**The Supreme Court sitting as the High Court of Justice**

**HCJ 687/15**
**HCJ 858/15**
**HCJ 1164/15**
**HCJ 1201/15**

Before: The Honorable President M. Naor
The Honorable Justice H. Melcer
The Honorable Justice N. Sohlberg

The Petitioners in HCJ 687/15:
1. David Yadid, Advocate and Notary
2. Eliyahu Weber, Advocate and Notary
3. Dr. David Etzion, Advocate and Notary
4. Shlomo Ben Porath, Advocate and Notary
5. Asher Fadlon, Advocate
6. Dorit Attia, Advocate and Notary
7. Theodore Weinberg, Advocate and Notary
8. Yisrael Kuris, Advocate and Notary
9. Guy Touti, Advocate and Notary
10. Dr. Ilan Keidar, Advocate and Notary

The Petitioners in HCJ 858/15:
1. The Coordination Committee of the Organizations of Persons of Moroccan Origin in Israel by the Committee Chairperson Rafael Ben Shushan
2. The World Federation of Moroccan Jewry
3. Sam Ben Shitreet, Chairperson of the Federation
4. The World Organization of North African Jews
5. Shaul Ben Simchon, Chairperson of the Organization
6. The Alliance of Persons of Moroccan Origin in Israel
7. *Shavie Tzion*, the Association of French, North African and French Speaking Immigrants
8. Yitzchak Bitton, President of the Association
9. Association of Academics of Iraqi Origin in Israel
10. Prof. Shmuel Moreh, Chairperson of the Association
11. Dr. Nissim Kazaz, Member of Management of the Association
12. The Center for the Heritage of Mosul Jewry
13. Aharon Efroni, Chairperson of the Center
14. Adv. David Nawi, Chairperson of the Shemesh – Shalom Ve'Shilumim Amuta

The Petitioners in HCJ 1164/15:
1. Yaacov Yaacobovitch, Advocate and Notary
2. Israel Feder, Advocate

The Petitioner in HCJ 1201/15: Rachel Duani

*v e r s u s*

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| The Respondents: | 1. The Knesset<br>2. The Attorney General |
| The Parties Requesting to Join as *amici curiae*: | 1. The Clinic for Legal Assistance to Elderly Persons and Holocaust Survivors, The Law Faculty, Bar-Ilan University<br>2. The Clinic for the Rights of Holocaust Survivors, The Law Faculty, Tel-Aviv University |

Petitions for Orders *Nisi* and Applications to Grant Interim Orders

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| Date of Session: | 10th of Nissan, 5775 (March 30, 2015) |
| On behalf of the Petitioners in HCJ 687/15: | Adv. Ilan Bombach; Adv. Yariv Ronen |
| On behalf of the Petitioners in HCJ 858/15: | Adv. David Yadid; Adv. Doron Atzmon |
| On behalf of the Petitioners in HCJ 1164/15: | Adv. Yaacov Yaacobovitch; Adv. Yisrael Feder |
| On behalf of the Petitioners in HCJ 1201/15: | Adv. Amram Doani |
| On behalf of Respondent 1: | Adv. Dr. Gur Bligh |
| On behalf of Respondent 2: | Adv. Hani Ofek |
| On behalf of Party requesting to join as *amicus curiae* 1: | Adv. Aviad Igra |
| On behalf of Party requesting to join as *amicus curiae* 2: | Adv. Yael Abasi-Aharoni |

## **J U D G M E N T**

**Justice N. Sohlberg:**

In their petitions, the Petitioners addressed three issues: (a) Limiting lawyer's fees; (b) Partial restitution thereof; (c) Retroactive application. Is the law constitutional?

1. On December 29, 2014, the Israeli Knesset approved the second and third readings of the Nazi Persecution Disabled Persons (Limiting Fees for Handling a

Claim to Determine Entitlement to Payments pursuant to an Administrative Decision) (Amendment no. 20) Bill 5775-2014 (hereinafter: the "**Amendment**" or the "**Bill**"). This Bill, as is evident from its title, addresses the limitation of the legal fees which holocaust survivors pay lawyers and additional entities who are not lawyers who handle their claims to receive compensation (hereinafter: the "**Claim Handlers**").

2. Four petitions were filed in which this Court was requested, as an initial and primary relief, to rule that the Amendment is not constitutional and to order that it be cancelled. The Petitioners in HCJ 687/15 and in HCJ 1164/15, attorneys who engage in representing holocaust survivors, requested that if the court shall not accede to their request to order that the Amendment be cancelled, then it shall alternatively instruct that the Amendment be partially cancelled, emphasizing the provisions regarding the retroactive application of the Amendment; alternatively to such alternative, that it instruct that the application of the Amendment be suspended for a period of a year "**so that the Knesset shall amend it in a proper and reasonable procedure while minimizing the harm to the petitioners**". The petitions were heard together, on March 30, 2015. On March 31, 2015, in light of the urgency of the matter, a judgment without reasons was delivered in which we rejected the four above petitions. The time has come to specify the reasons.

3. A word of preface: The petitions before us are greatly similar to each other, both in terms of the requested remedy and the substance of the arguments raised therein. However, not all of the petitions include the same arguments or the same requested remedies. For the sake of convenience and efficiency, the discussion relating to the Petitioners' arguments shall relate to all of the petitions as an entirety, despite certain differences among them. This is also the case vis-à-vis the Respondents – the Knesset and the Attorney General – which filed their responses separately, but their arguments greatly overlap, and therefore the discussion relating to their arguments shall, in general, be held in a consolidated manner, except in relevant places.

**Background**

4. As mentioned, the Amendment addresses determining limitations to the fees which can be collected for handling claims to receive payments pursuant to the Nazi Persecution Disabled Persons Law, 5717-1957 (hereinafter: the "**Nazi Persecution Disabled Persons Law**") and pursuant to the Claims of Holocaust Victims (Handling Arrangement) Law, 5717-1957 (hereinafter: the "**Claims of Holocaust Victims Law**"). The normative and historical background for the legislation of the Amendment was elaborately described by the parties' attorneys and is complicated and convoluted. I shall briefly address the details relevant to the case at hand.

5. Limiting fees for handling claims of holocaust survivors to receive payments is not an innovation of this Amendment. Section 22(a) of the Nazi Persecution Disabled Persons Law, which was enacted as early as in 1960, and which is entitled "**Limitation of Fees**", prescribes that "**The Minister of Justice may, by order, prescribe maximum rates for the fees that can be received for handling a claim**". The Nazi Persecution Disabled Persons (Limitation of Fees) Order, 5721-1961 (hereinafter: the "**Nazi Persecution Disabled Persons Order**")

was promulgated by virtue of this section, and prescribes that "**The maximum fee that it is permissible to receive for handling a claim, when the fee is contingent upon results, is 8% of the total payments for a period of five years**". On January 9, 2011, an amendment to the order came into effect (hereinafter: the "**Amendment to the Nazi Persecution Disabled Persons Order**"). In the framework thereof an absolute 'cap' on fees was prescribed, in addition to the original limitation of 8% of the total payments, and it is currently NIS 7,013. Similarly, provisions regarding limiting fees were also prescribed with respect to compensation claims pursuant to the Claims of Holocaust Victims Law. Thus, Section 10(b) of the Claims of Holocaust Victims Law prescribes that the 'cap' of fees which can be collected for handling claims pursuant to this law is 15% of the amount paid to the claimant.

Until recently, these provisions regulated the matter of the Claim Handlers' fees without any special difficulty. However, in recent years two main developments took place which changed matters, and led to the enactment of the Amendment at hand:

**(1) The Administrative Decision Regarding Libyan Jews**

6. During the Second World War many of the Libyan Jews were forced to flee their homes due to the events of the war. For many years the customary approach of the courts in Israel was that the Libyan Jews do not have a sweeping entitlement to receive payments by virtue of the Nazi Persecution Disabled Persons Law, and in order to receive payments, Libyan Jews were required to specifically prove that they indeed fled in fear of the Germans. Proving this fact was not simple, and indeed the vast majority of the claims were rejected. In 2010 a judgment was delivered in Appeal Committee 255/08 **Tayar v. The Competent Authority** (April 7, 2010) (hereinafter: the "**Tayar**" Case), which changed matters with regard to claims of persons who left Libya. Although the judgment rejected the appellants' motion to rule that they are sweepingly entitled to payments, it did rule, based on various testimonies and opinions, that the claim that the fleeing of the Libyan Jews did, at least partially, stem from fear of the Germans – is a reasonable scenario. This factual presumption constituted a significant change, which made it much easier for persons who left Libya to prove that their fleeing indeed stemmed from fear of the Germans, and to consequently establish their entitlement to compensation. Approximately five months after the judgment in the **Tayar** case, the Minister of Finance published a decision in the framework of which he instructed that commencing April 2010 (the time the judgment in the **Tayar** case was delivered), compensation be given to any person who left Libya who shall claim that his fleeing from his home during the war stemmed from fear of the Germans, **without any evidential examination or legal hearing**. This decision, which was also applied to claimants whose claim had already been rejected in a final judgment, significantly changed the legal situation in the matter of the Libyan Jews, as it *de facto* determined a sweeping entitlement to compensation for Libyan Jews by virtue of the Nazi Persecution Disabled Persons Law.

**(2) The Amendment to the German Law**

7. In 2002, a law that recognizes the entitlement of holocaust survivors to payment of allowances also for the period during which they worked in Ghettos was

adopted in Germany. However, for many years it was not clear when the entitlement to the payment of the allowance commences, and the German court's rulings were inconsistent in this matter. On June 6, 2014, the German law was amended (hereinafter: the "**Amendment to the German Law**"), and survivors entitled to an allowance were granted the option to choose between continuing to receive the allowance that was paid to them until then, and receiving a retroactive allowance from a uniform date that was prescribed in the law (July 1, 1997), subject to a certain reduction of the amount of the allowance.

8. **The similar aspect of these developments – the administrative decision regarding Libyan Jews, on the one hand, and the Amendment to the German Law, on the other hand – is that in consequence thereof the procedure of receiving the payments was made significantly easier, and, in general, amounts to completing a simple form without needing complex legal procedures**. Despite the fact that the handling of these procedures became significantly easier, in the period following their commencement, the Holocaust Survivors' Rights Authority and other entities were approached by many holocaust survivors claiming that exaggerated amounts of fees had been collected from them in claims to receive payments by virtue of these procedures. The legislator did not remain indifferent to these approaches and requested to adjust the law to the new reality by creating additional limitations to the fee 'cap', to create a proper correlation between the scope of the Claim Handler's work and his fee.

9. On July 14, 2014 the said Bill, which is a private bill, was tabled in the Knesset and on November 26, 2014, it was discussed in a preliminary reading in the Knesset plenum. In this reading the representative of the government announced the government's support of the Bill, subject to making a number of changes. The preliminary reading of the Bill was approved, and on December 9, 2014, the Knesset's Constitution, Law and Justice Committee (hereinafter: the "**Constitution Committee**" or the "**Committee**") began to discuss the bill in order to prepare it for the first reading. At the end of the discussion, the Committee unanimously approved the Bill for the first reading, in accordance with the changes that had been requested by the government, and on that same day the first reading of the Bill was approved in the Knesset plenum. It shall be noted that at this stage the Bill only included an amendment to the matter of claims for payments that were received by virtue of an administrative decision, but not to the matter of claims pursuant to the Amendment to the German Law.

10. On December 28, 2014, the Constitution Committee discussed the Bill in order to prepare it for the second and third reading. The wording that was tabled in the Committee was an updated wording, the result of internal discussions of the relevant professional bodies, and it also included an indirect amendment to the Claims of Holocaust Victims Law, prescribing limitations on fees for claims for an allowance pursuant to the Amendment to the German Law. At the end of the discussion, and after it was agreed to make a number of changes to the updated wording, the Committee unanimously approved the Bill for the second and third reading. On December 29, 2014, the Knesset plenum approved the second and third reading of the Bill, and on December 31, 2014, the Amendment was published in the Book of Laws of the State of Israel.

**The Principles of the Arrangement in the Amendment**

11. The essence of the principles of the new arrangement is as follows, and the specifics shall be discussed in detail further on. The arrangement imposes limitations on the rate of the fees in two situations: The **first**, claims to receive payments under the Nazi Persecution Disabled Persons Law, that were approved as a result of an administrative decision (at this time there is only one administrative decision, the decision regarding the Libyan Jews); the **second**, claims to receive an allowance by virtue of the Claims of Holocaust Victims Law, in accordance with the Amendment to the German Law dated June 6, 2014.

12. With respect to the claims pursuant to the Nazi Persecution Disabled Persons Law that were approved as a result of an administrative decision **four** levels of payment were prescribed, in accordance with the date the fee agreement was entered and the stage of the claim. Thus, the lowest level of payment prescribes a fee 'cap' in the amount of NIS 473, and it applies in a situation in which the fee agreement and the filing of the claim were made **after** the administrative decision was delivered, while the highest level of payment prescribes a fee 'cap' in the amount of NIS 5,960, and it applies in a situation in which the administrative decision was only delivered after the claimant had already actually filed an appeal to the court.

13. The rule is as follows: ***The gain is according to the pain***; the more work devoted by the Claim Handler, the greater his remuneration.

14. With respect to claims pursuant to the Claims of Holocaust Victims Law in accordance with the Amendment to the German Law **two** levels of payment were prescribed, in accordance with the date the claim or the appeal was filed in relation to the date of the Amendment to the German Law (June 6, 2014; hereinafter: the "**Effective Date**"). Thus, if and to the extent a claim or appeal was filed before the Effective Date, and at such time the claim or the appeal were pending, then the rate of the fee for handling the claim shall not exceed the lower of 7.5% of the retroactive payment given to the claimant or an amount of NIS 25,000. In contrast, if and to the extent a claim or appeal were not filed or were not pending on the Effective Date, then the fee for handling the choice between the two alternatives, shall not exceed an amount of NIS 473.

15. An additional main aspect of the Amendment is the provisions regarding the chronological application. Thus, it was prescribed that the provisions of the Amendment shall also apply to fee agreements that were entered prior to the publication thereof, provided that a final judgment was not delivered in the matter of the fees prior to the Amendment coming into effect. Moreover, even when the fee has already been actually paid, the claimant is entitled to restitution of the surplus fee that was already collected that exceeds the provisions of the Amendment. In furtherance thereof, and in order to make it easier for the holocaust survivors to conduct claims for the restitution of the surplus fees, it was ruled that they shall be entitled to legal assistance from the State without any need for an income examination.

**The Principles of the Parties' Arguments**

16. The Petitioners' arguments are divided into two main matters: the **first**, the matter

of the unconstitutionality of the Amendment; the **second**, the matter of the procedure of legislating the Amendment. Below, in brief, is the essence of their arguments.

17. As to the matter of the illegality of the Amendment, the Petitioners claim that the Amendment infringes a list of basic rights that are granted thereto by virtue of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, and does not meet the criteria of the limitation clause. The Petitioners particularly emphasized the severe harm caused thereto due to the unusual requirement to return amounts of money that have already been duly paid, thus constituting a harsh infringement of their property. Additionally, the Petitioners complained about the late intervention in agreements that were duly entered, constituting an infringement of their right to freedom of contracts and their right to autonomy, and about narrowing the steps of those who engage in the field, after they have gained knowledge, experience and expertise through hard work over many years, in a manner that infringes their right to freedom of occupation.

18. As to the procedure of legislating the Amendment, the Petitioners claim that the procedure was held "**in a hasty and panicked manner**", in order to pass the Amendment prior to the dispersion of the Knesset. According to the Petitioners, this amounts to being "a flaw at the root of the legislative procedure", and as such it is to be cancelled.

19. On the other hand, the Respondents are of the position that the petitions should be denied. According to them, despite the unusual nature of the Amendment that also applies retroactively, its alleged infringement of the constitutional rights is limited in its scope and complies with the terms of the limitation clause. The Respondent further claims that when examining the constitutionality of the Amendment thought must be given to the 'target audience' which the Amendment is meant to serve – elderly holocaust survivors, and the State of Israel has a moral responsibility to protect them from being exploited and to care for their financial wellbeing. Additionally, the Respondents elaborated on the case law which provides that the court must act with restraint when exercising its authority to apply constitutional review of the laws of the Knesset. As to the alleged flaw in the legislative procedure of the Amendment, the attorney for the Knesset was of the position that "**in light of the active participation of the members of Knesset in the Committee's discussions, the broad space given to the Petitioners to argue their claims against the Amendment, and the changes that were inserted in the Bill following these claims**" it cannot be argued that in the case at hand there is 'a flaw that is at the root of the legislative procedure', that would justify the court's intervention.

**Discussion and Ruling**

20. There are three central questions before us: The **first**, whether the Amendment infringes the Petitioners' constitutional rights in a manner that does not comply with the terms of the limitation clause? The **second**, intertwined with the first, is whether the retroactive application of the Amendment is just and appropriate in the circumstances at hand? The **third**, whether there is a flaw at the root of the legislative procedure that justifies its cancellation? As mentioned, our principle answer to these questions is negative. We shall now elaborate on the grounds of

our ruling.

21. The Petitioners and the Respondents and the parties that requested to join as *amici curiae* laid before us an extensive and well-reasoned factual and legal presentation; both in writing and orally. Thus, our path has already been paved for us and we have only to walk the path on which the parties' attorneys have led us. Our route shall be as follows: At the **first stage**, I shall briefly discuss the matter of the scope of judicial review of Knesset laws. At the **second stage**, I shall discuss the constitutionality of the Amendment, and in this context I shall refer to the essence and the scope of the alleged infringement of the Petitioners' rights; the matter of the Amendment's chronological application; and the proportionality of the infringement of the Petitioners' rights in accordance with the customary criteria. **Finally**, I shall address the legislative procedure of the Amendment and shall explain why it is not flawed, certainly not with a flaw that is 'at the root of the procedure' that justifies our intervention.

**Judicial Review**

22. The starting point of our discussion stems, to a significant degree, from the question of the scope of the judicial review of the Knesset's legislation. When discussing the constitutionality of any law, we must remember that "**it is not with ease that the court shall rule that a certain law is not constitutional**" (HCJ 2605/05 **The Law and Business Academic Center, The Human Rights Division v. The Minister of Finance**, PD 63(2) 545, 592 (2009) (hereinafter: the "**Prisons Case**"), and also see the references presented there in paragraph 14 of the judgment of President (Ret.) **D. Beinisch**). "**The court owes honor to the law as an expression of the desire of the people. Before the court disqualifies a law, it must be absolutely certain: it must carefully examine the language of the law and the purpose of the law and be extremely diligent, until it is completely convinced that at hand is a defect that cannot be cured**" (the words of Justice **I. Zamir** in HCJ 3434/96 **Hoffnung v. The Speaker of the Knesset**, PD 50(3) 57, 67 (1996) (hereinafter: the "**Hoffnung Case**")). The words of Justice **A. Procaccia** in HCJ 6304/09 **Lahav – The Umbrella Organization for the Self-Employed and Businesses in Israel v. The Attorney General** (September 2, 2010), in paragraph 62 of the judgment, are appropriate for this matter:

> **"The examination of the constitutionality of primary legislation of the Knesset is performed by the court cautiously and with great restraint while diligently attending to the delicate balance that is required between the principles of the majority rule and the separation of powers, and the constitutional protection of human rights and the fundamental values underlying the system of government in Israel… In the framework of striking this balance, even if it shall be found that the act of legislation does not coincide with a constitutional principle, a significant level of intensity of constitutional infringement is required in order to justify judicial intervention in the acts of the legislative authority."**

23. Hence, the court's starting point when examining whether or not the law before it is constitutional, is that the law has a sort of presumption of constitutionality that

obligates the court to assume that the law was not meant to infringe constitutional principles (see the **Prisons** Case, page 592; the **Hoffnung** Case, page 67). Thus, the scope of the court's intervention in the Knesset's legislation is limited. While keeping this in mind, we shall set out on our path.

**Constitutional Examination**

24. First one must examine whether, as alleged, the Amendment indeed infringes basic rights that are granted to the Petitioners by virtue of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. As is known, the existence of an infringement of a constitutional right is recognized broadly, and any infringement (provided that it is not an inconsequential infringement) that derogates from the right shall be considered an infringement that is subject to constitutional examination:

> "**The restriction or infringement occurs in any situation in which a government authority prohibits or prevents the owner of a right to exercise it to its fullest extent. In this matter, there is no significance to the question whether the infringement is severe or slight; if it is at the core of the right or in its penumbra; whether it is intentional or not; whether it is by act or omission (where there is a positive obligation to protect the right); any infringement, irrespective of its scope, is unconstitutional unless it is proportionate"** (A. Barak **Proportionality in Law – The Infringement of the Constitutional Right and the Limitations Thereof** 135 (2010) (hereinafter: "**Barak – Proportionality in Law**")).

25. In the case at hand there is no doubt that the Amendment infringes the Petitioners' rights. The payment which they are entitled to collect for their services has been limited, agreements they signed were retroactively changed, and they are being required to return payments they have already received. However, I agree with the Respondents' position that the infringement of the Petitioners' rights, if and to the extent at issue are freedom of occupation and freedom of contracts, is limited, and is not at the core of the right. This fact is of importance with regard to the degree of severity that should be applied at the constitutional review stage:

> "**The more exacerbated the law's infringement of the right and the closer it is to the core of the right, the greater the justification for a diligent judicial review of the constitutionality of the law; and *vice-versa*. As in the case at hand: the more the law's infringement is only at the margins of the right, the more the sphere of constitutionality that the infringing law shall be granted shall increase, respectively, and the sphere of this court's intervention shall decrease respectively**" (HCJ 7956/10 **Gabbay v. The Minister of Finance**, the judgment of Justice **D. Barak-Erez** (November 19, 2012)).

26. The Amendment's infringement of the freedom of occupation is not expressed in the **denial of the Petitioners' occupation** or in **preventing them from entering a certain field of occupation**, but rather in the **manner of exercising the**

**occupation** (see also my statements in HCJ 3676/10 ***Keter Cederech Hamlachim* Ltd. v. The Minister for Religious Services** (May 8, 2014), paragraph 20 of the judgment). This distinction between the various types of infringement of the freedom of occupation has long ago been recognized in the judgments of this court:

> "**Not every infringement of the freedom of occupation is of the same level. It can be said that the restriction of occupation by preventing it, denying it or shutting the entrances thereto is a more severe and exacerbated infringement than the imposition of limits upon one who engages in the profession or vocation that he desires, but the legislator has imposed restrictions as the manner or scope of performance, in which case the infringement of the freedom of occupation indeed exists but to a more tolerable degree**" (HCJ 726/94 **Clal Insurance Company Ltd. v. The Minister of Finance**, PD 48(5) 441, 475 (1994)).

27. The Amendment at hand clearly falls within the definition of an infringement in the **manner of exercising the occupation**. It does not intend to deny the Petitioners' right to handle the claims of the holocaust survivors, but rather only to limit the manner of exercising it. Thus, its infringement of the constitutional right of freedom of occupation is limited. This is also the case with regard to the infringement of the Petitioners' freedom of contracts, which is also of relatively low intensity for two reasons: **First**, the limitation of the lawyers' fees was already anchored by law even prior to the legislation of the Amendment, and in this sense the Amendment does not change the 'world order'. Indeed, this fact in and of itself does not justify making the limitations that are imposed on the scope of the fees more stringent, but it does, to a certain extent, "soften" the intensity of the infringement embedded in the Amendment. **Second**, the purpose of the Amendment is to prevent collecting exaggerated fees while exploiting the holocaust survivors. As the Attorney General's attorney stated in her response: "**The right to collect 'exaggerated' fees is not part of the core of the right of freedom of engagement**". Hence, the infringement of the Petitioners' rights, to the extent this relates to the freedom of occupation and the freedom of contracts, is relatively limited. As mentioned, this fact does not eliminate the need to examine whether the infringement complies with the terms of the limitation clause, but it does allow a relatively more lenient constitutional examination.

28. As opposed to the infringement of the freedom of occupation and the freedom of contract, I believe that the infringement of the Petitioners' right of property, that is expressed in the demand to return the surplus fee that was already actually paid, indeed infringes the core of the right (assuming that there was no flaw in the Claim Handler's entitlement to receive such funds to begin with and that they were duly earned). There is no doubt that applying the Amendment retroactively intensifies and exacerbates that infringement of the Petitioners' rights. This argument shall continue to reappear during the constitutional examination. We shall thus preface our remarks with a few words on the matter.

**Retroactivity**

29. The Petitioners argue that applying the law retroactively (or retrospectively, if and

to the extent it relates to fees that have not yet been paid) "**severely and fatally harms the(ir) interest of foreseeability and reliance**". According to them, this provision is contrary to the proper and reasonable standards of legislation in a democratic state, and involves severely impairing legal stability in general, and their rights, in particular. The Petitioners find certain support for their position in the Amendment to the Nazi Persecution Disabled Persons Order that came into effect in 2011, and, as mentioned, significantly reduced the fee 'cap' compared to the situation before it, and which was applied from the date it was issued and onwards, but not retroactively. According to them, the rationale underlying the amendment to the order is identical to the rationale underlying the discussed Amendment, and there is no justification to distinguish between them in the matter of chronological application.

30. There are times when the question arises whether or not a certain act of legislation indeed applies retroactively, and this requires applying rules of interpretation. This is not the case at hand, since here there is no doubt regarding the legislator's intention to also apply the Amendment retroactively. The question of the chronological application of the Amendment was discussed elaborately and explicitly in the framework of the discussions of the Constitution Committee, and it is clear that the legislator's intention was to apply the Amendment also with respect to fee agreements that were entered prior to the enactment of the Amendment, even with respect to funds that were already actually paid by virtue of these agreement (see the minutes of the Committee discussions dated December 28, 2014, pages 82-88). This fact enhances the difficulty embedded in the application provisions of the Amendment, since "**the more blatantly the law sends it arms towards the past – the more difficulties regarding its legitimacy arise**" (HCJ 6971/11 ***Eitanit*** **Building Products Ltd. v. The State of Israel**, paragraph 38 of the judgment of Justice **N. Hendel** (April 2, 2013); (hereinafter: the "**Eitanit Case**")). Retroactive legislation is an unusual matter in our legal landscape, and so it should be:

> "**Applying a new norm on actions that were performed prior to it coming into effect could cause injustice, since the law is intended to determine what is permitted and what is prohibited, and thus to direct human behavior. Therefore, retroactive legislation is presumed to be legislation that infringes basic constitutional perceptions, the principle of the rule of law, legal certainty and the public's trust therein, and the public's trust in the institutions of government**" (CFH 3993/07 **Jerusalem Assessing Officer 3 v. Ikafood Ltd.**, paragraph 32 of the judgment of Justice (Ret.) **A. Procaccia** (July 14, 2011)).

31. However, retroactive legislation, although unusual in its nature, is not necessarily unconstitutional. Given proper reasons that justify it, there is nothing to prevent a law from also applying retroactively. Naturally, the more blunt and infringing the retroactive application is, the more convincing the justifications must be (see: the **Eitanit** Case, paragraph 38). Justice **T. Strasberg-Cohen** elaborated on this in HCJ 1149/95 **Arco Electricity Industries v. The Mayor of Rishon Lezion**, PD 54(5) 547, 573 (2000):

> **"Retroactive legislation should be avoided as much as possible. Such legislation should be applied in unusual cases. But it does not follow that retroactive legislation in and of itself is disqualified in all situations and all circumstances… Each act of legislation must be examined on its merits in accordance with the circumstances of the matter, and it must be examined whether it complies with the reasonability criterion. When examining the reasonableness of the act of legislation all of the relevant considerations should be considered, including the extent of the reliance on the old law, the purpose of the retroactive application, the extent of the retroactive application, the extent of the infringement of rights that are vested and any relevant consideration".**

32. Truth must be told: late intervention in agreements that were duly and voluntarily entered, not to mention the demand to retroactively return funds which were already actually paid by virtue of such agreements, is not an inconsequential matter. Nevertheless, in the circumstances at hand, it appears that it is justified. Unusual circumstances justify exceptions. As is argued in the case at hand, the main justification to apply the Amendment retroactively is that otherwise the Amendment would have become almost completely irrelevant. The vast majority of the holocaust survivors the Amendment was meant to benefit already signed the fee agreements, and if the Amendment would not apply to them, what would the sages have accomplished with their ordinance and the legislators with their legislation? Expanding the Amendment's application to situations in which the fee was already actually paid is also justified, since limiting the application of the Amendment only to situations in which the fees have not yet been paid would have *de facto* created an unjustified distinction between survivors who paid the fees promptly and those who did not do so. Alongside such justification, one must remember that the legislator took 'softening' steps that were meant to limit and alleviate the unusual demand to return funds that were already actually paid. These steps do not mitigate the intensity of the infringement, but they create a proportionate and balanced arrangement, as shall be specified in detail below in the framework of the next stage of the constitutional examination.

**The Limitation Clause**

33. At this stage the court is required to rule in the matter whether the infringement of the constitutional rights, irrespective of the intensity thereof, was in accordance with the law. The balancing formula that was prescribed therefor, which is known as the 'limitation clause', is anchored in the Basic Law: Human Dignity and Liberty and in the Basic Law: Freedom of Occupation. According to such formula, basic rights that are anchored in these basic laws, shall not be infringed "**other than in a law which befits the values of the State of Israel, which is intended for a worthy purpose, and to an extent no greater than is required**". There is no dispute that the first condition, that the infringement must be made by a law, is met in this case at hand. The dispute between the parties revolves around the three latter conditions, that the infringing law must befit the values of the State of Israel; serve a worthy purpose; all while maintaining the principle of

proportionality.

34. The Petitioners in HCJ 1164/15 claim that the provisions regarding applying the Amendment retroactively do not befit the values of the State of Israel, since they prejudice legal stability and certainty, and as such "**severely infringe**" the rule of law, a value which is one of the foundations of the State of Israel as a democratic state. I do not accept this claim. As mentioned, retroactive legislation, albeit unusual, does not necessitate the conclusion that the law is unconstitutional. This is derived from the entirety of relevant considerations, including the purpose of the retroactive application of the Amendment, the purpose for which the law was legislated, the means that are applied in the law and additional relevant considerations.

**Worthy Purpose**

35. The purpose of the law is most worthy. The legislator wished, through this Amendment, to prevent the collection of exaggerated fees from holocaust survivors, which at times even created a material financial burden for the survivors, and even led to the initiation of execution proceedings against some of them. The collecting of exaggerated fees, even if legal, is never just – *a fortiori* in the case at hand. We must consider that the payments we are addressing were meant to compensate the survivors for those many troubles and hardships they endured during the hard days of the war, compensation that cannot even minimally recompense and alleviate their great suffering. Sadly, instead of treating them with more fairness and compassion, there were those who saw it fit to exploit survivors and wished to enrich themselves at their expense. To this the legislator said – no more. In fact, it emerges from reading the petitions that even the Petitioners do not dispute that this is a worthy purpose. But the Petitioners were not completely accurate in their claims in this matter, which are not directed against the **purpose** of the Amendment but rather against the **means** that were taken to achieve it. These claims should be examined in the framework of the discussion regarding the last condition of the limitation clause, the proportionality condition which shall be discussed below.

36. For the removal of doubt, I have found it appropriate to clarify and emphasize something regarding the purpose of the Amendment, in light of the claim that the Petitioners repeatedly reiterated. According to the Petitioners, the main purpose of the Amendment is to improve the holocaust survivors' financial condition. In furtherance thereof, the Petitioners are complaining that the legislator turned them into the "tool" by means of which and at whose expense it requested to realize this purpose. According to them, the Amendment in fact creates an arrangement in the framework of which the private service provider, in the case at hand – the party that is handling the claim, 'subsidizes' the financial benefit that the State is requesting to grant the holocaust survivors, and this is a unique arrangement compared to other service providers**.** Such description of the matter is inaccurate. Indeed, the practical outcome that is desired by the Amendment is that the lion's share of the payments that are paid to the survivors will eventually remain in their possession. The purpose is to prevent an unfair infringement by those parties who saw fit to exploit holocaust survivors. The financial benefit is a consequence of the Amendment, but was not the focus thereof. The **purpose** of the Amendment is to do justice with the survivors; its **outcome** is the improvement of their financial

condition.

**The Proportionality Principle**

37. The proportionality of the a law is examined by three sub-criteria: **the first**, the existence of a rational connection between the legislative means taken and the purpose the law wishes to achieve; **the second**, the criterion of the least infringing means, which examines whether the legislative purpose could have been achieved by less infringing means; **the third**, the proportionality criterion in the narrow sense, in the framework of which we shall examine the relation between the benefit derived from the law and the infringement it causes.

**(1) The Rational Connection Criterion**

38. "**The assessment of the existence of a rational connection is based on the set of facts that were placed before the legislator and on the legislator's assessment that was made based on such facts**" (Barak – "**Proportionality in Law**" page 382). According to the Petitioners, the said Amendment was legislated without a proper research or factual background, and in the absence of such a background, it cannot be said that the means that are applied in the Amendment, which greatly infringe the Petitioners, indeed promote the purpose that the legislator wished to realize. According to the Petitioners, the Amendment rests on shaky ground, since it is based on a sporadic gathering of testimonies of holocaust survivors, without a thorough and systematic examination of the facts, while creating a misrepresentation of a war between the "sons of light" (the survivors) and the "sons of darkness" (the Claim Handlers). According to the Petitioners, this representation is far from reality, and it would have been appropriate that the legislator properly examine the factual reality prior to infringing their rights. To such end the legislator could, according to them, have sought the assistance of the Knesset's research and information center, as would be expected in the circumstances of the matter. According to the Petitioners, not conducting a proper factual examination even led to determining a 'cap' for the amount of the fee, that in the circumstances of the matter is unreasonable, amounts of money that are based on an erroneous assumption of the legislator that the claims to which the Amendment refers are essentially just completing forms.

39. "**To what extent may a petitioner challenge the factual basis underlying a law? This is a fine question**" (the **Eitanit** Case, paragraph 29). In any event, I do not need to address this question in the case at hand, since a review of the transcripts of the discussions that were held in the Constitution Committee reveals that a sufficient factual basis was presented before the legislator, which is enough to properly establish the rational connection. Thus, it emerges from the words of the representatives of the Holocaust Survivors' Rights Authority to the Committee, and from the testimonies of additional participants, that exploitation of holocaust survivors by Claim Handlers is a real phenomenon, rather than just only some lone complaints. This factual basis was also presented to us in the response of the attorney for the Attorney General, who elaborated on the harmful methods of operation Claim Handlers applied under the normative vagueness that prevailed prior to the enactment of the Amendment. This is sufficient to satisfy me that there is a factual basis that justifies exercising the means prescribed in the Amendment. Could the factual basis have been established in a more orderly and concrete manner? Perhaps. However, and without setting hard and fast rules in the

matter, this fact in and of itself does not sever the rational connection between the means taken in the Amendment and the purpose thereof.

40. An additional claim that the Petitioners raise regarding the rational connection is that the Amendment's long term harm to the holocaust survivors will be greater than its short term benefits, and therefore not only will its purpose not be achieved, but it will be counter-productive. Thus, the Petitioners warn of the following chain of events: limiting the fees in such a significant manner adversely affects the financial worthwhileness of handing the claims of payments; this adverse effect will lead to many lawyers withdrawing from handling such claims; consequently the survivors will approach unprofessional entities that lack the expertise that is needed to assist them in handling their claims; the flawed care will eventually damage the survivors, who will receive smaller amounts of payments. Moreover, according to the Petitioners, distancing the lawyers from handling these claims will cause damage to groups that have not yet gained administrative recognition like those who left Libya. Indeed, this is the argument that underlies the petition in HCJ 858/15 before us, in the framework of which the Petitioners claim that the Amendment "**causes severe harm to thousands of immigrants from Morocco and Iraq… who are currently in a difficult and complex legal struggle to be recognized as entitled to payment by virtue of the Nazi Persecution Disabled Persons Law**" (paragraph 3 of the petition). According to them, there is a real concern that as a result of the Amendment the lawyers will withdraw from handling the said legal struggle, and many survivors who according to them are entitled to compensation – will not have the privilege of receiving what they deserve.

41. I find this argument unacceptable as well. First, these arguments are based on an erroneous assumption regarding the purpose of the Amendment. As I emphasized above, the purpose of the Amendment is not to improve the survivors' financial condition, but rather to prevent their continued exploitation and to make sure that the lion's share of the payment to which they are entitled remains in their possession. As such, it is clear that prescribing limits on the 'cap' of the fees that the Claim Handlers may collect contributes to realizing the requested purpose. Second, on the merits of the matter, I am not of the opinion that the adverse effect on the financial worthwhileness is so severe that not enough lawyers will be found to assist in such claims. Let us not forget that there are still significant financial incentives to represent survivors in these proceedings. Thus, for example, the Amendment determines various levels of pay that change in accordance with the degree of work devoted by the Claim Handler. The Petitioners indeed emphasize the relatively low amount of money that was prescribed at the lowest level –473 NIS, however one must remember that this amount is meant for the most simple cases, in which the work of the Claim Handler amounts to only completing a simple form. The more devotion the Claim Handler's work will require, the more his fee will increase. Additionally, these proceedings are often collective proceedings, and hence, even though the fee for each survivor is not in and of itself high, the total amount of the fee accumulates to a significant amount of money. Consequently, the concern that the Amendment will adversely affect the legal struggle of additional groups to receive administrative recognition is not sufficiently founded, since, as mentioned, there are still real financial incentives to handle the claims.

**(2) The Least Infringing Means Criterion**

42. The Petitioners raise a number of less infringing alternatives that the legislator could have taken in the circumstances of the matter. Thus, for example, in the matter of the retroactive application of the law, it was argued that a more narrow approach could have been taken, and the Claim Handlers could have been exempted from returning funds that were already actually paid. Additionally, it was argued that the concern for the wellbeing of the holocaust survivors, and the financial burden involved therewith, could and should have been imposed on the State, which is the proper entity to finance this, and not on the Claim Handlers. Additionally, the Petitioners in HCJ 1164/15 claim that prior to the Amendment they were already a number of less infringing mechanisms prescribed in the law that limited and supervised the fees of the lawyers in the claims at issue, including general principles in contracts laws (good faith and the like); lawyers' disciplinary laws, and the Amendment to the Nazi Persecution Disabled Persons Order, which set a fee 'cap' that is currently in the amount of NIS 7,013. As to the matter of the amendment to the order, the Petitioners emphasize that when the order was amended the administrative decision was already in effect, and it is presumed that the sub-legislator "**had the administrative decision before it when it made its statements regarding the proper limitation on the fees of the lawyers handling the claims of the holocaust survivors**" (paragraph 39 of the Petition).

43. It is known that the least infringing means criterion does not prescribe that the legislator must choose the means that is least infringing in absolute terms, but rather the means that is least infringing from among those alternatives that similarly realize the purpose of the law:

> "**The need criterion does not indeed require choosing the means with the least infringement or whose infringement is the smallest, if such means is not able to realize the purpose of the law in the same manner as that means that was chosen in the law**" (Barak – Proportionality in Law, page 395)."

44. The alternatives suggested by the Petitioners do not realize the purpose of the Amendment "**in the same manner**" as the means that was selected in the Amendment. Limiting the retroactive application of the Amendment only to funds that were not yet paid would not have addressed the legislator's inclination to grant a relief to all of the holocaust survivors for the injustice caused thereto, including to those who already paid the fee. Additionally, while prescribing an exemption from VAT to holocaust survivors or increasing the amount of the payments paid to the survivors would benefit the survivors and avoid harming the Petitioners, they do not equally realize the requested purpose. We shall reiterate that improving the holocaust survivors' financial condition is only the practical outcome of the Amendment, but is not the purpose thereof. The Amendment is founded on the legislator's principle position that the Claim Handlers should not be allowed to turn the survivors into exploitees and to collect fees to which they are not entitled, and certainly the State should not facilitate this by subsidies.

45. Similarly, the mechanisms that were prescribed in the law prior to the Amendment, albeit less infringing, also do not realize its purpose in the same

manner. First, it shall be stated that with regard to the Amendment to the Nazi Persecution Disabled Persons Order, that came into effect in 2011, there is a dispute between the Petitioners and the Respondents with regard to the question whether this amendment indeed intended to also address claims by virtue of the administrative decision in the matter of the Libyan Jews. According to the attorney of the Attorney General, the amendment of the order is the outcome of a different development that is unrelated to this Petition, and does not stem from the administrative decision, contrary to the above-mentioned position of the Petitioners. Although I found significant merit in these arguments on behalf of the Attorney General, I believe that in this matter justice lies with the Petitioners. It emerges from the Constitution Committee's discussions that the legislator was working on the premise that the Amendment to the Nazi Persecution Disabled Persons Order indeed also applies to claims by virtue of the administrative decision in the matter of the Libyan Jews (see the minutes of the discussions of the Committee dated December 28, 2014, pages 125-126; on these grounds it was also decided to distinguish, with respect to the matter of the retroactive application, between agreements that were entered prior to the amendment of the order and agreements that were entered thereafter, as shall be specified below in paragraph 46). In any event, this claim too does not support the Petitioners, since the fact that the amendment to the order was meant to also address claims by virtue of the administrative decision regarding Libyan Jews does not justify the cancellation of the Amendment at hand. Thus, while the amendment to the order is an act of the **executive authority**, the Amendment at hand is an act of the **legislative authority**, and there is a difference between them. The enactment of the Amendment is the right and even the duty of the main legislator, and its act is not limited by previous acts of legislation, certainly acts of secondary legislation. Furthermore, on the merits of the matter, the limitation that is imposed by virtue of the amendment to the order does not realize the purpose of the Amendment, since it does not create a correlation between the extent of work by the Claim Handler and the complexity of the proceedings, and it cannot prevent situations of exploitation on the part of Claim Handlers. For these reasons, even if both the general principles of contracts law and the disciplinary law of lawyers partially address the purpose of the Amendment at hand, they do not justify the cancellation thereof. On the contrary, it is possible that the principles of contracts law actually, to a certain extent, reinforce the arrangement prescribed in the Amendment, since it can, as the attorney of the Attorney General posited, be seen as a – "**(renewed) concretization of customary legal principles that prohibit collecting exaggerated fees**".

46. Alongside the above, one cannot ignore the fact that the legislator applied a series of 'softening' measures that were meant to mitigate, to the extent possible, the intensity of the infringement of the Petitioners' rights. **First**, regarding the duty to retroactively return funds that were already actually paid, it was prescribed that the date for filing a request for the restitution of the surplus fees shall be limited to a year from the date of the publication of the law, and therefore the Claim Handlers will not be in a state of perpetual uncertainty with respect to funds that were already paid thereto. Additionally, the legislator provided the Claim Handlers with the option whether to return 25% of the surplus fees to those requesting it within 60 days from the date of receiving the request, and in doing so become 'immune' to additional future claims, or to maintain their claims that the

requested restitution is unjust and to conduct a suit in the matter, while the court must rule in the claim "**taking into consideration that when collected, the collection of the surplus fees was not prohibited and while taking into consideration the harm that will be caused to the Claim Handler due to the restitution**" (Section 8(a)(3) of the Amendment). Indeed these mechanisms do not eliminate the harm to the Petitioners, but they do limit it. **Second**, regarding the retroactive application, it was prescribed that with respect to fee agreements that were entered prior to the date the Amendment to the Nazi Persecution Disabled Persons Order came into effect, for claims that were approved as a result of an administrative decision, the fee rate shall be 70% or 85% of the rate of the fee that had been prescribed in the original agreement, in accordance with the date the claim was filed and the scope of the work of the Claim Handler, and shall not be limited to the amounts of money prescribed in the Amendment. This provision is meant to moderate the harm to the Petitioners in claims in which an agreement was made before the limitation was prescribed in the Amendment to the Nazi Persecution Disabled Persons Order, and to avoid an excessively sharp reduction in the Claim Handler's fees. **Third**, in the case of claims that were filed pursuant to the Claims of Holocaust Victims Law, in accordance with the Amendment to the German Law, after the date of the enactment thereof, it was ruled that although the maximum fee in such situations is only 473 NIS, if following the handling of a claim, the payment was retroactively increased beyond the amount to which the claimant would have been entitled pursuant to the Amendment to the German Law, then the fees that shall be derived from the amount of the increase, shall not be subject to the provisions of the Amendment, and shall be determined in accordance with the relevant provisions in the Claims of Holocaust Victims Law. This reflected the principle that guided the legislator that if and to the extent the lawyer's contribution is what led to the increase of the payment, his fees should be ruled accordingly.

**(3) Proportionality in the Narrow Sense**

47. According to the Petitioners, the legislator did not give proper consideration to the significant damage that could be caused due to the Amendment, which exceeds by several orders of magnitude the benefit that derives therefrom. Thus, while the benefit of the Amendment amounts to a profit of some hundreds or thousands of Shekels for each claimant, this is not properly proportionate to the severe harm that will be caused by the Amendment, including "**the financial catastrophe that is heading towards the Petitioners and their likes**" (HCJ 1164/15, paragraph 153); the possible harm to the relatives of lawyers who heaven-forbid passed away, who will be required to deal with many restitution claims with respect to which they do not have all the necessary information; and the harm that the Amendment shall cause to the public purse both due to the expansion of the survivors' entitlement to legal assistance from the State, and as a result of the fact that the demand that the Claim Handlers return the surplus fees will lead to the State having to return the tax it received for such payments. **On the other hand**, the Respondents repeatedly mention that the infringement of the Petitioners' rights is relatively limited. The Respondents also mention the series of 'softening' measures that were taken by the legislator, which, according to them, create a proper correlation between the benefit embedded in the Amendment and the infringement it causes.

48. I agree with the position of the Respondents. The examination of the equation of the costs of the Amendment on the one hand vis-à-vis it benefits on the other hand, leads to the conclusion that its benefits outweigh the costs. **First**, as has been specified above, the legislator applied a series of 'softening' measures that significantly mitigate the intensity of the infringement caused to the Petitioners, both by creating different levels of pay in accordance with the scope of the Claim Handler's work, and by creating special mechanisms that 'soften' the impact of the retroactive application of the law. **Second**, a comparison between the various provisions of the Amendment and the legal situation that existed prior to the Amendment indicates that the change that the Amendment creates is not so dramatic, and in certain situations does not even change the state of affairs at all. For example, the determination of a 7.5% fee 'cap' for claims pursuant to the Claims of Holocaust Victims Law that were filed before the date of the enactment of the Amendment to the German Law, as specified above, constitutes only a clarification of the existing law. Thus, although prior to the amendment of the law the fee 'cap' in such cases was 15% pursuant to the provision of Section 10(b) of the Claims of Holocaust Victims Law, in fact in Regulation 4 of the Claims of Holocaust Victims (Handling Arrangements) Regulations, 5725-1965, it was prescribed that – "**Notwithstanding that stated in any agreement, the total fee for the handling in Israel and abroad of a claim to increase an allowance or other amount that was ruled for the benefit of a claimant, due to changes in the law pursuant to which the allowance or the other amount was ruled, shall not exceed <u>half of the maximum percentage</u> that would have applied if it were not for the provisions of this regulation**" (emphasis added). Hence, it is evident that even before the Amendment, the fee was limited to 7.5%, and the amendment of this section did not constitute a real change compared to the previous state. Indeed, determining a 'cap' in the amount of 25,000 NIS is new compared to the previous state, however, as the Respondents emphasized, these are extremely unusual cases and the application of this provision is marginal. In light of the above, I am of the opinion that in the circumstances at hand the bleak forecast regarding a "**financial catastrophe**" heading towards the Petitioners, grates on one's ear and is unfounded. The claims regarding the possible harm to lawyers' relatives and to the public purse, are no more than a general conjecture, which was argued weakly and was not sufficiently substantiated. Therefore, I am not of the opinion that they are of substance to justify the cancellation of the Amendment.

49. On the other side of the equation, it seems to me that the Petitioners described the benefit that derives from the Amendment in an over-simplistic manner. The benefit is more than just a profit of a few hundred or thousand shekels per survivor. There is first and foremost a value-based benefit. Once it became clear that there is an infuriating phenomenon among us of exploiting elderly holocaust survivors, we have the obligation to eliminate this phenomenon as per the words "**So thou shalt put away the evil from the midst of thee**" (Deuteronomy 17, 7). Heaven-forbid we shall close our eyes so we do not see and shut ears so we do not hear.

50. Hence, the infringement of the Petitioners' rights complies with the limitation clause, and there is no constitutional ground justifying the cancellation of the Amendment or of a part thereof, or the suspension of the date it shall come into effect.

**Flaws in the Legislative Procedure**

51. The Petitioners' second principle argument relates to the legislative procedure of the Amendment. According to them, the legislative procedure was "**hasty, negligent and offensive**". The Petitioners mainly emphasize the changes that were made at the last minute in the wording that was tabled in the Constitution Committee before the discussion in preparation for the second and third reading, which, according to them, included material additions that were not mentioned in the original wording. According to them, in the absence of a serious and thorough discussion regarding the Bill, it must be ruled that there was a flaw at the root of the legislative procedure that justifies the cancellation thereof.

52. Case law prescribes that this court applies great restraint when reviewing legislative procedures. "**The judicial restraint that is necessary in reviewing legislative procedures will not be assured by formal and technical criteria, but rather through the interpretation of the term 'a flaw that is at the root of the procedure', which limits it only to rare and severe flaws that severely and evidently prejudice the fundamental principles of the legislative procedure in our constitutional and parliamentary regime**" (HCJ 4885/03 **Israel Poultry Farmers Association Agricultural Cooperative Society Ltd v. The State of Israel**, PD 59(2) 14, 42 (2004) (hereinafter: the "**Poultry Farmers** Case"); emphasis added). A number of fundamental principles have been listed in case law pursuant to which one must examine whether there has been a flaw at the root of the legislative procedure, and they are as follows: The principle of the majority rule, the principle of equality in the legislative procedure, the principle of publicity and the principle of participation (the **Poultry Farmers** Case, pages 43-51). The Petitioners' arguments are directed towards the matter of the principle of participation. According to this principle, a proper legislative procedure is a procedure in which the Members of Knesset have a proper and fair opportunity to formulate their position vis-à-vis the bill being discussed. The absence of a practical possibility for the Members of Knesset to formulate their position would be deemed a severe and evident infringement of the legislative procedure which could justify the cancellation thereof. The Petitioners argue that in the case at hand the quick procedure in which the Amendment was legislated impaired the Members of Knesset's ability to formulate their position, particularly with respect to the material parts that were added to the wording of the Bill on the eve of and during the second discussion in the Constitution Committee.

53. I examined the matters and I am not of the opinion that in the case at hand there was a flaw in the legislative procedure, definitely not a rare and severe flaw that is at the root of the procedure. The attorney for the Knesset presented a long list of facts that indicate that there was no material flaw in the principle of participation in the legislating procedure of the Amendment: the procedure included, alongside the discussions in the Knesset's plenum, two discussions at the Constitution Committee, with the second one being lengthy and comprehensive; as emerges from the transcripts of the Committee discussions, the Members of Knesset actively participated in the discussions, presented reservations and added their remarks; the Committee discussions were characterized by significant presence of government representatives, including the Ministry of Justice, the Holocaust Survivors' Rights Authority, the Ministry for Senior Citizens, the Enforcement

and Collection Authority and the National Insurance Institute, as well as representatives from additional relevant organizations; most importantly, representatives of the Israel Bar Association, including some of the Petitioners in the case at hand, were present in the Committee discussions, and were granted the opportunity to voice their arguments with respect to the Amendment at length before the Members of Knesset, some of which arguments were even accepted and led to the amendment of the wording of the Bill. It is not superfluous to note that in this context the Petitioners in HCJ 1164/15 claim a conflicting argument, since alongside their argument that the legislative procedure was quick and hasty they argue that "**the legislator was sufficiently aware of the material flaws at the root of the matter of the law at hand**" (paragraph 73 of the Petition). In light of the above, the argument regarding a flaw that is at the root of the procedure is not to be accepted and the Petitioners' claim in this matter is to be rejected.

**A Closing Remark**

54. The Petitioners' sincere concerns regarding the harm to their livelihood were not unnoticed. However, the severe harm to many holocaust survivors was also not unnoticed. I have no intention to discredit the Petitioners in any manner, who are presumed to perform their work faithfully, while striving to make an honest living and grant devoted and fair service to their clients. But one must see the reality as it is, and unfortunately it not 'rosy'. This is the reality that the legislator wished to amend. The purpose of the Amendment is worthy, and it means – proportionate. The Claim Handlers are remunerated for their work, and they are able to continue to make an honest living in accordance with the levels prescribed in the Amendment, each in accordance with his work and effort.

55. Based on that stated above, we have decided to deny the petitions.

Given the circumstances of the matter, I would recommend to my colleagues not to issue an order for expenses.

JUSTICE

**President M. Naor**

1. I agree with the comprehensive judgment of my colleague Justice **Sohlberg**.

2. Some of the Petitioners before us have significantly contributed to the recognition of holocaust survivors' rights. Such as in the case of the struggle of the immigrants from Libya, a struggle that was both lengthy and not simple (see LCA 8745/11 **Maimon v. The Competent Authority pursuant to the Nazi Persecution Disabled Persons Law**, paragraphs 3-4 of the judgment of Justice **Shoham** and paragraphs 2-4 of the judgment of Justice **Amit** (November 10, 2013)). I am also willing to assume that some or all of the Petitioners have contributed to the legislative changes in Germany. However, when doing so the Petitioners were acting on behalf of **other** clients, who were naturally paying them fees. Now, following the administrative decision and the change in German law, the work that needs to be devoted is minimal; the lawyers' **past** contribution to these achievements cannot be taken into consideration while determining the fees charged for relatively simple actions of completing forms. The words of Adv.

Weber, Petitioner 2 in HCJ 687/15, in the course of the discussions of the Constitution, Law and Justice Committee, prior to approving the law for the second and third reading, testify to this, as he explained that "If I were to be approached today by anyone who would say to me: I received such a letter from Germany to do X, would I take money from him? I would do it for him for free. I would say to him: the stamp costs 4 shekels, I am willing to donate the stamp to you as well" (the minutes of meeting no. 281 of the Constitution, Law and Justice Committee, the 19th Knesset, 22 (December 28, 2014)). Adv. Weber should be applauded. It is not appropriate to obligate others to act like him, however his words testify as to the scope of the work that is required, and consequently as to the appropriate remuneration for this work.

3. When examining the petitions, I was disturbed by the issue of retroactivity, however, as my colleague pointed out (paragraph 46 of his opinion), in the provision regarding the restitution of payments that have already been made, the lawyer has the choice between returning only 25% of the surplus fee or conducting a restitution claim in the framework of which the lawyer will be able to argue that the restitution obligation is unjust.

THE PRESIDENT

**Justice H. Melcer**

I concur with the comprehensive judgment of my colleague, Justice **N. Sohlberg** and with the remarks of my colleague, President **M. Naor**.

JUSTICE

It was decided as stated in the judgment of Justice **Noam Sohlberg**.

Delivered on this 22nd day of Tamuz, 5775 (July 9, 2015).

THE PRESIDENT JUSTICE JUSTICE