit pipe. This is a roundabout way for an indirect and camouflaged collection of a compulsory contribution or impost for the benefit of the Treasury by means of an Order which purported to fix lighterage rates. I cannot find any common feature between the fiscal aims sought to be achieved by the Ports Order and the purpose contemplated by the legislature when it authorized the Minister of Transport to fix by order charges for port lighterage services. This fact in itself is sufficient to invalidate the Order.

For these reasons I am of the opinion that the retrospective force which the Minister of Transport wished to give to the Ports (Lighterage Charges) Order, 1953, is of no effect and that the claim was properly dismissed.

From what has been said it indeed follows that the entire Order lacks validity in so far as it fixes payments in excess of the amounts that remain in the possession of the Savar Co. Ltd., as actual service charges. Bearing in mind, however, the submissions of the parties, which only dealt with the matter of retrospective application, I confine my decision to this aspect alone.

GOITEIN J. I concur.
LANDAU J. I concur.

Appeal dismissed.
Judgment given on July 5, 1959.