HCJ 2390/96
HCJ 360/97
HCJ 1947/97

1. Yehudit Karsik
2. Miriam Itzkovitz
3. Emma Marriot
4. Aharon Hoter-Yishai
v.
1. State of Israel, Israel Lands Authority
2. Municipality of Hadera
3. Local Planning and Construction Committee near the Municipality of Hadera
4. Committee for Housing and Industry, Haifa Region

HCJ 2390/96

1. Michael Samuel
2. Vardina Simon
v.
1. Minister of Finance
2. Israel Lands Authority
3. Ministry of Building and Housing
4. Committee for Housing and Industry, Haifa Region

HCJ 360/97

1. Shaul Rothman
2. Malka Arel
3. Pnina Goren
v.
1. Minister of Finance
2. Ministry of Building and Housing
3. Committee for Housing and Industry, Haifa Region

HCJ 1947/97

The Supreme Court sitting as the High Court of Justice
[13 February 2001]
Before President A. Barak, Vice President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, I. Zamir, T. Strasberg-Cohen, D. Dorner, D. Beinisch

Answer to *Order nisi*. It was decided that the parties would argue as to the matter of the applicability of the law for the future or retroactively and whether it is appropriate to apply it to the expropriations which are the subject of the petitions.

Facts: In the late 1950's the army needed training area and for this purpose the authorities worked to expropriate a range of about 137 *dunam* of land in the region of Hadera in accordance with the Lands Ordinance (Purchase for Public Purposes) 1943. After a number of years – on 24 March 1966 – and according to his authority in section 19 of the Expropriations Ordinance, the Minister of Finance published a notice as to the granting of the land to the State and the land was registered in the land registration books in the name of the State.

The petitioners before us – in the three petitions that were heard as one are the heirs of the land owners of land in the area of the expropriation prior to the expropriations. The same owners acquired the lands that they purchased in the mid 1940's. From the time of the expropriation and until the date of the petition the petitioners and their successors refused to accept compensation from the State in exchange for the lands that were expropriated from them

The expropriated land has served its designation as to the expropriation for about three decades, from when the land was expropriated until 1996.

In a meeting from August 31, 1993, finding that there was demand in the area for residential construction, the government decided to clear out of army from the area. For this purpose an agreement was signed between the army and the Israel Lands Authority to clear this land and (additional land).

The appellants claim that once the public need for which the land was expropriated has ended it is incumbent upon the State to return the property to its owners, contact those from whom the asset was taken, him and their heirs. The property right of the owners obligates the expropriating authority to limit the harm to the property of the individual only for the public purpose for which the land was expropriated. Once that public purpose is accomplished, the property is to be returned to its original owners. In our matter: the land was expropriated for use for army training; now, when that public purpose no longer exists, the land is to be returned. As for the new designation of the land for residential building the petitioners have two arguments: one that this purpose is not a public purpose at all and second, even if residential building is a public purpose, there is nothing to prevent the petitioners from accomplishing it and themselves implementing the construction project. The petitioners therefore sought for the State to return the land to their possession, or at the very least, to compensate them at the present value of the land and not at its value when it was expropriated.

The State responded to the arguments of the petitioners, by arguing that all that has occurred was the replacement of one public purpose with another public purpose and the land did not need to be returned to its original owners. The State also made the claim that the petition should be delayed due to delay in its filing.

Held: The judges while varying in their approaches which led to the result were in agreement that if the public purpose which served as the basis for expropriation of lands according to the Lands Ordinance (Purchase for Public Purposes), 1943, ceased to exist, as a rule, the expropriation is to be cancelled, and the owner of the expropriated lands is entitled to the return of the lands subject to exceptions and rules that are to be formulated. Some of the differences between the judges revolved around the role of the Basic Law:

Human Dignity and Liberty in bringing about this legal rule. The judges also called on the legislator to regulate the matter of expropriation of lands against the background of what has been said in this judgment. Finally, the Court did not decide the question of the applicability of the new legal rule to the present matter, but decided to take a break and ask the parties to argue before the Court as to the applicability of the new legal rule in the present petitions, leaving this to be decided after the parties' arguments are heard. The claim of delay was rejected.

Basic laws cited:

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

Legislation cited:

Lands Ordinance (Purchase for Public Purposes), 1943, ss. 2, 3, 5, 5(1), 5(2), 7, 19, 19(2), 22.

Planning and Construction Law 5725-1965, ss. 121-128, 188, 188(b), 188-196, 195, 195(2), 196(a), ch. 8.

Statute of Limitations Law

Orders of Government and Justice Ordinance 5707-1948.

Journalism Ordinance 1930

Emergency Powers (Detentions) Law 5739-1979, s. 2.

Law for Treatment of the Mentally Ill 5751-1991, s. 11.

Lands Law 5769-1969.

Emergency Powers (Detentions) Law 5739-1979

Regulations cited:

Defense Regulation, 1939.

Defense (Emergency) Regulations, 1945, r. 119.

Israeli Supreme Court cases cited:

[1] Mot 33/53 *Salomon v. Attorney General* IsrSC 7 1023.

[2] HCJ 30/55 *Committee to Protect Expropriated Nazereth Lands v. Minister of finance* IsrSC 9 1261.

[3] HCJ 307/82 *Lubianker v. Minister of Finance* IsrSC 37(2) 141.

[4] HCJ 67/79 *Shmuelson v. State of Israel* IsrSC 34(1) 281.

[5] HCJ 2739/95 *Mahol v. Minister of Finance* IsrSC 50(1) 309.

[6] HCJ 5091/91 *Nuseiba v. Minister of Finance* (unreported).

[7] HCJ 465/93 *Tridat S.A. Foreign Corporation v. Local Planning and Construction Committee, Herzeliyah* IsrSC 58(2) 622.

[8] HCJ 3956/92 *Makor Hanfakot v. Prime Minister* (unreported).

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

[10] HCJ 3028/94 *Mehadrin Ltd. v. Minister of Finance* IsrSC 51(3) 85.

[11] HCJ 5224/97 *Yachimovitz v. Authorized Authority for Defense Regulations* 1939, 1945 IsrSC 2 198.

[12] HCJ 70/53 *M'SH Company v. Bergman* IsrSC 7 590.

[13] HCJ 142/97 *Avivim in Parcel 3947 Ltd. v. Minister of Finance* IsrSC 24 (2) 397.

[14] HCJ 282/71 *Binyan v. Minister of Finance* IsrSC 25 (2) 466.

[15] HCJ 224/72 *Geulat Hakerech Ltd. v. Minister of Finance* IsrSC 26(2) 155.

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

[17] HCJ 3648/97 *Stemka v. Minister of Interior*, IsrSC 53(2)728.
[18] HCJ 174/88 *Amitai v. Local Planning and Construction Committee, the Center* IsrSC 42(4) 89.
[19] HCJ 262/62 *Peretz v. Local Council K'far Shmaryahu* IsrSC 17 2101.
[20] CrimMA 537/95 *Ganimat v. State of Israel* IsrSC 39(4) 197.
[21] CrimFH 2316/95 *Ganimat v. State of Israel* IsrSC 49(4) 589.
[22] HCJ 2722/92 *Elamrin v. Commander of IDF Forces in Gaza Strip* IsrSC 46(3) 393.
[23] HCJ 4772/91 *Hizran v. Commander of IDF Forces in Judea Samaria* IsrSC 46(2) 150.
[24] HCJ 2313/95 *Contact Linsen (Israel) Ltd. v. Minister of Health* IsrSC 50(4) 397.
[25] HCJ 4809/93 *Local Planning and Construction Committee, Jerusalem v. Kehati* IsrSC 58(2) 190.
[26] HCJ 6821/93 *Mizrahi Bank Ltd. v. Migdal Cooperative Village* IsrSC 49(4) 221.
[27] FHC 7325/95 *Yediot Ahronot v. Kraus* IsrSC 52(3) 1.
[28] HCJ 147/74 *Sapolinsky v. Minister of Finance* IsrSC 29(1) 421.
[29] HCJ 63/52 *Neiman v. Minister of Finance* IsrSC 6 680.
[30] HCJ 334/63 *Galinovitz v. Minister of Finance* IsrSC 48(2) 833.
[31] HCJ 73/53 *Kol Ha'am v. Minister of Interior* IsrSC7 781.
[32] HCJ 1188/92 *Local Planning and Construction Committee Jerusalem v. Bareli* IsrSC 49(1) 463.
[33] LCA 5222/93 *Lot 1992 Building Ltd. v. Parcel 168 in Lot 6181 Ltd.* (unreported).
[34] CA 148/52 *Kasprios v. Kasprios* IsrSC 8 1289.
[35] HCJ 40/80 *Kenig v. Cohen* IsrSC 36(3) 701.
[36] HCJ 953/87 *Poraz v. Tel Aviv-Jaffa Mayor* IsrSC 42(2) 309.
[37] HCJ 680/88 *Schnitzer v. Head Military Censor* IsrSC 42(4) 617.
[38] HCJ 2000/97 *Lindorn v. Karnit, Fund for Compensation of Victims of Road Accidents* IsrSC 55(1) 12.
[39] HCJ 3267/97 *Rubinstein v. Minister of Defense* IsrSC 52(5) 481.

Israeli District Court cases cited:

[40] CrimMot (TA) 1015/96 *State of Israel-Minister of Finance v. 'Paz' Oil Company Ltd.* (unreported).
[41] CrimMot (J-m) 51/94 *Arad v. State of Israel* (unreported).

American cases cited:

[42] *Higginson v. United States* 384 F. 2d 504 (1967).
[43] *Wood v. City of East Providence* 811 F. 2d 677 (1987).
[44] *Federal Farm Mortg. Corporation v. Smith* 89 P. 2d 838 (1939).
[45] *Isley v. Bogart* 338 F. 2d 33 (1964).
[46] *Crouch v. State* 218 N.Y.S. 173 (1926).
[47] *People v. Helinski* 634 N.Y.S. 2d 837 (1995).

German cases cited:

[48] *BVerfGE* 38, 175 (1974).

Canadian cases cited:

[49] *Pineridge Property Ltd. v. Board of School Trustees of School District No. 57* (1982) 40 B.C.L.R. 221.

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[50] I. Zamir, *Administrative Power* (vol. A, 5756, 1996).
[51] I.H. Klinghoffer, *Administrative Law* (5717, 1957).
[52] A. Kamar, *Laws of Land Expropriation* (5th edition, 5755, 1995).
[53] Y. Weisman, *Property Laws-General Part* (1993).
[54] A. Barak, *The Essence of a Note* (1973).
[55] Y. Weisman, *Property Laws-Ownership and Partnership* (1997)
[56] A. Barak, *Interpretation in Law*, Vol. 2, Statutory Construction (1993).

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[57] H. Dagan 'The Laws of Governmental Taking and Laws of Competition – Toward a New Property Discussion' *Annual Book of Law in Israel*-5756 (A. Rosen-Zvi editor, 1997) 673.
[58] A. Hacohen, ''Is the Public Thieves' On the Expropriation of Land Rights in Jewish Law' *Sha'arei Mishpat* A (5757-5758) 39.
[59] I.H. Klinghoffer, 'The Attachment of Expropriated Land to its Designation' Iyunei Mishpat B (5732-5733) 874.
[60] H. Dagan 'Distributive Considerations in the Laws of Governmental Taking of Lands' *Iyunei Mishpat* 21 (5758-1998) 491.
[61] Y.M. Edri 'On a Declarative Constitution and a Constitutive Constitution – the Status of the Constitutional Property Right in the Human Right Ranking' *Mishpatim* 28 (5757-1997) 461.
[62] A. Gross 'Property Right as a Constitutional Right and the Basic Law: Human Dignity and Liberty' *Iyunei Mishpat* 21 (1998) 404.
[63] A. Haviv-Segel 'Problems of Adaptation and the Question of Public Purpose in Land Expropriation' *Iyunei Mishpat* 21 (1998) 449.

Foreign books cited:

[64] D.P. Currie *The Constitution of the Federal Republic of Germany* (Chicago, 1994).
[65] H.D. Jarras, B. Pieroth *Grundgesetz f□r die Bundesrepublik Deutschland: Kommentar* (M□nchen, 3 Aufl., 1995).
[66] O.W. Holmes *The Common Law* (Boston, 1881).

Foreign articles cited:

[67] M.J. Radin 'Property and Personhood' 34 Stan. L. Rev. (1981-82) 957.
[68] F.I. Michelman 'Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law' 80 Harv. L. Rev. (1967) 1165.

Other:

[69] 27 Am. Jur. 2d (Rochester, 1996).

Jewish law sources cited:

[70] Mishlei 30, 19.
[71] Kings I, 21, 2-3.

For the appellants in HCJ 2390/96 – Zvi Har Nevo, Tal Har Nevo

For the appellants in HCJ 360/97 – Amnon Evron, Alon Samuel
For the appellants in HCJ 1947/97 – Aryeh Feigenbaum, Ya'acov Lasri

For the respondents in HCJ 2390/96, HCJ 360/97, HCJ 1947/97 – Osnat Mendel

JUDGMENT

Justice M. Cheshin

A given area of land is expropriated by the authority for a given public purpose. True to its word the authority makes use of that land for the purpose specified by the expropriation. Years pass and that public purpose passes on from this world, and the authority seeks to make use of the land for another purpose, a public purpose or a non-public purpose. Is the authority authorized to do what it seeks to do? Those are the parameters of the field which we will plough in this opinion.

Background to the Petition

2. In the late 1950's the army needed a training area – primarily for shooting ranges – and for this purpose the authorities acted to expropriate an area of about 137 *dunam* of land in the region of Hadera. The expropriation proceeding was properly conducted: as required by law, notices were published in the official register that all of the land in that area is needed by the Minister of Finance for public purposes and that the Minister of Finance intends to acquire immediate possession of it. See notices according to sections 5 and 7 of the Lands Ordinance (Purchase for Public Purposes) 1943 (hereinafter we will title this ordinance – 'the Ordinance' or 'the Expropriations Ordinance'), which were published in *Yalkut Pirsumim* 5719 (from 25 December, 1958) and *Yalkut Pirsumim* 5719 757 (from 27 February 1959). After a number of years – on 24 March 1966 – and according to his authority per section 19 of the Expropriations Ordinance, the Minister of Finance published a notice as to the transfer of the land to the State (*Yalkut Pirsumim* 5726 (1966) 1368). The land was registered in the land registration books in the name of the State.

3. The petitioners before us – in the three petitions that were heard as one – are the heirs of those who were owners – prior to the expropriations – of parcels of land in the area of the expropriation. These owners had acquired the lands that they purchased – each on his own – in the mid 1940's. The petitioners and the original owners refused to accept compensation from the State in exchange for the lands that were expropriated from them; this was so at the time of the expropriation and until this very day.

4. The expropriated land has served its purpose as per the expropriation; a training area for IDF soldiers. Indeed, reserves soldiers and regular service soldiers will well remember 'the sands of Olga' near Hadera (Olga, for the interested, was the wife of Joshua Henkin, who is well remembered, and out of respect for Henkin the area was named for her). This is how it was for about three decades, since the land was expropriated until 1996.

5. In its meeting on August 31, 1993, and finding that there was demand in the area for residential construction, the government decided to remove the army from the area. For this purpose an agreement was signed between the army and the Israel Lands Authority to clear the land (and additional land). In consideration for this the army was to receive about twelve million NIS to build alternate shooting ranges.

6. Several words about city zoning plans which apply to the land. In the early 1980's a plan was initiated according to which the majority of the land was designated for residential area A and an educational and sport complex (HD/450). This plan was filed but it did not come into effect. In accordance with HD/761 which was published to come into effect on 15 September 1985 (*Yalkut Pirsumim* 5745 3358), the area of the expropriations was designated for the building of a neighborhood of townhouses, and recreation and public areas. In 1989 an amendment to the previous plan was filed (plan HD/761A), but it was not approved. After the government decision of 1993 the Ministry of Construction and Housing prepared an alternative plan – its neighborhood plan – HD/VM 944 – according to which an area of about 160 *dunam*, including the petitioners' lands, was designated for multi-story building (592 residential units), for public structures, for a commercial area and for open public spaces. The petitioners in HCJ 360/97 (the Samuel family) filed an objection to the plan. The objection of the Samuel family was dismissed and the plan was approved by the Committee for Building for Residences and Industry on November 17, 1996. The approval of the plan was published in the *Reshumot* on 21 July 1997 (*Yalkut Pirsumim* 5757 4479).

7. The Ministry of Construction and Housing began work on preparing the land for infrastructure and roads, and then on 24 October 1997 the notice of the Chairperson of the Committee for Building for Construction and Industry in the Haifa region was published as to the cancellation of the approval of plan – HD/VM 944) (*Yalkut Pirsumim* 5758 96, from October 24 1997).

Differences of opinion between the parties

8. The petitioners claim and state: when the public need for which the land was expropriated ceases, it is incumbent upon the State to return the asset to its owners, i.e. the one from whom the asset was taken, him or his heirs. The property right of the owner – to the extent it was a property right – obligates the expropriating authority to limit the injury to the property of the individual only to the public purpose for which the land was expropriated. When that public purpose is accomplished, the property returns to its home, its original owners. In our matter: the land was expropriated for use for army training; now, when that public purpose no longer exists, the land is to be returned to its owners. As for the new designation of the land – residential building – the petitioners have two arguments: one, this purpose is not a public purpose at all and therefore the 'public' use of the land has ended. Alternatively, even if we were to say that residential building is a public purpose, there is nothing to prevent the petitioners from accomplishing it and themselves

implementing the construction project. There is no need that specifically the State perform the construction (construction which will be carried out, as is common, by private contractors). The petitioners summarize their arguments as follows: it is a duty placed on the State to return the land to our hands, or at the very least, to compensate us at the present value of the land and not at its value when it was expropriated.

9. The State rejects the arguments of the petitioners, and according to it what occurred was the substitution of one public purpose with another public purpose. The building of a neighborhood in that location is within the bounds of a public purpose, and the expropriating authority acquired the authority to substitute one public purpose for another. That is the law and that should be the law. Moreover, given the multiple owners of the property, the need to establish a residential neighborhood will not be achieved other than by way of implementation by a single entity and the administration by an authorized authority. This too demonstrates the 'public' aspect in continuation of the expropriation. The respondents further argue that the petitioners delayed making their claims; that this delay has caused the authorities significant expenses, and therefore their request is to be denied.

These argue so and these argue so, and it is these differences of opinion that we must settle.

A general scheme in expropriations law

10. There are two periods in the legal status of expropriated land; one, the period of the birth and two, the period of existence and cessation. The **first** period – the period of birth – is the period of the expropriation processes, and will include the preconditions of expropriation, the topic of discretion in expropriation, notices, and the like, rules and norms which revolve around the expropriation process itself. The **second** period – the period of the existence and cessation of the expropriation – revolves around the legal status of the land after it was expropriated: the use or lack of use – of the land for its designation; the legal status of the land upon the satisfaction of the public purpose for which the land was expropriated – whether this public purpose is replaced with another public purpose or whether there is no other new public purpose which comes to replace the original public purpose; and the question of the former owners' connection to the land.

11. Our interest, is primarily, in the second period, however, we cannot leap directly to this period – and understand what occurs in it – without saying a few words about the prior period. As the second period is nothing other than a continuation of the first period, and we will have difficulty understanding the events of the second period where they are tied – if only chronologically – to events of the prior period.

We will therefore open with several words about the first period, and we will then go to the second period which constitutes the essence of our matter.

Several words on the expropriation process

12. None dispute the need to grant the State authority to expropriate the land of an individual for the good and welfare of the general public.

This is so for paving roads, establishing parks, building public structures, and so forth for other public purposes; provided, of course – as a matter of principle – that due compensation is paid to the owners. This recognition lies at the foundation of the Expropriation Ordinance, according to which the Minister of Finance – meaning the State – has acquired authority to expropriate land for public purposes. And as per the provision of section 3 of the Expropriation Ordinance, where the Minister of Finance ascertains that it is necessary or expedient for any public purpose he is authorized to acquire (*inter alia*) ownership, possession and right of use in any land. Section 5(1) of the Ordinance, establishes that the Minister of Finance will publish in the *Reshumot* a notice of his intent to purchase land for public purposes, and the provision of section 5(2) further adds and instructs us that publication in the *Reshumot* as said '... is seen as determinative proof that that the Minister of Finance certified that the purpose, for which the land is about to be purchased is a public purpose.' What is a 'public purpose'? Section 2 of the Expropriation Ordinance instructs us that a public purpose is 'any purpose that the Minister of Finance certified as a public purpose.'

13. As phrased in the Expropriation Ordinance, these powers that the Minister of Finance has acquired – powers which originally were granted to the High Commissioner himself – are far reaching powers. And indeed in the early years of the State the Court interpreted the powers of the Minister of Finance very broadly:

> The matter of expropriation of land for a public purpose is subject to the unlimited discretion of the Minister of Finance as the executive branch, and as long as he is acting in good faith, when he uses his discretion to implement his policy, he is under the oversight and review of the Knesset and not the review of the Courts. (Mot 33/53 *Salomon v. Attorney General* (*Salomon* legal rule [1], at p. 1028.)

'The unlimited discretion of the Minister of Finance' – so determined the Court. The Court in our day would not even consider expressing itself in a similar manner. See further I. Zamir 'Administrative Power' (vol. A) [50], at pp. 106-107, 197-198. In the same vein the court said in that case (**ibid** [1], at p. 1027) that 'there is no doubt, that according to the text of section 3 the discretion of the Minister is absolute'. See further HCJ 30/55 *Committee to Protect Expropriated Nazereth Lands v. Minister of finance* [2] at p. 1264. The courts at that time further determined that as to publication in the *Reshumot* according to section 5 of the Expropriation Ordinance, the Minister of finance is not required to specify the purpose for which the land was expropriated.

14. This was so years ago, in the early years of the State. Over the course of the years the legal rule changed gradually, and always in one direction: to narrow the discretion of the Minister of Finance and to make it more arduous for him in the processes leading up to expropriation. The right of the individual to his property is dear to the Court, has risen in importance and as the recognition increased that the individual's property is to be protected from the authority, so the Minister's power

has decreased in the act of expropriation. Thus, for example, in HCJ 307/82 *Lubianker v. Minister of Finance* (the *Lubianker* case [3]) the Acting President determined that the interpretation that was given to the *Salomon* legal rule [1] '... was occasionally too far-reaching' (**ibid**, [3]), at p. 147), and later:

> The legislator indeed placed in the hands of the Minister of Finance the authority to determine that a certain purpose constitutes a public need, and that publication of a notice according to section 5(1) is decisive evidence of this... However, it does not necessarily follow from this, that the Court will not examine, in its way, whether the considerations of the Minister, including the provision of certification as to the existence of public necessity, are not marred by a defect that goes to the root of the matter, such as lack of good faith or arbitrariness (**ibid**).

So too the Court further added and established in the *Lubianker* case [3] – contrary to the case law that existed until that time – that the Minister of Finance is duty-bound to specify in the notice published in the *Reshumot* the purpose for which the land was expropriated: 'in order to prevent arbitrary use of the broad powers, that were granted by the Ordinance' '[and] in order to allow effective oversight of the manner and substance of implementation of the discretion, it is proper that the purpose of the expropriation be known' (**ibid** at p. 148). See further: HCJ 67/79 *Shmuelson v. State of Israel* (the *Shmuelson* case [4]); HCJ 2739/95 *Mahol v. Minister of Finance* (*Mahol* case [5]) at pp. 327-328; HCJ 5091 *Nuseiba v. Minister of Finance* (HCJ *Nuseiba* [6]) (and in paragraph 4 of the opinion of Justice Mazza); HCJ 465/93 *Tridat S.S. Foreign Corp. V. Local Planning and Construction Committee, Herzeliyah* (*Tridat* case [7]), at p. 633. In the same vein it was established that there would not be a lawful expropriation unless these three conditions were met:

> The existence of a specific and defined public necessity; a connection between the specific public necessity and specific lands designated for expropriation; and the existence of a need to expropriate land in order to realize the public necessity (from the words of Justice Mazza in HCJ *Nuseiba* [6], in paragraph 3 of the opinion, in reliance on the words of the Acting President Shamgar in the *Lubianker* case [3], at pp. 146-147).

15. According to the legal rule that was established, it is not sufficient to have a public purpose to expropriate some specific land; it is the duty of the authority also show that the specific lands 'are intended and suited to serve a certain purpose' (the *Tridat* case [7] at p. 633). This is required to prove the link between the land and the public purpose and the need to prove that only expropriation would lead the authority to its purpose, meaning: it was not possible to achieve the result via a means causing lesser harm; HCJ 3956/92 *Makor Hanfakot v. Prime Minister* (*Makor Hanfakot* case [8] (in paragraph 6 of the opinion of Justice Or). In one word: the expropriation must meet the test of proportionality. See

HCJFH 4466/94 *Nuseiba v. Minister of Finance* (HCJFH *Nuseiba* [9]), at p. 88 (in the words of Justice Dorner); HCJ 3028/94 *Mehadrin Ltd. v. Minister of Finance* [10], at p. 107, in the words of Justice Goldberg. See further and compare H. Dagan 'The Laws of Governmental Taking and Laws of Competition – Toward a New Property Discussion' [57] at pp. 684-685. For a similar approach in Jewish law, see A. Hacohen, ''Is the Public Thieves' On the Expropriation of Land Rights in Jewish Law' [58] at pp. 44-45, 54. This complex legal rule, a legal rule whose subject is the application of the test of proportionality to an expropriation action and extra diligence in application of the test – we will keep in mind for the later part of our discussion. We are now speaking of the first period of the expropriation system – the period of birth – and when we arrive at the matter itself – at the examination of the second period – we will seek to draw an analogy from the first period as to the period that follows it.

Thus far – essential elements in an expropriation action.

Land after its expropriation – an act that severs the connection and an act that preserves the connection

16. All the required prerequisites have been fulfilled according to the Expropriation Ordinance, and the Minister of Finance has ordered the expropriation of a certain land for a certain purpose. What happens to the land after its expropriation? Is the Minister of Finance able and permitted to give the land to the highest bidder the day after the expropriation? Is he permitted and authorized to change the purpose for which the land was expropriated to another purpose? For any other purpose – whether it is a public purpose or not? Does the State acquire ownership in the expropriated land as though it were a person who inherits land from his parents? Does the State acquire free and clear ownership of the land without any ties to the former owners?

17. In principle – and as per the jurisprudence of administrative law – it is possible to characterize the status of expropriated land according to one of two models: the one model is the model of the ongoing connection and the other model is the model of the severing of the connection.

The ongoing connection model holds that the past owner holds on to a legal connection – of some degree or other – to the land that was expropriated from his ownership; and that the act of expropriation does not disconnect the owner entirely from that land. This is so as regards the past owners. Regarding the expropriating authority, the meaning of that legal connection is – in principle – that the authority has a continuing obligation to justify the act of expropriation. An analogy for this could be found in the act of seizing of assets according to the Defense Regulations of 1939. In one case the authorized authority decided to take possession of a certain apartment, and when the petitioner challenged the decision the respondent responded that the 'the condemnation order had already been carried out', and that it is the rule that the Court does not interfere 'after the fact'. As to this claim Justice Silberg said the following:

> Condemning assets according to regulation 48, is not a one

> time act, but an ongoing action, which draws its right of existence from the continuing will of the condemning authority (HCJ 5224/97 *Yachimovitz v. Authorized Authority for Defense Regulations* 1939, 1945 [11] at p. 200).

According to the law in effect at that time, it was possible to decide as to seized land only for a specific purpose such as public safety, defense of the State, the efficient operation of the war or provision of essential supplies and services for the public. And this connection between the seizure order and the purpose that the order was meant to achieve has led to the conclusion that the continuation of the seizure 'requires the continuation of the purposes for which it was carried out.' I.H. Klinghoffer, *Administrative Law* [51] at p. 108. See also HCJ 70/53 *M'SH Company v. Bergman* [12] at p. 593, in the words of Justice S. Z. Cheshin).

As an antonym to the model of the ongoing connection is the connection-severing model, and as its name implies: when the act is performed properly and without birth defect – it is as though a new life begins that has only a historical connection between it and the life before that action. According to this model, expropriating the land from its owner severs all connection between the former owner and the land, and from the moment of expropriation the two are strangers to one another. Indeed it is possible to challenge the act of expropriation if it had a defect or flaw when it occurred; but not if the act was done lawfully and within the framework of authority; in this case the act is done; the owners will be separated from the land and the two will each go their separate ways.

18. This distinction between the ongoing connection model and the connection-severing model – is a **normative** distinction; a normative distinction as opposed to a **factual** distinction, a description, of a set of circumstances. This normative determination is founded on considerations of legal policy. The law itself may not guide us explicitly one way or another, but the court will be of the view – in **construction** of the law – that it is proper to classify a specific action as action maintaining the connection or action severing the connection. It goes without saying that this classification is made, in order to apply to the given action a set of norms that the Court is of the view should apply to it.

The action of expropriating land – is it a connection-severing action or is it a connection-maintaining action?

19. How should we classify an act of land expropriation? Is it a connection-severing action or is it a connection-maintaining action? The law's naked provisions do not guide us explicitly one way or another. Ostensibly one could argue that expropriation is a connection-severing action, meaning: after the expropriation the original owner loses all connection to the expropriated asset – forever. At the same time one could make the counter argument that expropriation is made up of both a connection-severing action and a connection-maintaining action. And so, in relation to the expropriating action itself, a set of norms will apply which is suited to a connection-severing action. At the same time the

institution of expropriation, the complex of expropriation, the relationship of the former owner to the land that was expropriated – like the seizing of assets in the example we brought above – is a connection-maintaining action. It follows that, even after the expropriation act the original owner continues to maintain a connection to the land – to one degree or another – parallel to the duty of the authority to continue to use the expropriated asset according to its designation at the time of the expropriation.

How will we determine the law? Our determination will be derived – as is the practice for us – from the foundational principles which guide the legal system, the same principles which make up a part of the genetic compass of the entire legal system, principles which may not be written in a book but guide us on our path, they are the same 'pupils' which live in our bodies and teach us what we will do and what we will not do.

20. In the distant past – and in the not so distant past – the governing doctrine classified the institution of expropriation as a connection-severing action, an act that was completed – at the very latest upon the registration of the expropriated land in the State's name. Upon the transfer of the ownership in the property from the owner to the State the expropriation was completed, and thereafter the connection between the original owners and the land was severed forever. Indeed, the owner could and was permitted to attack the act of expropriation itself, but once it was found that there was no defect in the act of expropriation itself, the owner would be separated from his land. The analogy to the matter was to an out-an-out sale, which after the completion of which the seller loses all connection to the land. Indeed, for certain purposes – such as calculation of compensation – expropriation was compared (and is still compared) to a compulsory purchase, but in the past the doctrine extended this analogy to the connection – or should we say: to the lack of connection – of the former owner to the asset after the expropriation. The law relied, *inter alia*, on the provision of section 19 of the Expropriation Ordinance, that after the publication of the notice in the *Reshumot* on behalf of the Minister of Finance that a certain land is transferred to him '... the land will be granted to the Minister of Finance... free of any encumbrance, and the administrator of the Registration and Land Arrangement Division will bring about the proper registration in the property books'. (Section 19(2) of the Ordinance). Thus, for example, Justice H. Cohn said in HCJ 142/97 *Avivim in Parcel 3947 Ltd. v. Minister of Finance* (the *Avivim* case [13]), at p. 414:

> Not only is it that the public purpose for which the expropriation was made does not need to be revealed at all to the owners of the expropriated assets, but it also does not obligate the authority at all: it may use the expropriated land for that same public purpose, it may use it for other needs, or it may not use it at all – and the property owner has no standing before the expropriating authority nor any cause of action against it for any use or other, or for lack of use, of the expropriated asset in the period after the expropriation.

And Justice I. Cohn said (**ibid** p. 408):

> Not only is the special purpose for which the land will be used not specified in any law, but it also does not need to be disclosed in the notice of the Minister of Finance according to section 5 of the Ordinance. This fact also has practical ramifications. As my distinguished colleague Justice Berinson pointed out at the time of the hearing of the arguments, it is not at all necessary that the lands that were expropriated serve specifically that purpose intended by the Minister of Finance at the time of the expropriation, but the purpose can change from one public purpose to another public purpose and it is even possible, that the land that was expropriated for public necessities will not serve those necessities at all.

21. According to this legal rule, with the completion of the act of expropriation the right of the owner of the asset dissolves, and the authority is permitted and free to do with the asset as it pleases, as in the case of an owner who inherited the land from his elders. The public purpose for which the land was expropriated was satisfied with the act of expropriation; the life span of that purpose equals the lifespan of the act of expropriation. When the act of expropriation was completed the authority takes over the land of the owner, while the former owner is not left with any remnant in that land. This legal rule was reiterated in HCJ 282/71 *Binyan v. Minister of Finance* (the *Morris Binyan* Case [14]), in which land was expropriated for the use of the army (the Allenby Camp) and after some time had passed the State wished to offer the land to foreign residents 'in the framework of savings for building residential apartments.' The former owner Morris Binyan asked that after the abandonment of the public purpose that the land be returned to its ownership, but the Court decided it was not authorized to grant the request and assumed as a given that the act of expropriation severed all connection between the owner and the land that was expropriated. (Justice I. Cohen mentioned the provision of sections 195 and 196 of the Planning and Construction Law 4725-1965 (which deal with the continued connection of former owner to property that was expropriated, and which we will address later), and in discussing them he said (**ibid** at p. 469) that: '... it may be desirable to legislate similar provisions as to all lands that were expropriated for public purposes, but this matter is within the authority and discretion of the legislator.' All this, despite the fact that in the opinion of the judge 'in the case of the petitioner, the injustice seems to particularly cry out...' (**ibid**). Justice Landau agreed that an

> 'When a wrong that cries out was caused to the petitioner, as my distinguished colleague Justice I. Cohen noted, and the Court cannot provide salvation, it is a sign that the law and the use that was made of it in fact do not fulfill the requirements of justice.' (**ibid**, at p. 469).

Further in his opinion Justice Landau said (**ibid**, at p. 470):

> In the present case justice would demand that the State return to the petitioner and his brothers the land, once the security need for which the land was acquired has passed,

> and pay them usage fees for the years in which the land served for security purposes. . . If the land is required today by the State for another public purpose (and I do not know if the plan of sale to foreign investors is a public purpose), justice would require that the petitioner be compensated according to the value of the land today. However, this has no basis in the existing law, as the ownership in the land was transferred to the State in 1961, and what has already been acquired for public purposes is not to be acquired again.
>
> ... I am of the view that the Ordinance requires amendment in order to find more just legal solutions to cases such as this.

The Court ruled in the same vein in HCJ 224/72 *Geulat Hakerech Ltd. v. Minister of Finance* (the *Geulat Hakerech* case [15]) at p. 157. And again: the Court did not at all address the dichotomous classification of connection-severing actions and connection-maintaining actions. The underlying assumption of the judgment – an assumption that was regarded by all as self-evident – was this, the institution of expropriation circles around the act of expropriation, and a completed act of expropriation severs once and for all the connection between the owner and the land that was expropriated from him.

22. Therefore, the institution of expropriation – so declared the legal rule – is a connection-severing action. This legal rule was solid – a monolithic law – without exception or loophole in it. The courts indeed spoke up loudly in dissatisfaction, however, seeing themselves bound by the law's provisions – as per their construction of the law – did not deviate right or left from the legal rule. However, it appears that we would not do justice if we did not mention one voice which tried to cry out against the legal rule – not just with calls to the legislator to amend the law but in the construction of the existing law in favor of the owner of the expropriated land. This was the voice of Justice Landau in the *Avivim* case [13], in which he sounded in everyone's ears the rights of the owners after lawful expropriation (**ibid,** at p. 405):

> ... I am doubtful whether the Minister of Finance is permitted to expropriate for a given public purpose... and later make use of the land in fact for a[nother M.C.] purpose or, for example for the purpose of selling it in the market to make a profit. In such a case I would look for some sort of remedy, perhaps in Torts or in Unjust Enrichment laws, for the owner from whom the land was expropriated with 'false claims'.

See further the *Morris Binyan* case [14] at p. 468. However, here too Justice Landau is not suggesting we deviate from the traditional construction for expropriation, according to which the base assumption is that expropriation is an act severing connection between the original owners and the expropriated land.

23. The connection-severing action legal rule brought sharp criticism from the father of administrative law in Israel, Professor I.H.

Klinghoffer. This criticism was sounded in a comment to the *Geulat Hakerech* case [15], in an article entitled 'Attachment of Expropriation Land to its Designation' [59]. Professor Klinghoffer suggested recognizing the institution of 'public property', according to which land which was expropriated should be subject to a special regime, a regime which is different from land which was not expropriated. That regime would govern the expropriated land years after the expropriation obligate the authority to follow certain norms and at the same time grant the owners certain rights. This normative regime is a regime of connection-maintaining action, and with the act of expropriation there is no severing of the connection between the original owners and the land that was expropriated. Professor Klinghoffer quotes a statement from the decision in *Geulat Hakerech* case [15] that: 'the demand of the petitioner [the former owner of the expropriated land – M.C.] is in fact the demand that the State transfer to him part of the property that today is in its ownership.' And that 'it is not appropriate that we interfere and turn the orders of land property on its head', and therefore he says the following (**ibid** [59], at pp. 876-877):

> ... these words, more than reflecting an interpretation of statutory provisions, express an approach and a principle. The question is whether the approach and the principle are self-evident in the jurisprudence and laws of expropriations. In several states this is not the rationale and not the law. There, attachment of the expropriated land to its designation is not merely a formal matter where it is sufficient to simply declare it when the expropriation is decided upon, and which loses all importance after the transfer of ownership to the one who receives it by power of the expropriation. The opposite is true: the connection to the public necessity for which the expropriation was granted, accompanies the asset for a long time after the property is taken from its owners. If the asset is not used at all, or is not used in accordance with its designation, then the prior owner is entitled to demand its return...
>
> If permission is established in the law to demand return of land that was not utilized at all according to its designation, the legislator may also find it appropriate to determine that this permission will also be given as to land that was so utilized and then such utilization ceased.

Professor Klinghoffer explained the same idea fifteen years earlier in his book *supra* [51]. And he said as follows (**ibid** at p. 154):

> Creating public property, whether or not it involves transfer of ownership to the hands of the government, generally constitutes a serious if not severe intervention in property right that is not justifiable other than for the realization of certain purposes for the good of the public. Therefore it is incumbent upon the legislator to ensure that in every case of such interference by the government the property be limited in a significant legal limitation to a public purpose, and the

> administrative authorities and the courts that supervise the legality of their actions, must ensure that the intervention not be other than for the public purpose that the property is designated to serve by law.

24. This being so, Professor Klinghoffer suggested (although not in these words) replacing the doctrine with a better doctrine, meaning: instead of the classification of an act of expropriation as a connection-severing action, to classify it as a connection-maintaining action. And let us consider this: the idea of changing the doctrine is not sufficient to change the provisions of the Expropriation Ordinance or to interpret the statutory provisions as other than what they are. We are speaking of a foundational-doctrine which it is as though the Expropriation Ordinance has been built on. It is as though the Expropriation Ordinance is 'indifferent' to the doctrine and can be interpreted according to one doctrine or the other. The provisions of the Ordinance stay as they were, without any change – according to either one doctrine or the other – and there is no obstacle to maintaining one doctrine or another. Absent explicit provisions in the law – and there are no explicit provisions in the law – the preference of one doctrine over another is nothing more than the resolution of a conflict of values; the values are those which will determine, they and not any technical interpretation of this provision or another. These values – as we said elsewhere – are the body and soul of the Court when it sits to do justice and law. See LCA 6339/97 *Roker v. Salomon* [16] at p. 264.

25. It appears to us that Professor Klinghoffer was right in criticizing the legal rule, the legal rule which adopted for itself the doctrine of the connection-severing action. Not only is this doctrine not called for by the Ordinance, but it particularly calls for the doctrine of the connection-maintaining action. This latter doctrine is called for–as though on its own – from two principles: one, from the need to interpret in an integrated and harmonious manner the statutory provisions in expropriation – and primarily the continuity and continuousness which are required between the first period of the expropriation and the second period; second, and this is a consideration of the first degree: from the basic principles woven in each and every norm in the law (which also operate in the first period).

26. As for the continuity from the first period to the second period: in our words above (see paragraph 14) we discussed a bit about the first period in the life of the expropriation – the period which revolves around the act of expropriation itself – and identified several of its features. First of all, we saw that there is a burden placed on the Minister of Finance to explain and specify the notice which is published about his intention to expropriate specific land, and for which purpose he wishes to expropriate that land. Second, as opposed to the legal rule established in the first years of the State – according to which the act of expropriation was almost like a locked room that no one enters – the Court determined – explicitly – its authority to exercise 'effective' review of every act of expropriation. Third, the authority must prove that the following three factors exist in every expropriation action: the existence of a specific and

defined public purpose; the connection of the public purpose to the land to be expropriated; and the existence of a particular need for expropriation in order to realize the public purpose. In other words, the expropriation must meet the test of proportionality as to its three elements: the element of the rational connection of the means and the end; the element of the means with the least harm and the element of the utility-harm, an element which is also known to the public as the proportionality test in its narrow sense. (See the words of Justice Dorner in HCJFH *Nuseiba* [9] at p. 88; HCJ 3648/97 *Stemka v. Minister of Interior* [17], at pp. 776-777).

27. We will now turn to those characteristics required for expropriation to occur – we will turn to them and ask questions. The Minister of Finance bears the burden of explaining and specifying the purpose of expropriation and detailing it. Ostensibly and absent a contrary indication, one would think – and this is the reasonable interpretation of the Expropriation Ordinance – that the specifying of the purpose and its publication were intended not only for the day of the expropriation itself but for the continuation of the road; because the purpose of the expropriation was meant to accompany the land not only on the day of the expropriation itself but years after the act of expropriation. This interpretation of the Ordinance is more reasonable than the contrary interpretation according to which the purpose of the expropriation dissolves and disappears on the day of expropriation. Indeed, is it reasonable to assume that the burden to publish the fact that the expropriation is being done particularly for an explicit and specific purpose, that this burden exhausts itself on the day of the expropriation action? That the purpose of the expropriation is swallowed up and buried in the expropriation action with no remnants? That the purpose of the expropriation was as 'the way of the eagle in the sky, the way of the snake on the cliff, the way of the ship in middle of the ocean, and the way of man in woman' (*Mishlei* 30, 19 [a]? Meaning, that after the expropriation action the purpose disappears without leaving a trace? Will we accept that the day after expropriation the State can sell the land to the highest bidder as the purpose of the expropriation has become, supposedly, not relevant? Will we agree that after the expropriation the State can sit on its laurels for many years and not make use of the land for the purpose for which it was expropriated? The questions are questions and the answers within them.

28. As for the three conditions which must be met at the time of expropriation (the existence of a specific public purpose; the connection of the purpose to the land; the need specifically for expropriation), we can raise the same queries of them we have asked as to the conditions of publication. The Ordinance is silent and does not guide us as to the status of the expropriated land after the act of expropriation. However, we would find it difficult to accept that these three conditions – like a silk-weaver (a silk making-butterfly) – are meant to live only a day or two – during the days of the expropriation – and afterward their lives end. I could understand an argument that those conditions must exist in full force at the time of the expropriation, but later – in the second phase

– they will indeed continue to exist but to a lesser degree. But I will not be able to agree that these conditions will disappear as though with a magic wand after the expropriation action – literally from evening to morning – and that all the effort to satisfy the conditions was made for one day only, for the day of expropriation. At the conclusion of all the conclusions we need to remember, expropriation of land was intended not just for one day, but for many years, and according to the doctrine which was accepted in the past: forever; will we accept that all the intensity will be concentrated on that one and single day while all the years to come – until the end of time – will not be counted? My answer is in the absolute negative.

It also appears that the protection which property deserves – of property as property – necessitates this conclusion. Just as a property right does not live one day only but exists over days and years – and in the matter of land: forever–so we will claim as a derivative conclusion, that the limitations which apply to the **denial** of a property right by the sovereign be of an intensity equal to the property right; they will be of equal intensity and will follow like a shadow the expropriated property right after it was transferred to the authority.

If these words apply as to the fundamental conditions of expropriation and for the public publication of the expropriation, all the more so will they be said–and in a loud voice–as to the proportionality test, a test that the expropriation action must meet with dignity. In HCJFH *Nuseiba* [9] (**ibid**, at p. 88) Justice Dorner stated as to the proportionality test in connection with the expropriation of land:

> This principle – the proportionality – includes in our matter three elements: first, the land must correspond with the accomplishment of the defined public necessity in whose name it was expropriated. Second, property right are not to be harmed beyond the minimal degree necessary to achieve the public necessity. In other words, it is permitted to expropriate land only if the public necessity cannot be achieved without expropriation, such as by implementation by the owner of the property of the project for the sake of which expropriation of the land is sought. ... third, there must exist a proper relation between the utility that will be derived by the public from the land and the injury that will be caused to the citizen as a result of the expropriation.

We will now examine these proportionality requirements, one at a time, and we will know that a strange and foreign conclusion it will be if we limit that proportionality to the day of expropriation; such that on the eve of the day of expropriation the need for proportionality will disappear as though it never was.

29. Our conclusion as to our matter is that the characteristics of the first period in the expropriation – the expropriation action itself including that which is adjoined and attached to it – necessitate as though from themselves continuity to the second period. The required conditions for the expropriation action, by their very nature and essence, were not intended for a short-term life, for the day of the expropriation alone.

They were intended for a longer life: not only for the day of the expropriation but for the second period as well. Indeed, a bird's eye survey of the system – in a broad synoptic view – will teach us that the institution of expropriation – as a continuum of the two periods comprising it – is drawn more to the center of gravity of the connection-maintaining actions – much more – than the center of gravity of the connection-severing actions.

30. This is so as to the intrinsic characteristics of the expropriation, and it is certainly so when we give thought to the foundational principles in the law and the interests competing for supremacy: on the one side the needs of the state, the needs of the public, and on the other the interest of the individual in protection of his property. Needless to say – these are self-explanatory – the planting of property right in the Basic Law: Human Dignity and Liberty requires us to strengthen–and in a significant manner – the protection of the property of the individual. The Basic Law: Human Dignity and Liberty teaches us – in section 3 – that 'a person's property is not to be violated' and this determination in the basic law – including the limitations which are dictated by the basic law itself – proclaims to us in clear language what the value of property of the individual is. We view the property right of the individual through the prism of the Basic Law: Human Dignity and Liberty, and we know that the connection-maintaining doctrine – meaning a doctrine which in its entirety and its core was intended for none other than protection of the property of the individual – has been granted support of the highest order (in both senses). As to the importance of the Basic Law: Human Dignity and Liberty to our matter, our colleagues have discussed this in the *Nuseiba* case [6], [9], and *Mahol* [5] – our colleague Justice Dorner even made this basic law the foundation of her words – and we have only come to strengthen what they have said. See further, Zamir in his book *supra* [50] at pp. 200-201.

Moreover, in particular, because of the enormous power of the State in the expropriation action; in particular because of the limited protections given to the individual trying to protect his assets from an expropriation action; in particular because of these it is incumbent upon us to protect the property of the individual as much as possible. Indeed, at times expropriation is an unavoidable necessity – this is the good of the public – and to this we all agree. But, we will recognize the expropriation and support it as long as it does not infringe on the boundaries of the individual beyond the proper proportion. Take a case where a certain land was expropriated for the purpose of the establishment of a public park. After several years – following improvement in the city zoning plans, for example – the State seeks to sell the land to the highest bidder and to establish a park in another place. In such a case we would find it difficult to circumscribe this intent to sell within the framework of the good of the public, and we will not know any reason why the individual should not have the right to have the land returned to him, if only he requests it (of course, while obligating him to return to the authority the compensation that he received, subject to the accepted conditions of interest and indexation, indemnification for

improvement in the land, and possibly the payment of certain expenses that the State incurred). The same is true where the authority did not implement the expropriation for an excessive period of time. Compare the *Tridat* [7] and *Nuseiba* [6] [9] cases.

31. The conclusion: expropriation should properly be seen as a connection-maintaining action, and conditions which constituted necessary conditions for the expropriation action, by law should continue to exist – in principle–also in the second period. We have said in principle, and we are referring to these two qualifications: one, some of the conditions of an expropriation action (such as the duty of publication) by nature will not take hold in the second period, and others may undergo a mutation during that period, meaning: it is possible that certain changes will occur in the conditions and still the expropriation will remain in effect as at first; second, there is a basis for the version that we will not demand that the preconditions to the expropriation action exist in the period of the years after the expropriation in the same intensity that is required for the expropriation action itself. We will continue to discuss these topics later.

32. As a side matter we will add (and this is not directly related to our matter): the law that applies where the authority has exhausted the public purpose for which a certain land was expropriated will also apply in the case in which the authority has not carried out the expropriation action over an excessive amount of time. Indeed, an authority that has expropriated land for a specific purpose and for many years makes no use of the land for the purpose for which the land was expropriated, in its very omission reveals that it does not need the land that was expropriated: not at the time it was expropriated and not for the purpose for which it was expropriated. That public necessity for which the property was taken from the individual and transferred to the use of the general public has been proven to be insufficiently strong and thus does not justify compulsory taking of the land. If we have said that the proportionality test applies to the implementation of the expropriation, delay in implementation of the expropriation for an extended period raises doubts as to whether in fact the expropriation was a proportional means under the circumstances (as to this see the words of Justice Dorner in HCJFH *Nuseiba* [9] at p. 89). From here the accepted legal rule follows, that unreasonable delay by the authority in accomplishing the purpose of the expropriation grants the individual the right to demand the cancellation of the expropriation. See, for example, the *Tridat* case [7] and *Nuseiba* [6]. See further: HCJ 174/88 *Amitai v. Local Planning and Construction Committee, the Center* [18]; The *Shmuelson* case [4]; the *Mahol* case [5]. See at length A. Kamar, *Laws of Land Expropriation* [52] at pp. 178-188.

From doctrine to doctrine

33. The reasons we have brought for the characterization of the second period in expropriation have weighed down the legal rule that classified the expropriation action as a connection-severing action; they have weighed it down and caused it to be tossed to and fro. And note:

the written law has remained as it was. Nothing has changed in the Expropriation Ordinance itself. It is the doctrine which has begun to change, the same doctrine that runs through the veins of the Expropriation Ordinance and gives it life. Thus movement began from the connection-severing doctrine to the connection-maintaining doctrine. And so, with the beginning of the recognition of the existence of a connection even after the expropriation action, the proper balance has begun to stabilize between the property right of the individual and the interest of the general public – not only for the day of expropriation but for the days to come after the day of expropriation.

34. The recognition that it is proper that the accepted doctrine, the doctrine of the connection-severing action – will be invalidated and that another doctrine will come in its place – this being the connection-maintaining doctrine – has been seeping through the case law for some time: beginning with the comments of Justice Landau in the *Avivim* case [13] and *Morris Binyan* [14]; continuing with the comments of Professor Klinghoffer; going through the legal rules established by the Acting President Shamgar in the *Lubianker* case [3] and up to the *Nuseiba* case in both its incarnations [6], [9]). The pressure has steadily increased, and increased until the accepted doctrine has begun to lose its balance and stability.

A harsh blow to the connection-severing rule was dealt in the *Mahol* case [5], and in the same process the connection-maintaining doctrine – free and clear – began to rise up before us. In that case, land was expropriated for development and building of tenements, public and welfare structures for residents of the area and those moved out of the old city of Acre. The authorities did not realize the expropriation purpose. After about 16 years following the publication of the notice according to section 5 of the Expropriation Ordinance and about 6 years after granting the land to the State (as per section 19 of the Ordinance), it was decided to change the purpose of the expropriation. Following a wave of immigration of the early 90's a severe housing crisis developed, and therefore it was planned to establish a neighborhood for new immigrants in that location instead of the original plan for the expropriation. The petitioners, the original owners of the land, objected to this change in the purpose of the expropriation. The judges were split in their views as to the question whether a change in designation and the leap from one purpose to another is sufficient to uproot the expropriation (and we will discuss this further down the road), however, all agreed that the owners of the land that was expropriated continue to maintain a connection to the land, and that in principle the right of the authority in the expropriated land is entirely bound up and dependent on the continued use of the land for a public purpose. Justice Goldberg discussed this (at pp. 321-322).

> ... the expropriation was not intended to enrich the State. There is an unseverable link between the expropriation of the land and the public necessity, to the point where one could say that from a conceptual standpoint the property right acquired by the State in the land that was expropriated

> from an individual – even if the expropriation processes were completed – is a conditional right, and the condition is the indispensability of the land for realizing the public necessity. Once the public necessity has passed, or another ground has arisen to cancel the expropriation, the land is to be returned to its owner, if he so desires. Returning the land in these circumstances is what restores the 'property rules in land', as otherwise the expropriation turns from a **tool** for achieving social ends to an independent **purpose** which stands on its own.

And later (at p. 322):

> ... the link of the land owner to the land that was expropriated does not melt away after transferring the land to the State and it could even be said that this link exists even after he received compensation for the expropriation, as the expropriation is understood to include not only economic harm but also harm to the emotional aspect which makes up property right. Hence, even after completion of the expropriation processes the Minister of Finance still must act within the range of reasonableness in making use of the land, and is not permitted to make use of the land as though it was not purchased by way of expropriation.

And Justice Mazza stated (at p. 328):

> Once we have found that even from the beginning the authority does not enjoy a presumption that it will use the expropriated land for the purpose of a public necessity that is sufficient to justify expropriation, but that it is to be made to explain in advance the purpose of the expropriation, it is difficult to perceive that the authority will be exempt from this after the expropriation, if and when it discovers that the public necessity for which the land was expropriated has ceased to exist...

See further the words of Justice Dorner in HCJFH *Nuseiba* [9], at pp. 87-88 and the words of Justice Mazza in HCJ *Nuseiba* [6] in paragraph 5 of his opinion.

35. We will summarize by saying that in the expropriations sector we find ourselves today at the height of the transition from doctrine to doctrine: from the doctrine of the connection-severing action to the doctrine of the connection-maintaining activity; from a doctrine which instructs that in the act of expropriation the owners are forever severed from their property to a doctrine that instructs that the owners of land that was expropriated continue to maintain a connection to the land even after its expropriation, a doctrine which subjects the expropriated land to a regime of 'public property'. The meaning of this is that according to the doctrine which is hatching before our eyes, the expropriating authority is not entitled nor authorized to do with the expropriated land anything it wishes – as if it were the private owner – and it is subject to the regime of specific public uses of the land. Indeed, the attachment of

the expropriated land to a public designation may be necessitated by the property right of the individual, and the right of the individual should properly remain for him – in principle – and the land will return to his possession once its public use has concluded. With the passing of the public purpose the legitimacy of continued possession of the property and ownership by the authority also passes. The time has come to establish and erect the new doctrine in its place and we are declaring this today. We are aware of course, of the mini-revolution we are effecting in expropriation law and the fact that we are recognizing a doctrine which somewhat changes the concept of property in lands. However, this bite that the doctrine is meant to take out of property ownership, limits itself, by definition – and subject to other doctrines in law – primarily to the relationship between the State (or other public authorities) and the individual, and to the law of expropriation alone. However, we are of the view that it is proper that we recognize the connection-doctrine. The time has come for this.

36. We will be precise in our words and say: all that we are saying now is that expropriation – in and of itself – does not sever the connection of the owner from land that was expropriated from his ownership. In the second phase of expropriation – which is the phase after the lawfully executed act of expropriation – the original owner of the land maintains a 'connection' to the land that was expropriated, and at the same time the expropriating authority is obligated to make use of the expropriated land for a public purpose. It goes without saying – it is self-evident – that the 'connection' of the owner to the land and duties imposed on the expropriating authority are none other than two sides of the same coin. All that we have said is in the realm of doctrine only, meaning: the normative classification of expropriation is of connection-maintaining activity. As to the **content** of that 'connection' and the **scope** of those 'duties', we have not yet said a word.

37. And indeed, what is the meaning of that 'connection' and what is the scope of those 'duties'? Under what circumstances can the former-owner take legal action to receive what is due to him? When will we say that the expropriating authority has deviated from the framework of the mandate that was given to it to continue holding the expropriated land, and under which circumstances will a duty be imposed on the authority to return the land to its owners? What is the connection between the duty of the expropriating authority to return land to its former owner and its duty to pay him compensation? We must address these questions, these, and others like them, in an organized fashion, one at a time, and not in one package. We can say this, we are dealing with the second phase – the phase after the lawful expropriation – and where the authority does not make use of the expropriated land for the same designation that was declared upon expropriation. That is the common denominator of all the types of cases at hand, however, at that point the roads diverge, as one type of case is not like the other type of case. Thus, for example, a case where the authority makes use of the expropriated land for a different public purpose than the one for which the expropriation was intended is not similar to the case in which the designation of the expropriation was

exhausted and the land stands barren or the authority wishes to sell it to a third party; and both these cases are different from other cases in which the authority does not realize the designation of the expropriated land and years pass with no action. Each of these types of cases must be addressed separately, and the considerations which apply to one type of case will not necessarily apply to another type of case. Thus, for example, the Court in the past has addressed the question as to what the law is for land that was expropriated but the authority has not realized the designation of the land at all; see the *Nuseiba* case [6], [9]; see further the *Tridat* case [7]. However rules established for this matter will not necessarily apply as to the conversion of one public purpose to another public purpose.

38. In brief: for now we have only established a framework for the normative structure that will apply in the second phase to land that was expropriated – and now it is incumbent upon us to fill this framework with substantive content. The question is: what criteria will guide us in establishing the content of the normative structure which will apply to land that was expropriated in the phase after expropriation. We will now address this question and related questions.

A comment on methodology

39. This opinion has revolved around the question of the legal status of land that was expropriated from its owners. This question can be examined from the perspective of two interested parties: the view of the former owner and the view of the expropriating authority. On the part of the former owner we will ask whether he continues to have any legal connection to the land after it was expropriated. On the part of the expropriating authority we will ask if the authority is entitled to treat the expropriated land as if it were its own – as though it purchased the land from its owners – or whether any limitations apply to its right to make use of the land. It is possible, therefore, to look at the issue of the status of the land that was expropriated from the perspective of two interested parties, and it is unnecessary to say that this is a single issue, whether we examine it from the left or from the right; so too there is a single solution. The way to the solution points, at its essence, to no more than a methodology for working out the issue.

In our opinion we chose to examine the issue from the perspective of the former owner, and for the following reasons (in increasing order of weight): one, this is how the question was examined in the past, and we have not found it proper to deviate from the path that was paved. Second, the departure point for the interpretive journey is the expropriation action: John Doe is the owner of the asset, and now the State comes and expropriates that asset from his possession. In analyzing the system from the perspective of John Doe – the owner – we view and consider the expropriation process and the land's trek from hand to hand, and as something self-understood we ask what remains in the hands of the owner – if anything is left in his hands – after the expropriation action. Third, examining the issue from the position of the former owner emphasizes especially the property right of the individual

and the violent entry of the State into the individual's realm – indeed, permitted entry, but still a violent entry. It appears that it is proper to do so, particularly after the passage of the Basic Law: Human Dignity and Liberty, a basic law which elevated property right and placed them at the heights of basic rights.

As said, we will reach the very same solution whether we approach from the East or from the West. And here, when we reach the solution, we will find – and not surprisingly – that it resides at the intersection of two paths: the path of constitutional law and the path of administrative law. Constitutional law applies itself directly to the issue of expropriation, and after all we are speaking of violation of a constitutional right, the denial of property right. At the same time the expropriation process, and afterwards the legal status of the expropriated land, generally are matters to be handled by administrative law. A right – any right – that a public authority holds, it holds for the good of the public, which makes the right subject to the regime of public law. We have known this since HCJ 262/62 *Peretz v. Local Council K'far Shmaryahu* [19], and nothing has changed. However, land that was expropriated from its owners – is 'public property' of a special type, and a special set of norms applies to this public property, among other things as to its permitted uses.

40. And in continuation of what we have said. After having written what I wrote, I read the opinion of my colleague Justice Zamir. My colleague states, that in speaking of the connection-maintaining doctrine I have used language 'anchored in civil law', and as to this he comments and says as follows: 'But we find ourselves in public law. Therefore I am of the view that it is preferable to say, in the language of public law, that the expropriation power is bound to the purpose of the expropriation throughout the entire period of expropriation.' (In paragraph 7 of the opinion). I read these words and continue to hold my position.

First of all, I would have difficulty describing the right of the owner as a right that is 'anchored in civil law' only, in the language of my colleague; is the instruction of the Basic Law: Human Dignity and Liberty – in section 3 that 'a person's property is not to be infringed upon', an instruction from civil law? I am of the view that the answer to this question is in the negative. Indeed, the basic law cut to the heart of property right; raised it to the heights of constitutional law, and so dislodged it from the exclusive realm of the civil law. Property right can be described – since the Basic Law: Human Dignity and Liberty – as a right under civil law and also as a right under constitutional law.

Second, in my words I specifically related to the intersection of two paths: the crossing of the path of constitutional law with the path of administrative law, and it appears to me that this is a precise description.

Third, unlike myself, who analyzed the issue from the point of view of the former owner – and consequent to this I talked about the maintenance of the connection of the owner to the land that was expropriated from his possession – my colleague describes the expropriation power as a 'purpose appended' power, meaning: 'the purpose of the power must exist not only at the time the power is

exercised, but also after the exercise of the power' (in paragraph 6 of his opinion). As to this matter my colleague further mentions (among other things) the *Yachimovitz* case [11] which I also related to. My colleague finds the basis for this doctrine of a purpose appended power – as opposed to the prior doctrine in case law – in the Basic Law: Human Dignity and Liberty, and he tells us: 'The change in the interpretation of the expropriation power, which recognized this power as a purpose appended power, occurred in the wake of the Basic Law: Human Dignity and Liberty.' Thus, in my colleague's view we find the basic law divides us, and yet also this is the statute that guides us. And I stand up and ask: if the property provision in the basic law is itself what changes the law, then do we not learn from here that the defense of property – as per the provision of the basic law – is the fundamental element? That the power of the authority – for purpose appended expropriation – will come as a **result** of property right and will be limited **consequent to** property right (rights from the civil law or the constitutional law)? That the limited power of the authority to expropriate lands – given that it is purpose appended – is none other than **derivative** of property right? That property right is the fundamental element and that we interpret the Expropriation Ordinance as limiting the expropriation power as required by property right? My opinion can be learned from the questions I have asked. However, as I said above (in paragraph 39) we stand at the intersection of constitutional law and administrative law – we will add to the intersection the path of civil law – and we can view the system from each of these paths while we capture with our gaze the other two paths as well.

Another comment on methodology

41. It is proper that we be precise in describing the influence that the Basic Law: Human Dignity and Liberty has had on the scope of the expropriation power. The Expropriation Ordinance preceded the basic law and as per the provision of section 10 of the Basic Law, that law does not 'affect the validity of a law that existed on the eve of the start of the basic law.' This statutory provision was the subject of differences of opinion, and my opinion has been – and has not changed – that the power of the basic law exists in the realm of construction but it cannot create something from nothing as to the statutes that preceded it. See for example CrimMA 537/95 *Ganimat v. State of Israel* (CrimMA *Ganimat* [20]); CrimFH 2316/95 *Ganimat v. State of Israel* (CrimFH *Ganimat* [21]). I spoke of this in CrimMA *Ganimat* [20] (at pp. 397-398):

> And our words are such that by either approach the result is the same: either the prior law is open to several interpretations – if you will: to different 'balances' – or it is not open to several interpretations. If it is open to several interpretations, the Court may and is permitted to change its course – just as it may have done so in the past – but it will do so in reliance on the prior law and its original scope, giving thought, as in the past, to basic rights. In doing so the Court will operate within the bounds of its authority, **while taking upon itself responsibility for its action**

> **without trying to rely on an interpretation that is, as it were, forced upon it by the basic law**.

I have added to this and said in [21] (at p. 643):

> We will add the obvious, that it is proper that the basic law grant us **interpretive inspiration**. The legislator has planted a rose bed in the garden of the law, and we smell its scent. We will interpret past statutes and the scent of the basic law will descend upon us. However, we will always move in the circles that were established in previous law.

Thus also in our matter, as the Expropriation Ordinance is open to several interpretations at its core, as Professor Klinghoffer has taught us. The seed of the doctrine of the owner's connection was embedded – even if dormant – in the ground of the Ordinance from its inception. All we are doing now is watering the ground above it and around it. And as is the way of interpretation – in its broad sense – the doctrine that was dormant all these years rises and grows before our very eyes and now comes to life.

42. As I have learned, the opinion of my colleague Justice Zamir is that after the establishment of the State 'it was possible and appropriate' that the Court interpret the Ordinance by way of limiting the power of the authority to infringe upon property right. In other words, the Expropriation Ordinance could have been – properly – interpreted in our current manner even before the Basic Law. I agree with the words of my colleague. Indeed, the interpretation of statutes that were conceived and born during the Mandate period is not the same at their inception as their interpretation after the establishment of the State. I discussed this question in HCJ 2722/92 *Elamrin v. Commander of IDF Forces in Gaza Strip* [22], where we were called to interpret the authority of the military commander to order the demolition of houses as per the provision of regulation 119 of the Defense Regulations (Emergency) 5745-1945. And I have said as follows as to this power to order the demolition of houses (at p. 705).

> I agree that in the language of the Ordinance – in its literal form, as my colleague says – there is no room for a narrow interpretation, the interpretation acceptable to me. Indeed, the military commander has the authority, based on the language of the regulation, to order widespread demolition such as the demolition of that five-story house in the example we mentioned – and much beyond that, as I mentioned in HCJ 5359, 4272/91 [*Hizran v. Commander of IDF Forces in Judea Samaria* [23] M.C.] – however, it appears that no one would consider employing the authority in this way. And further I agree with my colleague, that 'according to the spirit of the words there', in the regulation, it is not proper to limit its meaning – if he meant the 'spirit of the words' at the time the regulation was created in 1945, and in the spirit that a court made up of English 'Mandatory' judges would breathe into the regulation. However that same 'spirit of the words' of the regulation has disappeared

> as though it never was – and by a wind greater than it – in 5748-1948, with the establishment of the State. Statutes that were conceived and born in the Mandate period – including the Defense Regulations (Emergency) – had one interpretation in the Mandate period and another interpretation after the establishment of the State, after all, the values of the State of Israel – a free, Jewish and democratic state – are entirely different from the basic values that the Mandate holder imposed in the land. Our fundamental principles – in our days – are the basic principles of a democratic state of law which seeks freedom and justice, and these are the principles which will breathe life into the interpretation of this statute and others.

I am of the view that one can go further, and that we can find the interpretation that narrows the expropriation power in the Expropriation Ordinance itself even without relying on the change that the establishment of the State brought about. However, the primary point is that this narrow interpretation of the Ordinance was latent in the Ordinance even prior to the passage of the Basic Law. This basic law indeed helped us reveal the hidden light, but it did not have – and does not have the power – to create something from nothing as to the statutes which preceded it.

Norms which apply to the expropriated land – analogy from the planning and construction law

43. As said, non-use of land for its designation at the time of expropriation can arise for different reasons and legal rules which will apply in one case will not necessarily apply in another case. It goes without saying that it is not our intention to deal with each and every one of the types of cases that occurred in the past – or those that might occur in the future – as everything has its time. In our words below we will deal only with the basics of the normative regime which will apply in our view on the expropriated land in the second phase, and the basic tenets and specific subjects which arise in the matter before us. To discover and develop the content of that normative regime we will make use of analogy to the Planning and Construction Law in our words below; learn from the regulations that have been adopted in other legal systems and norms which follow – or are even necessitated – in our view from the institution of expropriation itself. We will begin with the provisions of the Planning and Construction Law, which heretofore we will call – the Planning Law.

44. Parallel to the authority established in the Expropriation Ordinance – for the expropriation of land or the expropriation of rights in land – the Planning Law dedicates an entire chapter – chapter 8 comprising sections 188-196 – to the matter of expropriations according to zoning plans. The Planning Law grants power to expropriate land that was designated in a local plan or a detailed plan for a public purpose and goes on to establish specific provisions for the process of implementing the expropriation. Unlike in the Expropriation Ordinance, the Planning

Law establishes specifically and in detail what 'public necessities' are (roads, parks, recreation and sports areas, nature preserves, antiquities and more – section 188(b) of the statute), and at the conclusion of the explanations and details it adds: 'and any public purpose that the Minister of Interior has authorized for the purpose of this section.' The detailed definition of the concept 'public necessities' does not add much, and it can be presumed that 'public necessities' in the Planning Law are identical with the public purpose in the Expropriation Ordinance. Our issue now is not with all the provisions which detail the process of expropriation according to the Planning Law, but in the provisions of sections 195 and 196, which provide:

The Law of Land Purchased for Consideration	195	The following special provisions will apply to lands which were acquired in implementation of a plan by agreement or that were thus expropriated in exchange for payment of compensation: (1) as long as their designation was not changed according to the provisions of this statute, they may be rented to a public entity or another person, for the purpose for which it was designated in the plan, as long as the Minister of Interior, in consultation with the district council gave approval therefor; (2) where their designation was changed according to this statute, it is permitted to sell them with the approval and consultation as said, to rent them or to transfer them, as long as the one from whom the lands were purchased or his successor is given notice that he is entitled, within thirty days, to purchase them at a price that will not exceed the amount for which they were purchased from him, with the addition of the value of any improvement which results from the plan; once the recipient of the notice notifies that he is willing to purchase the lands, they will be

transferred to him as said.

Change of Designation of Property Expropriated without Payment	196	(a) lands that were expropriated according to this statute without the payment of compensation and their designation was changed to a designation for which land is not to be expropriated according to this law without payment of compensation, the local council will pay compensation to the one who would have been entitled to them at the time of expropriation were the expropriation to have required compensation at that time, or if he so desired, will return the land to the one it was expropriated from. (b) in an action according to this section – as to section 12 of the Expropriation Ordinance (Purchase for Public Purposes) 1943, the date of the change in designation will take the place of the publication date of the notice as to the intent to purchase the lands – and the value of the lands will be determined with attention paid to their new designation.

There is no need to discuss the details of the regulatory arrangement. We will make do with saying that here the legislator explicitly recognized the continuing connection between the (former) owner and the land that was expropriated from his ownership and the option which must be given to the owner, in certain circumstances for the return of the land to its owner. And these are the circumstances: where the designation of the land was changed according to the Planning Law – the former owner will be given the option to buy the land for consideration. Land expropriated according to the Planning Law without payment of compensation, where its designation was changed to a designation for which land is not to be expropriated under the Planning Law – the land will be returned to its owner for free or compensation will be paid to the one who was the owner at the time of the expropriation were the expropriation to necessitate payment of compensation. In dealing with the Expropriation Ordinance in the past the Court recognized this regulatory arrangement as a fair one in expressing the hope that the

regulatory arrangement – or a similar regulatory arrangement – would also be applied to the Expropriation Ordinance. See the *Morris Binyan* case [14], at pp. 468-469, 469-470; compare to the *Avivim* case [13] at p. 405.

45. Does the regulatory arrangement in the Planning Law illuminate the normative structure which applies to the second period in the life of an asset that was expropriated according to the Expropriation Ordinance? There is no doubt that the regulatory arrangement of the Planning Law does not apply to an expropriation according to the Expropriation Ordinance; the regulatory arrangement in the Planning Law does not apply itself to the Expropriation Ordinance, and the Expropriation Ordinance for its part does not have an incorporation provision of the regulatory arrangement in the Planning Law while they are ostensibly foreign to one another, it would be odd if, in building a normative structure that would govern an asset that was expropriated according to the Expropriation Ordinance we would entirely ignore the regulatory arrangement of the Planning Law. This being so, the authorities can expropriate land from Reuven according to the Expropriation Ordinance or according to the Planning Law, and Reuven does not have control over whether the land in his ownership will be expropriated one way or the other (as to this matter we will mention that the Minister of Finance acquired the authority to expropriate according to the Expropriation Ordinance even without a zoning plan, although generally a zoning plan will also be required for expropriation. See for example the *Mehadrin* case [10] at pp. 96-97).

The choice is therefore in the hands of the authorities in what way and by what power a specific land will be expropriated, whether by the Planning Law or the Expropriation Ordinance. See, for example the *Mehadrin* case [10] at p. 111 (however, let us remember that when the authority has at hand two different powers to achieve the same goal, it will not always have the freedom of choice whether it will make use of one power or another. If it is a matter of infringement of a basic right. See CrimMot (TA) 1015/96 *State of Israel-Minister of Finance v. 'Paz' Oil Company Ltd.* (the *Paz* case [40]) (in the words of Justice Kling); HCJ 2313/95 *Contact Linsen (Israel) Ltd. v. Minister of Health* [24], at p. 405 and the references there; Zamir in his book *supra* [50] at pp. 155-161. In these circumstances it would be odd if the rights of Reuven – the owner of the expropriated land – would be different based on an ostensibly irrelevant factor, i.e.: according to the source of the authority that was used for the expropriation of the land from his ownership. It is no wonder, then, that the thought arose to equate the two regulatory arrangements; see the words of Justice Mazza in the *Mahol* case [5] at p. 328.

What then is the relationship between the two regulatory arrangements?

46. We will all agree, it appears, that the **technical** regulatory arrangements in the Planning Law will not necessarily apply to the Expropriation Ordinance. This is true, for example, as to the time frame of thirty days mentioned in section 195(2) of the Planning Law. The

same is so as to the relationship between the local council and the district council, which does not apply as to the Expropriation Ordinance. The analogy is warranted as to the **fundamental** regulatory arrangements in the Planning Law, and the question is what level of abstraction we will adopt in applying principles of sections 195 and 196 of the Planning Law. It is clear to all that the fundamental provisions of section 195 and 196 of the Planning Law, were born of the doctrine of the ongoing and continuing connection, and when we say this we draw support for the interpretation of the Expropriation Ordinance as also founded on the same doctrine. In other words, in expropriation according to the Expropriation Ordinance as well, the former owner maintains a connection with the land that was expropriated from his possession and in a deviation, were it to occur, from the original expropriation purpose, the former owner will be entitled in certain circumstances to the return of the land to his ownership.

47. Can we go further than this? For myself, I would proceed with caution. Thus for example it might be asked: change of 'designation' as per the provision of section 195(2) of the Planning Law, can it be applied to a change in 'purpose' for land that was expropriated according to the Expropriation Ordinance even without a change in the zoning plan? The answer to this question – as to many others – is not easy, if only for the reason that a change in designation according to the Planning Law requires, ostensibly, the creation of a new legal norm – preparing a local plan or a detailed plan – while a change in designation according to the Expropriation Ordinance will take place, generally, in an action and not a norm. Another question: in the case of the exhaustion of the public purpose for which the land was expropriated is the authority bound to notify the former owner of this? See for example, the criticism of Professor Klinghoffer (in his article that we mentioned in paragraph 23 *supra*, **ibid** [59] at p. 877) of the words of the Court in the *Geulat Hakerech* case [15]; in the opinion of Professor Klinghoffer it is proper that such a burden be placed on the expropriating authority. See more below at paragraph 85. We will leave this question – as others – for the days to come, its determination is not necessary for our present matter. We will make do with stating that we should consider applying, with the appropriate changes dictated by the circumstances, the **core elements** of the regulatory arrangement in the Planning Law – or perhaps we should say: the life and spirit of the regulatory arrangement – on expropriation according to the Expropriation Ordinance as well. Compare the *Mahol* case [5] at p. 319. This, in any event, until the legislator makes time for the issue of expropriations and engages in the unification of the regulatory arrangements and their refinement.

Norms which apply to land that was expropriated – analogies from comparative law

48. Additional ideas for the content of the status which applies to land that was expropriated can be drawn from comparative law. Thus, for example the Constitutional Court in Germany ruled that land that was expropriated returns to its former owner where the purpose of the expropriation is not realized or where the asset is no longer needed for

the purpose of the expropriation. The Court based this conclusion when applying to the expropriation the second segment of the principle of proportionality: use of the least harmful means. See D.P. Currie *The Constitution of the Federal Republic of Germany* [64], at pp. 293-294, and in the words of the Constitutional Court:

> Aus der Eigentumsgarantie des Art. 14 GG folgt ein R□ckerwerbsrecht des fr□heren Grundst□ckseigent□mers, wenn der Zweck der Enteignung nicht verwirklicht wird. F□r die Realisierung dieses Anspruchs bedarf es nicht unbedingt einer ausdr□cklichen gesetzlichen Grundlage□(38 *BVerfGE* 175 [48], at p. 175).

And in free translation:

> The right to maintain property according to section 14(1) of the GG includes the right to return of the property of the previous owner, when the objective of the expropriation is not realized. To realize this right there is no need for an explicit law.

See further H.D. Jarras, B. Pieroth *Grundgesetz f□r die Bundesrepublik Deutschland: Kommentar* [65], Art. 14, Rdnr. 60.

It is interesting to note that this legal rule which the Court in Germany established, constitutes 'common law, the German version'. The court based its conclusion on the provision of section 14(1) of the German basic law according to which 'Property and the right of inheritance shall be guaranteed' and according to the interpretation of the Court, the guarantee of the property right also contains within it the right of the former owner to return to his ownership land that was expropriated from his ownership where the objective of the expropriation is not realized. The Court also determined that the provision of section 14(3) of the basic law – which permits expropriation only for the good of the public ('Expropriation shall only be permissible for the public good') – also leads to the same conclusion: the act of expropriation is a legitimate act only if it is for the good of the public, and when the good of the public ends – meaning when the purpose for which the land was expropriated ceases – the expropriation itself has nothing to stand on. With the termination of the purpose of the expropriation, the legitimacy of the possession by the State of the land also terminates. As discussed, this rule applies both where the purpose of the expropriation was not realized at all and where the first purpose of the expropriation has ended. This rule is worthy of attention, if only because it is not the product of an explicit statute: it is an interpretation of the law, an interpretation which creates common law, the German version. In our interpretation of the Expropriation Ordinance – we are similar to them. Indeed, when the use for which the expropriation was made is completed, it is as though the ownership right is meant to return to the former owner free of any encumbrance or any contrary right (subject of course to the return of the compensation etc.). The property right of the individual in the land is a legal value of high order. When the public use is completed, the power of the State to hold the land is exhausted, and it returns home, to its original home prior to the expropriation. The right of the former owner

is not diminished even if at the time he received compensation for the land. However–and so the law in Germany further adds – if many years passed from the expropriation to the abandonment of the original purpose, the authority is entitled to continue and hold the land and it is not obligated to return it to the original owner.

A similar law applies in French law, and where the authority – after a certain number of years have passed since the expropriation – makes use of the land not in accordance with the purpose of the expropriation, the former owner is entitled to demand the return of the land to his ownership for a payment of its value. This is also so in other countries on the Continent. See the article of Professor Klinghoffer, **ibid** [59] at p. 896.

49. The law is different in the United States and Canada. Expropriation of ownership in consideration of fair compensation severs the connection between the owners and the land; the right to compensation as though exhausts the property right of the owners and change of the public purpose later or its total abandonment – does not grant any rights to former owners. See for example: *Higginson v. United States* (1967) [42]; *Wood v. City of East Providence* (1987) [43]; 27 *Am. Jur.* 2d [69], sub. Tit. 'Eminent Domain', §§ 934, 937, 940; and in Canada, *Pineridge Property Ltd. v. Board of School Trustees of School District No. 57* (1982) [49]. However, as to the expropriation of lesser rights than ownership, in the United States and Canada a similar law applies as the law on the Continent. Where the authority has expropriated only a limited right in the land for a certain public purpose, the land returns to its owners – clear of the expropriation – with the conclusion of the accomplishment of the public purpose, and the authority may not make use of the land for another purpose. And in the language of the Court in the case of *Federal Farm Mortg. Corporation v. Smith* (1939) [44] *at p. 839*:

> ...if or when the purposes which authorized the condemnation had been terminated the burden of servitude is lifted from the land and the owner of the basic fee returns to full dominion.

See further *Isley v. Bogart* (1964) [45], *at p. 34*; 27 *Am. Jur.* 2d [69], §§ 934, 936, 939□

Moreover, due to this distinction between the expropriation of ownership and the expropriation of a lesser right than ownership the courts in the United States interpret narrowly the right that an authority acquires in land, and their tendency is to classify it as a limited right which enables the owners to return to what is theirs. See 27 *Am. Jur.* 2d [69], §§ 911, 924. In the case of *Crouch v. State* (1926) [46] the law granted the authority the power to seize land for the use of a railroad company. The land was seized, compensation was paid, and after a time the purpose of the expropriation was abandoned. The Court determined that the railroad company only acquired an easement in the land and as a necessary conclusion further determined that under the circumstances that were created the ownership returned to the original owners free of any expropriation. And the Court said as follows (**ibid** at p. 179):

> The rule is that, when private property is taken in the exercise of the right of eminent domain, particularly by a private corporation, the taking is limited to the reasonable necessities of the case, to carry out the purpose for which permission to take is given, so far as the owners of the property are concerned... We hold, therefore, that an easement only was taken in the property in question, which terminated when the state, through its sovereignty, diverted the lands from railroad purposes and appropriated them to its own use.
>
> ...
>
> If the owner of such an easement abandons the property, sells it, or devotes it to some purpose foreign to that for which it was acquired, or if it is condemned or appropriated for a new public purpose, the owner of the reversion may assert his right to possession or claim compensation.

See further *People v. Helinski* (1995) [47].

50. And so, comparative law may teach us, in principle that an owner can continue and maintain a connection to the land that was expropriated from his ownership, and that where the authority abandons the use of the assets for the original designation of the expropriation, the right of the former owner to return the land to his ownership emerges.

51. We will be careful with our words: we are speaking only of the basic tenets of the connection doctrine; the tenets and not the detailing of norms that this doctrine brings with it. The heart of the doctrine is important, it goes without saying, but from here on we will add and say that the 'permission is granted' and thus once we have learned the principle, we will put it away in a backpack on our backs, and for the rest of the journey we will proceed on our own strength. We will develop the principle in our way and slowly proceed on the road on which we walk, while we determine – on our own responsibility – in the struggle between the basic tenets which guide us at all times: on the one hand the right of the individual to his property and the extent of the proper defense of property, and on the other the interest of the public – the welfare of the public and the undisputed need to establish proper infrastructure for the society in which we live.

Land that was expropriated – leaping from one public purpose to another

52. Until now we have spoken, primarily, about land that was expropriated for a specific purpose and the purpose ceased to exist (or which never came into being by action). A separate and different question is, what is the law where the land was expropriated for a specific public purpose, and after a time the authority decides to make use of it for another public purpose – a public purpose that to begin with would have justified expropriation for that designation; it would have been justified – but the land was not expropriated for it. On this subject – one of the subjects in which 'permission is granted' – differences of opinion have surfaced in this Court. One view holds that within the

innards of the concept 'public purpose' in the Expropriation Ordinance – meaning, a purpose for which it is possible to expropriate land assets – all the public purposes for which land can be expropriated are running about, and as a necessary conclusion of this: in this framework of 'public purpose' it is possible to pass and leap from one public purpose to the next and the validity of the expropriation will not be harmed nor scratched. Thus, even if a parcel of land was expropriated for public purpose A, the authority can change its mind and make use of it for public purpose B. Justice Goldberg expressed this in the *Mahol* case [5] and he told us as follows (**ibid,** at p. 323):

> In my opinion the authority is entitled to use the land that was expropriated for another public purpose, which itself justifies, the expropriation of the land, and its hands are not to be tied specifically to the original purpose that was at the source of the expropriation. The fact that this approach is consistent with the public interest needs no elaboration… If our assumption is, that the new public need justifies expropriation of the land and that, if the land were not expropriated at the time for the [first] purpose, the authority could have now expropriated it for the new purpose, what is the justification not to allow a change in the purpose? This example illustrates that the public interest that the planning authorities are charged with advancing requires that they not shut their eyes to the sight of the changing needs of society and in the face of changes in social priorities. To the contrary: an authority that freezes the policy of making use of the land that it expropriated for needs that were proper at the time of the expropriation and does not adapt itself to the needs of the time and the place, fails to serve the public interest.
>
> The protection of the property right of the individual does not justify an interpretation according to which the Minister of Finance is obligated to stick with the original purpose of the expropriation where there is a new public purpose for whose realization it would have been possible to expropriate the land to begin with. When the property right retreats before the public necessity, this need continues to prevail despite the change in original purpose. Change in the purpose of the expropriation, in itself, does not therefore constitute grounds to cancel the expropriation.

A contrary approach was expressed by Justice Mazza in that same case. According to this view, when the first public purpose terminates, a duty is imposed on the authority to return the land to its original owners. And if indeed a new appropriate public purpose has been found, the authority can again expropriate the land while paying compensation as per its value at the time of the expropriation (of course with appropriate calculation including deduction of the compensation that was paid at the time of the original expropriation etc.) and in the words of Justice Mazza in the *Mahol* case [5] (**ibid**, at p. 328):

> When the public purpose for which the land was expropriated ceases to exist, the owners will have the choice of taking back the land, or demanding and receiving its value... and if the land is still needed to satisfy another public necessity, then the authority is required to again declare the expropriation of the land for the new need. This method might slightly burden the authority and lengthen the administrative process, but the property right of the owners will be respected and so long as there exists a justified necessity again expropriate the land from him, this necessity will need to be realized via the high road and not by roundabout paths.

Similar words were expressed by Justice Mazza in the *Nuseiba* case [6] in paragraph 5 of his opinion. So too were the words of Justice Dorner in HCJFH *Nuseiba* [9] (**ibid**, at pp. 87-88):

> In states which recognize property right as a basic right, a governmental authority is not free to use an asset it has expropriated other than for that purpose for which it was expropriated, and the asset is not to be used for another purpose, even if it is for the good of the public... In Israel the practice is different. An authority that expropriated land for a specific public purpose tends to take advantage of it for another purpose. This practice cannot hold, as a broad interpretation of the power which enables the authority to use the land for a purpose different from the purpose for which it was expropriated, contradicts the principle established in the case law as to a narrow interpretation of the power to infringe on a person's basic right. All the more so that a broad interpretive approach is not to be accepted with the passage of the basic law.
>
> My conclusion therefore is that change in the purpose is grounds for cancellation of the expropriation.

53. In our matter we need not settle between the two versions. There is logic and reason in each of them and the preference of one over the other is a policy determination. Some will hold one way, others will hold the other, and absent a legislated and binding statutory provision, a person from the one camp will not be able to protest against a person from the other camp: justice is in my bag, your bag is empty.

After saying the things that I said, I will add for my part, that I lean toward the second version, the one which limits the authority's power. First of all, this version brings expropriation as an institution to a complete whole, to an action with its own internal logic, logic which leads us from the beginning of the expropriation until its end. This version draws a straight path between the act of expropriation itself and the second phase in the life of the expropriated land, and it can fill with substantive content the burden imposed on the Minister of Finance in the expropriation proceedings, and the burden is: to decide precisely for which purpose he is expropriating the land, and by way of publishing it in the *Reshumot* to publicize this purpose among the public. The

determination of the specific purpose for the expropriation – its establishment and publication in public – are like a royal seal which is stamped on the normative status of the land for the second phase of its life, and they determine the status of the land in the continuation of its life.

Second, this interpretation of the law gives force and intensity to the individual's right to property, as is appropriate in our time and place. In this matter we will add what we have all known, the higher status that property right has acquired in the provision of section 3 of the Basic Law: Human Dignity and Liberty. Indeed, if Reuven's land was expropriated for a specific purpose for the public good, what justice is there in the public continuing to hold on to that land after the termination of the purpose of the expropriation, even where another public purpose has come to replace it? If indeed, another public purpose has sprouted and arisen, the authority should show some respect: expropriate the land anew, and in this way give appropriate and proper expression to the property right of the owners in the land. The individual from whose ownership the land was expropriated has already made his contribution to the public, and there is no justification for him to again contribute to the public. To the contrary, the principle of substantive equality – the same principle which is woven in each and every norm in law – dictates that when the public purpose for which the land was expropriated from a specific person for the good of the entire public is exhausted, the land is to be returned to that specific person – its former owners – to those owners that have already made their contribution to the public. With the return of the land to its owners – and it is possible that this will be, as an interim stage, merely a conceptual return – the equality principle will require us to conduct a renewed assessment of which land should be expropriated, and whether it should again be the land of that specific person. In this renewed assessment it will also be appropriate to make use of the consideration that that same specific person already made his contribution to the public. This, in the context of our matter, is one of the conclusions that arises from the principles of social solidarity and community responsibility. See further and compare H. Dagan 'Distributive Considerations in the Laws of Governmental Taking of Lands' [60].

Despite all these things – and they are important things – there is reason and logic, even public reason and logic, in the other version as well. We cannot say to those holding the other version that they are mistaken and their version is not 'correct'. And those who come after us will resolve this.

54. Reason suggests that not every change in the original public purpose will bring about a 'termination of the expropriation' and the return of the land to its original owners. And indeed, Justice Mazza establishes in his opinion in the *Mahol* case [5] (**ibid**, at p. 328), that:

> Not every **change**, but only a **substantive change** in the definition of the public necessity for which the expropriation should be considered as a new public necessity. Meaning, that a change which is not substantive

will not suffice to detract from the ostensible validity of the expropriation.

One should distinguish therefore between a substantive change in purpose and a change which is not substantive, as only a substantive change will uproot the original purpose from its place and impose on the authority the burden of returning the land to its original owners. Further on, Justice Mazza further adds two criteria for determining whether the change that occurred was 'substantive' or not, and one who wishes should study and learn (the *Mahol* case [5], at pp. 328-329).

Even in this matter – with the reservations we have discussed above – our view leans toward the view of Justice Mazza. Until we can say that the original purpose of the expropriation has terminated and is no longer, a substantive change must take place in the purpose. This will be so in the case of the termination of the public purpose whether another public purpose comes in its place or not. But when another public purpose comes in the place of the original purpose, another question will arise – how distant is the new purpose from the original purpose to the point that we can say that the first purpose has terminated and is no longer.

Resolution of this question will depend on the circumstances of each and every case, and we will have difficulty establishing hard and fast rules in advance. Indeed, some public purposes are so close to one another that at times we will have difficulty distinguishing between them. At the core of things, the question is to what level of abstraction will we follow in assessing the various public purposes. Justice Goldberg, as we saw, was of the view that the authority is entitled to move freely among public purposes and not to return the land to its owner even if another public purpose has come in the place of the original purpose. This is the highest level of abstraction. This interpretive approach is difficult for us, as we have seen. On the other hand, we will not agree that every change and even the smallest change will bring about the return of the land to its owners. The question is reduced therefore to the level of abstraction which will be appropriate in our view, in general and in each and every case.

55. As an aside: the very same question will also arise in the interpretation of the Planning Law. The legislator instructed us in section 195(2) of the Planning Law that where land was expropriated according to a zoning plan, the right of the original owner comes back to life where 'their designation was changed according to the provisions of this statute'. What does 'their designation was changed' mean in the context of these matters? For example: is it sufficient that the new plan establish that the designation of the land will be different than in the past, and the map appended to the plan will color the land a different color than in the past? In my view, the answer to this question is in the negative. The correct question will revolve around the **substance of things** and not their outer appearance. We must examine the prior uses of the land; its new uses; compare them and decide whether the changes that occurred are substantive changes or not.

56. As a rule, one could claim, that where land was expropriated for one public purpose, and the authority seeks to change its use to another

public purpose, the authority must revisit the expropriation path established by law or return the land to the original owner (with deductions as required). And if for any reason there is no possibility of returning the land to its owners nor a possibility to expropriate it – such as the land was sold to a buyer for consideration and in good faith – reason dictates that a duty will be imposed on the authority to compensate the owner at the appropriate amount, as though it had expropriated the land anew or as though it returned the land to the former owners. In this way the rights of the owners to petition against the renewed expropriation of the land will be preserved, and in its arguments the proportionality claim will also have a place. In this way, the authority will have a duty of care as to the uses it makes of the expropriated land, and will also be obligated to demonstrate respect to the property of the individual.

57. At the end of it all, the question is – at its heart and core – a question of cost. According to the other view, the authority could take its decision lightly if it changes the uses of the land from one purpose to another. Change in the use will not require any added cost, and thus the authority will not exert too much effort deciding on such a change. Not so with the view we are leaning toward, where a change in purpose will obligate the authority to return the land to its owners or to expropriate it anew and to pay compensation as the value of the land at the time of the change (with proper deductions). These obligations imposed upon the authority will obligate it to give deeper thought and examination to the worthiness of the change in purpose; meaning, the obligation to return the land to its former owner or to expropriate it and pay compensation for it. If so – if the authority will weigh questions of cost-benefit, expropriations which are not economically efficient – will be prevented from occurring – by application of the test. Compare further HCJ 4809/93 *Local Planning and Construction Committee, Jerusalem v. Kehati* [25] at pp. 202-205. Thus the authority also will not 'invent' (or: will not find) a new public purpose for use of the land only for the reason that a change in purpose will not obligate it to pay compensation.

Payment of compensation for expropriated land – Is this sufficient to sever the connection?

58. A last question in the context of our words now: Does payment of compensation to the original owners sever the connection to the expropriated land? Does the owner of the land that was expropriated exhaust his right of ownership – and become permanently severed from the land – in that he receives expropriation compensation from the authority? This question does not arise directly in our matter, as the petitioners refused to accept the compensation that was offered to them and have been steadfast in their refusal until now. However, we will raise a few thoughts on this subject.

59. In the past the view was expressed that the payment of compensation does not reduce the connection of the owners to the land even in the second phase, see, for example, the *Mahol* case [5] at p. 319 and the references mentioned there. In the words of Justice Goldberg

(**ibid**): 'payment of compensation indeed minimizes the **economic** damage which stems from the expropriation of the land, however it does not nullify the **emotional** damage which is the lot of one whose land is taken away'. See further and compare: Y.M. Edri 'On a Declarative Constitution and a Constitutive Constitution – the Status of the Constitutional Property right in the Human Right Ranking' [61; A. Gross 'Property Right as a Constitutional Right and the Basic Law: Human Dignity and Liberty' [62]. Section 3 of the Basic Law: Human Dignity and Liberty establishes that 'a person's property is not to be violated'. And while the payment of proper compensation makes it permissible to violate property (when the rest of the requirements for expropriation are met), here the violation to property, as such, remains even after payment of compensation. Compare the words of Justice Dorner in HCJFH *Nuseiba* [9] at p. 85. That same violation of property has the power to create a connection between the owner and the land that was expropriated from him, even if he was awarded compensation.

Indeed, the payment of compensation is a built-in condition in the power of the State to expropriate land from its owners, however, it is only one condition of expropriation – one condition among others. By law the State is not entitled to expropriate land for anything other than a public purpose, and once the purpose has terminated, the right of the original owners that the asset return to his ownership (or compensation will be paid to him instead) comes back to life as though on its own. For a similar approach in Jewish Law, see Hacohen, in his article *supra* [58] at pp. 53-54.

60. In this context the claim was made that the protection of property is derived directly or indirectly, from human dignity, from the autonomy of human will, from man's personality and his liberty. See: the *Mahol* case [5] at p. 319 and the references there; HCJFH *Nuseiba* [9] at p. 85. President Barak at HCJ 6821/93 *Mizrahi Bank Ltd. v. Migdal Cooperative Village* [26] at p. 431; Y. Weisman, *Property Laws-General Part* [53] at p. 115; M.J. Radin 'Property and Personhood' [67]; F.I. Michelman 'Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law' [68] at pp. 1214-1218; and the conclusion: the owner perhaps is entitled to monetary compensation for his damages to property, but he does not receive a quid pro quo for the harm to his dignity personality, autonomy of will, free choice.

These words are correct in my opinion, at a very high level of abstraction. They are true when it is a matter of expropriation of inherited land or the expropriation of a home in which the owner of the asset has been living for many years. This was so, for example, when King Ahab sought to take over the vineyard of Nabot the Jezreelite:

> And Ahab spoke to Nabot saying give me your vineyard so it may be a vegetable garden for me as it is close to my home and I will give you in its stead a better vineyard, if you wish I will give you its price in payment. And Nabot said to Ahab, the Lord forbid that I should give my inheritance to you. (Kings I, 21: 2-3).

The deal which Ahab offered Nabot was, ostensibly, a fair deal: in

exchange for the vineyard which he would give, Nabot would get a 'better vineyard' or 'its price in payment'. However Nabot is not interested in a 'better vineyard' or in monetary compensation. 'The Lord forbids that I should give my inheritance to you.' This is an inheritance which Nabot inherited from his father, his father from his father, and his father from his father, back to the first generation; as his father and his father's father before him, Nabot was born on that land, played on it as a child, spent his young adult years there, worked on it as an adult and knows every corner of it, even corners others know nothing about; the land has melded with the personality of Nabot and has become part of his existence in the world. There are those who will defend their land from expropriation as one would defend his homeland from an enemy. Nabot and his inherited land had become one. Nabot will not separate from his inherited land. Of inherited land such as this it may be said that it is of human dignity, and it has become part of the personality of the person.

61. This is so with Nabot the Jezreelite and his land inherited from his fathers. Can we apply these words – is it proper to apply these words – to land that a land merchant, or a land broker, holds for sale to the highest bidder? This land is entirely an exchange for money. Indeed, in this case, it will be difficult for us to identify the property with human dignity or personality. Compare Radin *supra* [67]. See further Hacohen, in his article [58] at pp. 45-46 (as to Jewish law's distinction between inherited land and land that was bought for money). Do we conclude from here that, where the authority expropriates land from one who deals in land, the expropriation will sever the connection between the owner and the land? Our answer is in the negative. There exists a different reason, an additional reason to protect the property, separate and distinct from the protection of the person's personality, dignity, liberty, and free will. And the reason is, in our opinion, the same reason, that the great among the greats, Justice Oliver Wendell Holmes, spoke of as a reason to protect possession. And so says Holmes in his book, The Common Law [66] at p. 213:

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

pedagogues, wholly devoid of reality.

See further FHC 7325/95 *Yediot Ahronot v. Kraus* [27] at pp. 76-77.

Indeed that same instinct that resides in the soul of a baby and which will prevent him from giving to another the object in his hand, the very same instinct resides in the soul of an adult and awakens in him a 'natural' – instinctive – resistance to the desire of another to take from him one of his assets, even with the payment of compensation. If that tendency and that instinct is called a person's personhood, the autonomy of man's will or man's liberty – so let it be said. One way or the other, expropriation compensation does not make the very violation that the expropriation of the land brings upon the owners, disappear.

62. Moreover, if we said that receiving compensation cuts off the connection between the owner and the land that was expropriated from him, as it might be argued, we have almost completely blocked off the connection between the owner and the land that was expropriated from him. Indeed, receipt of compensation is the least to which the owner is entitled, and it would be difficult – very difficult – if it were decided that only the non-receipt of compensation would leave in the hands of the former owner connection to the land. The choice that would be placed before the owner not to receive compensation and wait for the unknown, or receive compensation and lose the connection – as it might be argued, is a choice that is not reasonable; it is a cruel choice; a choice that has no justice. Indeed, there is no justifiable reason that we should obligate the individual to contribute to the public from his property, and that the consideration that is given to him will itself reduce a 'connection' whose fate is unknown to us.

However, it could be argued, that it is proper that receipt of compensation bring about severing of the connection. Why? Because payment of compensation for the expropriation is meant to place in the hands of the owners – at least theoretically – the value of the expropriated land. The owner should thus take that compensation and buy other land in the place of the land that was expropriated from him. And if the owner does not buy other land, it may be said of him: he has brought the damage upon himself.

63. Having said all we have said, we will now add that it is an open question whether receipt of compensation will cut off – or will not cut off – the connection of the former owner to the land that was expropriated from his ownership, or perhaps the receipt of compensation will only affect the question of the obligation of the owner to return compensation he received as a condition for returning the land to his ownership. Compare section 196(a) to the Planning Law. See further and compare CrimMot (J-m) 51/94 *Arad v. State of Israel* in the words of Justice D. Cheshin at paragraph 6 of his opinion).

The connection doctrine: Does a 'Statute of Limitations' apply?

64. Once we have established that the owner of land that was expropriated from his possession continues to hold on to a connection to land that was expropriated, a related question arises, – whether this connection will be maintained and exist forever as in the case of a

regular property right (if you will: a right in regulated property registered in the property registration books)?. Or perhaps we will say, a limit has been placed on that connection, and when we pass that limit the connection will disappear. The resolution of this question is not at all simple. On the one hand it could be argued that this connection that the former owner holds in his bag is derived from the ownership of property (or from another property right that was expropriated); and just as ownership of property does not have a statute of limitation (in principle) the same is true for that connection which is none other than an echo of ownership. The genetic code of the connection is like the genetic code of ownership, and a 'statute of limitation' will not attach to one as it does not attach to the other. Those holding such a view will seek to find support in the provisions of section 195 and 196 of the Planning Law, according to which a 'statute of limitations' does not apply to the right of the owner to return to himself – under conditions established by law – land that was expropriated from his possession.

On the other hand, it could be argued, that a declaration of the existence of a connection that has no end is a declaration that has no reason or logic. Is it to be said that the former owner – he and his heirs, his heirs' heirs, and the heirs of his heirs' heirs until the last generation – can demand return of land that was expropriated from the first generation? Will the connection survive for fifty years? One hundred years? Two hundred years? And as for the claim that the connection contains within it the genetic code of its mother – the ownership – the counter argument will be made that one is not like the other. In this a connection is different from ownership: property ownership as a rule, is registered in the property registration books or the owners physically possess the land, and from here it can be derived that the ownership in property has no ending (until expropriation...). Connection to the land that was expropriated is unlike ownership, as it is a conditional right to begin with and as such a 'weaker' right than an ownership right.

65. If this is the law, it will be argued, what should be the period of the 'statute of limitation' of the connection of the former owner to the land that was expropriated from his possession? After how many years will the connection dissolve and disappear? After seven years, as with the statute of limitation in non-land assets according to the Statute of Limitations Law 5718-1958? After fifteen years or twenty five years, as the statute for unregistered lands and registered lands? And perhaps an 'arbitrary' period will be set? For example a period of ten years? None of the solutions seem right to us. First of all the analogy to the Statute of Limitations Law appears problematic; once we know the topics are not identical, we will further know that the analogy is not appropriate. As for the 'arbitrary' period of years this too is not appropriate, as no one has authorized us to set in advance a fixed and finite period of years. This task is the task of the legislator: the legislator has his place and we have ours. What then is the solution to be adopted by the one making the counter argument?

It appears that the jurist will call that same figure – the reasonable person – who stands at our service at all times for assistance and ask him

what he will advise us. And it appears that the reasonable person – meaning the common sense, good taste, logic, and justice – will say to us thus: I cannot tell you when the connection between the former owner and land that was expropriated from his possession dissolves and disappears; this I can tell you, that in various circumstances which will be presented before me, I will answer you whether the connection has dissolved and dissipated or whether it is alive and breathing. And what will those circumstances be? They will be many and varied. Thus for example, the length of time in which the land served its designation until it was changed; thus, for example, the question if the owner received compensation for the land that was expropriated or if he did not receive; thus, for example, what use was made of the land over the years, such as: if what was expropriated in fact was none other than possession alone but in fact it was ownership that was expropriated (as in our case); thus, for example, the nature of the connection between the owners and the land (possession as an investment, possession of inherited land etc.); thus, for example, changes and improvements that were done to the land over the years; thus these and other factors, and the like, factors which should affect – in their cumulative weight – determination of the question whether the property-connection exists or whether it has died. The reasonable person is no stranger to us: he is a regular in our house; we consult him every day, knowingly or unknowingly, in all branches of the law, and ostensibly there is no good and proper reason why we should not consult also in the question before us. We will also recall, if only as an aside, that in French law there is in the law a limit to the years of connection of the owners to land that was expropriated from his possession (thus according to the Code de l'Expropriation). It is also so in German law (for example: section 102(1) number 1 of the BauGB-Baugesetzbuch).

66. And after we have said all the things we said, we will further add that the considerations which we discussed are not decisive. One could argue – and the argument would not be devoid of logic or devoid of reason – that lacking a definitive statutory determination, the authority is not ours, the Court's, to determine dates, and even reasonable dates. The work of determination of dates has been given to the legislator, and absent guidance by the legislator we will not set a date.

From the general to the specific

67. The land in our matter was expropriated for the use of the army. Indeed, as was the custom in those days it was not said in the notice of expropriation other than that the land is absolutely necessary for public purposes, however we all know that later action follows prior intention: from the fact that to begin with – and many years after the expropriation – the land did not serve other than the needs of the army, we will conclude, if only by way of retrospection, that it was expropriated for this purpose. This purpose was a public purpose, and there is no debate over that. When the use of the land for military purposes ended, the authority sought to turn its use to a new purpose: for the purpose of building a neighborhood. Against the changing of the purpose the petitioners raise several claims, and we will discuss them now.

First of all, so the petitioners claim, with the exhaustion of the first purpose – the use of the land for military designations – the land should be returned to its owners. Second, the new purpose – the building of a residential neighborhood – is not a public purpose at all. Thus, even according to the approach that holds that the public authority is entitled to leap from one public purpose to another within a single act of expropriation (see paragraph 52 *supra*), the petitioners are entitled to return of the land to their hands. Moreover, since the purpose of establishment of a new neighborhood is not a public purpose, the Minister of Finance is not authorized to expropriate the land again for that purpose. And finally, it is in the hands of the former owner, to implement, on its own, the purpose of establishment of a neighborhood meaning that there is no justice (in any case) that the State specifically should build the residential neighborhood, whether by the first expropriation or by power of an additional expropriation of the land.

Let us discuss these questions one by one in order.

68. First of all we will say, that based on the normative tapestry that we have discussed in our words above (and subject to the words that we will further discuss later, such as the question of the time that has passed since the expropriation) it can be argued that the owners are entitled – in principle – to return of the land to their hands, as the public purpose for which it was expropriated to begin with was exhausted. Moreover, even if we were to say that the purpose of establishing a residential neighborhood is a public purpose – and this question is itself in doubt – even then there would be no change in the conclusion. The reason for this is, so it can be claimed, that the two purposes – land for use for military designations and land for use for the establishment of a neighborhood – are so different from one another that it cannot be said that the one purpose is no more than a variation of the other purpose (see paragraph 54 above). A conclusion (ostensibly): according to the theoretical-normative tapestry it can be claimed that the petitioners are entitled – in principle – that the land be returned to them, and the respondent must return the land to the petitioners.

Moreover, the land was expropriated for training, shooting ranges and other uses of the military. Having determined what the purpose of the expropriation was, we will further know, if only by way of retrospection – that in principle the authority could have made due with the expropriation of possession only – as distinct from expropriation of ownership (we will note that according to section 3 of the Expropriation Ordinance, the authority was given to the Minister of Finance to acquire ownership or any other right in the land, including any right of usage). And thus, had the Minister of Finance, from the beginning expropriated only the right of use of the land, it appears that no one would be disagree that, with the departure of the military from the place, the owners were entitled to the return of the land to their hands. Compare the doctrine prevalent in the United States as described in paragraph 49 *supra*. However, knowing that in fact the land was expropriated for its designation for army training – and that it served this purpose over the years – we will also know that in truth the expropriation was not, at its

core, other than for its use and not to exploit it as owners (such as for building purposes). When the use of the land for military training ended, the law dictates that the land return to its home. We hasten to emphasize: that we are not stating this consideration of our own accord. This is none other than one consideration among many that can be raised to justify returning the land to the hands of the petitioners.

Moreover, it can be said that even in the view of those who broaden the power of the authority – those who permit it to change from one public purpose to another within the bounds of one expropriation – even in the their view the owners are entitled to the return to what is theirs, if only because the purpose of establishing a residential neighborhood in that location is not a public purpose under the circumstances. Let us say a few words on that point.

The establishment of a neighborhood – Is it a public purpose?

69. Is the purpose of the building of a residential neighborhood a public purpose in relation to the Expropriation Ordinance? The resolution of this question is not directly needed in our matter, but we will add and say that in our opinion this question does not have a single definitive answer. It all depends on the context: at times the building of a residential neighborhood will be a public purpose as to the Expropriation Ordinance – it can even be a public purpose of a high order – and at times the building of a residential neighborhood will not be a public purpose at all in context. The resolution of the question will always be a circumstance dependent determination, and we will have difficulty making analogies from one case to another. If this is so, in the normative realm, all the more so in the circumstances of our case. We will explain.

70. Let us ignore for the moment the power of the Minister of Finance according to the Expropriation Ordinance, for he is the one who is meant to determine – according to his discretion – what 'public purpose' justifies expropriation of a certain land. We will presume therefore that the concept 'public purpose' – in the context of the Expropriation Ordinance – is subject to the interpretation of the Court in accordance with the accepted construction (in truth, and in the final analysis, the differences between these two versions are few and minor). When we present the question this way, we will be presented with two models from two ends: one model declares itself to be a 'public purpose' and the other model declares itself to be a purpose which is not public. At one end will stand before us for example, establishing a public park, paving roads, establishing a school and similar purposes which declare themselves out loud to be 'public purposes'. At the other end will stand purposes which ostensibly are not public purposes. Thus, for example, the establishment of an office building in the middle of a commercial neighborhood. If the Minister of Finance expropriates land for this last purpose, I believe he will have difficulty classifying such a purpose – during the normal course of events–as a 'public' purpose. And we will give thought to the matter: in classifying a specific purpose as a public purpose or as a purpose which is not public, we take into consideration, among other things, if only subconsciously – market forces in a free

market and considerations of social norms which are accepted in our area. Thus, for example, we presume that a private person will not agree, of his own good and free will, to establish a public garden on his land for the use of the public, even in exchange for the accepted compensation. On the other hand, we presume that land on which an office building can be built, which is in the heart of a commercial area, the market forces will bring about the building of an office building on that land.

71. The question therefore is toward which of these poles does the purpose of the establishment of a residential neighborhood incline. It appears to me that the normative analysis will not provide us with an answer, as the purpose might contain both public and private elements, and the question in each case will be which elements dominate. In any case, let us remember, that the change from one public purpose to another requires the expropriation of the land, and hence the burden is imposed on the State to prove that the purpose of establishing a residential neighborhood – is a public purpose.

72. In this context we will add, that in each case and every matter the great principle of primary and secondary will apply, meaning: in examining the implementation of the purpose of the authority one is to examine the totality and not one detail or another. In the words of Justice Berinson in HCJ 147/74 *Sapolinsky v. Minister of Finance* (the *Sapolinsky* case [28]) at p. 424:

> The fact that, while implementing the purpose of the expropriation a profit is made here or there, whether by the State or by a private construction company which operates on its behalf, does not detract from the true substance of the expropriation and cannot cause a defect to its purpose, if from the start it was not done solely in order to make a profit. When the purpose of the expropriation is not making profit and this is only an indirect result of the expropriation, it means nothing. It does not affect the legality of the expropriation.

This was also the conclusion in the *Mehadrin* case [10] the expropriation of land to expand Ben Gurion airport – where part of the land had 'commercial elements'. And in the words of the Court (**ibid**, at p. 103):

> Examination of said purposes and usages reveals that indeed they also contain commercial elements (dining and retail services). However, these elements are not only negligible to the primary purpose for which the section of land was expropriated, but they constitute an inseparable part of the operation of an airport, meaning they have a direct connection to the public purpose for which the lands were expropriated. In particular when these are intended for the welfare of the employees of BGA (and this is true as well for the welfare and sports structures). And even if RST indirectly benefits in some way from these elements, this does not detract from the true substance of the expropriation or damage its purpose, when to begin with the expropriation

was not done solely for the purpose of making profits.

And later (**ibid** at p. 107):

> There can be no doubt that parking garages for visitors and others are an integral part of the airport. And I am of the view that the same is true also for a hotel in a modern airport... Although these are both two commercial elements, they have, as said a connection to the public purpose for which the land was expropriated. Therefore, it is not proper to view the commercial elements detached from the entire project, as though they stand on their own. The propriety of the expropriation of these elements is to be examined as part of the overall view of the purpose of the expropriation, and they are not to be isolated and examined separately.

The reason for this is that only the concentration of the land in one hand will enable the implementation of the project (**ibid**, at p. 108):

> I also see favorably the claim of RST that if the property rights in the airport project are split up between it and another entity, in a manner that in a certain location its rights will be subject to the right of that entity, it would be difficult for it to properly accomplish its role. From the substance of the project and its content it is necessary that the rights in the entire area will be in the hands of RST, in a manner that will leave freedom of movement in its hands throughout the area, according to changing necessities and future developments, without being dependent on the will and consent of another entity. Only concentration of the rights in the hands of RST will enable it to accomplish its role according to the powers given to it.

73. This was the case, for example, in the *Makor Hanfakot and Zechuyot* case [8] and the *Sapolinky* case [28]. Both these cases dealt with the establishment of a residential neighborhood, and in both cases the court was of the view that the public-general need dominated over the private-particular motive. In both cases the public necessity to establish a neighborhood on the expropriated area was established, and in both cases it was emphasized that the ownership of the lands was divided among many owners, something that would make it very difficult to achieve quick implementation of the building plans. One case dealt with populating Jerusalem Southward and the other case dealt with populating Jerusalem Eastward. We will add that in the second case it was also emphasized that there is both national importance and urban importance to establishing the neighborhood (*Makor Hanfakot and Zechuyot* case [8], paragraph 9 of the opinion of Justice Or).

The same decision was reached even where it was agreed that the use of the land for a public purpose may lead to profits in the future. The profit factor did not rule out the legality of the expropriation, provided it was possible – and in the Court's opinion it was proper – to view the specific expropriation in the overall context of a purpose that is, by all accounts, a public purpose (a commercial district within an airport). See

the *Mehadrin* case [10]; and HCJFH *Nuseiba* [9]. (We note, however, the minority opinion of Justice Dorner in FHHCJ *Nuseiba*, **ibid**, at p. 88), that 'the establishment of a commercial structure in a built neighborhood does not enter within the bounds of 'public necessity' which justifies expropriation. Fulfilling needs such as these are to be left to market forces.' Indeed, the *Nuseiba* case [9] – and comparison of the majority to the minority opinion – exemplifies well the difficult struggle between the 'public' element in expropriation and the 'private' element in it. See further A. **Haviv-Segel** 'Problems of Adaptation and the Question of Public Purpose in Land Expropriation' [63].

74. And thus, the establishment of a residential neighborhood can be a public purpose and can also not be a public purpose. In this context we will remember, that generally the initiative to build residential homes belongs to the individual and not the state.

75. And what about in our matter? Let us recall that at first – since the mid-eighties – the land was designated for single-story building, recreation and public areas, and that in 1995 an alternate plan begun to be planned: for the designation of the land for multi-story building, for public structures, for a commercial area and for open public areas. The respondents claim that this new plan was done for a pure public purpose, and Mr. Dan Seto Vice-Chair and Director of the Planning and Development Division in the Israel Lands Administration tells us as follows:

> Due to the existing needs and the great demand in the area, the Ministry of Construction and Housing saw fit to change the existing plan, according to which the land was designated for single-story building, and converted it to massive construction of hundreds of residential units. Among other things, it is intended to be built in the neighborhood small, basic apartments which will serve a needy population. In addition, there are planned large apartments in the area which are intended to improve the living conditions of the residents, and enable clearing out of the apartments they are living in for the needs of a population with lesser means.
>
> Development of a residential neighborhood of a fairly high quality, as expressed in said plan [HD/VM/944] including a substantial contribution in public areas such as: comprehensive school, sports center, and a community center will bring about the raising of the welfare of the existing neighborhood in Givat Olga.

It appears that these words – intended to substantiate the 'public purpose' – are overly broad in their scope. It is no wonder therefore that the petitioners respond to this – not without anger – that when we take these words at face value, it would be possible to justify any land expropriation for the purpose of building residential units. Indeed, the State has not been able to show that building a residential neighborhoods in the area has severed it from the zones of private purposes and entered it into the zone of the public purpose. Moreover, examining these things

closely will teach us that the State is making its claims facing backward rather than facing forward. We will explain.

76. In preparing and approving the plan of 1985; and the plan for the years 1995-1997; the authorities and the planners presumed – as a given – that the land is fully and completely owned by the State for every matter – available and free from any burden or encumbrance – and that as the owner the State was entitled and permitted to do with the land as it saw fit. On the basis of this assumption the planners planned what they planned and the authorities approved what they approved. These things are self-evident – from review of the chain of events and the evidentiary material brought before us – and if there is need for proof, it may be found in the affidavit of the Engineer of the City of Hadera, Mr. Michael Sharon, from whose affidavit we learn the following (among other things):

> In the meeting of the respondent no. 4 [the Committee for Residential and Commercial Construction, Haifa District] on June 20 1995 it was indeed decided on the amendment of the plan, before it was filed, such that it would be written in the bylaws that the plan would be implemented with **unification and division**. On the other hand, there was not attached to the plan a table of area allocations/balancing as stated in section 122 of the Planning and Construction Law in light of **the claim of the respondent no. 1** [the State] **which was adopted by respondent no. 2 [the City of Hadera] that it is a matter of lands that are under one ownership (of the State) and therefore there is no need for said table** (the first emphasis is in the original; the second emphasis my own – M.C.).

We will learn from here, that the starting assumption of the Planning Committee and of the State were the assumptions that the former owner has no connection to the land, and that the land is not tied at all to any public purpose. These assumptions are also those that led to the planning processes as they occurred in fact. Having discovered – based on the theoretical-normative tapestry – that these assumptions were mistaken assumptions, we further learned that classification of the building of a residential neighborhood as a 'public' purpose comes only after the fact and not in advance. The reason for this: the authorities gave no thought at all – in advance – not to the Expropriation Ordinance nor to the connection of the former owner to the land nor to the question whether the purpose is a 'public' purpose. Their claim – made in reverse and facing backward – may be claimed, but will not be successful. Proof of this, it will be further argued, will be found in the litmus test below.

77. Everyone agrees that, the State is not authorized to continue and hold the land that was expropriated – after exhausting the first expropriation – unless it makes use of the land for (another) 'public' purpose. This is also the holding of those who broaden the power of expropriation, meaning: those who are of the view, that the State is authorized to leap from one public purpose to another in the framework of the same expropriation, without being obligated to return the land to

the former owners.

Thus, the State is entitled to leap from purpose to purpose only where there is a new public necessity, and where this necessity justifies expropriation of the land as of today. See the words of Justice Goldberg in the *Mahol* case [5] at p. 323, which are brought in paragraph 52 *supra*. Our opinion is – as opposed to the view of Justice Goldberg – that in a case such as this the State must return the land to its owners or go back and expropriate it in the regular way. However, if this is the law, it is to be presumed that until it reaches a decision on expropriation, the authority would (in our matter) weigh very carefully whether it is proper to expropriate the land for that new purpose, meaning to expropriate – and to owe compensation to owners. And here is the litmus test: in our matter the State did not consider the matter. And if it had considered it, it is possible it would not have decided on expropriation – for the purpose of the establishment of that residential neighborhood – while obligating itself to pay expropriation-compensation.

Conclusion: knowing that it would owe compensation to the owner, it is possible that the State would not decide on expropriation at this time. In our view, the State is obligated – according to the normative-theoretical scheme – to return the land to its former owner and to deal directly with a new expropriation and with its obligation to pay expropriation-compensation to the new-old-owners.

In order to remove doubt we will add: we do not recommend to the State authorities that they act one way or the other with land that was expropriated for a certain purpose. In general it will be said, that when land was expropriated for a certain purpose, and the purpose was exhausted, it is not appropriate for the State to manoeuvre and take inappropriate action only in order to continue to hold the land in its possession.

78. Let us presume – without agreeing to the presumption – that the purpose of establishing a residential neighborhood under the circumstances is a public purpose, and that therefore the authority is authorized – in principle – to expropriate anew the land subject to discussion (it goes without saying, as said, that this question has not arisen at all, as the authority was working from the assumption – mistaken in our view – that the land is in its ownership free of any connection to former owners). Then too, so claim the petitioners, the question arises on its own – whether the authority is entitled, under the circumstances, to expropriate the land for the purpose of establishing a residential neighborhood? As this question has not come up for discussion explicitly, we have not heard arguments as to it. However, we will say, with full caution, several words on the issue, without purporting to settle it one way or another.

79. Until the authority is entitled to expropriate land for a public purpose – and for our matter we have assumed that the establishment of a residential neighborhood can be, in certain circumstances, a public purpose – it is incumbent upon us to inquire whether it is possible to achieve the public purpose – the same purpose for which it seeks to expropriate the land – not by way of expropriation and not necessarily by

way of expropriation of the land that was expropriated and whose expropriation expired. In theory, a precondition to the expropriation power is that the purpose of the expropriation cannot be achieved in an efficient manner that is not expropriation. This precondition to the power to expropriate land is necessary out of respect for the individual's property right, and the property right proclaims as though on its own this burden imposed on the authority. Indeed, where the authority proposes to expropriate Reuven's land for the realization of a certain purpose; Reuven declares at that time his intention to himself realize, that same purpose and proves that his intent is sincere, that he is capable of doing it, and that he is about to realize that purpose in the near future. It could be claimed – and we will not decide on the claim–that in these circumstances the power of the authority to expropriate the land will be denied – indeed, not in all circumstances and not every case –. That same person could further claim – and we will not express an opinion as to this – that the burden is on the authority to point to the need to expropriate the land specifically to realize the purpose of the expropriation and to explain and justify why the owners themselves will not allowed to achieve that same purpose. In the words of Justice Dorner in HCJFH *Nuseiba* [9] (**ibid** at p. 89):

> The burden of proof as to the existence of the elements of the limitations clause in an administrative decision which violates property right by expropriation is placed on the shoulders of the expropriating authority.

And Justice Or said on this in the *Makor Hanfakot and Zechuyot* case [8] (in the words of Justice Or, in paragraph 6 of the judgment).

> The fact that the expropriation contains a severe violation of man's right to his property must stand before the eyes of the court when it comes to interpret section 3 [of the Expropriation Ordinance – M.C.] and to determine if the expropriation is in fact necessary in order to realize that same public necessity in the name of which the expropriation is to be implemented. Therefore, if it is possible to reach the same result of satisfying the public necessity not by way of expropriation, it would be proper to do so. Thus, for example, if there exists a public necessity to build a certain residential structure and this can be done by the land owner, in a way and in a manner and within a time frame which is required for that public necessity, it cannot be said that expropriation of that land is necessary for the purpose of building that building.

So taught us Justice Goldberg in HCJFH *Nuseiba* [9] (at p. 82):

> If it is proven that it is possible to realize the public necessity without expropriation, then we face a balance between the public necessity and the property right of the owner of the expropriated lands. All this, with the condition that it is possible to ensure that the 'self realization' will not impair and will not delay the execution of the purpose of the expropriation.

See further the *Mehadrin* case [10] at p. 107. But the question is very complex and we will not take upon ourselves to resolve it. Indeed, real life has taught us that in many cases – possibly in most cases – the nature of the plan, its scope, the multiplicity of ownerships in the land and other similar factors will prevent self implementation of the plan and will necessitate expropriation of the land to achieve a proper public purpose. See for example *Makor Hanfakot and Zechuyot* case [8]; the *Sapolinsky* case [28]; the *Mehadrin* case [10]. However, in cases where self implementation is possible, we may reach the conclusion that expropriation is an inappropriate means, a means that goes beyond that which is necessary. In this context it is proper that we give thought to the words of Justice Dorner (in a minority opinion) in HCJFH *Nuseiba* [9] (at p. 91):

> When the individual is not capable of implementing the required project for public purposes on his own due to planning of broad scope, there may be a justification for use of the expropriation power. But when it is a matter of a small lot, whose owners have declared their intention to develop it themselves, there is no reason not to entrust the implementation of the plan to them.

See further the *Paz* case [40] mentioned in paragraph 45 *supra*.

Moreover, just as the burden is placed on the authority not to make use of expropriation if it is possible to realize the purpose of the expropriation not by way of expropriation, so too the burden is imposed on it – ostensibly – not to expropriate the ownership right in the land if it can achieve its purpose by way of expropriation of a lesser right than ownership, such as expropriation of rights of usage. This statement is important in our matter, if only because to begin with – as we learned at the time of the expropriation and for over 30 years that followed the expropriation – the State could have made due with expropriation of the rights of usage of the land and not expropriated the ownership right in its entirety. When we say this, we will add and say that here we have found an additional reason for which it can be said that the petitioners are deserving – in principle – of the return of the land to their ownership.

80. We have said what we have said, and we wish to reiterate, that our words do not go beyond mere ruminations. Resolution of all these questions – those and others derived from them – will only come about in the days to come.

81. In our matter, so claim the petitioners, it is also possible to achieve the public purpose not by way of expropriation but by advancing the processes for planning the construction of a residential neighborhood by the owners, and the advancement will occur by way of unification and division (a process which is necessary in any case) and the preparation of a table which deals with allocation of areas and balance, and all this as per the provisions of sections 121-128 of the Planning Law. Thus the owners will not be required to give up their lands, and thus they will be the ones who advance the construction rather than it being done by private contractors on behalf of the State. The petitioners' claims are consistent with the law, but given its view that it need not address this at

all – as the land is in its complete and absolute ownership – the State did not attempt at all to be in contact with the petitioners to clarify this matter of self implementation. Indeed so: the State claims that the area of the plan is split among many lot owners; and that due to the multiple purposes of the plan the authorities will have difficulty constructing balancing charts and because of all this the construction of a residential neighbourhood by the owners will not be possible in the desired time frame. However, all these arguments did not arise other than as a response to the petitions, and the State never made an effort to try to clarify with the owners these topics that it claims prevent self implementation. By this course of action the opportunity has been denied from the petitioners to prove that they can achieve self implementation, and thus their rights have been detracted from.

We have not said, and we also will not say, that the petitioners are right in their claims and that the State has the lower hand. All we are saying is that in our case a precondition for renewed expropriation has not been met (if you wish, for transition from one public purpose to another).

82. This is also the case with the arguments of the respondents according to which the execution of such a large project, as planned, must be under one hand, and that it will be best for all if a State authority implements it. As said in the affidavit of Dan Seto on behalf of the State:

> The possibility to plan a residential neighborhood which includes hundreds of housing units and public structures exists primarily, and best, where the ownership of the land is concentrated in the hands of one entity, in our case – the Israel Lands Authority.
>
> Hadera is in a high demand area for residences, there is an explicit advantage to development of a residential neighborhood by the Construction and Housing Ministry – as opposed to the private sector – both in terms of concentration of sufficient areas to establish a residential neighborhood of a large scope, and in terms of the ability and desire to donate land and develop it for public purposes. This advantage is also manifest in all that relates to the speed of the planning and swiftness of implementation.
>
> As can be seen with other parts of the city of Hadera, as in other cities where there exist many split lots in private ownership, the process of development of new neighborhoods, not by governmental entities and tools is lengthy, slow and at times impossible. Only neighborhoods whose planning and establishment is dealt with by a governmental entity like the Ministry of Construction and Housing, based on lands found in State ownership, can be established with proper momentum and scope, which will be sufficient to serve the immediate public needs.

I will not express my view as to these words, not positively or negatively. I will make due by saying that this topic has not been

properly worked through between the petitioners and the State, and thus it is not appropriate that we address it. If this is so in general, all the more so when we all know that the State too, being in charge of the building of a public project, makes use of private entities for implementation. See further Haviv-Segel, in her article *supra* [63].

83. The State has followed a process of we will do and then we will listen, while we are of the view that the process must be by way of we will listen and then we will do. The State has not listened, and therefore – in principle – it is not proper for it to do.

Delay

84. The State further claims that the petitioners have delayed their petition to the Court; that in that period of delay the State bore significant expenses in planning proceedings and building of infrastructure, and for this reason alone the petition should be dismissed. The State asks: why haven't the petitioners petitioned against the plans that began in 1986? That is a sign and indication that they gave up their rights and hence their petition ought to be dismissed.

Indeed, it is a long held legal rule that delay in objecting to an expropriation action – delay which is accompanied by a change in the situation of the authority due to investments made in the expropriated land – can lead to dismissal of the petition for this reason alone. See for example HCJ 63/52 *Neiman v. Minister of Finance* [29]; HCJ 334/63 *Galinovitz v. Minister of Finance* [30]; Kamer in his book *supra* [52] at p. 149-153.

85. This claim by the State is somewhat strange. The petitioners knew nothing about the proposed plans for the expropriated land, and had no basis to presume that, parallel to the use of the land for military designations, the authorities had plans for civil construction in the area. Moreover, in its view that it was the unconditional owner, the State did not notify the former owner as to the existence of the plans, and we can but wonder as to the claim of delay it raises, meaning, a claim which is thrown in the face of a petitioner who bides his time. In the *Geulat Hakerech* case [15] (*supra*) the petitioner, the owner of expropriated land, discovered – after five years passed from the day of the expropriation – that a parcel of that land that was expropriated was not needed by the authority to implement the public purpose for which the land was expropriated. The petitioner sought to declare that the expropriation was not valid for that parcel of land, but the Court was of the view that due to the delay it should not listen to her. This ruling raised the ire of Professor Klinghoffer, and he stated as follows in his article about the attachment of expropriated land to its designation (in his article, *supra* [59] at p. 877):

> One may ask if the feeling of justice has not been harmed slightly when the blame is placed on the petitioner in such a manner. It would be more reasonable to expect that, out of decency, the expropriation authority notify the former owner as to the lack of suitability between the expropriated asset and its designation. If the governmental authorities are not

> willing to act so of their own will, then it is in the power of the legislator to obligate them to act in this way. In this context note that in Switzerland, if the intention of the expropriator is to carry out a transfer of the expropriated lands or dedicate them to a designation different than the one determined for purposes of the expropriation, it must give notice of this to the one who is entitled to demand their return.

This was true there; this is true in our matter as well. Indeed so: our matter is different from *Geulat Hakerech* case [15], and in the following two ways: first of all, in the *Geulat Hakerech* case [15] the petitioner sought cancellation of the expropriation retroactively, while in our matter we speak of cancellation of the expropriation only henceforth. Second, in the case before us the ownership passed to the State many years ago, and the State could not have known that the connection rule would be applied to the expropriation action. Not knowing this, one cannot criticize it for not notifying the petitioners of the plans that were applied to the area. But, this claim could hold only until the day in which the *Mahol* case [5] was decided, which is 12 March 1996. From that time on the State could have known of the shift that occurred in the legal rule, and if it had undertaken precautionary measures as dictated by the legal rule, then the petitioners would have been warned about the plans, if only from that time on.

My view is the view of my mentor, Professor Klinghoffer, and his words of criticism on the ruling in *Geulat Hakerech* case [15] should be applied to our case as well. This is demanded, in my view, by the duty of decency. For, if the individual does not know of the authority's plans, how can he protest against them and protect his rights?

This duty imposed on the authority – it can be claimed – can also be learned from the provision of section 195(2) of the Planning Law, according to which:

The Law of Land Purchased for Consideration	195	The following special provisions will apply to lands which were acquired in implementation of a plan by agreement or that were expropriated for payment of compensation: (1) ... (2) where their designation was changed according to the provisions of this statute, it is permitted with the approval and consultation as said to sell them, to rent them or to effect some other transfer of them, as long as the one from whom the lands were purchased or his

> successor is given a notice that
> he is entitled, within thirty days,
> to purchase them. . .

This statutory provision establishes the duty of the authority to notify the individual as to the change in the designation of the lands – so that he can realize his right and buy the land that was expropriated from his possession – and from this explicit statutory provision one can also learn as to our matter what is the Israeli common law, meaning as a legal rule that obligates the authority in the framework of the connection that is maintained between the former owner of the expropriated land and the land that was expropriated from him. In cases of planning, the duty is fixed explicitly in the statute; in our matter we can learn and establish this duty from the combination of the connection of the owners to land expropriated from them; the duty of decency which fills this connection with content and from a (possible) analogy to planning law. See further paragraph 47 *supra*. But again: Our words are to be interpreted as thoughts only.

86. In our matter the authority did not notify the owners of the plans – and the changes to them – while, it goes without saying, no changes were visible on the land: just the opposite. Moreover, reading the words of the petitioners in HCJ 360/97 teaches us that the late attorney Mr. Samuel persevered in his view that the expropriation should be cancelled, and, though the years passed, he never gave up his desire to return the land to his ownership. The decedent's son, Mr. Michael Samuel informs us that in the late 1980's and early 1990's he travelled to the expropriated land – at his father's behest and his own initiative, and sought to learn the status of the land. Only at the end of 1995, so he declares, did he learn – indirectly – about the changes occurring on the land, and only as a result of this learned of the plans applying to it. Moreover, even though the late Adv. Samuel, and his heirs after his passing, approached the Administration several times with the request that the land be returned to their possession, the Administration was steadfast in its stance that the expropriation cannot be cancelled due to the military's use of it, and all those years the Administration did not reveal to the petitioners the change in the plan. When they found out about the change, the petitioners immediately filed the request that the land be returned to their possession, and on 21 March 1996 they even filed an objection to the new plan that was filed. Their objection was dismissed on 17 November 1996; they were notified of the matter of the dismissal on 2 December 1996, and on 16 January 1997 they came to the Supreme Court. Against the background of all this we have difficulty understanding in what way the petitioners delayed their petition.

The petitioners in HCJ 1947/97 also declare that they only became aware of the change with the publication of notices as to the cessation of the use of the place for military purposes, and that immediately upon this being made known to them they approached the authorities to clarify the status of the land. In point of fact therefore, the owners did not know of the intentions of the authorities until close to the date in which the land was returned to the Israel Lands Authority, on 25 August 1996.

As for the petitioners in HCJ 2390/96 – these demanded their rights, and we have not found delay as to them either.

87. The claim of delay is difficult in our view for another reason. It relies on the expenses that the authority incurred in implementing and advancing plan HD/VM/944, however, as we saw (in paragraph 7 *supra*) – and as per the notice of the Chairperson of the Committee for Building for Construction and Industry in the Haifa region that was published on 24 October 1997 – this plan was cancelled. Once the plan was cancelled, how can the respondents complain as to their situation being made worse due to the implementation of a plan which is no longer among the living? One way or the other, the expenses expended by the State – it is to be presumed (and so it was argued before us) – will be taken into consideration if the land is returned to its owners.

The claim of delay has nothing to it and is to be dismissed.

Date of applicability – the past and the future or only the future?

88. As per the ongoing-connection rule – a legal rule which we today plant in the soil of Israeli law – one from whom land was expropriated – in principle – to the return of the land or to the payment of its value with the exhaustion of the public purpose for which the land was expropriated (with the payment of certain balancing-payments, for the improvement of the land due to zoning plans or for other reasons, return of the compensation that the former owner received, etc.). This is so as a general rule, and the matter of the petitioners can also serve as a model in practice. In this case the petitioners' lands were expropriated to begin with for military purposes; this purpose exhausted itself, and thus in any event the petitioners can claim that what was taken from them should be returned to them. Indeed, it is possible the authority can expropriate those lands anew, but this expropriation – if it happens – must be performed properly and according to the accepted process – as per the expropriation legal rules. All this – as we have emphasized time and again – in principle. But the principle is not sufficient.

89. In our judgment we have not discovered a new continent and we have not invented a doctrine *ex nihilo*. The idea of the ongoing connection – as we have seen – has come up in the past more than once, and during the course of the years the doctrine has even been favored by some of the judges. Nevertheless it is not lost on us that this is the first time that we are determining – in a broad panel–definitive statements as to the connection of the owner to land that was expropriated from him. Until now the connection-severing doctrine governed, and now we have come and turned things upside down: we have uprooted the doctrine from its place and planted another doctrine in its place. Indeed, the doctrine of the connection sends roots to the expropriation law, and draws its strength from the Expropriation Ordinance – since otherwise we couldn't decide what we are deciding – and yet it is also true, that removing the queen from her throne and crowning a new queen instead is something of a mini-revolution in expropriation law. It appears that we would not be far from the truth if we say that the changing of the guards which we are conducting between doctrines appears like a change in the

law; until that very day a certain law established arrangements in a certain segment of life, and on the same day a certain law was passed which establishes different arrangements in that life segment, and in certain respects – arrangements which are the opposite of prior arrangements.

90. As to our matter, the question which is pressuring us for a solution arises on its own. According to the new doctrine, it is possible that the petitioners have acquired a ground for return of the land to their possession or to receipt of compensation instead. However, this right, if the petitioners have acquired such a right, was born prior to our establishment of the legal rule which we have established in this decision. And this raises a question: what will be the date for the beginning and applicability of the new arrangements we have established. Will the legal rule be applicable prospectively only, meaning: the new arrangements will apply only to an expropriation which will occur in the future or land that was expropriated in the past yet the public purpose will only dissipate in the future? Or perhaps we will say, the correct date for application of the legal rule will be retrospective – will look toward the past and will apply in the past – meaning: the new arrangements will also apply to an expropriation that occurred in the past and even if the public necessity has ended in the past. And possibly there will be found those who will say that the new arrangements indeed will apply just for the future but in an exceptional manner they will hold in the matter of the petitioners.

91. The question of the correct date for the applicability of the new arrangements involves various and important considerations; among them: the reliance interest of the expropriating authority – at the time of the expropriation or at the time of change or giving up of the public necessity; questions of budget and discussions which are necessitated by retroactive application, and on the other hand the consideration of the interest of the owners whose lands were expropriated in the past and more.

On this question of the date of applicability and on the matter of the relevant considerations, we have not heard arguments from the parties, not in writing nor orally, and it would not be right that we make a determination in the law prior to hearing from them. It is therefore appropriate that we take a short break and ask the parties to argue before us as to the question of the proper date for the applicability of the new arrangements in general, and, particularly, on the question of the applicability of the new arrangements in the petitions before us.

I therefore propose that the petitioners make their arguments in writing as follows: first, arguments on the question of the correct date for application of the new arrangements in general, whether from this day forward or also retroactively, and second, presuming that the new arrangements will also apply retroactively – the question whether they should apply to the expropriations which are the subject of the petitions before us.

The petitioners are requested to make their arguments, as said, within 30 days; the respondents will respond to these arguments within 30 days;

the petitioners may submit a response within 15 additional days. Following that, and if we believe that it is proper, we will set a date for an oral hearing, or we will make a determination in the law on the basis of the written arguments only.

A call to the legislator

92. Once we have made a determination on the matter of the doctrine, we see it as our duty to direct a call to the legislator that it act – and quickly – to regulate the matter of expropriation of land in a comprehensive and organized statute. The Expropriation Ordinance of today was passed in the Mandate period – in the year 1943 – and will soon celebrate sixty years to its birth. Now, with the arrival of the connection doctrine, there is no doubt in our minds that more than a few questions will pop up here and there – some of which we have discussed above – and it would be proper for these questions, at least their core elements, to find a solution in the written law. In the same motion it is proper that the legislator give thought to the expropriation provisions in the Planning Law and consider the possibility of unifying the law. The work is great and now is the time to act.

Justice I. Zamir

I agree to the main element in the judgment of Justice M. Cheshin. And what is the main element? The essential main is that the power to expropriate land according to the Expropriation Ordinance (Purchase for Public Purposes) is appended to a public purpose. The meaning of this is that a public purpose is needed not only as a precondition which must exist before the expropriation of lands according to the Ordinance, but also as a later condition which also must exist after the expropriation. From hence, if the public purpose ceases to exist after the expropriation it is possible and proper, in principle, to cancel the expropriation.

That is the main element, but I reach it by my own path, different from the path which Justice M. Cheshin has taken. Indeed, we are dealing with theory, but as we know, in the end theory impacts practice.

The expropriation power: the original interpretation

1. The Expropriation Ordinance (Purchase for Public Purposes) (hereinafter: 'Expropriation Ordinance') is a Mandatory ordinance not just in terms of time period but also by its character. The Ordinance, like other ordinances from that period, expresses the spirit of the Mandatory regime of Britain. This regime was not very different, in spirit and actions, from a colonial regime, as it was in the colonies of the British Crown. The regime, by nature of a colonial regime, was not committed to the values of democracy, but primarily to the interest of the Crown. For this need the regime acquired for itself far ranging powers via ordinances and other means. The powers that were granted to the regime did not show proper respect for basic human rights. On the contrary, they enabled severe violation of these rights.

So too the Expropriation Ordinance. The Ordinance grants extreme power to the Minister of Finance (who comes in the place of the High

Commissioner) to expropriate private property (with compensation). In theory it grants the power to the Minister of Finance to expropriate lands only for public necessity. But in fact it establishes, in language that can mislead the innocent reader, that the Minister of Finance may expropriate land for any purpose he sees fit. How so? Section 3 establishes that the Minister of Finance (or according to section 22, any entity or other person that the Minister authorized for this) may expropriate any land if he finds that this is necessary for any public necessity, but section 2 adds that public necessity is any necessity that the Minister has approved as a public necessity, and section 5(2) says that publication of a notice in the *Reshumot* according to which the Minister intends to expropriate specific land, will be considered definitive proof that the Minister certified that the purpose of the expropriation is a public purpose.

Moreover, the Expropriation Ordinance by its language does not demand that the Minister of Finance conduct an inquiry as to the public necessity in order to establish whether a certain land is necessary for a certain public necessity to a degree that requires expropriation; it does not obligate the Minister to give the owners of the land an opportunity to voice arguments against the expropriation, as would follow from the rules of natural justice, and it does not even impose a duty to note in the expropriation decision the public necessity at the basis of the expropriation. See, for example, HCJ 67/79 *supra* [4]. Indeed, as I have said elsewhere, 'this is a striking example of the unbearable ease of governmental violation of property right'. See Zamir in his book *supra* [50] at p. 197.

2. When the State of Israel was established, it could be expected that the very transition from a Mandatory regime to a democratic regime would lead to the cancellation of the Mandatory Expropriation Ordinance and the legislation of an Israeli expropriation law which would properly balance between public necessities and human rights. Indeed, in Britain itself the law which regulates expropriation of lands for public necessities has undergone substantive transformations, and it protects property right much more than the Expropriation Ordinance. But in Israel, surprisingly, not only has the Expropriation Ordinance not been cancelled and not made room for a new law, but it remained as it was, without even one amendment over the course of all the years since the State was founded, as though it were a perfect law. Moreover, it was left in its original version, which is the English version, with a Hebrew translation which is infelicitous and not binding, and a new version has not even been produced according to section 16 of the Orders of Government and Justice Ordinance 5708-1948. Is this not so because the Ordinance is so convenient for the government which is given such an easy hand for the purpose of expropriation, to the point where the government is hesitant to touch it, lest the need be found to amend it in a thorough manner? One way or the other, the fact that this ordinance has remained standing as it was for so many years is not a badge of honor for the State of Israel. And it is still possible and proper to fix the distorted.

Indeed, the truth must be told, in fact the situation changed since the legislation of the Planning and Construction Law. This law also

regulates the expropriation of lands for public necessities. Among other things it establishes, in sections 195 and 196, provisions for the case where the designation of lands that were expropriated is changed, and this includes provisions as to the return of lands to the original owners. Today this law is the basis for the expropriation of land in many cases, and apparently even in most cases. However, the Expropriation Ordinance still is valid, as it was, and it enables expropriations according to the Ordinance, and not necessarily according to the Planning and Construction Law.

3. Since the legislator has not done anything to amend the Ordinance, it was possible and proper that the Court do something toward a new interpretation of the Ordinance, as is called for by the very transition, with the establishment of the State, from a Mandatory regime to a democratic regime. Indeed, as was established in section 11 of the Orders of Government and Law Ordinance, the law that existed in Israel on the eve of the establishment of the State will stay in force, *inter alia*, 'with the changes necessitated by the establishment of the State'. One of the most important changes stemming from the democratic character of the State is the relative status of human rights vis-à-vis public necessities. The balancing point between these and these, so ruled the Court, changed with the establishment of the State. The change must also be expressed in a change in the interpretation of the Mandatory ordinances, even if the language of the ordinance has remained unchanged. So ruled the Court, for example, as to the Journalism Ordinance from 1930. This ordinance granted the Minister of the Interior power, *inter alia*, to stop the publication of a newspaper that published something that may, in the opinion of the Minister, endanger public safety. The Court determined in HCJ 73/53 *Kol Ha'am Company Ltd. v. Minister of Interior* [31] that the democratic character of the State obligates granting effective protection to freedom of expression, and therefore a new interpretation of that ordinance is necessitated: according to that interpretation, the Minister of the Interior is not authorized to stop the publication of a newspaper unless something has been published in it which creates a near certainty of real danger to public safety.

In a similar manner it was possible to interpret the Expropriations Ordinance, after the establishment of the State, in a manner that would limit the power to violate the right to property. However, the Court, while it declared property right as a human right, did not act with the property right as it acted with freedom of expression. It is possible that this was so because the Court did not evaluate the property right as it evaluated the freedom of expression, or because it was not willing to spread its force over all the rights or for any other reason. Indeed over the years a certain change occurred in the approach of the Court toward the Expropriation Ordinance in a manner that somewhat strengthened the defense of property right. See HCJ 307/82 *supra* [3]. However, in a general manner, the Court continued to give the expropriation power a broad interpretation, in accordance with the language of the Ordinance, in a manner that is not accepted in democratic states. In Mot 33/53 *Salomon v. Attorney General* [1] the Court said:

> 'The manner of expropriation of lands for a public purpose is subject to the unlimited discretion of the Minister of Finance as an executive branch, and as long as it operates in good faith, when he uses his discretion to implement his policy he is subject to supervision and review of the Knesset and not review of the Court.'

The Court also ruled in this vein after this. *Inter alia* the court held that even if it turns out after the expropriation that the lands that were expropriated for public necessities no longer serve a public necessity and the State intends to sell them to the highest bidder, this is not sufficient to rescind the expropriation. See for example, HCJ 282/71 *supra* [14] where Justice Landau said (at p. 470):

> 'Ostensibly the meaning of these words is simple nationalization of private property for compensation that does not compensate, in the guise of purchase for public necessities which ceased and no longer exist. The tool of the Ordinance of Purchase for Public Necessities was not created for this, although in a formal sense the Administration is acting also in this case within its provisions.'

See further Kamer in his book *supra* [52] at pp. 158-160.

However, since then a change has occurred in the legal rule, although no change has occurred in the language of Ordinance. What occurred?

Property right as a constitutional right

4. In 5752-1992 a substantive change occurred in the legal status of property right in Israel. The Basic Law: Human Dignity and Liberty, that was legislated that year, established in section 3 that: 'a person's property is not to be violated'. Indeed, this section does not stand on its own, but it is woven with other sections of the Basic Law, including section 8 ('the limitations clause') which permits infringement of basic rights, including property right, under certain conditions: infringement in a law (or by power of an explicit authorization in it) which is compatible with the values of the State of Israel, which is intended for a proper purpose, and to a degree that does not go beyond that which is necessary. Yet, as has been ruled, the basic law has elevated property right up the levels of the pyramid of the legal norms and placed it at the pinnacle: it made it not only into a basic right but also a constitutional right. See CA 6821/93 *supra* [26].

From a practical perspective a double significance stems from the status of a constitutional right. First the Court is authorized to void a new statutory provision that was legislated after the Basic Law if it violates a right in conflict with the provisions of the Basic Law. Second, the Court may interpret an old statutory provision that was legislated prior to the Basic Law, if it violates the right, in a manner that will reduce the violation. Indeed, this Court has clarified well in various contexts, that the interpretation of a law that violates a constitutional right, and accordingly the meaning of that law, may change consequent to the Basic Law. See, for example, CrimMA 537/95 *Ganimat v. State of Israel supra*

[20]. The Court has also clarified this as to property right. Thus, for example, in HCJ 1188/92 *Local Planning and Construction Committee Jerusalem v. Bareli* [32], at p. 483, the Court said: 'The interpretation today, more than in the past, must operate in the direction of reducing the violation of property right.' See also LCA 5222/93 *Lot 1992 Building Ltd. v. Parcel 168 in Lot 6181 Ltd*. [33].

If so, then today it is possible and appropriate that the Court act toward the interpretation of the expropriation power in the Expropriation Ordinance, following the change that occurred in the status of the property right, as it acted after the establishment of the State as to the interpretation of the power to stop the publication of a newspaper in the Journalism Ordinance, consequent to the change that occurred then in the status of freedom of expression. See *supra* paragraph 3. Accordingly, it is possible and appropriate that the expropriation power will be interpreted today on the basis of the balance between public necessities and property right that would be compatible with the values of the State of Israel so that will strengthen the protection, that until now was weak, of property right.

Expropriation power: purpose appended

5. Indeed, after property right was raised to the level of a constitutional right, and since it went up a level, a change has occurred in the interpretation of the expropriation power in a manner that strengthens the protection of the right: the expropriation power has been recognized as purpose appended. What does this mean?

There is a strong connection between the power and the purpose. Every power has its own purpose. At times the purpose is explicit in the law and at times it is learned, in an implied way, from the history of the statute, the language of the statute, the substance of the power and more. The Planning and Construction Law, for example, in section 188 grants the power to the local planning and construction council to expropriate land for public purposes, and it defines public purposes in great detail. The Expropriation Ordinance also explicitly establishes the purpose of the expropriation power: to purchase land for a public necessity (the exact translation from the English source is purpose). But what is the public necessity? The Ordinance intentionally uses opaque language: public necessity, as section 2 of the Ordinance establishes, is any necessity which the Minister of Finance certified as a public necessity. However, today it is clear that the certification of the Minister, like any administrative decision, is subject to judicial review, *inter alia*, to review in terms of the purpose of the statute and the relevant considerations. Therefore, it is clear that there is a duty to exercise the expropriation power like any power, for the purpose of the power and not for an irrelevant purpose. From hence, that if the Minister of Finance decides to exercise this power, for example, for a personal purpose, the decision is defective and illegitimate.

This is so as to any power. However, there are powers that can be called purpose appended powers, in which the purpose of the power must exist not only at the time the power is exercised, but also after the

exercise of the power. With such power the exercise of the power changes the legal situation over time upon the condition that the purpose of the power exists for the entire time. When the condition ceases to exist, the legal situation that is created with the exercise of the power must change. Thus, for example, the Court saw the power according to the Defense Regulations from 1939 to expropriate the use of an asset for a certain purpose, such as public safety or supply of vital services. The Court stated that such expropriation is 'an ongoing and continuous activity', and therefore it can exist as long as the purpose of the expropriation exists. See HCJ 31/48 *supra* [11] at p. 200. The power of the Minister of Finance according to section 2 of the Emergency Powers (Detentions) Law 5739-1979, to order the administrative detention of a person if security reasons necessitate that he be held in detention. Or the power of a district psychiatrist according to section 11 of the Law for the Treatment of the Mentally Ill 5751-1991, to order compulsory clinical treatment of a mentally ill person who needs continued clinical treatment. With powers such as these, if the purpose of the treatment that existed at the time of the decision to exercise the power ceases to exist, it is possible that the Court would void the decision.

6. The expropriation power, as said, was not considered a purpose appended power at the time. See *supra* paragraph 3. The result was that even if the public necessity which lead to the expropriation ceases to exist, the expropriation continues to exist, as if the connection between the power and the purpose had been severed. This result appeared, more often than once, unjust. In HCJ 282/71 *supra* [14], in which such a case was discussed, the Court said (at pp. 469-470) that 'in the case of the petitioner the injustice cried out in particular' and that 'in the present case justice would require that the State return the land to the petitioner and his brother, after the security necessity for which the land was acquired at the time ceased to exist.' See the criticism voiced by Professor Klinghoffer, in his article *supra* [59]. See further as to accepted legal theories of public property in the countries of the European continent, and in contrast, as to the Expropriations Ordinance in Israel, Klinghoffer in his book *supra* [51] at p. 141 and on. But this was not sufficient over many years to bring about change in the interpretation of the expropriation power as it was established in the Expropriations Ordinance.

7. The change in the interpretation of the expropriation power, which recognized this power as a purpose appended power, occurred following the Basic Law: Human Dignity and Liberty. The change was expressed at first in HCJ 5091/91 *supra* [6]. See also HCJFH 4466/94 *supra* [9]. There Justice Dorner related to the new status that the Basic Law: Human Dignity and Liberty granted to property right as a constitutional right. And so she said (at p. 87):

> 'The rise in the status of property right to a supra-statutory constitutional right requires an additional development in the interpretation of the Mandatory Ordinance, in order to adapt its provisions to the new normative reality which was created with the passing of the Basic Law… a broad

> interpretation of the power, which enables the authority to use the land for a different purpose than the purpose for which it was expropriated, is contrary to the rule that the case law established as to a narrow interpretation of the power to infringe on a basic human right. All the more so that one is not to accept a broad interpretive approach with the passing of the Basic Law.'

The change found expression once again, after a short time, in HCJ 2739/95 *supra* [5], at p. 321-322. Justice Goldberg said there with the agreement of Justice Mazza and Justice Kedmi, as follows:

> 'The expropriation is an unavoidable necessity if there is no escape from it in order to ensure that public necessities are satisfied. However, expropriation was not intended to enrich the State. Between the expropriation of the land and public necessities there exists an unseverable connection, to the point where it can be said that from a conceptual standpoint the property right that the State acquires in the land that was expropriated from the individual – even if the expropriation processes were completed – is a 'conditional' right, and the condition is the necessity of the land to achieving the public purpose: once the public purpose has passed from the world, or other grounds have arisen to cancel the expropriation, the land is to be returned to is owners, if he so wishes. Returning the land in this situation is what returns the 'orders of property in land' to their place, as otherwise the expropriation turns from a **tool** for realizing social objectives to an independent **purpose**, which stands on its own.'

This being so we are not today breaking new ground, but rather continuing to go in the path that has already been opened following the Basic Law: Human Dignity and Liberty, which connects the expropriation power to the purpose of the expropriation. Justice M. Cheshin, who is also of this view, uses the language of an ongoing connection between the lands that were expropriated and the owners of those lands. This, it appears to me, is language anchored in civil law. But we find ourselves in public law. Therefore I am of the view that it is preferable to say, in the language of public law, that the expropriation power is appended to the purpose of the expropriation throughout the entire expropriation.

This way or that, today there is no longer room for doubt that a legal rule has been established by the Court in an extended panel: in principle, expropriation of lands for public necessity is valid as long as the public necessity exists. This is the new rule.

This is so in principle. But in a practical manner there now have grown out of the new rule many and complex problems. How is the legal rule to be implemented in the many cases of land expropriations that occurred over decades, being very different from one another?

8. It is clear that the new rule does not require in every case in

which the public necessity expires in land expropriation that, without exception, land will be returned to the original owners. For example, it is possible that the lands were expropriated a very long time ago, and even the public necessity expired a long time ago, and since then they have served a private purpose, and no one has said a word; it is also possible that in the meantime the lands were sold and have been transferred in good faith from hand to hand; it is also possible that the face of the lands has undergone significant change, such as that a large structure was built on it for a certain purpose, so that under the circumstances it is not practical or reasonable to return the lands to the original owners; so too it is possible that the lands are still necessary for a public necessity although another necessity, slightly or greatly different from the original necessity; and it is possible that there is no justification for returning the land to the original owners because of delay on the part of the owners or because returning the lands will cause severe damage to the public interest. What is the law in such cases? Even in other countries where the law establishes that expropriation of lands is valid only as long as the public necessity exists, this law is subject to limitations, such as the time that has passed since the expropriation.

When and how then is it possible and proper to implement the new rule in Israel?

Problems in implementation of the new rule

9. First, it is to be clarified that according to the new rule, it is not sufficient that the public necessity expired in order for the lands that were expropriated to transfer as though on their own, from the hands of the expropriation authority (whether it be the State or another authority) to the hands of the original owner. In order for the lands to be transferred from hand to hand a decision is still necessary. The decision can be made by the expropriating authority after it realizes that the public necessity expired, or by the Court when it is asked to decide in a dispute between the expropriating authority and the original owners.

Indeed, when the expropriating authority realizes that the public necessity expired, it would be proper that it notify the original owners of this and exchange words with him in order to make an arrangement for return of the lands to his possession or to work out another arrangement (such as purchase or compensation) which will be agreed to or even to inform him that it is its intention to continue holding the lands for another public purpose.

This is a change which is derivative of the new rule. It has practical significance. The communication between the expropriating authority and the original owners, against the background of the new l rule, is likely to end, and it is desirable that it should end, with an agreed upon arrangement.

10. Second, implementation of the new rule raises various questions. Among others, the question arises in the case where the public necessity which led to the expropriation of the lands expired, but in the meantime another public necessity, slightly or greatly different from the original necessity, has arisen. Is the expropriating authority entitled to continue

holding the land for the new public necessity, or does it need to expropriate the land again? If in such a case, the authority has to expropriate anew, does it also have to pay compensation again? And if so, in what amount? And there is also room for the question if there is a difference between the case in which the owner of the land received compensation for the expropriation and the case where the owner did not receive (perhaps because he refused to receive) compensation. Moreover, is the authority obligated to return the lands that were expropriated to the owner, or perhaps must it sell the lands to the owner? And if so, at what price? These questions and additional questions are as complex as they are important. However, they need not be answered now, nor even an opinion expressed, by the Court. It is possible and even proper that in time the answer be given in a statute. If the answer will not be given in a statute, the Court will have no recourse but to provide the answer itself, when there will be a need for this.

11. Third, a date must be set for the applicability of the new rule. It is straightforward that this legal rule applies prospectively, on any land expropriation that will be done according to the Expropriation Ordinance from here on in. From here on in the expropriating authority knows that the expropriating power is purpose appended, and therefore a new expropriation will be valid only as long as there is a public necessity for expropriation.

However, what is the law as to expropriation in the past, such as expropriation which was done a year or ten or fifty years ago: does the legal rule apply retroactively on every expropriation that was done in the past? Moreover, let us presume that the legal rule also applies to an expropriation that was done in the past for one period of time or other. In such a case what is the law if the public necessity for the expropriation has also expired in the past, such as a year or thirty years ago? It can be said that even if the new rule applies to an expropriation that was done in the past, it does not apply unless the public necessity in the expropriation will expire in the future, meaning from here on in. But it can also be said otherwise, What is the law?

The question whether to give a new rule retroactive applicability is at the Court's doorstep, at times explicitly and at times impliedly, whenever it lays down a new rule. At times, the answer is clear, one way or another, according to the circumstances of the case and the substance of the legal rule. At times the answer can move to and fro, and it is dependent on the circumstances of the case and the substance of the rule. Then the Court must develop a stance for itself, as a matter of judicial policy, as to the date of applicability of the rule.

In the present case there are several possibilities for determining a date for the applicability of the rule. In various countries in Europe in which the expropriation authority is purpose appended, such as France and Germany, the duty to return lands that were expropriated, when the public necessity expires, applies for a specific time period, such as a period of ten years from the day of expropriation. What is the proper rule? It is appropriate that these questions and other additional questions derived from the new rule be provided in a statute. Indeed, the subject of

expropriation of lands for public necessities is a topic that should properly be regulated in a detailed and comprehensive manner, as much as possible, by statute. This is accepted in other countries. So too in Israel. But in Israel the Mandatory Ordinance which regulates the expropriation of lands is an outdated ordinance that is not compatible with the values of the State. It should have already been replaced by a new law. See *supra* paragraphs 1 and 2. In any event now, with the change in the rule, the need for a new statute that will be compatible with the values of the State, will not infringe on property right in a manner that goes beyond what is necessary, and will also provide answers to problems which arise from the new rule, has become more urgent and pressing.

However, the question of the date for applicability of the new legal rule is before us today, in the petitions that were filed already several years ago, and there is no avoiding an answer, if only a partial answer, to the extent it is necessitated by the present case.

12. However, the question of the date for the applicability of the new rule was not discussed at all before the Court, neither orally nor in writing, and it would not be proper to give it an answer without a foundation of arguments. Therefore I agree that it is proper to now hear the arguments of the parties on this question, as said in paragraph 91 of the decision of Justice Cheshin.

Justice T. Strasberg-Cohen

1. I accept that according to the legal rule that has come out of this decision in the words of Justice M. Cheshin and I. Zamir, once the public purpose for which the land was expropriated has been exhausted, the one from whose ownership the land was expropriated is entitled – in principle – to the return of the land or to compensation if it cannot be returned subject to the exceptions mentioned in the opinion of my colleague.

2. As for myself, I see the ownership acquired by the State by way of expropriation as a special legal institution of 'public ownership' which is acquired by compulsion, and which is not expressed in the Land Law 5729-1969 and it is an outcome of the laws of expropriation. The legal rule that has come out of this decision before us is derived of this. When the purpose of the expropriation has been exhausted, the duty of the authority arises to return to the original owner the land that was taken from him by the authority by compulsion (or to pay compensation, according to the circumstances). This duty reflects the protection of the property right of the original owner, which was anchored as a constitutional right in the Basic Law: Human Dignity and Liberty.

3. From the legal determination which has come out before us in this decision various questions are derived which we are not called upon to determine at this stage or in this matter, such as on whom the legal rule which has come out before us will be applied, on one whose grounds for his suit – which arises with the change in expropriation of the land – will ripen after the handing down of this decision; one whose grounds for suit

arose in the past and the statute of limitations has not applied to it yet, or only on the petitioners before us. Additional questions are what is the ramification of the passage of time since the expropriation and until the change of purpose on the right to the return of the land or to compensation; what is the ramification of the new purpose that was designated for use of the land by the expropriating authority, on the right to the return of the land; what ramification is there to the state of the land at the time of the change in designation (the existence of structures on it or the granting of rights to third parties) on the question if it is to be returned or if compensation is to be paid for it; what is the fate of improvement of the land by the authority, if it was improved: what are the conditions in which it is made possible for the expropriation authority to change the purpose of the expropriation and leave the land in its hands by power of the expropriation; what are the ramifications of receipt of compensation in the past as a result of the expropriation on the right to return of the land and other similar questions. Part of these questions will be dealt with – as necessary – at the second phase, after hearing the parties' arguments, as was determined in the decisions of my colleagues, some of them will be left for later determination, when they arise.

I therefore also join the result acceptable to my colleagues, which finds expression in paragraph 91 of the decision of Justice M. Cheshin and I also join my colleagues call to the legislator, to regulate this important topic in legislation, and the sooner the better.

President A. Barak

Today an important legal rule is being handed down. According to it if the public purpose which served as the basis for expropriation of lands according to the Expropriation Ordinance (Purchase for Public Purpose) (hereinafter: 'the Expropriation Ordinance') ceases to exist, the expropriation is cancelled and as a rule (subject to exceptions) the lands are to be returned to the owner of the lands from which they were expropriated (the 'original owner'). This legal rule is acceptable to me. I ask to make several comments as to the theory (or model) at the basis of this important legal rule and its normative basis.

The model at the basis of the legal rule

1. My colleague Justice M. Cheshin places the 'ongoing connection model' at the basis of the legal rule. My colleague Justice Zamir places at the basis of the legal rule the approach of 'purpose appended authority'. Both of my colleagues seek to establish a 'model' or a 'prototype' or a 'doctrine' (hereinafter: 'the theory'). The role of the theory in general is two-fold: on the one hand it explains the existing normative framework. This framework is not impacted by it nor was it caused by it. The existing normative framework is deduced from sources which are external to the theory itself (this can be termed the explanatory face of the theory). On the other hand, it constitutes a legal source from which normative results are derived. The theory, in itself, effects legal consequences (they can be termed the creative face of the theory). I have discussed these two roles of theory elsewhere, noting:

> 'The purpose of general theory is twofold: first, it can give an explanation of existing law. From this perspective it constitutes a tool of interpretation; second, it can assist in the solution of new problems, which have not yet arisen. From this perspective it constitutes an operative legal norm. In a certain sense, our work is like the work of a mathematician, who on the basis of a given number of geometric points on a surface deduces a general geometric shape which represents these points. With the help of this geometric shape it is possible to deduce the existence of additional points that have not yet been established' (A. Barak 'the Essence of a Note' [54] at p. 17).

We find that in relation to certain questions, theory summarizes existing law. It gives a 'name' or 'explanation' to what was determined without it, and in for whose determination it was not needed. In relation to other questions, theory is an independent norm, from which solutions are derived. It grants the solution to the legal problem that is derived from the theory itself. What is the status of the theory which my colleagues are proposing in the case before us?

2. I will open with the theory of my colleague Justice Cheshin. A significant portion of his judgment is dedicated to the model (or the theory or doctrine) of the ongoing connection. According to the importance which my colleague attributes to it, it would be possible to presume that in relation to the problem before us – whether the cessation of the public purpose brings about cancellation of the expropriation – it provides an answer to the problem (the creative face). Support for this approach can be found in the stance of my colleague that in expropriation, the authority 'as though must justify the expropriation action daily' (paragraph 17). My colleague continues and learns an analogy from the seizing of assets according to the Defense Regulations from 1939, and from the words below of Justice Silberg as to that seizure:

> 'Confiscation of assets according to regulation 48, is not a one-time completed act, but an ongoing continuous action which often draws its right to exist from the consistent desire of the authority that is condemning' (HCJ 31/48 *supra* [11], at p. 200)

Indeed, were the 'institution' of expropriation built on the concept that the expropriation is not a one-time completed act but a continuing act which 'often draws its right to exist from the consistent desire of the authority' that is expropriating, then it would be possible to say that from this model of expropriation the conclusion is to be drawn – as an expression of the creative face – that if the public purpose ceased to exist the expropriation must be cancelled. But the expropriation is not an ongoing activity. It does not constitute – while adopting the theory espoused by Justice Silberg as to making a will – 'a sort of 'ambulatory', transitory creature' (CA 148/52 *Kasprios* v. *Kasprios* [34] at p. 1292.) Expropriation is a one-time legal action. The need for the continued existence of the public purpose is not derived from the very institution of

expropriation. It is concluded from considerations which are external to the expropriation itself, and at their center the central status of property right. Indeed, as my colleague Justice M. Cheshin has shown, in various countries in which the institution of expropriation exists there are various solutions as to the need for the continued existence of the public purpose. I have no doubt that there is not in the model (or theory) of the ongoing connection to bring about the legal rule which arises from our judgment. It is not to be said the **since** the connection between the original owner and the expropriated lands is an ongoing connection, **therefore**, with the cessation of the public purpose which stood at the basis of the expropriation the lands return to the original owner. All that can be said is that the connection-maintaining model (or theory) explains the result that the Court reached for other reasons. Therefore, it is to be said that **since** according to the legal rule the State must return to the original owner – to him and not to another – the lands that were expropriated from him, **therefore**, the original owner maintains, despite the expropriation, the connection to the land that was expropriated. Indeed, it is important to relate to the connection-maintaining model (or theory) as a model which explains a normative system that was designed by force of considerations which are external to it (explanatory face), and not as a model that has, in terms of the question before us, a life of its own, in a manner that there is in the force of the model to provide a foundation for the legal rule. If indeed I am right, then in any event the title of the (explanatory) model does not raise a question of much importance. It is only a matter of judicial semantics. It can be used if it is precise and does not create excessive problems.

3. In this textual realm I would like to note that the talk of ongoing connection may create the impression that the original owners is left with a property right in the land even after expropriation. My colleague Justice M. Cheshin writes:

> 'The ongoing connection model shows us that past owner holds on to a legal connection – at some intensity or other – to the land that was expropriated from his ownership; and that the act of expropriation does not disconnect the owner entirely from that land.'

Certainly this is not the approach of my colleague Justice M. Cheshin. The ongoing connection of the original owner does not grant him a property right to the lands that were expropriated. All that was granted to the original owner is the right to demand from the State the cancellation of the expropriation and the return of the ownership (or its value) to the original owners. This is an obligatory right toward the State. It is not a property right in the land. It is not to be said that after the expropriation the original owner is in a 'holding pattern' for his ownership to be filled with new content. (See Y. Weisman *Property Laws-Ownership and Partnership* [55] at p. 28). He is not left with a blank box titled 'ownership' which will be filled with property rights that were ripped from it. (**ibid**, at p. 31). With the formulation of the expropriation the original owner ceases to be the owner of the lands. The 'box' in its entirety has been transferred to the State. However since the property

was taken from the original owner without his consent and for the sake of realizing a public purpose, the expropriation is cancelled and the original owners are given a remedy following this.

4. My colleague Justice Zamir describes the power of the Minister of Finance to expropriate lands as a 'purpose appended' authority. It is clear from his decision that he does not see this characterization as a source of the requirement that the public purpose exist not only at the time of the expropriation but also after the expropriation. This characterization does not express the creative face of the theory. This characterization is descriptive, and it expresses the explanatory face of his approach. The source for the requirement of 'appendance' of the purpose does not stem from the expropriation laws themselves or from the jurisprudence of administrative law. The source for this requirement stems from the weighty status of property right, which in 1992 became a constitutional right. Justice Zamir notes that 'This being so we are not today breaking new ground, but rather continuing to go in the path that has already been opened following the Basic Law: Human Dignity and Liberty, which connects the expropriation authority to the purpose of the expropriation' (paragraph 7). I agree with this approach and in any event I have no objection to use of the phrase 'purpose appended' power. I hope that in the future it will be possible to develop the rules of this power for additional and similar powers in a manner that it will be possible to use this model not only to explain normative results achieved by sources external to it (the explanatory face), but it will be possible to see in this model itself a source of the requirement as to the appendence of the requirement to the authority (creative face). This matter does not require determination in our matter.

5. My colleagues dedicate part of their decision to finding the 'geometric place' of the new theory – the model of the ongoing and continuous connection on the one hand and the 'purpose appended' model – in the field of private or public law. It appears that they both agree to the fact that at the source of the legal rule which arises from our judgment rests the central status of property right. This right has lately received constitutional supra-statutory status. By its very nature, property right operates both in the public realm (in all that relates to the relationship between individuals among themselves). In the matter before us – the (obligatory) right of the original owner toward the State (to cancellation of the expropriation) – its operation is in the realm of the public law. Indeed, Justice M. Cheshin notes in his judgment that 'this bite that the doctrine is meant to take out of property ownership, limits itself, by definition – and subject to other doctrines in law – primarily to the relationship between the State (or other public authorities) and the individual, and to the law of expropriation alone' (paragraph 35).

The status of the basic law: Human dignity and liberty

6. What is the role of the Basic Law: Human Dignity and Liberty in the petitions before us? In this matter there is a certain difference between the approach of Justice Zamir and the approach of Justice M. Cheshin. Justice Zamir sees the Basic Law: Human Dignity and Liberty

as the primary basis for a change in the interpretation of the Expropriation Ordinance. Justice Zamir writes:

> 'The change in the interpretation of the expropriation power, which recognized this power as a purpose appended power, occurred following the Basic Law: Human Dignity and Liberty.'

The stance of Justice Cheshin is more qualified. According to his view, it was possible to reach this legal rule already in the Mandate period, and certainly after the establishment of the State and before the legislation of the Basic Law: Human Dignity and Liberty. We find that it is not the Basic Law which brought about the new legal rule, although it 'helped us reveal the light of the hidden, but did not have – and does not have the power – to create something from nothing as to the statutes which preceded it' (paragraph 42). These differences of opinion are not new (see CrimMA 537/95 [20] CrimFH 2316/95 [21]). I wish to express my view on them briefly.

7. The starting point is that the Basic Law: Human Dignity and Liberty did not come to damage the validity of a law that existed on the eve of the start of the Basic Law (see section 10). However, the Basic Law impacts the interpretation of a statute that existed on the eve of its inception (hereinafter: 'the prior statute'). This impact is inherently limited, as there is not in the power of the Basic Law to bring about a new interpretation which cannot be reconciled with the language of the prior statute. Any interpretation is limited by the language. The interpreter is not permitted to give the language of the law a meaning which the language cannot bear. I discussed this in one of the cases, noting:

> 'The work of interpretation is not limited only to words, but the words limit the interpretation... it is possible that the language of the statute will be given a broad interpretation or a narrow interpretation, a regular interpretation or an exceptional one, but generally an archimedic grasping point must be found for the purpose in the language of the Statute.' (FH 40/80 Kenig v. Cohen [35] at p. 715).

But in the framework of the range of textual possibilities of the prior statute the Basic Law has a great influence. It operates primarily in formulating the purpose of the prior statute. This purpose is, as is known, the specific purpose and the general purpose. The first is learned from the language of the law and its history. The second is learned from the basic values of the system (see HCJ 953/87 *Poraz v. Mayor of the City of Tel-Aviv Jaffa* [36]). These two purposes – and the final purpose which is formulated from them – are not frozen in time. They are dynamic (See A. Barak, *Interpretation in Law*, Vol. 2, *Statutory Construction* [56] at p. 264, 603) Therefore a purpose that would have formulated in the Mandate period is not identical to the purpose that the Court would formulate after the establishment of the State HCJ 680/88 *Scnitzer v. Head Military Censor* [37] at p. 627; HCJ 2722/92 *supra* [22], at p. 705). A purpose that would formulate with the establishment of the State is not identical to the purpose the Court would formulate following

fifty years of independence. Our understanding of the language and the history (the specific purpose) changes with the passage of time. Our understanding of the basic values of the system (the general purpose) change with the change of time. Our understanding of that which surrounds us changes all the time, and with it our approach as to the purpose of the legislation changes. I discussed this in one of the episodes, noting:

> 'The meaning that is to be given to the statement in the statute... is not set and standing forever. The law is part of life, and life changes. With the change in reality the understanding of the law also changes. The language of the law stands as is, but its meaning changes with the 'changing life conditions'... the law blends with the new reality. In this way an old law speaks to the modern person. From the interpretive approach, that 'the law always speaks'... interpretation is a renewing process. Modern content is to be given to the old language, in this way the gap between the law and life is narrowed. Against this background it would be proper to say, as Radbruch has said that the interpreter may understand the law better than the maker of the law and the law is always wiser than its maker... the law is a living creature, its interpretation must be dynamic. It is to be understood in such a way that it will blend with and advance the modern reality. (HCJ 2000/97 *Lindorn v. Karnit, Fund for Compensation of Victims of Road Accidents* [38] at pp. 32-33.)

Therefore I do not find fault with the justices of the Supreme Court at the time of the establishment of the State for not developing the legal rule that arises from our judgment fifty years ago or thirty years ago. Times were different. Problems were different. Horizons were different. The balance between the needs of the public and the individual – which formulates the general purpose of every statute – was different.

8. A central factor which brings about a change in understanding the language of the law is constitutional change. The new constitutional framework brings after it constitutionalization of all legal systems (see HCJ 3267/97 *Rubinstein v. Minister of Defense* [39] at p. 522). Its significance is that it raises new values or gives them new weight. A new balance is created between the conflicting general values. This is so generally. This is so in particular when the constitutional change is in the provision of constitutional status to human rights. The change creates a new normative framework for the status of human rights. As a result a new balance is created between human rights and public necessities. A 'constitutional revolution' takes place (see CA 6821/93 *supra* at p. 352). In the framework of this new balance a change may occur in the purpose of prior statutes. A purpose that could not have been formulated prior to the passing of basic laws might be able to be formulated after the passage of basic laws. And again, the text of the law has not changed. But the purpose of the law has changed. The change might be slight. It may reflect a new purpose that could have been reached – even if in fact it

was not reached – in the past. The change may be weighty. It may reflect a new purpose that could not have been reached in the past. Indeed, Radbruch's statement – that the law is always wiser than its maker – is particularly true during a time of constitutional change. These change the normative expanse in which we continue to think. It is no longer possible after the legislation of the basic laws on human rights to think of the general purpose of the legislation in the same manner in which we thought of it before the legislation of the basic laws. Our normative world has changed, our way of thinking has changed (knowingly or unknowingly).

9. Therefore, it is only natural in my view that our approach to the purpose of the Expropriations Ordinance is different from the approach to it fifty years ago or thirty years ago. The central change occurred with the legislation of the Basic Law: Human Dignity and Liberty. This law granted constitutional supra-statutory status to the property right of the original owners. In the balance between the property right of the original owners and the public necessities a change has occurred. This change does not impact the validity of the expropriation ordinance. It is expressed in our new understanding of the purpose of the Expropriation Ordinance. It leads to increasing consideration of the rights of the original owners (see HCJFH 4466/94 *supra* [9] at p. 88 (Justice Dorner); HCJ 2739/95 *supra* [5] at p. 321 (Justice Goldberg); at p. 327 (Justice Mazza)). This consideration is not enough to create a property link between the original owner and the expropriated land. But this consideration is sufficient to impose upon the state the duty to cancel the expropriation if the public purpose no longer exists. Indeed, the basis for the legal rule is the central status of the property right of the original owner. The expropriation mortally wounded this right. The property of the original owner was taken from him without his consent, without leaving in his hands a vestige of right in his property. The reason for taking the property was in the existence of the public purpose which justified sacrificing the property of the individual on the public's altar. Justice requires that when the public purpose terminated, and the original reason was removed for the continued ownership by the State in the land, the ownership will be returned to the original owners (see HCJ 282/71 *supra* [14], at p. 469-470). The State's ownership comes to it for the use of its governmental powers and against the wishes of the original owner. From hence, that its ownership in the lands is of a special character ('public property'). Thus, for example, it is not proper that the day after the expropriation the State can sell the land in the market in order to finance its budget. Limitations are placed on the State's ownership. One of those limitations – which is derived from the demand of justice and from the property right of the original owner which has been denied from him without his consent – is that with the passing of the public purpose which was at the basis of the expropriation the expropriation itself will be cancelled.

10. My colleagues, Justices Zamir, Strasberg-Cohen and S. Levin have raised a series of questions which they wish to leave for further inquiry. I join them. I also join the call to the legislator as to the urgent

need to regulate the entire matter in a statute.

Vice President S. Levin

1. I agree both with the result and the basic approach of my distinguished colleague Justice M. Cheshin in his monumental opinion as to the non-severing of the connection between the owner of the land that was expropriated and the land. Whether we adopt the model of the connection-maintaining expropriation action or the model of the purpose appended expropriation power, I accept, as do my colleagues, that when the purpose of the expropriation is cancelled the owner of the land is entitled – in principle – to its return to his possession. The disagreement between my esteemed colleagues Justice M. Cheshin and Justice Zamir as to the precise placement of the question before us – appears semantic to me. It relates to artificial distinctions, which may be different from one another in various legal systems and may contain elements of this one and of that one. In the end – the law is one, and its division into separate and distinct squares – each evolving independently –appears undesirable to me and does not serve any useful purpose.

2. As my distinguished colleague Justice M. Cheshin, I too wish to leave for further inquiry the same questions which he did not determine with finality, without expressing any opinion as to them. Thus, for example, I wish to leave for further inquiry the question as to what the law is regarding one whose lands were expropriated and compensation was paid to him, and the question whether consequent to a change in the public purpose it is incumbent upon the authority to expropriate the land anew.

I join the call of my distinguished colleagues to the legislator to regulate the subject of expropriation of lands in a comprehensive, modern, and ordered statute.

Justice D. Dorner

1. I agree that the expropriation power according to the Lands Ordinance (Purchase for Public Purposes) (hereinafter: 'the Purchase Ordinance') is limited to the purpose of realization of a public necessity, and that when the land is no longer necessary for the realization of the public necessity, the Minister of finance, as a rule, is to cancel the expropriation.

This legal rule is not new to us. It developed following the legislation of the Basic Law: Human Dignity and Liberty (hereinafter: 'the Basic Law'), in the framework of which constitutional status was granted to the right to property . This necessitates a re-examination of the interpretation of laws which violate the right to property. See the words of Justice Or in HCJ 3956/92 *supra* [8], at paragraph 6 and the words of Vice-President Barak in CrimMA 537/95 [20], at pp. 418-419 (in a majority opinion that was approved in FHCrimA 2316/95 *supra* [21], at p. 655).

2. Even before the passing of the Basic Law the right to property was

recognized as a basic right. With the passage of years changes also occurred in the interpretation of the Mandatory Purchase Ordinance. It was established that the authority of the Minister of finance to expropriate land exists for a defined purpose, which it must publicize; that its discretion is limited and not absolute and that the expropriation will be invalidated if the considerations of the minister were afflicted by severe defects. See HCJ 307/82 *supra* [3].

However, the actual decisions of the courts—which possibly fit the social reality of the early days of the State - did not reflect the rhetoric, which the courts expressed, as to the status of the right to property as a basic right. See **Haviv-Segel** in her article *supra* [63], at pp. 454-455.

3. In our matter it was decided that expropriation according to the Purchase Ordinance is valid even if the public purpose for which the land was expropriated has ceased to exist, and that in principle the court will not get involved unless the expropriation was afflicted by severe defects such as arbitrariness and lack of good faith. Thus, in HCJ 282/71 (hereinafter: 'HCJ *Binyan*' [14] a petition to return land that was expropriated without compensation for the purpose of establishing a military camp, and which with the passing of the security necessity was to be sold to investors, was dismissed. The Court did not find a basis in law to obligate the Minister of finance to cancel the expropriation, although it was of the view that justice would require this. It was also decided that under the assumption that the land is necessary for a public purpose different from the one for which it was expropriated, it is not possible to compensate the petitioner according to the present value of the land because with the implementation of the expropriation the ownership of the land was granted to the State, 'and what has already been acquired for public needs, is not to be acquired again.' (Justice Landau, **ibid**, at p. 470). The Court even recommended amending the Purchase Ordinance in a manner that would prevent injustice.

The legislator did not heed the Court's recommendation, and the Purchase Ordinance was not amended, nonetheless in 1992 the right to property was anchored in the Basic Law.

4. Against this background, and as the normative change in the status of the property right has introduced an opportunity for the re-examination of the interpretation of laws infringing on the right to property, the laws of expropriation according to the Purchase Ordinance were given a new interpretation, which brought about significant change.

In HCJ 5091/91 (hereinafter: 'HCJ *Nuseiba*' [6]) it was decided in reliance on the Basic Law, to return lands that were expropriated after it was determined that the public necessity for which they were expropriated expired. And so wrote Justice D. Levin in paragraphs 4-8 of his decision:

> 'In light of the principles in the Basic Law itself, the limiting interpretation of [the Purchase Ordinance] is to be given even greater validity.
>
> ...
>
> When it turns out after the fact that there is no longer a vital

> need for the expropriated land, the owners have grounds to free themselves from the shackles of expropriation and to act as the owners of their land. This result is necessitated by the basic rights of the petitioners over their private property...'

Justice Mazza agreed with Justice D. Levin. Even Justice Or, who in a minority opinion was of the view that the petition was to be dismissed, did not disagree that indeed a change had occurred in the normative status of the right to property which requires an interpretation which suits this change. But, Justice Or explained, in the circumstances of that case, as a matter of fact, the original public necessity remained intact.

In addition, in the further hearing that took place on this decision—FHHCJ 4466/94 (hereinafter 'FHHCJ *Nuseiba*' [9])—in the framework of which the stance of Justice Or in HCJ *Nuseiba* [6] was accepted, no reservation was expressed as to legal rule which establishes that with the passing of the public purpose the authority must return the land to its owners. The debate between the judges of the majority and the judges of the minority was factual in essence and touched upon the question of the existence of the public necessity. In the legal literature as well it was explained that in FHHCJ *Nuseiba* [9] the Court did not intervene in the legal rule that was established in the original High Court of Justice case but rather only in the result. See Haviv Segel, in her article *supra* [63] at p. 460; H. Dagan 'The Laws of Governmental Taking and Laws of Competition—Toward a New Property Discussion' [57] at p. 676 footnote 6. In any event, the legal rule - that the rules of expropriation according to the Purchase Ordinance are to be cancelled when the public necessity for which the land was expropriated no longer exists - is alive and well since the day that FHHCJ *Nuseiba* [9] was handed down—9 August 1994.

5. My view in FHHCJ *Nuseiba* [9]—from which the majority judges did not have reservations—was that in the face of the constitutional status of the right to property a broad interpretive approach which enables the authority which expropriated land for a public purpose to use it for another purpose, after the original purpose has passed on from this world, is no longer to be accepted. I wrote as follows:

> 'It was decided that the Minister is entitled to expropriate the land for a public purpose, and later to change the designation of the land as he sees fit.
>
> ...
>
> This approach of the case law... can[not] be accepted after the passing of [the Basic Law]. The basic right to property is today anchored in section 3 of the Basic Law, in which it was determined:
>
> 'a person's property is not to be violated'
>
> ...
>
> Indeed [the Purchase Ordinance] has preceded the Basic Law and therefore its provisions cannot impinge on its validity (section 10 of the Basic Law). However, as to its

> interpretation and the exercise of discretion by its authority section 11 of the Basic Law applies. According to this section, all the governmental authorities—including the Court—must respect the rights anchored in the Basic law, as much as this is consistent with the valid statutes on whose basis they operate. The Court must fulfill this duty by an exacting interpretation of the statutory provisions which permit infringement of the property right, which will express the status of property right as a constitutional *supra* statutory basic right. From this status a new balance is needed between the public interest and the basic right.
>
> ... respect of the right to property as necessitated by section 11 of the Basic Law will be achieved, *inter alia*, by the exercise of discretion according to the law in accordance with what is said in section 1 and section 8 of the Basic Law. From section 1 of the Basic Law in which it is established, *inter alia*, that 'basic human rights in Israel... will be respected in the spirit of the principles in the declaration of the establishment of the State of Israel' it follows that the discretion which relates to the right to property (similar to the rest of the constitutional basic rights) are to be exercised out of 'complete social and political equality for all the citizens [of the State] without distinction as to religion, race or gender' (as said in the Declaration). From section 8 of the Basic Law... it follows that the right to property is not to be infringed upon, other than in a manner that is compatible with the values of the State of Israel as a Jewish and Democratic State, for a proper purpose and to a degree that does not go beyond what is necessary.'

I have continued to hold this view even after reading the decision of my colleague Justice M. Cheshin who has reservations as to connecting the change that occurred in the interpretation of the Purchase Ordinance to the passing of the Basic Law, and in any event I agree with the stance of Justice Zamir.

Indeed the legal rule agreed to by all of us establishes a fundamental approach, alongside which remain a row of open questions which were detailed by my colleagues Vice-President S. Levin, and Justices Zamir and Strasberg-Cohen, who have also recommended that legislation provide an answer to these question.

Indeed, the legal development by way of changes in interpretation is slow and truncated and generally derivative of the concrete cases heard before the Court. There is, therefore, no doubt, that in our matter it would be proper to establish comprehensive and full regulation in the law.

I therefore join the stance of my colleagues both as to the existence of the open questions and as to the need for legislation.

However, in this proceeding we must determine whether the

interpretation according to which the expropriation is subject to be cancelled when the land is no longer needed for public necessity, is applicable in our matter. We will do so after receiving the arguments of the parties.

Justice D. Beinisch

We have reached broad agreement in determining the legal rule according to which if the public purpose that was at the root of the expropriation of the land according to Lands Ordinance (Purchase for Public Purposes), has ceased to exist, the expropriation is cancelled, and this subject to the exceptions and the rules that are to be developed. Before I developed my stance in the matter before us there was before me the comprehensive, broad scoped opinion that my colleague Justice M. Cheshin laid out and the opinion of my colleagues Justice Zamir and President Barak which reached the same conclusion on the basis of different theories.

Once we have agreed to the result I do not see the necessity of expanding on the questions which touch upon difference in the starting point which is at the basis of the joint result. In a general manner it would be correct to say that the basic approach in our system was that the expropriation denies the property right from the owners and severs the property connection to the lands in the transfer of the full rights to the State. Accordingly this Court did not find that it was able to intervene as to the exercise of powers in all that relates to the later stages of the expropriation, even though this result was unsatisfactory and subject to criticism. My colleague Justice M. Cheshin is of the view that this approach is to be changed from its core and thereby expressed the criticism that was expressed over many years as to the 'connection-severing' approach. The question of the nature of the connection between the land owner and the expropriated land and the result which arises from this are planted in the legal system in which the expropriation power is anchored. In my view, the result we reached is necessitated by the character of the expropriation power and from the relationship that was created between the expropriating authority as a governmental authority and the individual whose property was expropriated. As to the expropriation power and as to the governmental activity which will bring on the principles which limit the power of the regime to infringe on basic rights, where the duty to narrow the infringement is not limited to the expropriation process itself. In the era after the passing of the Basic Law this limitation is to be given meaning that will express the narrowing of the expropriation power to the public purpose for which it was designated.

In their various opinions my colleagues pointed, each in their way, to the development that occurred over the years in the approach of this Court in relation to the expropriation power and judicial review of it. In summary it can be established that the path that our case law has taken from the beginnings of the State until today was a one way path that has marched the Court in one direction: a direction of interpretive

development according to which the discretion of the authority on the subject of expropriations stands before judicial review according to the general principles which apply to the authority when it comes to infringe on a basic right.

My colleagues have discussed the fact that the manner of this Court in interpretation which touches upon the extent and the nature of governmental powers that were granted to the authority in the period of the Mandatory regime adapts itself to the period in which the interpretation is given, and therefore it is a dynamic interpretation which is not to be detached from the background and the circumstances in which the governmental power is exercised. Like them, I too am of the view that after legislation of the Basic Law: Human Dignity and Liberty the interpretive process took a significant turn in all that relates to establishment of the proper balance between the protection of the rights of the individual and the public interest. It appears, that none among us disputes the very impact of the Basic Law on the matter before us. The difference in views is none other than a difference in the weight that each of us gives to the centrality of the Basic Law in the legislation that preceded it.

I share the view of those who hold that the change in the view of this Court as to the result which is necessitated by the cancellation of the purpose of the original expropriation is anchored in the change in the system of balances between the rights of the individual and the public interest according to the Basic Law. This change also influences the character and extent of the governmental authority in all that relates to the expropriation of the property of the individual for the public purpose. My colleague, Justice Dorner, has discussed this development which came following the Basic Law in the decision in HCJFH 4466/94 *supra* [9] at pp. 86-88.

I join the view that the character of the expropriation power is what necessitates that it be limited to the purpose for which it was granted. The limitations on the power of the authority according to the principles of the limitations clause in the Basic Law are not exhausted at the expropriation stage itself and apply to every later governmental activity related to the expropriation. The very expropriation and the processes implemented following it are to be seen as subject to the limitations of the law which are tied to the violation of basic rights. These principles raise a duty on the part of the authorities as to those from whom the land was expropriated for a purpose that was justified at the time of expropriation and for this purpose only. Return of the land or provision of compensation, depending on the circumstances, at the time that the purpose of the expropriation ends is part of this duty.

I will further add that I have no other recourse but to join the views of all my colleagues that the change in the legal rule raises many questions that we cannot answer in the framework of the proceeding before us and as to the recommendation shared by all of us for this matter to be regulated in legislation.

Justice T. Or

I had the advantage and pleasure of reading the decisions of my colleagues Justice M. Cheshin, Justice Zamir, and President Barak. I accept, as do all the other members of the panel, the result reached by the three of them. According to this result (a) if the public purpose which served as the basis for the expropriation of the lands according to Lands Ordinance (Purchase for Public Purposes), ceased to exist, as a rule, the expropriation is cancelled, and the owner of the expropriated lands is entitled to the return of the lands subject to exceptions and rules that are to be formulated; (b) once the principle has been established in our judgment, it is proper that the legislator say its piece and regulate the matter of expropriation of lands against the background of what has been said in this judgment; (c) as to the question of the applicability of the law to our matter, this will be decided after hearing the parties' arguments, as said in paragraph 91 of the decision of my colleague Justice M. Cheshin.

Justice E. Mazza

The legal rule coming forth before us today expresses in clear and explicit language the approach which I expressed and supported in the *Nuseiba* case (HCJ 5091/91 [6] and HCJFH 4466/97 [9]) and in the *Mahol* case (HCJ 2739/95 [5]) as to the expropriation power being a 'purpose appended' power. I, of course, agree to this legal rule, which properly reflects a change in the interpretation that was given in the past to the meaning of expropriation according to Lands Ordinance (Purchase for Public Purposes) and which is necessitated from recognition of the Basic Law: Human Dignity and Liberty given that property right is a protected constitutional right. Due to the possible ramifications of this legal rule, and without taking a stand as to the proper determination in the matter of the petitioners, I agree to the determination proposed in paragraph 91 of the decision of our colleague Justice M. Cheshin. It seems to me as well that the legislator would do well if it moved promptly to develop a statutory arrangement that would provide a practical and proper response to a row of open questions that the application of the new legal rule may raise.

It was unanimously decided as said in paragraph 91 of the decision of Justice M. Cheshin.

20 Shvat 5761
13 February 2001