HCJ 9098/01

Yelena Ganis and others

v

1. Ministry of Building and Housing

2. Attorney-General

HCJ 10043/01

Raphael Kornitzer and another

v

1. Ministry of Building and Housing

2. Minister of Building and Housing

3. Minister of Finance

4. Attorney-General

HCJ 401/02

Mordechai Bilitzer and others

v

1. Government of Israel

2. Minister of Finance

3. Minister of Building and Housing

The Supreme Court sitting as the High Court of Justice

[22 November 2004]

Before President A. Barak, Vice-President E. Mazza
and Justices M. Cheshin, J. Türkel, D. Beinisch, E. Rivlin, A. Procaccia

Petition to the Supreme Court sitting as the High Court of Justice

Facts: Shortly before the election for Prime Minister in 2001, the Knesset passed a law that gave certain persons an entitlement to grants for the purchase or extension of an apartment in Jerusalem. After the election, some six weeks later, the Knesset suspended the grants, and went so far as to include a provision to the effect that the suspension of the grants was retroactive, from the date on which the grants originally came into effect. The petitioners challenged this retroactive suspension of the grants,

on the grounds that they had relied on the grants and undertaken to buy or extend an apartment in Jerusalem during the interim period, and therefore it was unconstitutional for the Knesset to suspend the grants retroactively.

Held: The Supreme Court was unanimous in the opinion that the Knesset had acted improperly when it retroactively suspended the grants, since it had not considered the possibility that some persons may have relied on the grants and taken commitments upon themselves as a result. However, the justices differed as to the proper approach that should be adopted to remedy the situation.

The majority opinion was that it was possible to construe the statute narrowly in such a way that the retroactive suspension would only apply to potentially entitled persons who had not relied on the statute during the interim period, but it would not apply to those entitled persons who did rely on the statute during the interim period. Consequently, the right of the latter group of persons to receive the grant was held to remain valid.

The minority opinion was that it was not possible to construe the statute narrowly as aforesaid, and therefore the retroactive suspension ought to be declared void for unconstitutionality.

Petition granted, in the manner held by the majority (Justice Cheshin, President A. Barak, and Justices A. Procaccia and D. Beinisch), Vice-President E. Mazza and Justices J. Türkel and E. Rivlin dissenting.

Legislation cited:

Adoption of Children Law, 5741-1981, s. 13.

Basic Law: Human Dignity and Liberty, ss. 3, 8.

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

Budget Principles Law, 5745-1985, s. 39A.

Economic Policy for 2004 Fiscal Year (Legislative Amendments) Law, 5764-2004.

Government and Justice Arrangements Ordinance, 5708-1948, s. 10(a).

Housing Loans Law, 5752-1992, ss. 6B, 6C.

Housing Loans Law (Amendment no. 5), 5761-2001.

Income Tax Ordinance [New Version], s. 3(i)(1)(a).

Inheritance Law, 5725-1965, s. 5(a)(1).

Interpretation Law, 5741-1981, s. 22.

Interpretation Ordinance [New Version], s. 17.

State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001, ss. 20, 20(a)(1), 20(b), 20(c).

Torts Ordinance [New Version].

Israeli Supreme Court cases cited:

[1] HCJ 6195/98 *Goldstein v. Central District Commander* [1999] IsrSC 53(5) 317.

[2] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[3] HCJ 5503/94 *Segal v. Knesset Speaker* [1997] IsrSC 51(4) 529.

[4] CA 238/53 *Cohen v. Attorney-General* [1954] IsrSC 8 4; **IsrSJ 2 239**.

[5] PPA 1613/91 *Arbiv v. State of Israel* [1992] IsrSC 46(2) 765.

[6] CrimA 4912/91 *Talmai v. State of Israel* [1994] IsrSC 48(1) 581.

[7] HCJ 5290/97 *Ezra, Israel National Orthodox Youth Movement v. Minister of Religious Affairs* [1997] IsrSC 51(5) 410.

[8] CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [1998] IsrSC 52(3) 1.

[9] HCJ 1149/95 *Arco Electric Industries Ltd v. Mayor of Rishon LeZion* [2000] IsrSC 54(5) 547.

[10] CFH 4757/03 *Land Appreciation Tax Director v. M.L. Investments and Development Ltd* (unreported);

[11] LCrimA 1127/93 *State of Israel v. Klein* [1994] IsrSC 48(3) 485.

[12] HCJ 163/57 *Lubin v. Tel-Aviv-Jaffa Municipality* [1958] IsrSC 12 1041.

[13] CA 2000/97 *Lindorn v. Karnit, Road Accident Victims Fund* [2001] IsrSC 55(1) 12.

[14] HCJ 1779/99 *Brenner-Kadosh v. Minister of Interior* [2000] IsrSC 54(2) 368.

[15] CA 3798/94 *A v. B* [1996] IsrSC 50(3) 133; **[1995-6] IsrLR 243**.

[16] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.

[17] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

[18] HCJ 4562/92 *Zandberg v. Broadcasting Authority* [1996] IsrSC 50(2) 793.

[19] CA 1900/96 *Telmaccio v. Custodian-General* [1999] IsrSC 53(2) 817.

[20] MApp 67/84 *Hadad v. Paz* [1985] IsrSC 39(1) 667.

[21] LCA 6339/97 *Roker v. Salomon* [2001] IsrSC 55(1) 199.

[22] FH 40/80 *Koenig v. Cohen* [1982] IsrSC 36(3) 701.

[23] CA 3622/96 *Hacham v. Maccabi Health Fund* [1998] IsrSC 52(2) 638.

[24] CA 7034/99 *Kefar Saba Assessing Officer v. Dar* [2004], IsrSC 58(4) 913.

[25] EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; **IsrSJ 8 83**.

[26] HCJ 79/63 *Trudler v. Borstein, Election Official for the Composition of the Agricultural Committee of Ramat HaSharon Local Council* [1963] IsrSC 17 2503.

[27] LCA 176/86 *A v. B* [1988] IsrSC 40(2) 497.

[28] HCJ 294/89 *National Insurance Institute v. Appeals Committee for Enemy Action Victims Compensation Law* [1991] IsrSC 45(5) 445.

[29] HCJ 188/77 *Coptic Orthodox Mutran v. Government of Israel* [1979] IsrSC 33(1) 225.

[30] CA 64/72 *General Federation of Workers v. Moav* [1973] IsrSC 27(1) 260.

[31] HCJ 264/77 *Katan v. National Insurance Institute* [1978] IsrSC 32(1) 678.

[32] HCJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477.

[33] CA 165/82 *Hatzor Kibbutz v. Rehovot Assessment Officer* [1985] IsrSC 39(2) 70.

[34] CA 10608/02 *Hazima v. Department of Customs and VAT* [2004] IsrSC 58(3) 663.

[35] CA 9136/02 *Mister Mani Israel Ltd v. Rize* [2004] IsrSC 58(3) 934.

[36] HCJ 4128/02 *Man Nature and Law — Israeli Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.

[37] HCJ 4885/03 *Israel Poultry Raisers Association v. Government of Israel* [2005] IsrSC 59(2) 14; **[2004] IsrLR** Error! Bookmark not defined..

American cases cited:

[38] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

[39] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

[40] *Crowell v. Benson*, 285 U.S. 22 (1932).

[41] *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

[42] *Shapiro v. United States*, 335 U.S. 1 (1948).

Jewish law sources cited:

[43] I Kings 21, 19.

For the petitioners in HCJ 9098/01 — E. Prince, R. Dovrovitzer.

For the petitioners in HCJ 10043/01 — A. Zahar.

For the petitioners in HCJ 401/02 — R. Yarak.

For the respondents — O. Koren, D. Briskman.

JUDGMENT

Justice M. Cheshin

The Knesset enacts a law and provides therein that persons who buy an apartment or extend an apartment in Jerusalem are entitled to receive a grant of several tens of thousands of sheqels. The commencement of the law is, as usual, on the date it is published in *Reshumot*. A short time — approximately six weeks — after the law is published, the Knesset 'returns to its senses' and decides — once again in a law — to postpone the commencement of the first law. Until now, all has gone well; there is no clamour or outcry. But the Knesset wishes to give the second law, the law that postpones the commencement of the first law, not only future application — prospective application — but also past application — retrospective application — from the date of the commencement of the first law, the benefit law. In other words, the second law seeks to suspend the application of the first law, the benefit law, retroactively, from the first day on which it came into effect. This leads to the question: what is the law with regard to someone who bought an apartment or extended an apartment in Jerusalem during that interim period of six weeks, between the date on which the first law was published and the date on which the second law was published? Was the Knesset entitled to deny him in the second law — by means of the suspension — what it gave him in the first law? Does the retroactive application of the second law comply with the criteria provided in the Basic Law: Human Dignity and Liberty? This is the question that the petitioners have brought before us, and it is to this question that we are obliged to provide an answer.

Prologue

2. The Housing Loans Law, 5752-1992, grants 'entitled' persons — persons without housing who are entitled to housing assistance pursuant to rules prescribed by the Ministry of Building and Housing in coordination with the Ministry of Finance — certain pecuniary benefits. In the middle of the year 2000, Knesset members promoted a private draft law whose purpose was to give significant pecuniary benefits to whoever would buy apartments

or extend their apartments in Jerusalem. The draft law, so the explanatory notes state, was intended to contend with the migration away from Jerusalem by encouraging young couples and additional entitled persons to buy or extend apartments in Jerusalem. After it was approved by the Knesset, the draft came up before the Knesset Finance Committee, and a representative of the Ministry of Finance expressed opposition to the draft, on the grounds that the grant offered would not prevent migration away from Jerusalem but would cause a rise in the prices of apartments in Jerusalem. In the words of Mr S. Yiftah, the representative of the Ministry of Finance:

> 'The problem here is a question of supply. The increase in the stock of apartments in Jerusalem, for the present purpose, is less than the natural increase in population, and it is also less than the total increase in population. The increase in the stock of apartments is 2% per annum, and the natural increase of the population in numbers of households, is 2.5% per annum. In such a situation, there is no doubt that whoever does not find his solution in Jerusalem will leave Jerusalem. In the absence of solutions on the supply side, there is no doubt that the draft will not only not help, but it will increase the price unequivocally. When there will be reserves of apartments in Jerusalem, the position will be different.'
>
> (Page 60 of the minutes of the meeting of the Knesset Finance Committee on 11 September 2000, as published on the Knesset web site).

Later at the meeting, MK Meir Porush was asked to vote upon the source of the budget for financing the draft law — as required by the provisions of s. 39A of the Budget Principles Law, 5745-1985 — and his response was that 'each year approx 1,200 million sheqels remain from loans and from this item — that is [the] budgetary source.' The representative of the Ministry of Finance replied that this source was totally irrelevant. But the Finance Committee decided to adopt the draft law, and the draft was published on 18 December 2000 as a draft law promoted by it, under the name of the draft Housing Loans Law (Amendment no. 6) (Promoting Jerusalem, the Capital of Israel) 5761-2000 (*Draft Laws* 5761, 369). The following is what the explanatory notes to the draft law (*ibid*.) tell us:

> 'In view of the migration away from Jerusalem, the capital of Israel, there is great importance in encouraging entitled persons

> to prefer Jerusalem when they are about to buy or extend an apartment.
>
> The proposed law will encourage many to buy an apartment in Jerusalem and it will thereby strengthen its status as the united and prosperous capital of Israel, a matter on which there is a consensus in the State of Israel.
>
> The estimated cost to the State is 130 million new sheqels.'

The Knesset approved the draft law on its first reading, and when the draft came up for discussion at the Finance Committee, the representative of the Minister of Finance again argued that its enactment would lead to a rise in the prices of apartments in Jerusalem, while it would not prevent the migration away from the city:

> 'Assaf Regev [Ministry of Finance]:
> The main problem in Jerusalem is not the demand for apartments but the supply of apartments. This law will simply raise the prices of apartments. It will increase the demand for apartments but it will not increase the supply of housing. The problem in Jerusalem is that there are no available planning resources nor are there any resources of land. An initial consequence of this law is that it will lead to an increase in the prices of housing and it will harm precisely those persons whom MK Meir Porush supposedly wishes to help.'
>
> (Page 60 of the minutes of the meeting of the Knesset Finance Committee on 3 January 2001, as published on the Knesset web site).

The Finance Committee approved the draft law with various changes, and the draft was brought before the Knesset once again for the second and third readings. The Knesset adopted the draft law, and on 15 February 2001, the Housing Loans Law (Amendment no. 5), 5761-2001 was published (in *Sefer HaHukkim (Book of Laws)*, 5761, 140). Below we will refer to this law as 'Amendment 5.' This law was supposed, as we have said, to grant significant pecuniary benefits to persons suffering from housing distress who bought or extended apartments in Jerusalem.

3. Amendment 5 was of short duration. This law was adopted at the end of the term of office of Ehud Barak's government, when the government did not have the confidence of a majority of the Knesset. On 6 February 2001

elections were held for prime minister, and when a new government was formed on 7 March 2001, it was decided to postpone the date of the commencement of Amendment 5, and also to postpone the commencement of additional laws of a similar nature — laws for which there was no allocation in the State budget — that were adopted at the same time. Thus, on 21 March 2001, the draft State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001, was published (in *Hatzaot Hok (Draft Laws)*, 5761, 582). The following was stated in the explanatory notes (*ibid.*, at p. 586):

> Introduction
>
> During the last year, the Knesset adopted a series of laws, which were initiated by Knesset members and whose cost, whether through increasing spending or by reducing the income of the State, is estimated at approximately 3,000 million new sheqels per annum. The draft budget for 2001 does not include sources of finance for these laws.
>
> It is proposed therefore to postpone the commencement of most of the aforesaid laws to the next tax year, and to amend or cancel several of them, as set out below, so that the budgetary cost involved in operating them shall not be reflected in the current fiscal year.'

With regard to Amendment 5, the explanatory notes to the draft law said as follows (*ibid.*, at pp. 587-588):

> 'The Housing Loans Law (Amendment no. 5), 5761-2001, provides that the Government should give a grant to any entitled person who buys an apartment in Jerusalem or who extends his apartment as a result of housing distress, in an amount of 80 thousand new sheqels, when the apartment is situated on land administered by the Israel Lands Administration, and in an amount of 60 thousand new sheqels, when the apartment is situated on land that is not administered by the Israel Lands Administration.
>
> The direct budgetary cost of the law is approximately 160 million new sheqels per annum, and it involves wide-ranging ramifications whose cost may reach hundreds of millions of additional new sheqels.

…

> It is therefore proposed that the validity of the aforesaid laws should be suspended until the end of 2001. In addition, in view of the fact that during the short period when these laws were valid no instructions were given to implement them, it is proposed that it should also be provided that even during the period when the aforesaid laws were valid, it was not possible to acquire rights by virtue thereof.'

The draft law passed a first reading, and when it was sent to the Finance Committee, to be prepared for the second and third readings, we find the following remarks were made by Mr Ohad Marani, the Director of Budgets at the Ministry of Finance, to the members of the committee:

> 'A final remark on the private laws — we do not say that the laws are populist, nor do we say that they were passed as an oversight, but we do say that this is a collection of private laws that cost a great deal of money. Each one of these laws costs money — whether they are better or worse is a matter of individual opinion for each draft law — but all these laws cost a great deal of money. We have no budget to finance these laws.
>
> Similarly, in our opinion — irrespective of the quality of each law in itself — these laws do not reflect any clear statement of the government's priorities, and if you will allow me to say this, I will say that I am not sure whether they even reflect the priorities of the Knesset. In the last two months, when the government did not have a majority in the Knesset, a series of many laws was passed. All of these laws cost approximately 3,000 million sheqels. This is a large amount of money, and we are not able to finance all these laws.'
>
> (Page 5 of the minutes of the meeting of the Knesset Finance Committee on 27 January 2001, as published on the Knesset web site).

After deliberation, the Finance Committee referred the draft law back to the Knesset, and on 4 April 2001, when it was published in *Reshumot*, the draft became law. Thus the State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001, was enacted (*Sefer HaHukkim (Book of Laws)*, 5761, 236).

Below we shall refer to this law as 'the Arrangements Law.' Section 20 of the Arrangements Law is the provision relevant to the matter before us; in this, the validity of Amendment 5 was suspended until 31 December 2001 (from then until today the commencement of Amendment 5 has been repeatedly deferred until 31 December 2007: Economic Policy for 2004 Fiscal Year (Legislative Amendments) Law, 5764-2004).

According to s. 20, the commencement of the Arrangements Law was determined to be retrospective, from 15 February 2001, i.e., starting from the date of the commencement of Amendment 5. Thus the legislator of the Arrangements Law sought to uproot Amendment 5 *ab initio*, and so to postpone its commencement. The reason for this was that Amendment 5, as well as other laws that were enacted at the end of the term of office of the Barak Government, were all adopted — at a total cost of 3,000 million sheqels a year — without there being any sources of financing in the budget, and implementing them would have harmed the budget seriously.

4. Up to this point we have summarized the tortuous series of events in which Amendment 5 — an amendment that granted benefits to persons suffering housing distress who bought or extended an apartment in Jerusalem — was adopted, and how, approximately six weeks later, the Knesset enacted s. 20 of the Arrangements Law, which sought to uproot these benefits *ab initio*.

The main pertinent facts and the question in dispute

5. There are three petitions before us. In HCJ 9098/02 the petitioners are five couples, in HCJ 10043/01 the petitioners are one young couple, and in HCJ 401/02 there are twenty-five petitioners, some of whom are couples and some single. The cases of the petitioners differ from one another — each one has its own unique series of events — but they all focus on the same six weeks between the date on which Amendment 5 was published and the date on which the Arrangements Law was published. The petitioners argue that they complied in full with all the conditions set out in Amendment 5 for receiving the pecuniary benefits: they were recognized as 'entitled persons' and they bought apartments or extended apartments in accordance with the provisions of Amendment 5 prior to its suspension; moreover, by buying and extending the apartments they relied on the undertaking of the law to give them pecuniary grants. This leads to the conclusion, so the petitioners argue, that they were entitled in those six weeks to receive the benefits that the law gave them. But then s. 20 of the Arrangements Law befell them, and because of its retroactive application, they were denied a right that they had acquired

by virtue of Amendment 5. This denial that was the result of s. 20 — this is the essence of the claim — was an unlawful denial and contrary to the Basic Law: Human Dignity and Liberty, and therefore their petitions ask us to declare the retroactive provision void and to order the State to give them the grants as stated in Amendment 5. The respondents gave their reply to the claims of the petitioners, and we now have the burden of entering into the dispute and deciding between the opposing parties.

Later in our remarks we will consider the legal questions in this matter, but let us first say that in the absence of details and clarifications, we will find it difficult to decide whether the petitioners, or some of them — complied with the preliminary conditions that were provided in s. 6B of the Housing Loans Law. This is the case, for example, with regard to whether the petitioners were 'entitled persons' as s. 6B requires. And if this is the case with regard to the conditions set out expressly in s. 6B, certainly we shall be unable to decide the question whether, when they bought or extended an apartment, the petitioners — or some of them — relied on the undertaking of the law in s. 6B. In view of our final decision in the three petitions — and as we shall explain below — there is no longer any need to decide the individual case of each petitioner.

6. Before we consider the matter in detail, let us set out the pertinent provisions of the law, and below we will discuss the provisions of the law in greater detail.

Amendment 5: Section 6B of the Housing Loans Law — the benefiting provision

7. The first provision of the law, which sought to benefit persons who purchased or extended apartments in Jerusalem, will be found in s. 6B that was added by Amendment 5 to the Housing Loans Law. The following is the language of s. 6B, as added to the Housing Loans Law:

'Special grant for purchasing or extending an apartment in Jerusalem

6B. (a) An entitled person, including someone recognized as entitled to a housing distress programme for apartment owners, who bought an apartment in Jerusalem or who extended his apartment in Jerusalem, will receive a grant as set out below:

(1) For an apartment on Israel Land as defined in the Basic Law: Israel Land (hereafter — Israel Land) — an amount

of 80,000 new sheqels;

(2) For an apartment on land that is not Israel Land — an amount of 60,000 new sheqels.

(b) What is stated in sub-section (a) shall apply both with regard to a purchase or an extension of an apartment that has not yet begun to be built and also with regard to a built apartment.

(c) The amounts of the grants under sub-section (a) will be revised on the first of January each year for the increase in the index as of the fifteenth of December that precedes it; the revised amounts as aforesaid shall be rounded to the nearest new sheqel.

(d) The Minister of Building and Housing shall publish a notice concerning the amounts of the grants, as revised under this section.

(e) Nothing in the provisions of this section shall derogate from any benefit given under any law.

(We should remark, parenthetically, that later the number of the section was changed, and it is today numbered 6C). We see that the first part of section 6B(a) stipulates preliminary conditions for receiving the benefits — someone who is recognized as an entitled person (as this concept is defined in the law) or someone recognized as entitled to a housing distress programme for apartment owners and who bought an apartment in Jerusalem or extended an apartment in Jerusalem — and then it proceeds to stipulate the benefits that will be given. The interpretation and effect of the provisions of s. 6B are the subject of disagreement between the parties, and we will now discuss these briefly.

8. The state argues as follows: it is a basic premise in the petitioners' arguments that the provisions of s. 6B intended to give them, in themselves, a right to the grants as set out in the law. The petitioners' premise is therefore that by complying with those preliminary conditions prescribed in the first part of s. 6B, they automatically acquired a right to the grants. It is this right,

they further go on to claim, that s. 20 of the Arrangements Law purportedly wishes to take away from them. But this basic premise, so the State claims, is founded upon an error. The reason for this is that the right of the petitioners to the grants had not yet crystallized into a mature right during those six weeks when Amendment 5 was valid. Why is this? Because at that time rules had not yet been prescribed for implementing the giving of the grants, including suitable rules for implementation by the commercial banks, and in the absence of rules of implementation the right to the grant did not crystallize. In the language of the respondents:

> 'The absence of rules for implementing the grant is not merely a procedural problem, but it is a substantial failure, which prevents the implementation of the law. It is not reasonable to order the payment of a grant without rules that regulate the implementation of the provisions of the law… It should be emphasized that neither party disputes that during the period when the law was valid, it was impossible to receive the grant from the banks, because of the absence of guidelines for implementing the law… In addition it should be noted that it is clear that whoever wished to realize his alleged right to a grant was obliged to apply to a bank, and if he did not do so before buying the apartment, he certainly cannot argue now that he relied on the grant when he bought the apartment.'

Is this really the case?

9. The question that must be asked is, of course, what right did the petitioners acquire pursuant to the provisions of s. 6B of the Housing Loans Law? Was this a qualified right or a conditional right? And if it was a qualified right or a conditional right — what was the qualification and what was the condition? Indeed, there are cases where a statute makes its implementation conditional upon the enactment of regulations or on the fulfilment of other preliminary conditions; and the question whether this is indeed the case here is a question of interpretation of the statute. As was stated in HCJ 6195/98 *Goldstein v. Central District Commander* [1] at p. 331:

> 'There are cases where a statute makes its implementation conditional upon regulations that will be enacted pursuant to it, and without regulations the statute cannot be implemented… and there are cases where a statute can be implemented even

> when no regulations for implementation have been enacted pursuant to it. The answer to the question whether a particular statute can or cannot be implemented without regulations for implementation derives first and foremost from the drafting of the statute, whether it makes itself conditional upon the enactment of regulations for implementation or not.'

See also the references mentioned in that judgment.

The question here is therefore a question of interpretation: do the provisions of s. 6B, as added in Amendment 5, in and of themselves, give rise to a right to receive grants — naturally, if the preliminary conditions prescribed in the provisions of s. 6B itself are fulfilled — or perhaps the provisions of s. 6B are merely the infrastructure, and the right to a grant will not be complete and final unless rules are enacted to regulate the methods of receiving the grant? If the latter interpretation is the correct one, then the petitioners did not acquire a right to a grant in those six week, and the application of s. 20 retroactively did not infringe any right since they had not acquired one.

10. A consideration of the provisions of s. 6B of Amendment 5 does not leave us in any doubt; we know that whoever complies with those preliminary conditions prescribed in the first part of s. 6B(a) acquires a clear right *ex lege* to receive the grants set out in the law. The right is granted directly by the law, and the executive authority did not acquire any power to delay the payment or to make it subject to additional conditions that are not prescribed in the law. The right of the entitled persons is a specific right, a clear and express right that makes itself conditional only on the conditions prescribed in the first part of s. 6B(a): *first*, that a recipient of the grant is 'an entitled person, including someone recognized as entitled to a housing distress programme for apartment owners,' and *second*, that the person claiming a grant bought an apartment or extended an apartment in Jerusalem. If both of these conditions were fulfilled during the critical six weeks, the applicant is entitled to a grant. Indeed, the executive authority is entitled — perhaps we should say, obliged — to formulate rules, and even strict rules, for proving compliance with those two preliminary conditions that give entitlement to a grant. And we agree that these rules were not determined during those six weeks. However, the failure to enact the rules was insufficient to affect or invalidate the substantive right of the entitled persons to a grant. Their right remained valid, and the failure to enact rules for implementation was incapable of derogating from the existence and validity

of the right.

11. The State does not stop here, and it goes on to raise, in the same context, an argument that is a variation on the issue of the preliminary conditions for the validity of the law. According to the State, even if the petitioners acquired a right *de jure*, they never had any real expectation of realizing it. Consequently everyone agrees that during the lifetime of s. 6B — in those six weeks between the commencement of s. 6B of the Housing Loans Law and the commencement of s. 20 of the Arrangements Law — it was not possible to receive the grant from the banks; moreover there was talk of the Government taking action to cancel s. 6B. It follows from this, the State argues, that 'there was no basis for the petitioners to have any reasonable expectation of receiving the amount.' Therefore, *prima facie*, the petitioners never acquired any real right, a right that ought to be protected. In other words, because the petitioners did not have a reasonable expectation, a real expectation, that they would receive a grant, they ought therefore not to be regarded as having a right to a grant — a right that the law seeks to protect.

But the State's argument is no argument. From a simple reading of the provisions of s. 6B we can see that whoever fulfils two preliminary conditions set out in the first part of s. 6B(a) is entitled directly and by virtue of the statute itself to receive a grant, and no interpretive acrobatics will succeed in interpreting the provision of the law otherwise. So, whoever fulfilled those two preliminary conditions acquired a right — a right that is unconditional — to receive grants as set out in the law.

12. The State further argues: if we interpret s. 6B, in and of itself, in the absence of rules for implementation of the right to a grant, then a person could have bought an apartment in Jerusalem, received a grant, and the next day sold the apartment to someone else. Is this possible? This is an indication, so the State ends its argument, that it was not possible to implement the law without rules; and once we realize that no rules were made, we will also know that the petitioners did not acquire a real right to receive a grant. This claim has no merit. It has no merit not because it is not a good argument in general; it is a good and proper argument in general. But the law in this case is so clear in its language that the argument has nothing to which to attach itself. We should point out, parenthetically, that a restriction of this kind exists apparently in rules that were prescribed under the Housing Loans Law, in its original form, and a hint of this can be found in the deliberations of the Finance Committee (see: pp. 52-53 of the minutes of the

meeting of the Finance Committee on 11 September 2000, as published on the Knesset web site). However, since the rules were not presented to us, we cannot say anything for certain. In any case, even this argument that the application of the provisions of s. 6B should be restricted, has, in our opinion, no foundation either in statute or case law.

13. From all of this we see that the right of those persons listed in the provisions of s. 6B of the Housing Loans Law is a right *ex lege*, a right that is not conditional upon the fulfilment of additional conditions to those prescribed in that provision.

Section 20 of the Arrangement Law — the repeal provision

14. The second provision of statute in this matter — and this is the main one — is found in s. 20 of the Arrangements Law (which was published in *Reshumot* on 4 April 2001), which states as follows:

'Housing Loans Law — Amendment no. 7

20. (a) In the Housing Loans Law, 5752-1992 (in this section — the Housing Loans Law) —

(1) Section 6B, which is entitled "Special grant for purchasing or extending an apartment in Jerusalem" shall be marked "6C," and it shall not apply in the period from 22 Shevat 5761 (15 February 2001) until 16 Tevet 5762 (31 December 2001);

…

(b) The commencement of sub-section (a)(1) is on 22 Shevat 5761 (15 February 2001).

(c) Notwithstanding the provisions of section 6B of the Housing Loans Law, which is entitled "Special grant for purchasing or extending an apartment in Jerusalem," according to its language prior to the commencement of this law, no person shall be entitled to the benefits under the aforesaid section in the period from 22 Shevat 5761 (15 February 2001) until the commencement of this law.'

The provisions of section 20, for our purposes, fall into two parts. One

part — which is the main one — is prospective and its purpose is to postpone the application of the provisions of s. 6B of the Housing Loans Law into the future. Another part is retrospective, and its purpose is to make that postponement retroactive, from the date on which the provisions of s. 6B came into effect. We are now concerned with the retroactive part of s. 20, and we will consider the details of this issue in our remarks below.

The order of our deliberations

15. The petitioners argue that s. 6B of the Housing Loans Law gave each one of them a right to receive pecuniary grants as set out in s. 6B; that the retroactive application of the provisions of s. 20 of the Arrangements Law purports to deprive them of their right; that the denial of this right is clearly in conflict with s. 3 of the Basic Law: Human Dignity and Liberty, which commands us that 'A person's property shall not be infringed;' this leads to the conclusion that the retroactive application of s. 20 of the Arrangements Law is void. The argument of the petitioners is therefore simply this, that s. 20 of the Arrangements Law is null and void, in so far as it seeks to apply itself retroactively, in that it conflicts with the protection of property as stated in s. 3 of the Basic Law: Human Dignity and Liberty.

However, as we have repeatedly said, before we consider an argument that a statute is void, we must first interpret the statute according to its language and according to its purpose; to go on to determine the scope of its application; and in the course of this interpretation, we are obliged to do our best to try and reconcile the provisions of the statute with the provisions of the Basic Law. See and cf. CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at pp. 349-350; HCJ 5503/94 *Segal v. Knesset Speaker* [3], at pp. 548-550. Let us therefore begin our voyage by interpreting s. 20 of the Arrangements Law. It need not be said that if we reach the conclusion that the provisions of s. 20 do not purport to apply retroactively, or if, alternatively, s. 20 can be applied retroactively only in some cases but not in others, then we will be obliged to derive conclusions from this for the case before us, and it is possible that the consideration of the constitutional issue will thereby become redundant. But let us not jump ahead of ourselves.

Concerning the retroactive application of s. 20 of the Arrangements Law

16. There is a presumption, both in statute and in case law, that a statute is prospective — prospective, but not retrospective. A statute is intended to regulate interpersonal relationships, and it therefore follows that by its very nature it is prospective. See and cf. s. 10(a) of the Government and Justice

Arrangements Ordinance, 5708-1948; s. 17 of the Interpretation Ordinance [New Version]; s. 22 of the Interpretation Law, 5741-1982; CA 238/53 *Cohen v. Attorney-General* [4], at pp. 16, 38 {[redacted]}; PPA 1613/91 *Arbiv v. State of Israel* [5]; CrimA 4912/91 *Talmai v. State of Israel* [6], at pp. 619 *et seq.*; HCJ 5290/97 *Ezra, Israel National Orthodox Youth Movement v. Minister of Religious Affairs* [7], at p. 424; A. Barak, *Legal Interpretation* (vol. 2, *Interpretation of Legislation*, 1993), at pp. 609 *et seq*.. The source of this presumption, *inter alia*, lies in the recognition that the application of a statute retroactively may cause an injustice, violate rights that have been acquired, undermine stability and certainty in interpersonal relationships and harm just expectations. But this presumption — that a statute is only prospective — like every other presumption is rebuttable in the interpretation of a particular statute; and the question whether a particular statute or regulation operates retroactively or not is a question of interpretation. The question that must be asked is a double one: *first*, did s. 20 of the Arrangements Law seek to apply itself retroactively? If the answer to the question is yes, then a *second* question arises, namely: must that retroactive application be complete or is it possible to interpret it as merely partial?

17. The answer to the first question is unambiguous. In at least three places the legislature wished to inform us that s. 20 operates retroactively, from the date of the commencement of Amendment 5, namely from 15 February 2001. The legislature informed us of this the *first* time in s. 20(a)(1), where it stated that Amendment 5 — or more precisely, s. 6B of the Housing Loans Law as added by Amendment 5 — shall not apply 'in the period from 22 Shevat 5761 (15 February 2001) until…'. The law states this a *second* time in s. 20(b), where it says that 'The commencement of sub-section (a)(1) is on 22 Shevat 5761 (15 February 2001),' as if we did not know this from what is stated in section 20(a)(1) itself. And in case we fail to understand the express provisions that we have cited, the legislator took pains to notify us a *third* time of the issue of the retroactive application, by stating in s. 20(c) that, notwithstanding the provision of section 6B that was added in Amendment 5 on the subject of a 'special grant for purchasing or extending an apartment in Jerusalem,' nonetheless no person shall be entitled to these benefits 'in the period from 22 Shevat 5761 (15 February 2001) until the commencement of this law.' Not once, not twice, but three times! Indeed, the legislature did not give the learned interpreter any credit at all, and its fear of the presumption of non-retroactivity was so great that it saw fit to tell us again and again that its intention was to uproot benefits *ab initio*, from the date of the commencement of Amendment 5. The interpretation of s. 20 of

the Arrangements Law in respect of the retroactivity is an unambiguous interpretation. The legislature succeeded again and again in informing us of its intention that the denial of the benefits was intended to operate retroactively, from the date of the commencement of the law that granted those benefits, and thus the presumption of non-retroactivity was entirely rebutted.

18. Finally we should add that this unambiguous intention is also evident from the deliberations that took place at the Finance Committee. In those deliberations a proposal was made to the effect that the application of the suspending law would be prospective only, but the representative of the Ministry of Finance opposed this vehemently, and consequently the law as we have it was enacted. The following is a part of the discussions at the Finance Committee on 27 March 2001:

> *Chairman Yisrael Katz:* And what will happen to the law in the interim?
>
> *Yitzhak Cohen:* We must at least agree on the commencement of the law. Is the first of May acceptable?
>
> *Ohad Marani [Director of Budgets at the Ministry of Finance]:* No…
>
> *Yitzhak Cohen:* I propose that we agree to suspend it until the first of June…
>
> *Yaakov Litzman:* The statute was passed and published. People have bought apartments on the basis of the knowledge that there is an increased loan. It is impossible now to say that this will commence later. First there needs to be a declaration of the Ministry of Finance, before we continue, and until that moment — the statute exists…
>
> *Chairman Yisrael Katz:* What is the position of the Ministry of Finance with regard to the proposals?
>
> *Ohad Marani [Director of Budgets at the Ministry of Finance]:* Certainly not. That was not the arrangement. We wish to postpone the statute, as was agreed. This is a statute that costs a considerable amount of money, 160 million sheqels. We wish to postpone it as agreed.

> (Pages 30-31 of the minutes of the meeting of the Knesset Finance Committee on 27 March 2001, as published on the Knesset web site).

19. The essence of the matter is that s. 20 of the Arrangements Law was intended to apply retroactively. But in saying this we have still answered only the first part of the double question. For even if s. 20 of the Arrangements Law was intended to apply retroactively — from the date of the commencement of s. 6B of the Housing Loans Law as added in Amendment 5 — there still remains the question as to which *activities* s. 20 is supposed to apply. Is the retroactive application all-embracing, applying to every subject matter and for all intents and purposes, or perhaps it is only a partial application? And if it is a partial application, what is the part to which s. 20 applies and what is the part to which s. 20 does not apply? Let us now confront this question.

20. To which classes of cases in the past was s. 20 of the Arrangements Law intended to apply? In order to remove doubt, we should add that in speaking of the 'intention' of s. 20, we are not referring to the subjective intention of all or some of the Members of Knesset, and certainly not to the intention of the Government or its representatives. We are referring to the message and purpose required by s. 20 in and of itself, when combined with existing legislation and case law, and especially when integrated with the basic principles and doctrines that constitute the framework within which the legislature enacts legislation and the judiciary determine case law. As was stated in CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [8], at pp. 73-74:

> 'It is accepted that the interpretation of a statute begins with the words of the statute. This statement is correct, of course, when we wish to study the words and phrases of the statute. But it is *we* who do our utmost to interpret it, and we are not a *tabula rasa*. Before we approach the statute we must ask: who are *we*, and the answer to this question is that "we" are those proper values, principles, morality and fundamental outlooks. It follows therefore that we begin the voyage of interpretation — whether wittingly or unwittingly — with those values and principles and doctrines — the foundation on which the law is based — and from these our voyage continues. We cannot "understand" a statute unless we analyze it with the analytical tools that we carry about with us, and these analytical tools are what will guide us… Let us know and remember that legal interpretation

is — always and forever — a legal creation, an ethical creation, an inseparable part of the culture of a people and country.'

21. Two alternative interpretations of s. 20 offer themselves for our selection, and the question before us is which of the two is preferable. *One* interpretation proposes that we read s. 20 according to its text and language, combining words and sentences, and deriving the meaning and the dictates of the statute from those combinations of words and sentences. In years past, we called this interpretation — literal interpretation. If we choose this interpretation, we will conclude that the retroactive application of s. 20 is all-embracing; it is retroactive for all intents and purposes, as if s. 20 was enacted on the day when s. 6B was enacted. According to this interpretation, the provisions of s. 20 were intended to suspend the provisions of s. 6B absolutely and in every respect, until it would one day be revived.

An alternative interpretation of s. 20 may be called a purposive interpretation, and this is indeed what it is. It need not be said that this interpretation does not ignore the combinations of words and sentences in the statute, but in order to discover and comprehend the essence and the content, the interpretation will take into account the historical background of the legislation in its time and place, the objective purpose of the legislation, the difficulties that the legislator wished to overcome, the evil that the provision was designed to prevent; the events that have occurred from the time that s. 6B came into existence until the enactment of s. 20; to all of these we will apply our accepted rules of interpretation, the rules that express the values and the basic principles upon which the legal system and the social order are founded. See and cf. *Yediot Aharonot Ltd v. Kraus* [8], at pp. 71 *et seq.*; *Segal v. Knesset Speaker* [3], at 562 *et seq*., and the references cited therein. This is what we will do with regard to s. 20 and this is what we will do with regard to s. 6B of the Housing Loans Law.

Which of these interpretations should we prefer, and which shall we reject?

22. We are speaking of the interpretation of s. 20 of the Arrangements Law, but since we know that s. 20 only came into existence because of s. 6B of the Housing Loans Law, it is only logical that we should begin the voyage of interpretation precisely with the provisions of s. 6B. As for this provision of statute, we know that originally it was intended by its promoters to prevent migration away from Jerusalem, to encourage persons entitled to housing to prefer Jerusalem when they wanted to buy or extend an apartment, and to

strengthen the status of Jerusalem as the capital of Israel. See *supra*, para. 2. Admittedly, Ministry of Finance representatives thought that these purposes would not be achieved by means of grants as the promoters proposed, but the Knesset thought otherwise, and that is the thinking behind the law. And so, when the Knesset enacted s. 6B, the petitioners hurried off — so they claim, each with regard to himself — and in reliance on the promise of the State in s. 6B they bought apartments or took steps in order to extend their apartments. The petitioners claim, therefore, that they took upon themselves pecuniary undertakings and changed their position in reliance upon an undertaking given by the legislator — the State's undertaking — that they would be given various grants for the purchase of an apartment that they bought or for the extension of an apartment that they possessed.

In view of all of the aforesaid, we will have difficulty in adopting an interpretation that recommends us to ignore totally the moral and social aspect involved in the breach of the undertaking that the State took upon itself, i.e., a breach of the undertaking to give grants to whoever pursued the path that the legislator outlined in s. 6B. If the State acts in this fashion, what will the individual say and what will the public say? If the leaders of the country — those who sit in the legislature — repudiate the promises that they have made and the undertakings that they took upon themselves, what will members of the public do and say? Indeed, we will find it difficult to accept that the legislator reverses his tracks in this way, repudiates his undertaking to the individual and abandons along the way whoever followed him. The state ought to act honestly and carry out undertakings that it took upon itself, and the state can be presumed to act in this way. These principles of substance translate themselves into the language of interpretation, and it necessarily follows that obviously the retroactive application of s. 20 of the Arrangements Law was not originally intended to apply — we might almost say: is incapable of applying — to someone who relied on the legislator's promise and clearly changed his position. As Justice Strasberg-Cohen wrote in HCJ 1149/95 *Arco Electric Industries Ltd v. Mayor of Rishon LeZion* [9], at p. 574, with regard to the factor of reliance as the decisive factor in disqualifying retroactive legislation:

> 'An important factor is the existence of harm to the actual reliance on existing legislation and the degree of reliance thereon. Retroactive legislation that harms reliance cannot be compared to retroactive legislation that does not harm it at all or to a significant degree.'

The petitioners before us argue, each with regard to his own case, that they bought and extended apartments in reliance on s. 6B of the Housing Loans Law, and therefore, *prima facie*, the retroactive application provision passes over them and does not affect them. Being mindful of the basic principles on which the Israeli legal system is founded, we can say that the retroactive application of s. 20 was not originally designed to apply to someone who acted and changed his position in reliance on the provisions of s. 6B. The retroactive application was intended to apply only to someone who did *not* rely on the State's promise as stated in s. 6B, i.e., someone who bought or extended an apartment without there being any causal connection between the purchase or extension of the apartment and the State's promise in s. 6B.

23. Interpreting s. 20 in this way will uphold in its entirety the purpose of s. 6B as its promoters foresaw. Section 6B only came into existence in order to prevent migration away from Jerusalem and to encourage persons entitled to housing to prefer Jerusalem when buying or extending an apartment. So, if someone intended in any case to buy an apartment — or to extend an apartment — in Jerusalem irrespective of the benefits that the legislator wished to grant in s. 6B, then the purpose of s. 6B would not be prejudiced by denying the benefits retroactively.

Indeed, initially the law granted s. 6B benefits to whoever complied with the s. 6B conditions even if they did not rely on the legislator's undertaking. However, for the purpose of determining the scope of the application of s. 20, and relying on the basic presumption — which adopts the guise of a rule of interpretation — that tells us that the legislator will not act unjustly to an individual nor will he turn his back on persons who followed him and relied on promises and undertakings that he made, we will interpret s. 20 as seeking to apply only to persons who did not rely on the legislator's promise and not to apply to persons who relied on the legislator's promise. Justice Barak expressed these ideas well in *Arbiv v. State of Israel* [5], when he said the following (at pp. 776-777):

> 'The presumption is that a statute does not apply retroactively… the basic approach is that "applying a new statute to a transaction that was completed before the statute was published, where those concerned have acted and completed it in reliance on the law in force at that time, may be wrong and unjust"… retroactive or retrospective legislation conflicts with "accepted concepts of justice"… and the presumption against this

> legislation is required in order to do justice. The principle of the rule of law requires certainty and security in interpersonal relationships. Retroactive legislation harms both of these… it does not allow conduct to be planned in advance, and therefore it also harms the stability of the law…'

24. In saying this we have only said a half of what needs to be said. In relying on the provisions of s. 20 of the Arrangements Law, and in thinking that this provision is capable of denying the rights of the petitioners, the State rejected *in limine* the demand of the petitioners to receive grants, and in any case it did not consider their requests on the merits. Thus the question whether the preliminary conditions set out in s. 6B of the Housing Loans Law were satisfied or not was not considered, and the question whether the petitioners bought or extended apartments in Jerusalem in reliance on the undertaking in s. 6B, as they claimed, was certainly not examined. All of these questions need to be examined on the merits, and it need not be said that the petitioners have the burden of proving that they are indeed entitled to the grants as they demand. In this regard, the State is competent to determine proper proceedings that will allow the petitioners to prove what they are liable to prove, namely the fulfilment of the conditions prescribed in s. 6C (originally s. 6B) of the Housing Loans Law and a change of their position in reliance on the State's undertaking, and at the end of these proceedings to decide in respect of the request of each of the petitioners. In order that the proceedings will not be prolonged excessively, we will propose the following timetable: within thirty days from today, the State shall determine the proceedings, and within an additional ninety days — assuming that the petitioners cooperate with the State — decisions shall be made with regard to the petitioners' requests.

25. Our decision with regard to the method of interpreting s. 20 of the Arrangements Law makes a consideration of the constitutional question (see *supra*, at para. 15) redundant, and we will therefore not enter into it.

In summary

26. I propose to my colleagues that we make the order absolute as stated in para. 24 *supra*, and that we further find the State liable to pay the petitioners in each of the three petitions legal fees of NIS 25,000.

Subsequent reflections

27. I have carefully read the opinions of my colleagues Vice-President Mazza, Justice Türkel and Justice Rivlin. My colleagues, each following his

own path and his own style, are of the opinion that the retroactive provision in s. 20 of the Arrangements Law is void *ab initio*, and their main reason for this is that if we say otherwise — as I have, for example — then we have overstepped our authority as a court and we have taken upon ourselves the role of legislator. My interpretation that seeks to distinguish between various classes of persons having rights, while restricting the application of s. 20 merely to those persons who did not rely on Amendment 5 of the Housing Loans Law, does not have, in my colleagues' opinion, even a 'minimal foothold in the text,' and according to them it amounts, 'in practice, to a change in the language of the statute, and as such it departs from the legitimate boundaries of interpretation' (Vice-President Mazza, in the first paragraph of his opinion). My colleague Justice Rivlin speaks in similar terms, and whoever reads his remarks will comprehend his meaning.

28. I find this surprising, and I ask myself what is this fear of the legislator that has so suddenly overwhelmed my colleagues, that it may be said of us that we have broken down the barriers and gone 'beyond the confines of what is possible and what is permitted' (in the language of my colleague Justice Rivlin in para. 3 of his opinion). Yet we engage in this kind of 'legislative' activity from time to time. Moreover, my colleagues' decision is that the retroactive provision of s. 20 of the Arrangements Law is void *ab initio*. Is this normative activity of declaring a provision of statute to be void *ab initio* not 'legislative activity'? Indeed, the court is supposed to make its decision by virtue of a Basic Law, but this does not lessen the fact that the decision is a legislative decision that voids statute. Moreover, my colleagues' decision is to suspend for six months the commencement of their judgment. Does this decision to suspend not have an aspect of legislation to it? Indeed, the statement that certain normative activity of the court is a 'legislative' activity — i.e., activity that trespasses on the province of the legislature — is a statement that cannot, in and of itself, captivate or intimidate us. We are charged with examining the decisions that we make diligently and painstakingly, and we should determine the character of normative activity on the merits and not by affixing labels that are prefabricated.

29. On the merits, the drafting of s. 20 of the Arrangements Law appears, on the face of it, to apply itself to the past universally, to impose itself on every event that has occurred and to every act that has been done concerning the special grant involved in the purchase or extension of an apartment in Jerusalem, between 15 February and 4 April 2001 (the day on which the Arrangements Law was published). This is the interpretation of the

application of s. 20 retroactively from the date of commencement of s. 6B of Amendment 5. From the viewpoint of the legislation, in and of itself — or we might say, from a merely normative viewpoint — there is no difficulty in this. Just one stroke of the pen, and a statute that is enacted today carries itself into the past at the whim of the legislator. Such is the act of legislation. But life — the life of man and his surroundings — is different. No matter how much we wish or yearn to do so, no man can change acts and events in the past, not even a legislator:

> 'We are unable to change the past (to the regret of some and to the happiness of others). Acts that were done, were done; omissions that were committed, were committed; events that occurred, occurred; vows that were made, were made; vows that were breached, were breached. All of these are as if they froze on the spot and became stone, and what has been done cannot be undone. We are incapable of doing anything other than describing and recording things that have happened — or that have not happened — but we are unable to change them. The freedom of choice and selection — as choice and selection — are no more' (*Talmai v. State of Israel* [6], at p. 619).

Therefore a kind of dichotomy arises: from a historical point of view, we cannot change events in the past, but from a normative point of view, we find legislation that seeks to take control of events in the past that were originally governed by a different law.

This is what happened in the case before us: during the period of the retroactive application of the statute, events occurred that were of legal significance according to the law that prevailed at that time, and no one can change these events. In view of all this, the pertinent question is whether the legislator, and we as interpreters of the statute, are able and permitted to ignore those events as if they did not occur.

30. Let us now examine those events of legal significance that occurred in the period between 15 February 2001 and 4 April 2001, and we will discover that the entitled persons stipulated in the original s. 6B fell into several categories. The following are the main categories: *first*, entitled persons who relied on the State's undertaking in Amendment 5 and bought or extended an apartment in Jerusalem; *second*, entitled persons who bought or extended an apartment in Jerusalem without relying on the State's undertaking in Amendment 5; *third*, entitled persons who took various preliminary steps towards the purchase or extension of an apartment in Jerusalem, but did not

reach the point of buying or extending an apartment; *fourth*, entitled persons who did nothing. The fourth category of entitled persons does not concern us here. We are therefore left with the other three categories of entitled persons. Against this background the question arises: there is no doubt that s. 20 of the Arrangements Law, according to its language and at face value, purports to take control of all those events and rights that were acquired, namely to ignore all those events and all the rights that were acquired. But we are experienced interpreters of statute who are continuously called upon for the purposes of interpretation, analyzers of statute equipped with analytical tools and high-powered microscopes; we know how to interpret and analyze even legislation that appears to violate — unfairly — basic rights or rights even if they are not basic rights. Let us therefore proceed to the task.

31. A *first* principle is that the legislature can and may knead legislation as it wishes, as long as the legislative proceedings are in progress. But when a statute has left the bakery, the baker can no longer put his mark upon it or express an opinion about its quality. The decision concerning the validity, scope of application and interpretation of the statute lies with the court — the court and no other. See and cf. CFH 4757/03 *Land Appreciation Tax Director v. M.L. Investments and Development Ltd* [10]; LCrimA 1127/93 *State of Israel v. Klein* [11], at pp. 500-501.

A *second* principle, which is of inestimable value, is that when approaching the task of interpreting statute, we do not come empty-handed. We come heavily laden with morality, fairness, justice, equity and efficiency. We come with language, interpretation and meaning, social norms, conventions, basic premises, fundamental principles and doctrines. We come with the theory of the separation of powers and the principle of the decentralization of powers. We come with the tools of *PaRDeS*[1] (Interpretation, Implied Meaning, Homiletic Exegesis and Hidden Meaning). See and cf. *Yediot Aharonot Ltd v. Kraus* [8], at pp. 71-74. All of these principles and values translate themselves into rules of interpretation that are applied in practice — narrow interpretation, broad interpretation, presumption of administrative regularity, *ut res magis valeat quam pereat*, etc. — and this is what we do in our everyday work of interpretation.

32. For our purposes we can say that when subjecting the provisions of s. 20 of the Arrangements Law to the filter of values, principles and rules, we are charged with doing our best to uphold the statute, so that the dictates of

[1] The Hebrew acrostic for the four Rabbinic tools of Biblical interpretation.

the legislature are upheld, in so far as possible, even if only partially. Thus, when we put the provisions of s. 20 into the time tunnel, and we send it back into the past to 15 February 2001, we meet on our way those entitled persons who relied on the State's undertaking and carried out acts that changed their position. Applying the statute literally is likely to cause hardship to those entitled persons, and it is possible that it will even lead them to disaster. In the words of my colleague Justice Rivlin, not allocating the promised funds to those entitled persons will be 'equivalent in many senses to taking away the apartments in which they live.' The 'objective' interpretation of the statute requires us therefore to interpret it narrowly, i.e., as a statute that does not intend to apply itself to those entitled persons. We make use of this tool of narrow interpretation on a daily basis, and I do not see in what way this case differs from other cases; why in other cases we should give a warm welcome to narrow interpretation, whereas in this case we should reject it utterly.

33. In our opinion, the text can indeed bear the interpretation that we proposed without collapsing under the weight. It follows that we shall not apply the provisions of s. 20 to entitled persons who relied on the Government's undertaking and changed their position. But the same will not necessarily apply to other categories of entitled persons, such as, for example, entitled persons who bought or extended an apartment in the relevant period without knowing about, and therefore without relying on, the State's undertaking.

34. My colleagues will certainly not deny the blue pencil principle, namely the principle of separating and distinguishing between the invalid and unhealthy part of a statute, which should be voided, and the valid and healthy part of that statute. See, for example, A. Barak, *Legal Interpretation* (vol. 3, *Constitutional Interpretation*, 1994), at pp. 735 *et seq*. (and as we have seen, invalidating a statute, or a part thereof, is equivalent to an act of legislation). Why therefore should we not apply this principle to this case also? Admittedly, the cases differ from one another. The (usual) blue pencil principle assumes a physical possibility of circling (with a 'blue pencil') the defective part of the statute (or of the contract) and to cut it out of the actual text. This is not the case here, since the categories of entitled persons are not listed in the law one after another, but are included in the statute in one category. However, I can see no magic in the 'physical' ability of cutting parts out of the statute and throwing them into the bin in order to uphold the other part of the statute. There is nothing in my opinion to prevent an

interpretation of s. 20 as if all the categories of entitled persons whom we have mentioned are listed there, one after another (see para. 30; and if I have omitted a category of entitled persons, we can add it to the list), and after a close examination we can cut out and remove what is unhealthy and keep what is healthy. It is also possible to regard the entitled persons as listed in the statute one on top of the other, and we can peel away the statute like peeling the layers of an onion: healthy layers will be left and unhealthy layers will be thrown into the bin. The cutting will not be vertical, like the cutting of the blue pencil, but horizontal, like the peeling of the onion. We were taught this by Justice Silberg in HCJ 163/57 *Lubin v. Tel-Aviv-Jaffa Municipality* [12], at p. 1074 (on the question of declaring a bylaw void, in whole or in part):

> '… Already at the beginning of the eighteenth century a more liberal spirit prevailed, and a qualification was made to this doctrine. The qualification is: unless there is a way of "dividing" up the statute, and it is possible to distinguish between the invalid part and the valid part thereof. In other words, the partial defect in the bylaw does not lead to its complete disqualification, when the two parts are not dependent on, or in conflict with, one another, and it is possible for the valid part to stand without relying on the other part.
>
> …
>
> It seems to me that the stability and coherence of the remaining permitted part should be examined not merely from the viewpoint of the "syntactical" structure of the *language* of the statute, but also, and *mainly*, from the viewpoint of the *substantive* content thereof. If the bylaw of any public corporation tries to apply itself to *two* classes of persons, and something is found to be invalid with regard to one of these, it will still be regarded as valid with regard to the other class — even if it will be necessary to delete or add several words — unless the two classes are so bound to one another that it is impossible to separate them' [emphases in the original].

Indeed, the examination ought to be one of substance and not merely one of form.

We concede that the voyage of examining substance may be full of pitfalls and care must be taken with regard thereto. But I think that in our

case we will not encounter any special difficulty, since there is a division and distinction between the different classes of entitled persons, and I have not found any good reason not to hold the State liable where it should be liable, and to exempt it where it should be exempt. In conclusion we can reiterate that we do not see any difference — in the sense of a legal distinction — between the 'classic' blue pencil principle and the peeling of layers in our case.

Suspending the validity of the judgment

35. My colleague Vice-President Mazza proposes that the validity of the decision concerning the invalidity of the retroactive provisions of s. 20 of the Arrangements Law should be suspended for six months, and the purpose of the suspension is 'to allow the legislature to re-enact these provisions, while distinguishing — according to the parameters that will be determined in the statute — between persons who relied on the entitling law and others to whom the entitling law was supposed, in principle, to apply.' The purpose of this suspension seems to me problematic, since without any great difficulty we can already, in my opinion, reach the same conclusion today. A short path appears to me preferable to a long one.

Voiding a statute and upholding a statute

36. My colleague Vice-President Mazza sees fit to void a provision of statute, whereas I uphold that provision of statute, while interpreting it narrowly. But expressing matters in this way is merely an optical illusion. From an operative point of view, the narrow interpretation that I have adopted is equivalent to a partial voidance of s. 20 of the Arrangements Law. The difference between the interpretation of my colleague and my interpretation is this, that the narrow interpretation which is preferable to me brings finality to those persons who relied on the State's undertaking and changed their position, whereas my colleague's interpretation makes it possible for a future statute to create parameters that may perhaps harm the rights of those who relied on the State's undertakings. So I ask: once my colleague has reached the conclusion that those persons who relied on the State's undertaking and incurred unnecessary expenses, are entitled to receive their grants, what justification is there for us not entitling them, immediately, to what they seek? The question provides its own answer.

Who is all-powerful and what is all-powerful?

37. My colleague Justice Rivlin writes in his opinion (in paragraph. 3) as follows:

> 'Even the statement that even the British Parliament cannot make a man a woman or a woman a man has lost some of its force, since with the assistance of the surgeon's scalpel Parliament can do even this. It can do this, but we cannot; we do not have this power.'

I would like to make two comments on these remarks, one concerning Parliament and the other concerning the courts.

38. *Concerning Parliament*, unlike my colleague, my opinion is that Parliament was always able — as it is today — to make a man a woman and a woman a man, even without the surgeon's scalpel. A.V. Dicey, in *Introduction to the Study of the Law of the Constitution* (London, eighth edition, 1924), at p. 41, wrote as follows:

> 'It is fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.'

I commented on this statement when I wrote (in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at p. 527):

> 'This statement is, of course, imprecise. If the author's intention is that Parliament does not have the power to make a man a woman and a woman a man — taking the words literally — then the remarks are certainly correct. But then they have no significance whatsoever, since in the same way Parliament does not have the power to move a pencil from one side of the table to the other. Parliament — as such — does not concern itself at all with physical actions, and it does not have the power to make physical changes in the world about us directly. Parliament only concerns itself with norms and normative activity, and it is in this field that it has power and authority. If the intention of the author is therefore that Parliament is "unable" — from a normative point of view — to make a woman a man and a man a woman, it is obvious that the statement is incorrect. In the wonderful world of norms — a world that cannot be perceived by the five senses but that rules our lives — the Knesset "can make" a man a woman and a woman a man. It is a separate question whether those persons to whom the norms are supposed to apply will abide by them. That question, it need not be said, falls outside our jurisdiction.'

And so, in the creation of norms in the world of norms, Parliament is all-powerful. Parliament does not have — nor did it ever have — a surgeon's scalpel that can draw blood. But it had, has and always will have a normative surgeon's scalpel.

Concerning the courts, it is true that the court is not all-powerful like Parliament, but it too has power. Thus we see that not so many years ago — twenty or twenty-five years — it never occurred to any woman or man that the concept 'spouse' in the Torts Ordinance extended also to unmarried partners. But in recent years we have said this: CA 2000/97 *Lindorn v. Karnit, Road Accident Victims Fund* [13]. See further the remarks of President Barak, *ibid*., at pp. 32-33. And in former generations, even someone who exercised his imagination could not have conceived that two women would be registered at the Population Registry as the mothers of an infant, since 'a person only has one mother.' But in recent years this has happened: HCJ 1779/99 *Brenner-Kadosh v. Minister of Interior* [14]. It is therefore possible that in suitable circumstances a court will make, in our lifetime or thereafter, additional decisions that our ancestors never imagined.

Vice-President E. Mazza

Like my colleague, Justice Cheshin, I too think that the interpretation of s. 20 of the Arrangements Law ('the suspending law') on the question of its retroactivity is unambiguous. As he says, 'the legislature did not give the learned interpreter any credit at all, and its fear of the presumption of non-retroactivity was so great that it saw fit to tell us again and again that its intention was to uproot benefits *ab initio*, from the date of the commencement of Amendment 5.' But unlike my colleague I am of the opinion that it is not possible to overcome this unambiguous provision by means of interpretation. In my opinion, it is not reasonable to expect the legislature to clarify its intention more decisively that it did in ss. 20(a)(1), 20(b) and 20(c). This is a clear and comprehensive directive and I can see no linguistic possibility of restricting it in a way that will apply only to some of the persons entitled to a grant under Amendment no. 5 of the Housing Loans Law ('the entitling law'). In any case, it is not possible to interpret the suspending law as applicable only to whoever did not rely on the entitling law. Such an interpretation does not even have a minimal foothold in the text. It constitutes, in practice, a change in the language of the statute, and as such it departs from the legitimate boundaries of interpretation (cf. Justice Cheshin's criticism of the doctrine of the 'concealed lacuna' in a statute: CA

3798/94 *A v. B* [15], at pp. 177-178 {298-299}. For the distinction between interpretive activity and extra-interpretative activity, which requires a distinct source of authority, see: A. Barak, *Purposive Interpretation in Law* (2003), at pp. 101 *et seq.*).

In such circumstances, we are obliged to examine the constitutionality of the retroactive application of the suspending law in accordance with the constitutional criteria set out in the Basic Law: Human Dignity and Liberty. Indeed, I too accept that whenever it is possible to refrain from constitutional intervention in the validity of a statute by giving an interpretation — even if it is a 'creative' interpretation — to a provision of a problematic statute, we are obliged to prefer this method. But even interpretation has its linguistic limits. We are not speaking of a choice between 'literal interpretation' and 'purposive interpretation,' but of a choice between purposive interpretation that is based on the text and purposive interpretation that is divorced from it. In any case, there is no basis for such great fear of the constitutionality test. Even when unconstitutionality is discovered in a statute, this does not necessarily lead to drastic consequences. Constitutional law allows a moderate and precise correlation of the remedy to the nature of the constitutional violation and all the interests involved therein (see: A. Barak, *Legal Interpretation*, vol. 3, *Constitutional Interpretation* (1994), at pp. 699-775).

What does the constitutionality test tell us in the case before us? Like my colleague Justice Cheshin, I too am of the opinion that the entitling law gave the persons entitled thereunder a substantive right, and that the legislature was not entitled, when enacting the suspending law, to ignore the reliance of those persons on the entitling law. This substantive right amounts to 'property,' within the meaning of s. 3 of the Basic Law (see: *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [2], at pp. 431-433, and also my comment on p. 578). I am also prepared to accept that the harm to the property of whoever did not adversely change his position in reliance on the entitling law complies with the conditions of the limitation clause in s. 8 of the Basic Law. In other words, in the absence of a legitimate interest of reliance, there is a presumption that the legislature that gave may also take away, and this should not be seen to contain any constitutional defect. But this is not the case with harm to someone who relied on the aforesaid property right and adversely changed his position as a result of the entitling law. Even if we regard this harm as befitting the values of the State of Israel and designed to achieve a proper purpose, it cannot be regarded as

proportional harm. Proportional harm to the property of someone who relied on the entitling law must, at the very least, have taken into account various parameters connected with his reliance, such as the degree of legitimacy of the reliance, its strength and the criteria for proving it. The suspending law does not relate to these questions at all, and even from the history of its legislation we do not find that the legislature took any account of them.

It should be noted that in all of the aforesaid I am not adopting any position on the constitutional question of the entitling law itself. The respondents argued that this law was defective *ab initio*, *inter alia* because it did not promote the purpose for which it was enacted and because it unlawfully violated the principle of equality governing the whole class of persons lacking housing in Israel. But even if we assume that there is a foundation to those arguments, that in itself will be insufficient to remedy the disproportionate constitutional violation of the suspending law to the property of those persons who relied on the entitling law; they were not responsible for the alleged defects, and it is not fair that they should suffer the consequences thereof.

What then is the appropriate constitutional remedy in this case? One possible path is to declare the suspending law void in its entirety, effective immediately. In the circumstances of this case that would be the most drastic intervention in the validity of the statute and in the work of the legislature (see Barak, *Constitutional Interpretation*, at pp. 734-735). It significance is a blanket voiding of the constitutional parts of the statute, and consequently, *inter alia*, significant harm to the State budget. Another possible path is that we take upon ourselves the task of amending the defective statute, for example by means of separating the unconstitutional part from the constitutional parts, or by means of 'extending the statute' (*ibid.*, at pp. 735-740, 759-767). Adopting this path admittedly does not harm the constitutional parts of the statute and significantly reduces the harm to the State budget, but adopting it still involves an 'aggressive' intervention in constitutional activity. Following this path also places institutional difficulties before the court, in view of its limited ability to formulate primary arrangements and to consider all of the relevant factors instead of the legislature. A third possible path is to declare the violating statute void, in whole or in part, but to suspend the validity of the voidance for a period that will allow the legislature to amend the constitutional defect. We have already followed this path in the past (HCJ 6055/95 *Tzemah v. Minister of Defence* [16], at p. 284 {687}; HCJ 1715/97 *Israel Investment Managers Association*

v. Minister of Finance [17], at pp. 415-416). It seems to me that in our case too this path should be followed, since it is preferable to the other possible paths. The advantages of this path are obvious: it allows the legislature to consider the question of reliance concerning the suspension of the entitling law, a question that it did not consider when it enacted the suspending law; its intervention in the work of the legislature is minimal; and it does not impose on the court a task that is unsuited to its institutional competence. Suspending the validity of the declaration of voidance does not lead to an immediate operative consequence, and it certainly does not cause — at least until the mending of the defect by the legislature or until the end of the suspension period — any harm to the constitutional part of the statute or the State budget. In this way, the legislator, and not the court, is the one that determines the exact timing, manner and scope of the harm to the budget, which itself is unavoidable.

After writing my opinion, I received the opinion of my colleague the President. I have examined it, but I am not convinced that it is possible to overcome the retroactive provision of the suspending law by means of interpretation. The President's interpretive distinction is based on the phrase 'no person shall be entitled to the benefits' in s. 20(c) of the suspending law. In his discussion of this phrase, the President says that even though in the linguistic sphere a person who is entitled to benefits means any person who is entitled to a benefit, whether he is an entitled person who relied on the statute or an entitled person who did not rely on the statute, the court has the power to interpret the words of the legislature in a manner that restricts them to those entitled to benefits who did not rely on the entitling law. I should emphasize that, in my opinion, this proposed path is not at all simple. But in our case, even the President's proposal concerning the interpretation of the phrase 'no person shall be entitled to the benefits' is insufficient for solving the difficulty that the suspending law raises. For in order to clarify its intention with regard to the scope of the application of the suspending law, the legislature did not merely use the aforesaid phrase. In s. 20(a)(1) it took pains to explain that s. 6B of the entitling law *would not apply* during the period of the suspension of the law's validity; and in order to make its intention with regard to the retroactive validity of the suspension even clearer, it stipulated in s. 20(b) that the date of commencement of the aforesaid s. 20(a)(1) would be on the date of the commencement of the entitling law. It follows that the legislature made its intention absolutely clear, that it wanted to suspend the validity of the entitling law, retroactively,

from its date of commencement; and with all due respect, I do not see any method of interpretation that can determine that s. 6B of the entitling law, whose applicability was expressly cancelled ('shall not apply') by the legislature starting from its date of commencement, continues to apply vis-à-vis those persons who relied upon it. With regard to the remarks of the President in para. 16 of his opinion, I would like to point out that even if we assume that the proponents of the suspending law were unaware of the possibility that its retroactive application would harm those persons who have relied on the entitling law, I see no place for doubt that the subjective intention of the legislature, when enacting the suspending law, was to suspend the validity of the entitling law absolutely and retroactively. I even cannot agree with the President's remarks in para. 17 of his opinion. With all due respect, I am of the opinion that we are obliged to interpret the suspending law against the background of the legal position created when it was enacted, according to which the 'temporary' suspension of the entitling law is still valid, and not against the background of a hypothetical legal position according to which suspending its validity has already occurred in the past.

My opinion is, therefore, that we should grant the petitions and make the order absolute, in the sense that we declare the retroactive provisions of s. 20 of the Arrangements Law void. The validity of the declaration shall be suspended for six months from the date of giving the judgment; and the purpose of the suspension is to allow the legislature to re-enact these provisions, while distinguishing — according to the parameters that will be determined in the statute — between persons who relied on the entitling law and others to whom the entitling law was supposed, in principle, to apply.

President A. Barak

My opinion on the dispute between my colleagues is the same as the opinion of Justice M. Cheshin. I agree with his reasoning. I would like to add several remarks of my own.

Presentation of the problem

1. The Housing Loans Law (Amendment no. 5), 5761-2001 (hereafter — Amendment 5) provides that 'an entitled person… who bought an apartment in Jerusalem or who extended his apartment in Jerusalem, will receive a grant…' (s. 6B(a)). Amendment 5 determined the amount of the grant and the ways of revising it. This provision came into force on 15 February 2001

(when it was published in *Reshumot*). Not even two months passed and the Knesset enacted the State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001 (hereafter — the Arrangements Law). The Arrangements Law suspended the validity of s. 6B of Amendment 5. This suspension — which came into effect on 4 April 2001 when the Arrangements Law was published in *Reshumot*, was given retroactive effect from the date of publication of Amendment 5 (s. 20(a)(1), 20(b) and 20(c)) (hereafter — the interim period).

2. The main purpose of the suspension was prospective. It was intended to save the State treasury a significant expense (approximately sixty million sheqels per annum) and to prevent an increase in housing prices in Jerusalem as a result of an increase in demand. Nonetheless, the suspension also operated retrospectively. In this respect, three provisions were enacted in s. 20 of the Arrangements Law. Two of these stipulated a suspension (ss. 20(a)(1) and 20(b)). The third provision cancelled the actual right in the interim period (s. 20(c)).

3. Against this background, we all agree that the fact that an entitled person bought an apartment in Jerusalem in the interim period cannot prevent the application of s. 20 of the Arrangements Law to the interim period. Therefore, the right of an entitled person who bought an apartment in Jerusalem during the interim period for his own reasons, without relying at all on the acquisition of the right to a grant that he was granted in Amendment 5 (whom we shall call an entitled person who did not rely on Amendment 5) was suspended and even cancelled. That person does not come before us in these petitions. But what is the law with regard to an entitled person, who did rely on the existence of the grant and, because of the grant that was given in the interim period, sold his other apartment or entered into pecuniary undertakings and bought an apartment in Jerusalem in the interim period? Is also this entitled person (whom we shall call an entitled person who did rely on Amendment 5) caught by the provisions of the suspension and the cancellation? Indeed, it is the case of the entitled person who did rely on Amendment 5 that comes before us in these petitions for our decision.

4. We all agree that the Arrangements Law should have distinguished — for the purposes of the suspension in the interim period — between the entitled person who did rely on Amendment 5 (whose right, because of his reliance, ought not to be suspended or cancelled in the interim period) and the

entitled person who did not rely on Amendment 5 (who for various economic reasons ought to have his right suspended even in the interim period (ss. 20(a)(1) and 20(b) of the Arrangements Law), and even cancelled in its entirety (s. 20(c) of the Arrangements Law)). The dispute between us is whether it is possible to base this distinction between the entitled person who relied on Amendment 5 and the entitled person who did not rely on Amendment 5 in the suspension and cancellation provisions in s. 20 of the Arrangements Law, or whether this distinction has no foothold in the provisions of s. 20 of the Arrangements Law. In this dispute, I am of the opinion — and thus I join with the approach of my colleague Justice M. Cheshin — that it is possible to base this distinction between the entitled person who did rely on Amendment 5 and the entitled person who did not rely on Amendment 5 on the provisions of s. 20 of the Arrangements Law. My colleague the Vice-President, together with Justices Türkel and Rivlin, are of the opinion that this distinction does not have any basis in the provisions of s. 20 of the Arrangements Law. Against the background of their approach — and since they are of the opinion that the distinction between the entitled person who did rely on Amendment 5 and the entitled person who did not rely on Amendment 5 is important and even has constitutional force — they are of the opinion that any provision that suspends or cancels the entitlement in the interim period is unconstitutional and therefore void.

5. I think that we are all agreed that if it possible to distinguish — within the framework of the possible interpretation of s. 20 of the Arrangements Law — between the entitled person who did rely on Amendment 5 and the entitled person who did not rely on Amendment 5, this path should be chosen. The other path — the one in which we examine the question whether an arrangement that does not distinguish in the interim period between the two classes of entitled persons is a constitutional arrangement or not — becomes available to the judge only if the first path is closed to him. Indeed, we all agree upon the outlook that the proper approach is that the interpreter of the statute should do everything possible in order to give the statute that possible interpretation that is consistent with the constitution (in Israel — with the Basic Law) and does not conflict with it, 'and between two possible interpretations we should choose the interpretation that is consistent with the constitution' (HCJ 4562/92 *Zandberg v. Broadcasting Authority* [18], at p. 810). Thus we give expression to the aspiration of achieving normative harmony in the legal system. This also gives rise to the presumption that the general purpose of every statute is to achieve constitutional values. Notwithstanding, this proper approach assumes, as my colleagues have noted,

a possible interpretation of the statute. It acts within the framework of the accepted rules of interpretation. It cannot be said that we must always choose the meaning that achieves consistency between the statute and the constitution (see A. Barak, *Legal Interpretation*, vol. 3, *Constitutional Interpretation*, 1994). The presumption of consistency between the constitution and the statute can be rebutted. It is rebutted where the accepted rules of interpretation in the legal system do not allow this consistency to be achieved. It follows that the key to solving the legal question before us lies in providing an answer to the question of interpretation. The question is whether the normal accepted rules of interpretation in Israel allow a distinction between the entitled person who did rely on Amendment 5 and the entitled person who did not rely on Amendment 5. Let us now turn to an examination of this question.

Limits of interpretation

6. The basic premise is that the 'limit of interpretation is the limit of language' (CA 1900/96 *Telmaccio v. Custodian-General* [19], at p. 827). 'An activity is interpretation if it gives a meaning to the text that is consistent with one of its (express or implied) senses of the text in its (public or private) language' (A. Barak, *Purposive Interpretation in Law* (2003), at p. 55). The interpretation ends where the language ends. 'It is essential… that the interpretive option that realizes the legislative purpose is capable of sustaining the language of the statute' (MApp 67/84 *Hadad v. Paz* [20], at p. 670). This was well expressed by my colleague, Justice M. Cheshin:

> 'Every word, every expression in the language can be interpreted narrowly or it can be interpreted broadly, even very broadly, but no matter how much we widen the interpretation, we will reach a point where the elastic reaches it maximum stretching point' (LCA 6339/97 *Roker v. Salomon* [21], at p. 253).

I discussed the same idea in another case:

> 'The art of interpretation is not limited merely to words, but the words limit the interpretation… It is possible that the language of the statute may be given a broad interpretation or a narrow interpretation, but in general an Archimedean foothold must be found for a word in the language of the statute' (FH 40/80 *Koenig v. Cohen* [22], at p. 715).

And in another case I added:

> 'Every interpreter must take into account the limits of language. The linguistic significance of the language, which is intended to realize the purpose that underlies it, must be consistent with one of the linguistic senses of the text. Admittedly, the linguistic component is not sufficient for interpretation, but it is essential to it' (CA 3622/96 *Hacham v. Maccabi Health Fund* [23], at p. 646).

This approach is derived from constitutional considerations. The role of the judge as an interpreter is to interpret a text that is created by the persons competent to do so (the legislature, the minister, the parties to a contract, the testator). His role as an interpreter does not authorize him to create a new test (see Barak, *Purposive Interpretation*, *ibid.*, at p. 57).

7. Section 20 of the Arrangements Law suspends and cancels the right of entitled persons. It states that 'no person shall be entitled to the benefits' provided in s. 6B of Amendment 5 (s. 20(c)). *Prima facie*, from a linguistic viewpoint, 'no person shall be entitled to the benefits' refers to every person who is entitled to a benefit, whether he is an entitled person who relied on Amendment 5 or an entitled person who did not rely on Amendment 5. Against the background of this general and broad language arises the interpretive question that is before us, which concerns the legitimate interpretive possibility of narrowing this broad language. The solution to this question will be found in the solution to the general problem of interpretation. Is the interpreter entitled to narrow the broad language of the text in order to achieve the purpose of the text? When the text provides a legal arrangement that applies to 'every person,' with regard to 'every object' or 'in all circumstances', may the interpreter — who wishes to achieve the purpose underlying the text — interpret the text in such a way that it does not apply to a particular class of persons (not 'every' person) or such that it does not apply to a particular class of objects (not 'every' object) or such that it does not apply in a particular class of circumstances (not 'all' circumstances)? The answer given to this question in Israel and in comparative law is yes. I discussed this in *Zandberg v. Broadcasting Authority* [18], where I said:

> 'Where the language of the statute is broad, the judge is entitled and competent to give it a narrower meaning, which extends only to some of the options inherent in the language, provided that by doing so he realizes the purpose of the legislation. This is the case in Israel. This is also the case in comparative law'

(*Zandberg v. Broadcasting Authority* [18], at p. 811; see also R. Sullivan, *Driedger on the Construction of Statutes*, third edition, 1994, at p. 94).

Indeed, in order to realize the purpose underlying the statute — whether it is a specific purpose or a general purpose — the interpreter is authorized to give the broad language of the statute a narrower meaning. We will discuss this approach, while distinguishing between giving a narrow interpretation to broad language in order to realize a specific purpose and giving a narrow interpretation to broad language in order to realize a general purpose.

8. Let us begin with situations of restricting broad language in order to achieve a specific purpose. A purpose is specific when it is unique to the purposes and functions that are unique to a statute or to several statutes. In order to realize this specific purpose — whether a subjective purpose or an objective purpose — the interpreter may give the general language of the statute an interpretation that restricts its application and prevents it from applying to certain situations that fall within the bounds of the general language. The following are two examples of this approach.

9. *Zandberg v. Broadcasting Authority* [18] considered the Broadcasting Authority (Approval of Validity of Radio and Television Fees) Law, 5753-1992 (hereafter — the confirmation law). This law provided (in s. 1):

> 'In order to remove doubt, it is hereby provided that the fees for possessing a radio or television receiver, which were determined in accordance with the Broadcasting Authority Law, 5725-1965, for the years 1985 to 1992, are valid for all intents and purposes from the date on which they were determined.'

It was held in that case that the general and broad language of the statute, according to which fees were valid 'for all intents and purposes,' required the conclusion that the confirmation law allows linkage differentials to be charged on fees that were unpaid. Notwithstanding it was held — and this is what is relevant to our case — that the expression 'for all intents and purposes' should be given a narrow interpretation, so that it should not apply to a law determining a fine for arrears. Underlying this approach was the special purpose of the confirmation law that was inconsistent with imposing a fine for arrears for a period in which there was no duty at all to pay the fee itself. In my opinion, I considered the question whether it was possible to limit the expression 'for all intents and purposes' in such a way that it would not apply to fines:

> 'Is it possible to interpret the broad language of the confirmation law narrowly in such a way that the validity, notwithstanding the all-inclusive language, shall not apply to a fine for arrears? Is it possible, according to our accepted rules of interpretation, to interpret broad language narrowly merely because of a narrower purpose underlying it? In my opinion, the answer is yes. Indeed, the judicial interpreter ought not to sit idle and direct barbs of criticism at the legislature because he, the judge, has been unable to restrict its language that is too broad. The judge may not display apathy to a situation in which the legislative purpose is not realized. He must make an interpretive effort to realize the purpose of the legislation… the judge should not sit idle and watch the legislative purpose fail. He must interpret the statute in accordance with its purpose. Sometimes this interpretation will lead to a result that the language of the statute should be interpreted broadly. Sometimes — and this is the case before us — this interpretation leads to the conclusion that the language of the statute should be interpreted narrowly. The criterion is the criterion of the purpose of the statute. In order to realize it, the interpreter is entitled to restrict the broad (linguistic) meaning of the statute' (*ibid*., at p. 811).

10. A second example can be found in the interpretation of s. 3(i)(1)(a) of the Income Tax Ordinance [New Version]. According to this provision, a right that a person received in the past to buy an asset (such as an option that an employee receives from his employer with regard to work relations) is liable for tax when it is realized. This court restricted the broad language of the statute that referred to any right, i.e., to any option, and held that this provision refers only to options that are not negotiable. The court held, relying on *Zandberg v. Broadcasting Authority* [18], that a court may 'give a narrow interpretation to broad language of a provision of statute in order to apply it only to those case that are required to realize the purpose underlying the legislation' (*per* Justice E. Chayot in CA 7034/99 *Kefar Saba Assessing Officer v. Dar* [24]).

11. Let us now turn to the second situation — which is mainly the one relevant to our case — in which the judge-interpreter restricts the broad and general language of the statute in order to realize a general purpose (subjective or objective), which is enshrined in the basic values of the legal system. I discussed this possibility in one case, where I said:

> 'On more than one occasion our Supreme Court has adopted this method, when it restricted or extended the language of the statute in order to realize the basic principles of our legal system. Indeed, legislation in general and basic provisions of statute in particular are not one-time acts that are divorced from the general experience. The statute derives its flesh and bones within the framework of a given legal system. It constitutes one brick of a whole building, which is built on foundations of a political and legal system that constitute the "basic principles of that society".' (EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [25], at p. 307 {158}).

In that case, I gave examples of this approach, *inter alia*, in American case law that interpreted the First Amendment to the Constitution. This Amendment provides that 'Congress shall make no law… abridging the freedom of speech, or of the press…'. I said that 'the Supreme Court has not hesitated to hold, in a long line of precedents, that notwithstanding the absolute language, which rules out any discretion on the part of Congress, it has the authority to restrict the freedom of speech and the press in certain cases' (*ibid.*, at p. 301 {151}). I went on to say:

> 'We interpret the language of the general obligation against the background of our constitution and in accordance with the principles of equality, justice, fairness and morality of our legal system. Applying these restricts the general language' (*ibid.*).

Let us turn to several cases that exemplify this approach.

12. In a significant number of laws, it is stated that decisions of quasi-judicial bodies are 'final.' It is stated in several places that there is 'no further recourse.' Notwithstanding this broad language, this court has not hesitated in holding that the expression 'final' or 'no further recourse' does not prevent an application to the High Court of Justice (see HCJ 79/63 *Trudler v. Borstein, Election Official for the Composition of the Agricultural Committee of Ramat HaSharon Local Council* [26]; LCA 176/86 *A v. B* [27]; HCJ 294/89 *National Insurance Institute v. Appeals Committee for Enemy Action Victims Compensation Law* [28]). This approach was based on 'narrow interpretation' (HCJ 188/77 *Coptic Orthodox Mutran v. Government of Israel* [29], at p. 236), or on 'precise and narrow interpretation' (CA 64/72 *General Federation of Workers v. Moav* [30], at p. 265), or on 'strict and narrow' interpretation (HCJ 264/77 *Katan v. National Insurance Institute* [31], at p.

687). Underlying this was the need to realize the general and important social value of accessibility to the courts.

13. Sometimes a civil servant is obliged to make decisions within the field of public law. An example is a competent authority that is obliged to grant a licence to whoever fulfils the conditions for this. Notwithstanding the general and all-embracing language of the provision, it is accepted that such a civil servant may not make decisions in a position of a conflict of interests. I discussed this in one case, where I said:

> 'When a statute provides that someone is obliged to hear every dispute, it is obvious that he is not obliged to hear a dispute in which he has a personal interest' (*Neiman v. Chairman of Elections Committee for Eleventh Knesset* [25], at p. 307 {158}).

Underlying this approach is the outlook that the rule concerning the prohibition against a conflict of interests is one of the basic principles of our legal system. It is a part of the general purpose of every piece of legislation. Even when a statute makes use of general language that does not contain any restrictions, restrictions are imposed by virtue of the general principle of the prohibition of a conflict of interests.

14. In comparative law the following example is well-known: an inheritance statute provides that when a person dies, his property passes to his children. That inheritance statute contains no provision — of the kind that we have in Israel (s. 5(a)(1) of the Inheritance Law, 5725-1965) — to the effect that a child who murders his father is disqualified from inheriting from him. Notwithstanding this, it is accepted that the son who murdered his father does not inherit (see H. Hart and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1944), at p. 68; R. Dworkin, *Taking Rights Seriously* (1977), at p. 22; S. Shilo, 'Disqualification from Inheriting: Someone who Deliberately Causes the Death of the Legator,' *Uri Yadin Book — Articles in Memory of Uri Yadin* 257, vol. 2 (1990)). Underlying this approach is the outlook that the general language of the inheritance statute concerning heirs in an intestacy should be interpreted against a background of the basic principles of the legal system. One of those basic principles — which is based on principles of equity, justice and morality — is that a person should not be allowed to enjoy the fruits of his misdeeds ('Have you committed murder and also taken the inheritance?' (I Kings 21, 19 [43])). The broad language receives a restricted sense in order

to realize one of the basic principles of the legal system. In discussing this approach, Vice-President S. Levin said:

> '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… 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' (CA 3798/94 *A v. B* [15], at p. 154 {266}).

By virtue of this principle, Vice-President S. Levin held in *A v. B* [15] that a rule should be read into s. 13 of the Adoption of Children Law, 5741-1981, that a parent may not object to his child being declared adoptable if this is contrary to reasons of public policy concerning the acts that led to the birth of the child.

15. Underlying the approach that an interpreter may restrict the general language of the statute in order to realize the general purpose of the legislation is the approach that 'a provision of statute is a creature that lives in its environment' (Justice Sussman in HCJ 58/68 *Shalit v. Minister of Interior* [32], at p. 513). Language is interpreted in accordance with its context, and the text is understood against the background of the context. The context of every statute includes the basic values of the legal system, which constitute its general purpose. This is the 'spirit' that encompasses the 'body' (see *A. v. B* [15], at p. 182 {306}). This is the 'normative umbrella' that extends over all statutes (CA 165/82 *Hatzor Kibbutz v. Rehovot Assessment Officer* [33], at p. 75). An expression of this approach was given by my colleague Justice M. Cheshin, when he said that:

> 'When we approach a statute of the Knesset, we do not come empty-handed. We come with a weight of language, linguistic definitions and meanings, social customs and morality, consensuses and first principles, justice and equity, principles and doctrines in our knapsack… all of these — doctrines and values and principles — are located, *prima facie*, outside the statute, but they serve as a platform for the statute — for every statute — and no statute can be conceived without them. A statute without that platform is like a house without

> foundations… When we approach the work of interpretation — like a surgeon — we do not come empty-handed. When we read the statute in our judicial capacity, we carry on our bodies an "interpretation kit," and in this kit are all of those values and principles and doctrines without which we would not be what we are: basic principles of the legal system, morality, fairness, justice' (*Yediot Aharonot Ltd v. Kraus* [8], at p. 72. See also *Segal v. Knesset Speaker* [3], at pp. 563-567; *A. v. B* [15], at p. 182 {306}).

By virtue of this approach — which constitutes a central component of our theory of interpretation — the interpreter is authorized to consider the general language of the statute and to restrict it merely to those aspects that realize the basic values of the legal system. It is to this that my colleague Justice M. Cheshin refers in his simile that 'we can peel away the statute like peeling the layers of an onion: healthy layers will be left and unhealthy layers will be thrown into the bin' (para. 34 of his opinion).

From the general to the specific

16. Does the purpose of s. 20 of the Arrangements Law require a restriction of the scope of the section to an entitled person who did not rely on Amendment 5? Let us begin with the specific purpose underlying s. 20 of the Arrangements Law. For this purpose, I have examined the legislative and parliamentary history. It emerges from this that according to the factual basis that was brought before the Knesset, the assumption was apparently that applying s. 20 of the Arrangements Law retroactively would not harm the entitled persons who bought an apartment in Jerusalem at all. In the explanatory notes to the draft law, it was stated that 'In addition, in view of the fact that during the short period when these laws were valid no instructions were given to implement them, it is proposed that it should be provided also that even during the period when the aforesaid laws were valid, it was not possible to acquire rights by virtue thereof' (cited by my colleague, Justice M. Cheshin, in para. 3 of his opinion). It would appear that the question before us — the law concerning the entitled person who relied on Amendment 5 — was not considered by the members of the Knesset. It can therefore certainly not be said that the subjective purpose of s. 20 of the Arrangements Law is to deny the grant even to entitled persons who relied on Amendment 5.

17. Moreover, s. 20 of the Arrangements Law did not merely suspend the right of the entitled persons in the interim period. It expressly stated that the

right was cancelled (s. 20(c)). It follows that even if on 31 December 2001 — which was the original date for the end of the suspension — Amendment 5 had become valid once again, this would not have applied to the interim period, and it would have begun only on 4 April 2001 (the date on which s. 20 of the Arrangements Law was published) rather than on 15 February 2001 (the date on which Amendment 5 was published). This approach is natural with regard to entitled persons who did not rely on Amendment 5. It is totally irrational with regard to entitled persons who did rely on Amendment 5. If the Treasury has resources to finance the entitled persons from 4 April 2001, how is it possible to explain the unwillingness to finance precisely those entitled persons who bought an apartment in Jerusalem during the interim period while relying on Amendment 5? It would appear that the correct answer is that the interests of these entitled persons were not even considered by the legislature. The assumption was that all the entitled persons, without exception, bought an apartment in Jerusalem without relying on Amendment 5.

18. What about the general purpose of s. 20 of the Arrangements Law? This general purpose naturally includes the property right and its not being harmed retroactively. Notwithstanding, this right in itself is insufficient, since it would deny the retroactive application of the infringement of the property right of every entitled person — both the entitled person who relied on Amendment 5 and the entitled person who did not rely on Amendment 5. This result, which empties the application of s. 20 of the Arrangements Law of all content in the interim period, cannot be reached by means of interpretation. This requires a constitutional analysis. But the petitioners before us argue that they are entitled persons who did rely on Amendment 5. How is it therefore possible to justify the distinction between an entitled person whose property right was infringed during the interim period and who did rely on Amendment 5 and an entitled person whose property right was infringed in the interim period but who did not rely on Amendment 5? What is the difference between the one and the other from the viewpoint of the basic values of the legal system? The answer is that one of the basic values of our legal system is the interest of the individual's reliance. Protection of this interest — alongside the general infringement of property — allows the interpreter to restrict the scope of the infringement to an entitled person who bought an apartment in Jerusalem solely to entitled persons who did not rely on Amendment 5. Let us therefore turn to the interest of reliance, its status in our legal system and its operation in the case before us.

19. The interest of reliance is like a golden thread that runs through Israeli law. Significant portions of private law are based on it (see A. Barak, *The Agency Law*, vol. 1, 1996, at p. 180; D. Friedman and N. Cohen, *Contracts*, vol. 1, 1991, at p. 151; G. Shalev, *The Law of Contracts*, second edition, 1995, at p. 161; D. Barak-Erez, 'The Protection of Reliance in Administrative Law,' 27 *Hebrew Univ. L. Rev. (Mishpatim)* 17 (1996), at p. 22). This was the law in the past when the principle of estoppel based on the rules of reliance was employed. It is also the law today, when it is possible to regard the realization of the interest of reliance as a part of the principle of good faith. From private law the interest of reliance passed to public law (see S. Schonberg, *Legitimate Expectations in Administrative Law* (2000)). Indeed, the public authority is the trustee of the public. Its fiduciary duty to the public leads to its duty to act fairly, equitably and proportionately. From these we derive a duty to take into account the individual's interest of reliance. On this basis are founded the laws of administrative promise, the laws of tenders, the laws of administrative finality, the laws of administrative instructions and the laws of relative voidance (see Barak-Erez, *supra*). They are the basis for the need to ensure that legislation (whether primary legislation or subordinate legislation) has transition provisions in order to protect the interests of those persons who relied on the former law. This is certainly the case when a person relies on a right that was given to him (whether in primary legislation, in subordinate legislation or in any other administrative act), and it is taken away from him not only from now onwards (and without any transition provision) but even retroactively. The infringement of the interest of reliance is the most extreme in such a case. Underlying the protection of the interest of reliance are considerations of both morality and efficiency. Of course, the strength of the interest of reliance is not absolute. It is not the only consideration. It needs to be balanced against other interests, which operate in different directions. However, it must always be taken into account and given the proper relative weight (see A. Barak, *Legal Interpretation*, vol. 2, 1993, at p. 470).

20. In the petition before us, the petitioners claim that they relied on Amendment 5. In buying an apartment in Jerusalem during the interim period, they took into account that they would be given a pecuniary grant, and they planned their actions on the basis of this reliance. We must take this reliance of theirs into account. This is a social interest worthy of protection. Naturally, the existence of the reliance must be proved; even if it exists, it can have various degrees of strength. This public interest does not have decisive weight. However, it justifies the distinction between an entitled person who

did rely on Amendment 5 and an entitled person who did not rely on it. Indeed, this distinction is accepted by all of us. My colleagues, Vice-President E. Mazza, and Justices J. Türkel and E. Rivlin, are prepared to regard the absence of this distinction as a ground for declaring s. 20 of the Arrangements Law unconstitutional, in so far as the transition period is concerned. Like my colleague, Justice M. Cheshin, I too propose giving this interest a different role, which concerns the meaning of the statute and not its validity. In view of this approach, I do not need to examine the constitutional aspect in depth, and I will refrain from adopting any position in this respect.

Justice A. Procaccia

I agree with the opinion of my colleague, Justice M. Cheshin, and with the comments of my colleague, President A. Barak.

Justice J. Türkel

Like my honourable colleague, Vice-President E. Mazza, and for his reasons, I am also of the opinion that it is not possible to overcome the unambiguous provisions of s. 20 of the State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001, by means of interpretation. Admittedly, in general it is preferable to adopt the path of interpretation and to refrain from a constitutional examination of a statute, but the language of the section does not have any linguistic opening, even as small as the eye of a needle, through which it is possible to inject a different meaning from the one that the legislator intended. It follows that we are compelled to examine the constitutionality of the retroactive application of the section in accordance with the constitutional criteria in the Basic Law: Human Dignity and Liberty. In this regard, I agree also with the comments of my honourable colleague, Justice E. Rivlin.

Therefore I agree with the opinion of the Vice-President and the outcome that he reached.

Justice E. Rivlin

1. In the dispute between my colleagues Vice-President E. Mazza and Justice J. Türkel on one side, and President A. Barak, as well as Justices M. Cheshin, D. Beinisch and A. Procaccia on the other, my opinion is like that of the Vice-President, for his reasons. Like him, I am of the opinion that there is no possibility of interpreting the provisions of s. 20 of the State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and Suspension of Legislation Originating in Private Draft Laws), 5761-2001 (hereafter: the Arrangements Law), in a manner that restricts its application to such an extent that it can make it unnecessary for us to consider its constitutionality.

2. In practice, there is no dispute between my colleagues that we cannot accept the outcome that the benefit to which the petitioners are entitled should be cancelled so comprehensively, and retroactively. My colleague Justice M. Cheshin wishes to avoid the constitutional question that arises in the petition by using an alternative tool — the tool of interpretation — in order to resolve the petitioners' problem. My colleague the President also proposes this. I accept their fundamental position, with which my colleague the Vice-President also agrees, according to which we should turn to constitutional review — which can be described as a 'judgment day weapon' — only when we have exhausted all other avenues. This approach is accepted in American constitutional law, where a doctrine sometimes called the doctrine of 'strict necessity' is accepted. According to this theory, the court shall not resort to constitutional review unless it is unavoidable. Various techniques are used by the court there as escape routes from constitutional review. In *Rescue Army v. Municipal Court of Los Angeles* [38], Justice Rutledge listed these techniques and explained the logic that justified using them (it should be noted that some of the techniques are the subject of dispute in the United States, and others, such as the right of standing, are no longer relevant in Israeli law):

> '…this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications… arose in the Court's refusal to render advisory opinions…
>
> … in addition, "the Court (has) developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for

> decision" (*Ashwander v. Tennessee Valley Authority* [39], at p. 346). Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided' (at pp. 568-569).
>
> 'The policy's ultimate foundations… lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system' (at p. 571).

One of the tools listed by Justice Rutledge is the construction of the statute under attack in such a way that it will make constitutional review of its superfluous. With regard to this tool, Justice Brandeis, to whose important remarks in *Ashwander v. Tennessee Valley Authority* [39], at p. 348, Justice Rutledge refers, cited the following:

> 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided' (*Crowell v. Benson* [40], at p. 62).

See also the remarks of Justice White, in a similar vein, in *Ellis v. Railway Clerks* [41], at p. 444.

3. But care must be taken so that excessive use is not made of this tool. Chief Justice Vinson said in this regard, in *Shapiro v. United States* [42], at p. 31:

> 'The canon of avoidance of constitutional doubts must… give way where its application would produce a futile result, or an unreasonable result "plainly at variance with the policy of the legislation as a whole".'

Like my colleague Vice-President E. Mazza, I too am of the opinion that the case before us is one of the cases to which Chief Justice Vinson referred. As both the Vice-President and Justice M. Cheshin explain, the language of the provision that is relevant in our case is unambiguous. A provision should not be given an interpretation that is entirely in conflict with its language. The art of interpretation, although it is desirable and essential, has limits, beyond which the interpreter cannot pass; otherwise he will find himself rewriting legislation. In the case before us, the interpretation proposed by the majority justices goes, in my opinion, beyond the confines of what is possible and what is permitted. As my colleague the President says, there are indeed times when the interpreter is authorized to give the broad language of the statute a narrower meaning in order to achieve a broad or specific purpose. But this is not the case where the legislature has made its intention clear in a manner that is unambiguous. Once it has done that, and has ruled out any other intention, there is only one method of interpretation and no other — one interpretation but not its opposite. Indeed, even the statement that even the British Parliament cannot make a man a woman or a woman a man has lost some of its force, since with the assistance of surgeon's scalpel Parliament can do even this. It can do this, but we cannot; we do not have this power. My colleague Justice Cheshin complains about this remark. He emphasizes that the court does have power and he points to important case law that has strengthened equality between the sexes with a progressive spirit. But the dispute between us, in this case, concerns the method rather than the outcome, for where the interpretive tool fails, constitutional review may remain. Where it is impossible to call a woman a man, it is possible, in the proper circumstances and when the constitutional requirements are fulfilled, to nullify the distinction between them by means of reducing the force of the provision of statute itself. Thus equality is achieved between man and woman even without calling a woman a man. Like my colleague Vice-President E.

Mazza, I am of the opinion that where the court reaches an opinion that a particular law, according to the interpretation required in the light of its language and purpose, is not a desirable law, it cannot, by giving an ('creative') interpretation to the statute, remedy it on behalf of the legislature. In such cases, the court is obliged to examine the statute constitutionally. This examination does not constitute a 'fear of the legislator' that has taken hold of us — in the language of my colleague Justice M. Cheshin. This examination is merely a direct constitutional attack on the statute, of its actual validity, once the more moderate attack — namely the interpretation to which my colleague resorted — was unsuccessful. As my colleague Justice J. Türkel rightly points out, since there is no 'linguistic opening, even as small as the eye of a needle, through which it is possible to inject a different meaning from the one that the legislator intended… we are compelled to examine the constitutionality of the retroactive application.'

This procedure is the proper procedure in view of the principle of the separation of powers. The power to enact and amend legislation is the sole province of the legislature, whereas the court interprets statutes and examines their constitutionality. An interpretation that is inconsistent with the language of the statute violates the authority given to the legislature far more than a declaration that a statute is void for constitutional reasons. An interpretation that lacks a proper foothold in the language of the statute may breach the delicate balance between the powers. In a certain sense, interpretation that bypasses the language of the statute also involves the court shirking its proper role, namely to denounce in a loud and clear voice any statute that our statute book cannot accept — in view of the basic principles of our legal system, as these are established in the constitutional documents. A clear constitutional declaration is sometimes an essential need that presents the legislature and the public with a constitutional guideline that also looks to the future.

4. In view of the aforesaid, I am of the opinion that we cannot avoid considering the question of constitutionality that the petition raises. On this question too I agree with the position of my colleague, Vice-President E. Mazza. I will merely add and comment that the question of the scope of the property right enshrined within the framework of s. 3 of the Basic Law: Human Dignity and Liberty is a weighty and multifaceted question. I am not persuaded that there is a basis for regarding reliance on an undertaking or even on a property right — as it is recognized in private law — as property that is worthy of constitutional protection in every case. This has already been said in CA 10608/02 *Hazima v. Department of Customs and VAT* [34]:

> 'The modern State, which is no longer merely a 'night watchman,' cannot refrain from intervening in the private market and from causing, in certain circumstances, harm to the right of private property. For this reason, the definition of property, and the definition of harm thereto, for the purposes of constitutional law are not identical to the definitions recognized in private law. The protection to the right of property is also not absolute, and frequently it will have to contend with competing values, until it reaches a proper balance (*ibid.*, at para. 8).

In our case, I am of the opinion that we are able to refrain from considering this major question, on account of the special circumstances of the case. According to the arguments of the petitioners, they had in their possession, in theory if not in practice, money that the State allocated them. The petitioners used this money in order to buy or to extend residential apartments. Taking this money away from them, now, is equivalent in many senses to taking the apartments in which they live away from them, because they will not be able to meet the financial undertakings involved in the purchase or extension of the apartments, to which the petitioners have already committed themselves. The centrality of the home for the 'personhood' of the individual and his self-realization (M.J. Radin, 'Property and Personhood,' 34 *Stan. L. Rev.* (1982) 957) requires us to hold that the protection of this is included in the constitutional protection of property (see and cf. CA 9136/02 *Mister Mani Israel Ltd v. Rize* [35], at para. 8). Therefore the provisions of s. 20 are contrary to the dictates of s. 3 of the Basic Law, and since, as my colleague Vice-President E. Mazza has shown, it does not comply with the terms of the limitations clause, it is void. In the circumstances of the case, the proposal of my colleague, the Vice-President, to make an absolute order in the sense that we declare the retroactive provisions of s. 20 of the Arrangements Law void and that the validity of the aforesaid declaration shall be suspended for six months for the purpose set out in the opinion of the Vice-President seems right to me.

Therefore I agree with the opinion of Vice-President E. Mazza.

Justice D. Beinisch

1. All of my colleagues in this case agree that the retroactive application of s. 20 of the State Economy Arrangements (Legislative Amendments for Achieving Budget Targets for 2001) Law (Amendment, Repeal and

Suspension of Legislation Originating in Private Draft Laws), 5761-2001 (hereafter: section 20) cannot stand in its entirety. There is no disagreement between us that its application must be restricted, so that the comprehensive retroactive cancellation of the benefit to which the petitioners were entitled under s. 6B (currently s. 6C) of the Housing Loans Law, 5752-1992, is not upheld in a way that does not take into account at all the question whether they relied on the provisions of the statute that granted entitlement to the benefit, and the question whether they changed their position accordingly before the benefit was suspended.

The disagreement is whether the proper outcome of restricting the retroactive application can be achieved by means of interpretation — as Justcie Cheshin, President Barak and Justice Procaccia believe — or whether a constitutional examination of the aforesaid section 20 and a declaration that its retroactive provisions are void are inescapable, which is the position of Vice-President Mazza, Justice Rivlin and Justice Türkel.

Everyone agrees that when the validity of a statute is questioned and a doubt arises as to its constitutionality, the court should first consider whether it is possible to find a reasonable interpretation that will make it unnecessary to decide its constitutionality and will allow the statute to exist in harmony with the basic principles of the constitution and the legal system (see, for example, the opinion of Justice Cheshin in *Segal v. Knesset Speaker* [3], at pp. 548-550; the opinion of Justice Dorner in HCJ 4128/02 *Man Nature and Law — Israeli Environmental Protection Society v. Prime Minister of Israel* [36]; HCJ 4885/03 *Israel Poultry Raisers Association v. Government of Israel* [37], at pp. 74-79 {**Error! Bookmark not defined.-Error! Bookmark not defined.**}). However, this is only the case when the path of interpretation is available to the court. As President Barak discussed in his book *Legal Interpretation* (vol. 3, *Constitutional Interpretation*, 1994, at p. 117:

> 'The proper approach is that we should choose, of the two possible interpretations from the viewpoint of the language and the purpose, the interpretation that leads to harmony between the statute and the constitution… [but,] the loyalty of the judge-interpreter to the legislation requires him to give the statute an interpretation that its language can sustain and that realizes its purpose. If this interpretation leads to a harmony between the statute and the constitution, it is right and proper; and if this interpretation leads to a conflict between the statute and the

> constitution, it is unavoidable. It transpires that the desire to achieve harmony between the statute and the constitution operates within the framework of the rules of interpretation, and as an inner-purposive rule of interpretation. It assists in formulating the purpose of the legislation. It cannot bring about a forced harmony between the interpretation of the statute and the constitution.'

None of my colleagues disputes this starting point in principle; the dispute is whether in this case the interpretive option that allows the provisions of s. 20 of the aforesaid law to be upheld and its retroactive application not to be comprehensive is open to us. I have given much consideration to this question, and initially I even was disposed to favour the approach of Vice-President Mazza. But after I read the opinions of my colleagues several times, I have been persuaded that the interpretive path proposed by Justice Cheshin is indeed possible (or, should we say, is not impossible) in this case, and therefore we are obliged to prefer it.

2. The approach of Justice Cheshin and President Barak admittedly narrows the retroactive application of the aforesaid section 20 by means of an interpretation that adds to the broad language of the section a qualification that is not expressly mentioned in the section. But in appropriate circumstances there are cases where the legislative purpose, as well as the context, the text taken as a whole and the basic principles of the legal system require us to read into a provision of statute a qualification that is not stated in it. This interpretive outcome is possible when a qualification of this kind is consistent with the purpose of that statute and it has a foothold, albeit a weak one, in the language of the statute, or at least when the language of the statute does not conflict with the possibility of reading into it the aforesaid qualification (and for this purpose I accept in principle the approach of the President as set out in paras. 7-15 of his opinion).

3. In our case, the language of section 20 admittedly is more consistent, on the face of it, with an interpretation that grants this section an all-embracing retroactive application, but I do not think that the language of the section completely rules out the possibility of qualifying the retroactive application as proposed in the opinion of my colleague, Justice Cheshin. Note that the interpretation of Justice Cheshin does not absolutely rule out the retroactive application of section 20, for we all agree that the language of the section cannot sustain such an interpretation; instead, it restricts or qualifies the retroactive application, in a way that the language of the section can

sustain. In such circumstances, we should consider whether this interpretation is consistent with the purpose of the statute.

4. The purpose of the aforesaid Arrangements Law and of section 20 thereof is to postpone the date of commencement of statutes that were enacted without there being sources of finance in the budget, and the implementation of these would have seriously harmed the budget (see para. 3 of the opinion of Justice Cheshin). As can be seen from the language of section 20 and from the deliberations that took place before it was enacted, the legislature was of the opinion that in order to realize the purpose of the statute — preventing serious harm to the State budget — it was not sufficient to suspend the validity of the provision granting entitled persons a grant to buy or extend an apartment in Jerusalem from that time onward, but it was necessary to suspend the validity of that provision retroactively from the date on which it was enacted. However, there is no doubt that the saving achieved for the State budget as a result of denying the benefits to those few entitled persons who, during the six weeks in which the provision granting the benefits was valid, managed to rely upon it and to change their position adversely, is a negligible fraction of the total saving. Certainly, these are not amounts that are capable of frustrating the purpose of the statute — preventing serious harm to the budget. Therefore, the interpretation of Justice Cheshin, which excludes from the retroactive application of section 20 those few persons who relied on the provision of the entitling law, is consistent, or at least does not conflict with, the particular purpose of section 20 — preventing serious harm to the State budget.

5. Alongside the particular purpose of the aforesaid section 20 is the general purpose of the section. Within the framework of this general purpose are the basic principles of our legal system. Within the framework of the general purpose of the legislation, there is, *inter alia*, a presumption that a statute is not intended to conflict with the basic laws and to harm the basic rights of the individual. The property right that the State gave to entitled persons under the aforesaid entitling provision was a concrete and restricted benefit that was given for the purpose of housing, and only to entitled persons who fell into the category of persons in need. Retracting the benefit from those persons who relied on that benefit to buy or extend a residential apartment amounts to a real infringement of the basic right to property. Therefore, there is no doubt that the general purpose of the aforesaid section 20 not only is consistent with the interpretation of Justice Cheshin, which

seeks to prevent the serious harm to the property right of those entitled persons who relied on it, but it even requires this interpretation.

It should be noted that, in my opinion, in this case we are not required to decide the question of the status of the principle of reliance in Israeli law and the question whether it is included among the basic principles of our legal system (cf. paras. 18-19 of the President's opinion). This is for the reason that in our case the question whether the principle of reliance in itself can require a narrow interpretation that is consistent with it does not arise. In the case before us, the reliance constitutes a circumstance that makes the harm to property disproportionate (as my colleagues Vice-President Mazza and Justice Rivlin explain), and the property right is the dominant basic principle in view of which the restrictive interpretation in required.

6. Thus we see that the interpretation proposed by Justice Cheshin, which excludes from the retroactive application of section 20 the entitled persons who relied on the provision of statute that gave entitlement to a grant for the purchase or extension of an apartment in Jerusalem, is possible from the viewpoint of the language of the section, does not conflict with the particular purpose of the section, and is required by the general purpose of the section. In these circumstances, the interpretive path should be preferred to the voidance of the relevant part of the provision of statute.

Petition granted, in the manner stated in the majority opinion (Justice Cheshin, with President A. Barak and Justices A. Procaccia and D. Beinisch concurring), Vice-President E. Mazza and Justices J. Türkel and E. Rivlin dissenting.

9 Kislev 5765.

22 November 2004.