FREE TRANSLATION FROM HEBREW

The Supreme Court

LCrimA 8273/13

Before:	The Honorable Justice E. Rubinstein The Honorable Justice U. Vogelman The Honorable Justice N. Sohlberg
The Applicant:	The State of Israel (Tel-Aviv Jaffa Municipality)
	v e r s u s
The Respondent:	Lior Haimovitz, Adv.

Application for leave to appeal the judgment of the Tel Aviv–Jaffa District Court, in Miscellaneous Criminal Appeal 19334-06-13 dated October 23, 2013 that was given by Judge A. Cohen.

Date of Session:	8th of Tishrei 5775 (October 2, 2014)
On behalf of the Applicant:	Adv. Joey Ash; Adv. Oshra Fattal-Rozenberg
On behalf of the Respondent:	Himself

J U D G M E N T

Justice N. Sohlberg:

1. The case of one penny (*peruta*) is to be treated as a case of many, and at times the case of a penny is quite important. The crux of the dispute is NIS 100, a fine for parking without paying a parking regulation fee; an act that had been forbidden and was subsequently permitted.

2. An application for leave to appeal the judgment of the Tel Aviv–Jaffa District Court dated October 23, 2013, in Miscellaneous Criminal Appeal 19334-06-13 (Judge **A. Cohen**), in the framework of which the Respondent's appeal of the judgment of the Tel Aviv–Jaffa Local Affairs Court dated April 25, 2013, in case 24942146 (Judge **A. Goldin**) was accepted, and it was ruled that the Respondent is to be acquitted of the parking offense of which he had been convicted, due to it having been cancelled after it had been committed.

The Main Facts

3. The Respondent, a resident of Tel Aviv-Jaffa, parked his car adjacent to curbstones that had been painted blue and white (hereinafter: a "**Regulated Parking Place**"), without paying a parking regulation fee and not in the zone of his residence. However, at that time the Tel-Aviv-Jaffa (Standing and Parking Cars) By-Law, 5744-1983 (hereinafter: the "**By-Law**") allowed residents of the city to park their cars in a Regulated Parking Place, free of charge, only in their zone of residence.

4. Section 12 of the By-Law – entitled "**Payment of Parking Regulation Fee**" – prescribes in sub-section (a), as follows:

> **"Subject to that stated in Section 4, a person shall not stand and shall not park a car… in a Regulated Parking Place, unless he paid a Parking Regulation Fee…"**

Section 4 of the By-Law, entitled – "**Parking for Residents in a Regulated Parking Place**", prescribes in sub-section (a) as follows:

> **"If a parking zone, or a part thereof, is designated as a Regulated Parking Place, those who live in that zone shall be permitted to park their car in a place that was designated as a Regulated Parking Place in the zone of their residence, without paying a fee… unless said permission was restricted and the restriction was marked by a parking sign"**.

Thus, the Respondent was required to pay a fine in the amount of NIS 100.

5. A few weeks thereafter, and before the fine was paid, an amendment to the By-Law was promulgated – Section 4(a1) – which added a new layer to the specific rule that applies to the city residents, and granted a free gift:

> **"If a parking zone, or a part thereof, is designated as a Regulated Parking Place, those who live in the area of the municipality shall be permitted to park their car in a place that was designated as a Regulated Parking Place that is not in the zone of their residence, without paying a fee… if such permission was marked by a parking sign"**.

Commencing from the date the ameliorative amendment came into effect, residents of Tel Aviv-Jaffa, as a rule, are permitted to park their cars in Regulated Parking Places, free of charge, throughout the city, due to the extensive distribution of permitting parking signs; and as a result of the municipality's "non-enforcement" policy in this matter.

6. Given this development, the Respondent approached the municipality and requested to cancel the fine that had been imposed upon him, however his request was denied, on the grounds that he had committed the offense before the ameliorative amendment came into effect. In response, the Respondent requested to stand trial. It was then that a charge sheet was filed against him.

The Essence of the Judgment of the Local Affairs Court

7. In the hearing that took place at the Tel Aviv-Jaffa Local Affairs Court, the Respondent admitted to the act attributed to him, but concurrently disputed the criminality thereof. His argument was that he indeed committed an offense, however it was subsequently cancelled, in the framework of the abovementioned ameliorative amendment to the By-Law, and this cancellation also applies retroactively to his own matter, by virtue of Section 4 of the Penal Law, 5737-1977 (hereinafter: the "**Penal Law**"), which addresses the "**Cancellation of the Offense After it was Committed**", and reads as follows:

> **"If an offense was committed and its prohibition was cancelled**

> **by an act of legislation – then the criminal liability for its commission shall be cancelled; proceedings initiated shall be terminated; if judgment was delivered, its implementation shall be halted; and there shall be no future consequences that derive from the conviction."**

At this stage the Respondent had not yet raised any alternative argument that is based on the provision of Section 5(a) of the Penal Law, which addresses "**The Change of an Act of Legislation After the Offense was Committed**", but its wording shall be presented below for the sake of convenience:

> **"If an offense was committed and final judgment with respect thereto has not yet been delivered, and if a change occurred in respect of its definition, of liability therefor or of the penalty set therefor, then the ameliorative act of legislation shall apply to the matter; 'liability therefor' – includes the applicability of qualifications on criminal liability for the act."**

8. On the other hand, the municipality's main argument was that at hand is an offense which by its very nature is subject to changes from time to time, as stated in Section 6 of the Penal Law – entitled "**Offenses Caused by Time**" – which qualifies the application of the rule upon which the Respondent is relying:

> **"The provisions of Sections 4 and 5 shall not apply to an offense pursuant to an act of legislation, in which or in respect of which it has been prescribed that it shall be in effect for a certain period of time, or which by its very nature is subject to changes from time to time."**

9. The Local Affairs Court heard the parties' arguments and at the end of the hearing immediately ruled as follows:

> **"Section 4 of the Penal Law, upon which the accused person relied, prescribes as follows: 'If an offense was committed and the prohibition thereof was cancelled in an act of legislation, the criminal liability for committing it shall be cancelled.' The title of such section even states: The Cancellation of the Offense After it was Committed. In this matter I did not hear that the offense was cancelled. There is still an obligation to pay a parking regulation fee in a Regulated Parking Place… Not paying is still defined as an offense, the prohibition of which was not cancelled in an act of legislation. Therefore, since the essence of the offense was not cancelled, Section 4 of the Penal Law should not apply."**

In light of this conclusion the Local Affairs Court did not address the question of the applicability of Section 6 of the Penal Law. As was mentioned, the question of the applicability of Section 5(a) of the Penal Law was not even addressed. The Respondent was convicted and was ordered to pay a fine in the amount of NIS 100. The Respondent did not accept this and filed an appeal with the District Court.

The Essence of the Judgment of the District Court

10. The District Court began by stating that despite its requests and questions, it was not informed whether the relevant entities at the municipality that acted to change the By-Law, and that emphasized that there is a need to alleviate the Tel Aviv-Jaffa residents' parking problem, are of the opinion that as a matter of policy, it is appropriate to continue to conduct proceedings with respect to tickets that were issued to the city's residents prior to the ameliorative amendment coming into effect. Considering the broad implications a ruling in the matter at hand could have, the Attorney General was requested to consider appearing in the hearing in this case, however the Attorney General did not see it fit to do so.

11. The District Court elaborated on the fact that even after the ameliorative amendment came into effect, the general prohibition to park in a Regulation Parking Place without paying a fee remained in effect. However, with respect to the population of the residents of Tel Aviv-Jaffa – the Respondent included – such prohibition was cancelled by an act of legislation. It follows, that the acts of the Respondent do not constitute an offense, and their criminality was negated, retroactively, by virtue of Section 4 of the Penal Law. In light of this conclusion, the District Court did not address the question of the application of Section 5 of the Penal Law, which addresses situations of (mitigatory) changes to the offense, as opposed to the cancellation thereof.

12. The District Court added that at hand is not a specific change that is subject to changes from time to time, such as the removal of a certain parking sign, or a new marking of a specific section of the curbstones, but rather a material change of a by-law, with respect to the entire parking arrangements in the city. This change was not made offhandedly – it was preceded by discussions that lasted for many years, thorough examinations, various approvals, publication procedures and more. Therefore the qualification in Section 6 of the Penal Law does not apply to the matter.

13. Based on that stated above, the District Court cancelled the conviction and acquitted the Respondent of the offence of which he had been convicted. This led to the application before us for leave to appeal.

The Essence of the Arguments of the Parties to the Application for Leave to Appeal

14. According to the municipality, the District Court's rulings and reasons regarding the retroactive application of the ameliorative amendment to the By-Law, raise weighted legal questions that deviate from the interests of the Parties to this proceeding and incorporate significant broad implications. Thus, for example, the outcome of the proceedings is expected to have an immediate impact on many parking tickets that were issued in similar circumstances. Additionally, a ruling in the matter before us may project onto a wide variety of ameliorative changes to legislation, in many fields and arrangements that involve criminal sanctions, which are routinely made by the secondary legislator and in municipal by-laws. Up until now, this court did not address the interpretation of Sections 4-6 of the Penal Law with respect to arrangements of such a normative level and clear case law has not yet been ruled in this matter. Therefore, the municipality should be

granted leave to appeal the District Court's judgment.

15. On the merits of the matter, the municipality's first argument is that the District Court erred when it applied Section 4 of the Penal Law to the case at hand, since even following the ameliorative amendment of the By-Law, the prohibition underlying the offense that was committed by the Respondent is still in effect. The exemption from payment that was granted to the residents of Tel Aviv-Jaffa amounts at most to a change of the details and terms and conditions of the prohibition (that are listed in Section 4 of the By-Law), but the actual prohibition (that is anchored in Section 12 of the By-Law) prohibiting parking in a Regulated Parking Place contrary to the rules that relate to paying a fee, was never cancelled. The purpose of Section 4 of the Penal Law is to handle situations in which a criminal norm was cancelled as a result of a material and principled change in the fundamental perceptions of society with respect to its protected values. Such a 'deep-rooted change' did not occur in this case.

16. The municipality further argues that in any event the case at hand is qualified by the end of Section 6 of the Penal Law, which qualifies the application of the preceding Sections 4 and 5. According to the municipality, the fields that are regulated by secondary legislation, in general, and in municipal by-laws, in particular, including parking arrangements, are dynamic fields that are influenced by the needs of the hour of the authority and the residents, and changes that are made thereto do not constitute a change in the direction of society's perception of the severity of an act that was committed when it was prohibited. To the contrary, at hand are situations in which there is a concern that a person could commit an offence while disregarding the needs of the hour and relying on the anticipated change of the law. The kind of arrangements at hand, by their very essence, are subject to changes from time to time and the fact that the change at hand was preceded by an extended and proper and professional procedure, does not change this principled conclusion. In any event, in the case at hand, the ameliorative amendment itself stipulates that the alleviation for the city residents is conditioned upon specific parking signs being placed, and this, too, indicates its temporary nature. If this were not sufficient, then relieving the Respondent of liability leads to an outcome in which a sinner will profit from his sin and will be better off than those residents of the city who settled the parking fee as required to begin with, or who immediately paid the tickets issued to them.

17. On the other hand, the Respondent's position is that commencing from the time that the ameliorative amendment to the By-Law came into effect, he, as a resident of the city, can no longer commit the offense of which he was convicted. Therefore, *de facto*, the prohibition incorporated in the offense was cancelled with respect to him. In this context, it does not matter whether the cancellation was made by deleting an existing section or by adding a new section, and the emphasis is on the essence of the change, as opposed to the format thereof. The ameliorative amendment, despite being anchored 'only' in a municipal by-law, changed world order in all that relates to parking in Tel Aviv-Jaffa, and it reflects a conceptual change of values with respect to the criminality of the Respondent's acts. In any event, even if the prohibition of the offense that the Respondent committed was not **cancelled**, as stated in Section 4 of the Penal Law, that at the least, there was a dramatic **change** with respect to the definition of the offense or with respect to

liability for committing it. It that case the Respondent's acquittal would follow by virtue of Section 5(a) of the Penal Law, which the municipality ignored in its arguments. It is clear, so claims the Respondent, that conducting criminal proceedings for an offense for which, at the time of the trial, a prohibition no longer exists, or which was changed such that it no longer applies to the person accused of committing it, prejudices the sense of justice and does disservice to the purpose of such sections of the law.

18. Furthermore, the municipality's interpretation of Section 6 of the Penal Law could lead to an unreasonable outcome pursuant to which all secondary legislation and municipal by-laws, by their very nature, are subject to changes from time to time, since as a rule they do not anchor norms of extraordinary significance. In such a state of affairs, no alleviation of offenses of a 'relatively low' normative level would ever be applied retroactively, despite the far-reaching impact they have on the lives of individuals. Moreover, the municipality's approach would require examining, with respect to any ameliorative norm whatsoever, whether it is indicative of a 'dramatic change of values' (which, in any event, is the case in the case at hand). Therefore, and considering the purpose of Section 6 of the Penal Law, that was meant to prevent premeditated evasion of criminal liability for a temporary offense (which is not what happened in the case at hand), one must adhere to the 'natural' interpretation of the section and set it aside for 'real' temporary acts of legislation. The by-law at hand, by its very nature, is not such an act of legislation and is not by its very nature subject to changes from time to time, certainly not more than any other act of legislation. Any change therein requires quite a complex procedure, and in fact, compared to other central laws, a relatively small number of changes were made therein. It is for good reason that it took approximately 14 years for the ameliorative amendment at hand to come to pass. The Respondent emphasizes that the application of Section 6 of the Penal Law could have easily been secured, while concurrently also securing the prevention of the application of Sections 4 and 5. Thus, for example, the municipality could have prescribed transitional provisions and temporary provisions (the temporary nature of which is undisputed), but it chose not to do so.

19. The Respondent argues, that in general, the municipality's insistence to continue with the enforcement measures regarding an offense that no longer exists, as well as its conduct throughout the entire legal proceeding, including on the procedural level, amount to a lack of basic administrative fairness which justifies denying the application for leave to appeal. The concern regarding the broad implications is vague and unfounded, since the ruling of the District Court in the matter at hand, that the By-Law does not constitute an act of legislation that by its very nature is subject to changes from time to time, is limited to its own boundaries, and the said judgment is not sufficient to rule on similar questions with respect to other secondary legislation. Additionally, Sections 4 and 5(a) of the Penal Law address situations in which a final judgment has not yet been delivered, and it is reasonable to assume that today, more than two years after the ameliorative amendment came into effect, there are not many others who are in a situation similar to that of the Respondent. Finally, the Respondent argues that if and to the extent that leave to appeal shall be granted, it should be restricted only to matters of principle, while emphasizing the customary starting point in criminal law, that interpretation that is lenient towards the accused party should be preferred. In any

event, leave to appeal should not be granted with respect to the Respondent's individual matter, and according to him, in the circumstances of the matter, he even has an abuse of process claim. Furthermore, despite a very narrow personal interest, the Respondent undertook to examine an issue that could have a positive impact on many others and therefore it is appropriate to rule that expenses be paid to him.

Discussion and Ruling

20. At hand is an application for leave to appeal in a 'third instance'. It is known that such leave is granted sparingly and is reserved for situations which raise matters of significant legal or public importance, which exceed beyond the interests of the parties to the application (LA 103/82 ***Chenyon Haifa*** **Ltd. v.** ***Matzat Or*** **(Hadar Haifa) Ltd.**, IsrSC 36(3) 123 (1982); CrimA 4946/07 **Makleda v. The State of Israel**, paragraph 18 (February 19, 2009)). As shall be clarified below, I am of the opinion that the matter at hand indeed is among those special cases, the principle question at hand raises a significant legal matter, and it is necessary to make a binding case law ruling. Therefore, I would suggest to my colleagues that we grant leave to appeal and hear the application as though an appeal was filed pursuant to the leave granted.

The Chronological Application of the Material Criminal Norm

21. It is a fundamental axiom that the relevant point in time for formulating criminal liability, and for assessing the appropriate punitive response therefor, is the time of the individual's conduct. In general, the question whether such conduct is permitted, or prohibited, or how severe it is, should be examined in accordance with the normative state that was in effect at the time it occurred. As the Penal Law guides us, in the first chapter, entitled "**Basic Provisions**", in Section 3 – entitled "**No Retroactive Penalty**":

> **"(a) An act of legislation that creates an offense shall not apply to an act committed before the later of the day on which it was lawfully published, or the day on which it came into effect.**
> **(b) If an act of legislation prescribes a more severe penalty for an offense than was prescribed therefor at the time it was committed, then it shall not apply to an act committed before the later of when it was lawfully published, or when it went into effect…"**

The above Section 3 is none other than a partial expression of a basic principle of utmost importance in criminal law, the "**legality principle**", pursuant to which – "**There is no offense and no punishment other than pursuant to a law that was in effect when the offense was committed**" (S.Z. Feller **Elements of Criminal Law**, Volume A 4 (1984); hereinafter: "**Feller**"). This deep-rooted principle is a vital prerequisite to social recognition of the legitimacy of the criminal norm (Gabriel Hallevy **The Theory of Criminal Law**, Volume A 299 (2009); hereinafter: "**Hallevy**"). It is necessary in order to effectively direct human behavior. It is necessary to realize the educational and preventive purpose of the criminal law. It creates a balance between the power of the sovereign and the need to protect the individuals' rights and freedoms (Yoram Rabin and Yaniv Vaki **Criminal Law**, Volume A 84-85 (Third Edition, 2014); hereinafter: "**Rabin and**

Vaki"). This significantly important principle draws its essence from the approach that – "**Retroactive legislation prejudices constitutional fundamentals. It prejudices the rule of law, legal certainty and the public's confidence therein. It prejudices fundamentals of justice and fairness and the public's trust in the governing institutions.**" (PPA 1613/91 **Arbiv v. The State of Israel**, IsrSC 46(2) 765, 777-778 (1992); hereinafter: the **Arbiv** Case).

22. The logic of that stated above is valid, however it loses much of its relevance when addressing the application of a later and ameliorative norm. Prof. **Feller** elaborated on this matter:

> **"When the new norm is an ameliorative law, it is less of a principle matter, because it is not a matter of surprising the individual after the fact with liability that was not anticipated – in terms of its existence or in terms of its scope; applying the later norm can only improve his legal situation… Therefore, when referring to the lack of retroactive application of the criminal norm as an iron rule of criminal law, the intention is to the application of a more severe criminal norm**. (***ibid***, on page 223).

23. However, also the retroactive application of an ameliorative criminal law does not lack difficulty:

> **"A person who committed an act that constitutes an offense when it is committed, prejudiced not only a specific social interest that is protected by the offense, but also a general social value of respecting the law… an accused person who committed an offense demonstrated that he is ready to 'show contempt' for the law, and is not intimidated by the imposition of criminal liability or a punishment. Such a person poses a social risk due to the 'anarchistic' expression in his behavior and serves as a bad example for the public.**" (Dan Bein "The Application of Criminal Law in Accordance with the Time the Offense was Committed – Interpretation, Critique and the Scope of Application of Amendment Novelties" **Trends in Criminal Law: A Decade to the 39th Amendment of the Penal Law** 557, 577-578 (Eli Lederman, Keren Shapira-Ettinger and Shai Lavi Editors, 2010, hereinafter: "**Bein**").

24. Nevertheless, the prevalent approach is that retrospective application of an ameliorative punitive law – "**appears to be just and fair… it is true that the constitutional value of the rule of law (in the sense of imposing the law) is infringed, however it would be an improper outcome if society were to punish a person today for committing an act that today is perceived to be permitted, or if it shall impose a severe punishment when the act today requires a light punishment. In the total balance between the conflicting values, the retrospective application prevails**" (the **Arbiv** Case, page 785). It is in this spirit that Prof. **Feller** noted that:

> **"The realization of justice, as a function of punishment, is**

> **impaired by imposing a punishment or implementing a punishment due to an act that is no longer an offense, even if it was an offense when it was committed. Although the person proved to be one who did not follow the command of the criminal norm that at the time forbade his actions, however the punishment is linked to a given offense, as per its essence and severity; it is meant only to deter people from committing offenses of that kind, and to apply justice only with respect thereto and not, incidentally, with respect to all the fields of the offenses which such person and others like him could commit in the future… When the punishment is for a certain offense which was since cancelled, it also contradicts the public's sense of justice, since the punishment is no longer grounded in any prohibition. [This is also true with respect] to a later norm that alleviates the criminal liability, without cancelling the offense. There is no longer any point in imposing upon a person treatment that the legislator found to be inappropriate and exaggerated and which it replaced"** (***ibid***, on pages 226-227).

25. The central reason underlying this approach stems from the approach that the cancelation of the material criminal norm or the amelioration thereof, constitutes an expression of a social recognition, albeit delayed, of an existing state of affairs. Meaning, the ameliorative norm is not constitutive, but rather only declarative. It expresses a statement of values that a certain behavior should not have been defined as a criminal offense to begin with, or that excessive severity had, in the past, been erroneously attributed thereto (**Hallevy**, pages 351-352). **Bein** summarized this (on page 577) as follows:

> **"Adopting… the principle of the retrospectivity of the ameliorative law… is based on the reasoning that if there is a change in public perception regarding the mere imposition of criminal liability on a certain behavior or as to the degree of severity of such behavior, the person accused is entitled to be judged and sentenced in accordance with the new perception and not in accordance with an archaic perception that is no longer prevalent. The emphasis in this approach is not on the formal framework of the offense but rather on its underlying social interest. If the interest no longer exists or is of lesser importance, there is no longer any point in protecting it or protecting it at a level of intensity that does not coincide with its current importance. This is, to a certain degree, an expression of preferring the 'rule of material law' over the 'rule of formal law'.**

26. The above-described approach was adopted in our case law even before the legislation of Amendment 39 of the Penal Law, in the framework of which, *inter alia*, Sections 4, 5, and 6, which are the crux of the dispute in the case at hand, were created. This was expressed in the **Mizrachi** Case as follows:

> **"It is a basic human right that there is no retroactive application of a criminal provision that applies a stricter standard upon a**

> **person, and a person is not to be punished for an act that he committed, unless at the time he committed the act the act was defined as a criminal offense with a defined punishment. In contrast, we have a worthy case law tradition that there is retroactive application of a criminal provision that is meant to be more lenient, and a person shall not be punished for an act that was prohibited when it was committed and is permitted at the time of the punishment, and he shall not receive a punishment for an act that he committed that is harsher than that which exists when the punishment is given…the reason for the influence of the ameliorative change… is grounded in the fact that the legislator expressed its position that it wishes to be more lenient regarding a certain offense, and it is just that the accused person benefit from the change that occurred in the legislator's perception."** (CrimA 63/89 **Mizrachi v. The State of Israel**, IsrSC 43(4) 388, 396 (1989); hereinafter: the **Mizrachi** Case).

27. However, despite the significance of the principle of the retrospectivity of an ameliorative act of legislation, and the logic thereof, "**if the ameliorative change is made in a temporary prohibition, the ameliorative norm shall not apply retroactively. The rationale is that if to begin with the offense was meant to prohibit a certain behavior for a limited period of time, it is inappropriate to retroactively project from the situation at the end of the period of time to the situation that existed during the period of time. This means that a temporary prohibition is governed by the law that was in effect when it was violated, irrespective of a later act of legislation that benefits the accused person, including an act of legislation that completely cancels the offense**" (LCrimA 4521/11 **Muchtaseb v. The State of Israel**, paragraph 11 of the judgment of Justice **I. Amit** (March 7, 2013); hereinafter: the **Muchtaseb** Case).

28. Equipped with these insights, we shall now turn to examining the arrangement that was adopted in the framework of Amendment no. 39 of the Penal Law.

Section 4 of the Penal Law

29. As was mentioned, Section 4 of the Penal Law, entitled "**Cancellation of the Offense After it was Committed**", prescribes as follows:

> **"If an offense was committed and its prohibition was cancelled by an act of legislation – then the criminal liability for its commission shall be cancelled; proceedings initiated shall be terminated; if judgment was delivered, its implementation shall be halted; and there shall be no future consequences that derive from the conviction."**

It emerges from the wording of the section that a condition for it to apply is that the "**prohibition**" incorporated in the offense be cancelled. It would seem that the use of such term could benefit the individual accused or convicted of a crime, but it could also be to his detriment. Hence, for example, following a legislative change and in certain circumstances, an individual could argue that

notwithstanding that the offense of which he was accused or convicted was not omitted from the book of laws, the prohibition that was incorporated therein was cancelled with respect to a certain population – the individual included. On the other hand, it could be argued that in the described situation, in which the general offense remained in effect, it follows that the prohibition that is incorporated therein was not cancelled, and that there certainly was no deep and principled change of direction in the legislator's position. Hence, the individual should not be exempt from liability, even if his behavior, at the current time, would not have created any offense. It is thus clear that at hand is an interpretational question, and as we shall yet see, an explicit and unequivocal answer – is not to be found.

30. "**In Section 4 of the Penal Law there is a clear expression of the intention that if an act that was an offense ceases to be an offense, no sanction whatsoever should be exercised vis-à-vis whomever committed such act, whether or not proceedings were initiated against him before the cancellation of the prohibition. Furthermore, even if a judgment was delivered before the cancellation of the prohibition, its implementation should not be continued. The legislator did not suffice with this, and at the end of the section the possibility that the conviction that existed before the cancellation would have any consequences in the future was explicitly negated, in sweeping language**" (HCJ 1618/97 **Sachi v. Tel-Aviv-Jaffa Municipality**, IsrSC 52(2) 542, 565-566 (1998); hereinafter: the **Sachi** Case). Section 4 of the Penal Law adopts an intermediate approach. On the one hand, a more narrow arrangement, by which the cancellation of the criminal norm would have a retroactive impact only in situations in which criminal proceedings were not yet initiated or a final judgment was not yet delivered, could have been conceivable. On the other hand, a broader arrangement could, for example, include provisions regarding compensation for a period of imprisonment that was served in vain or restitution of a fine that was paid (**Rabin and Vaki**, pages 138-140). However, one cannot deny that the results of the section are 'dramatic', and tend significantly towards leniency. The underlying concept of this approach is that:

> **"The cancellation of an offense cancels the criminal liability in all the stages of its realization, including deleting the criminal record due thereto. The cancellation of the criminality of the act is the most deep-rooted way among the ways to change society's position towards an act of offense – *de facto* making it permitted. The cancellation of the criminal offense applies to each and every stage of realizing the criminal liability therefor – and in this sense it also applies retroactively"** (Explanatory Notes to the Penal (Preliminary Part and General Part) Bill, 5752-1992. Bills 2098, 116; hereinafter: "**Explanatory Notes to the Bill**").

31. As we have already seen, the prevalent opinion among scholars posits that:

> **"The approach that is expressed in the bill implies a broader perception of the status of the criminal prohibition. The prohibition – so it follows – has no independent significance. The fact that when committed, the accused person violated the prohibition does not in and of itself justify a punitive response.**

> **Such a response shall be justified only if and only for as long as the social value which the prohibition is meant to protect is perceived by society to be a value that is worthy of protection by criminal law."** (Miriam Gur-Arie "Penal (Preliminary Part and General Part) Bill, 5752-1992" 24 ***Mishpatim*** 9, 24 (1994); hereinafter: "**Gur-Arie**").

32. But what is the rule when the individual argues that the offense of which he was accused or convicted was cancelled, and on the other hand, it is argued that the change that occurred in the legislation does not reflect a conceptual change? That the protected social value – remains relevant? That at hand is not an expression of recognition of a legal situation which should have existed all along? That the new law does not deviate from a basic perception that is no longer acceptable? Prof. Kremnitzer writes:

> **"I shall only state that the phenomenon of an ameliorative law in the punitive field is relatively rare and that <u>almost always</u>, not only does it reflect a conceptual change of values but it also constitutes a delayed amendment of what – at least according to our current perception – was also distorted and unjustified in the past, and did not protect a social value that is worthy of punitive protection, such as the criminal prohibitions of 'deviating from the natural way'… The insistence to continue to apply criminal liability in such circumstances is first and foremost unjust… This insistence adds insult to the injury inflicted in the past by the legislator by excessive and unjustified limitations of freedom of action"** (Mordechai Kremnitzer "A Decade to Amendment 39 of the Penal Law: Comments" **Trends in Criminal Law: A Decade to the 39th Amendment of the Penal Law** 609, 642-643 (Eli Lederman, Keren Shapira-Ettinger and Shai Lavi Editors, 2010; emphases added).

33. Similar remarks are found also in Prof. **Feller**'s book:

> **"It is <u>reasonable to assume</u> that the later norm replaced the earlier one, since the standards of society changed. <u>One can assume</u> that the punitive policy that was prescribed therein better befits the changing needs of society and betters accords with the public's legal perception than that which it superseded. If this is the case, can there still be justification, in the case of a <u>complete cancellation</u> of the criminality of the act, to impose criminal liability therefor, or to realize the liability that was imposed therefor, only because it was committed before the cancellation, when the law was different? Criminal liability is prospective in terms of the personal preventive and treatment function and in terms of the general prevention function of the criminal norm. When at hand is an action that ceased being a criminal offense, there is no longer any point or purpose to penalize for committing it, there is nothing to treat and nothing to deter and even the judge himself is permitted to commit the**

act" (***ibid***, on page 226; emphases added).

34. Hence, the starting point is that a change that mitigates the material criminal norm incorporates a kind of conceptual change of direction of declarative nature. However, it appears that this is no more than a presumption that can, occasionally, be contradicted. It is clear that not every change reflects an amendment of an archaic, distorted or a 'plain' unworthy law. Indeed, there can be situations which do not coincide with the rationales that justify such a significant retroactive amelioration. Considering the far-reaching implications of Section 4 of the Penal Law, which are not subject to the principle of the finality of litigation, the application thereof cannot be 'automatic'. If a sufficient change did not occur in the legislator's perception, if the "**prohibition**" that is incorporated in the offense, was not **cancelled**, the value-based and theoretical foundation for applying the section is gone, and there are no substantial grounds to support the offender's release from criminal liability.

35. I shall emphasize that the conclusion that the application of Section 4 of the Penal Law depends on the realization of its underlying rationales, and is conditioned upon judicial discretion, does not mean that it should become a 'dead letter' that only 'comes to life' once in a century. I am of the opinion that the purpose of the section is not limited to only handling extreme and unusual situations that necessarily reflect a deep change of symbolic significance in society's fundamental perceptions, such as in the paradigmatic example of cancelling the criminal prohibitions of 'deviating from the natural way'. The purpose of the section is not so narrow. Section 4 of the Penal Law addresses change in society's position regarding what is permitted and what is prohibited and making certain behavior legal. However, a strict interpretation, by which the application of the section is limited to changes that relate only to 'high level' criminal norms in 'matters of utmost importance', should not be adopted (see, for example, **Bein**'s example (on page 581): "**Let us assume… that there is a statutory obligation in a consumer law that obligates presenting prices on certain goods… At a certain stage thereafter the obligation was cancelled in a new act of legislation that does not obligate presenting prices… The cancellation of the statutory obligation is like the cancellation of a prohibition in the offense… The cancellation of the obligation constitutes a change in society's position as to the behavior that is the subject of the obligation**."). To begin with, many criminal norms do not reflect protected values of particularly eminent importance. It is thus clear that their cancellation is also not of earthshattering significance. Nevertheless, this certainly could indicate a change of perception that justifies retroactive mitigation. Accordingly, it appears to me that in the matter of the application of Section 4 of the Penal Law, there are no grounds to distinguish between main legislation and secondary legislation or municipal by-laws. In appropriate circumstances, the cancellation of a criminal prohibition that was anchored in a relatively low normative level can also be subject to the section's application.

36. It is clear that the question whether the "**prohibition**" that is incorporated in the offense was **cancelled**, can create difficulties. However, it appears to me that a number of 'rules of thumb' can already be addressed in this context. For example, in situations in which an offense is cancelled, and a new offense is concurrently

legislated with identical elements, or when in any event an additional offense with elements that are identical to the law that expired exists in the book of laws, it is easy to see that the prohibition remains in effect (**Rabin and Vaki**, page 139). It should be noted that more complex questions could emerge in situations in which there is no identicalness, but rather only 'similarity', between the elements of such offenses. Conversely, if an offense was completely deleted from the book of laws, along with its derivatives, and especially when this was done by the wording: 'Section x of statute y – is cancelled', one can believe that the prohibition that is incorporated therein, was indeed cancelled (**Hallevy**, page 353). On the other hand, if the offense of which the individual was accused or convicted continues to exist in the books, it is presumed that its underlying prohibition was not cancelled. This presumption of course can be contradicted. For example, there can be situations in which the essence of the prohibition actually stems from one of the circumstances of the offense and could therefore expire if it ceased existing (**Bein**, pages 581-582). An additional important point is connected to the application of Section 4 being conditioned upon a change of an "**act of legislation**". This requires that the alleged cancellation of the prohibition shall reflect a general, rather than an individual, norm (CrimA 213/56 **The Attorney General v. Alexandrovitch**, IsrSC 11 695 (1957); hereinafter: the **Alexandrovitch** Case). Therefore, a person who was tried for building without a permit, and later obtained a permit, as required, is not entitled to benefit from the section, since even after receiving the specific permit, the general prohibition of building without a permit remains in effect (CrimA 586/94 ***Merkaz Hasport Azur*** **Ltd. v. The State of Israel**, IsrSC 55(2) 112, 138-140 (2001); LCrimA 8984/00 **Frantz v. The State of Israel** (July 2, 2001); LCrimA 3742/07 **Storck v. The State of Israel** (May 17, 2007)). Furthermore, I am of the opinion that the logic of the section necessitates that the cancellation of the prohibition included therein shall be one that is directed towards all, and it is not sufficient that it shall relate only to a 'non-specific' part of the public (the **Alexandrovitch** Case, page 701).

37. As a rule, the hurdles that are faced by a person who wishes to argue that the "**prohibition**" that is incorporated in the offense that he committed was **cancelled**, can be understood, *inter alia*, based on the similarities and differences between Sections 4 and 5 of the Penal Law. The relationship between the two as well as the differences between them, will assist in the act of their interpretation. As shall be specified below, on more than one occasion the individual will be able to find complete or partial relief in Section 5 even if Section 4 does not apply in such case.

Section 5 of the Penal Law

38. As was explained above, Section 4 of the Penal Law addresses the cancellation of a criminal norm. Its application is not dependent on the stage of the proceeding. Its sweeping implications, that eradicate any remnant of the criminality that was associated with the individual's behavior, can be expressed at each and every stage and step, commencing from terminating his initial investigation and culminating with his release from prison years after his conviction became final. In contrast, the scope of Section 5 of the Penal Law is narrower. It does not address the cancellation of a criminal norm, but rather its amelioration. Its application and intensity are influenced by the stage of the proceeding. Its results are not so far-reaching. As mentioned, Section 5 addresses "**The Change of an Act of**

Legislation After the Offense was Committed", and it reads as follows:

> **"(a) If an offense was committed and final judgment with respect thereto has not yet been delivered, and if a change occurred in respect of its definition, of liability therefor or of the penalty set therefor, then the ameliorative act of legislation shall apply to the matter; 'liability therefor' – includes the applicability of qualifications on criminal liability for the act."**
>
> **(b) If a person was convicted by final judgment of an offense, and if thereafter an act of legislation prescribed a penalty, which – in respect of its degree or category – is lighter than the penalty imposed thereupon, then his penalty shall be the maximum penalty set by the act of legislation, as if it had been imposed from the start."**

39. "**Both the alternatives of the section were meant to complement each other. It follows that allegedly it is necessary that an accused person to whose penalty Section 5(a) applies, will not be able to find relief by relying on Section 5(b) and *vice versa***" (CrimA 4002/01 **Korakin v. The State of Israel**, IsrSC 56(4) 250, 255 (2002)). Section 5(a) addresses a wide variety of ameliorative changes which could occur in a given offense, be it a change in its definition (including all of its elements and components), in the liability for committing it (including the application of qualifications to its criminality), or in the penalty prescribed therefor. In such situations, and as long as a final judgment has not yet been delivered, the ameliorative act of legislation shall apply to the matter (see, for example: CrimA 2796/95 **Anonymous v. The State of Israel**, IsrSC 51(3) 388, 398-400 (1997)). It is thus easy to conclude that at this stage of the proceeding, Sections 4 and 5(a) of the Penal Law can both lead to an identical outcome. Thus, for example, even if the statutory change at hand does not amount to a **cancellation of the "prohibition**" incorporated in the offense, it is still possible that its definition was changed such that it no longer applies to the person accused or convicted (with respect to whom the judgment has not yet become final), leading to his acquittal. In contrast, if the ameliorative norm came into effect only after the judgment became final, the narrow provisions of Section 5(b) shall apply, and they can, at most, lead to a reduced punishment. Such a reduction, so it is prescribed, is limited only to administrative changes, which do not require exercising discretion or necessitate reopening legal proceedings that ended, in light of the signal importance of the principle of **finality of litigation**, and the purposes thereof (CrimA 7853/05 **Rachmian v. The State of Israel** (November 27, 2006)). Notwithstanding, even assuming that it is worthy to limit the application of Section 5(b) to purely 'arithmetic' changes, it can be opined that the arrangement that was adopted in the framework thereof is excessively strict (**Hallevy**, pages 366-367).

40. It thus follows that the main difference between Section 4 and Section 5 of the Penal Law appears in the case of a person who was convicted and the judgment in his case became final. If and to the extent his argument that the "**prohibition**" incorporated in the offense he committed was **cancelled**, shall be accepted, then the criminality associated with his behavior shall retroactively 'evaporate' as

though it never existed (by virtue of Section 4). Conversely, if at hand is 'only' a ameliorative **change**, such person will be able to petition only for a certain reduction of his punishment (by virtue of Section 5(b)). This distinction is allegedly obvious in light of the essence of the matter, since the cancellation of an offense is not the same as an ameliorative change thereof. The first situation is a substantive normative change of direction, and as such it can even override the principle of finality of litigation. However, when the norm is only subject to a partial change, there is no sufficient justification to reopen the proceeding.

41. On the other hand, as mentioned, Sections 4 and 5(a) of the Penal Law could both lead to acquittal at the stage before a final judgment has been delivered. Additionally, as we have already seen, as a matter of principle, these sections share a common theoretical basis, that it is only just that the social recognition as to the proper normative situation apply retroactively, and it makes no difference whether it addresses the cancellation of the discussed prohibition, in its proper definition, or the appropriate punishment therefor. Additionally, any change that is made in one of the layers of a criminal offense allegedly reflects its cancellation, and the legislation of a new norm in its place (**Hallevy**, page 360). Based on the above, the question follows whether hurdles should also be placed in the application of Section 5 such as those placed in the application of the one preceding it? Should the quality and nature of the legislative change also be examined for the purposes of this section? Is it necessary to be convinced that at hand is a conceptual change at the root of the protected social value?

    I am of the opinion that the answer to this is negative.

42. The main reason for the said approach is twofold. **First**, to begin with, the change of direction in the legislator's perception that is addressed in Section 5 is not 'deep' as in the situations covered by Section 4. The social value is still protected, it has not become outdated, it has just undergone a change. In such case, in my opinion, one must, to the extent possible, avoid embarking on a 'value-based interpretational journey' as to the meaning of the change and the extent of the 'revolutionary change' incorporated therein. **Second**, and this is the main point, the application of Section 5(a) is limited to the stage when a final judgement has not yet been delivered. It is clear that initiating criminal proceedings against the individual in real time, in accordance with the previous law that has been changed, is not the same as preserving the outcome of proceedings that already ended or limiting the relief that is granted to the individual thereafter. The first situation has a certain flaw, while the second situation is dictated by reality. Indeed, "**The trend of Section 5 is not to benefit the person who committed the offense; it is not a matter of benefiting or prejudicing. The new approach is well grounded in a dynamic punitive policy that befits an advanced society. We cannot accept punishments of acts that are permitted when committed, and it is inappropriate to impose a punitive treatment upon a person, that is more severe than that which is required by law at the time of the treatment… In the special case in which the accused person has already been sentenced by a final judgment, it is suggested not to reopen a discussion …**" (**Explanatory Notes to the Bill**, page 116).

43. It thus follows that while Section 4 of the Penal Law prescribes a sweeping

arrangement without distinctions, the provisions of Section 5 are more 'delicate' and balanced, all considering the essence of the changes that each of these sections is meant to address. Based on the significant differences in the terms of application of the two, as well as in their outcomes, it is possible that one can be more lenient with the requirements for exercising Section 5 compared to the section preceding it.

44. I find support to this position in this Court's judgment in the above-mentioned **Mizrachi** case, even though at that time the sections that are at the core of our discussion were not yet legislated. In that case, Mizrachi was convicted of committing a forced indecent act, an offense under a section of the Penal Law which was in effect when the act was committed. He was sentenced to 4 years imprisonment. However, at the time the sentence was delivered significant changes in the sex offenses chapter in the Penal Law had already come into effect. The section by which Mizrachi had been convicted had been cancelled, and the closest section in terms of its contents, following the change, addressed an offense of sexual assault, the circumstances of which were lighter and the maximum punishment therefore was only 3 years of imprisonment. Mizrachi appealed, claiming that his punishment should also be mitigated. The Supreme Court elaborated on the declared trend of the change of the law, which clearly emerges also from its content, which is expressed in substantially more severe definitions of the sexual offenses, as well as in significantly intensified levels of punishment therefor. However, in light of the entire circumstances and evidence that were presented thereto, the Court learnt that – "**Among the many harshening amendments… in the matter of the indecent act offense, the legislator led to a peculiar and puzzling omission… and the wonder is multifold… the legislation department at the Ministry of Justice announced that it would act to amend the law… we can only hope that the current lack of logic… which originated as the legislator's mistake… will indeed be amended…**". Further on: "**The change that occurred in the matter of the non-existence of [forced indecent act offense] is not the result of a trend to mitigate the matter of the offense, but rather of a mishap that occurred during the craft of legislation, which is about to be amended; in terms of the trend of the legislation, we have found that in the offense which is the subject of the appeal, the trend is the opposite – to be more severe and not to mitigate. And these words are particularly relevant to the case at hand, the circumstances of which are severe and difficult."** Upon reading the judgment, it is difficult to imagine a situation in which it was so clear that the new norm does not express a true change in the legislator's perception. Notwithstanding – "**even in a case such as that before us – since, today, in light of the change that occurred in the law after the offense was committed, there is no section regarding the offense at hand which carries a punishment that exceeds three years of imprisonment – it is appropriate that we not sustain an imprisonment punishment that exceeds such period, and that we change the sentence accordingly".**

45. According to the outline suggested above, had the **Mizrachi** Case been addressed today, then notwithstanding the cancellation of the offense of which the individual was convicted, he could not have been acquitted and relieved from liability by virtue of Section 4 of the Penal Law. This outcome is difficult to accept, and all the more so in a situation in which the judgment became final, and there is no

longer any option of amending the charge sheet. However, according to the said outline, it is possible, including at present, to reach the more 'softened' outcome of the judgment, meaning a certain reduction of the punishment, by virtue of Section 5 of the Penal Law.

46. Attention should be drawn to the fact that notwithstanding the 'amelioration' with respect to the application of Section 5, its exercise is still conditioned upon a change of an "**act of legislation**". As such, and as has already been clarified, such change must reflect a general, rather than individual, norm. However, as is necessitated by the logic of this section, and contrary to the section preceding it, there is no need that the change be directed towards all (although this is possible), and it is even possible that it shall relate only to a 'non-specific' part of the public (see paragraph 36 above).

Interim Summary

47. In light of the points of similarity and difference between Sections 4 and 5 of the Penal Law, and considering their language, their purposes and their underlying rationales, I have reached the conclusion that the criterion suggested by **Bein**, should be adopted:

> **"In order to give meaning to the distinction between the cancellation of the prohibition in the offense and change, I am of the opinion that the following question is to be asked: did the legislator forgo the protection that is granted by the criminal law to a certain social value, or is the protection of such value still in effect, albeit in a different format? The first alternative is a cancellation of the offense in the sense of Section 4 of the law, and the second alternative is a change of the offense, as covered by Section 5"** (***ibid***, on page 584)

Additionally, the application of these sections is not limited to offenses of a certain kind and is not influenced by the normative level by which the criminal prohibited was anchored. In contrast, if there is a doubt as to the 'deepness' of the changes of direction that occurred in the legislator's perception, to such extent that it could impact the question presented above, this would constitute a consideration only in the framework of Section 4, while the application of Section 5 would not be dependent thereon. Furthermore, no retroactive amelioration could be possible unless by way of a change that expresses a general norm. For the purpose of Section 4 it is necessary that such change be directed towards all, while for the purpose of Section 5 it is sufficient that it relate to a 'non-specific' part of the public.

48. I am aware of the fact that the above-mentioned outline does not lack difficulties. In particular, one can be of the opinion that the fact that the possible difference between two who committed an identical offense at the same time is dependent on the question whether or not the judgment in their case became final – "**will encourage people to 'drag out' criminal proceedings, which in our system last too long in any event, as much as possible, hoping for ameliorative changes in future criminal legislation that relates to the offenses attributed to them**" (**Bein**, pages 578-579). To that I can only respond that "**Rulings, by their very**

nature… determine different legal outcomes to those who 'fall' on the different sides of the border, and an ordinary person may find them puzzling. There is no 'perfect' solution to this, only relative solutions" (the **Muchtaseb** Case, paragraph c of the judgment of Justice **E. Rubinstein**). As mentioned, the principle of the finality of litigation constitutes a central and signally important consideration in the case at hand, and its impact is a necessary evil.

Section 6 of the Penal Law

49. The provisions of Section 6 of the Penal Law – entitled "**Offenses Caused by Time**" – were meant to limit the retrospective application of the ameliorative act of legislation. The section reads as follows:

> **"The provisions of Sections 4 and 5 shall not apply to an offense pursuant to an act of legislation, in which or in respect of which it has been prescribed that it shall be in effect for a certain period of time, or which by its very nature is subject to changes from time to time."**

50. The beginning of the section provides that Sections 4 and 5 of the Penal Law, which were addressed above, shall not apply – **"when [in the act of legislation] itself it was prescribed that the offense was meant to exist only for a limited period of time, either by way of explicitly stating the expiration date [of the act of legislation] or by explicitly linking it to a certain event such as war, natural disaster, economic crisis"** (**Bein,** page 588). An example of an offense of such kind is "**the offense prescribed in Regulation 97(c) of the Traffic Regulations, 5721-1961, regarding the matter of 'Lighting a Motor Vehicle': 'A person shall not drive… during the period from November 1 through March 31, of each year, unless its front lights and back lights are lit'… What rule applies to a person who committed an offense of not turning on the lights during the winter months, but stood trial during the summer months? May he argue that at the time of the trial the act is permitted? Since at hand is a regulation that prescribes that it shall be in effect for a certain period of time, Section 6 applies thereto… it cannot be argued that it was cancelled (in the summer months)",** and I shall add – that it can also not be argued that it underwent a change **(Rabin and Vaki,** page 149; and see additional examples ***ibid***).

51. According to the end of Section 6 of the Penal Law, the ameliorative norm does not apply retroactively also in a situation in which **"the nature of the [act of legislation] is such, that even without an explicit statement by the legislator – it is clear that it is temporary and it is to be expected that it shall be cancelled or that it shall undergo changes from time to time"** (**Bein**, page 588). An example of an act of legislation "**with respect to which it can be determined by way of interpretation that it is subject to changes from time to time is an [act of legislation] that prescribes an offense for which one of the circumstantial elements is the existence of a 'state of emergency'. Such [an act of legislation] is temporary by nature, since its raison d'etre stems from a state of affairs… which by its nature could change (the end of the state of emergency)**" (**Rabin and Vaki**, page 149).

52. As mentioned, the rationale that the ameliorative arrangement should apply to the accused or convicted person in criminal law in light of the change of the legislator's perception, does not, in general, apply with respect to temporary offenses. By and large, the expiration of a temporary norm is not indicative of a social recognition that the said prohibition was inappropriate to begin with, but rather only that the limited period of time during which it actually was appropriate for the prohibition to be in effect has ended (**Hallevy**, page 352). Furthermore, it can generally be assumed that if and to extent that at hand really is a 'deep' social change, it did not, in any event, intend to change only a temporary prohibition. Nevertheless, after finding that it is not desirable to attempt to find the value-based meaning of each ameliorative change of legislation, and that it can, occasionally, be a consideration only in the framework of Section 4 of the Penal Law, and not in the framework of Section 5, I am of the opinion that it is inappropriate to have these considerations enter 'through the back door', and that in general there is no need for them in the context of the application of Section 6.

53. The rationale for legislating Section 6 of the Penal Law was explained as follows:

> **"When at hand are offenses pursuant to a temporary law – whether it is temporary because its period of validity was prescribed in advance or temporary in its nature – the possibility of evading criminal liability, and consequently encouraging criminality, must be prevented; a person could commit an offense while hoping, and even manipulating, that he will not be caught and punished as long as the law that was violated is in effect, with complete confidence that it will expire shortly, and occasionally even at a predetermined time"** (**Explanatory Notes of the Bill**, page 116)

And as Prof. **Gur-Arie** emphasized:

> **"A more principle consideration can be added to this practical consideration: a temporary act of legislation is meant to deal with the needs of the hour. The cancellation of the act of legislation was not done due to a change in the perceptions of society with respect to the essence of the act, but rather due to the changing needs. Even after such needs have changed, the social perception as to the severity of the act that was committed when the act of legislation was in effect, does not change. At this stage as well, society harshly perceives a person who was willing to disregard the needs of the hour and to violate the special prohibitions that were intended to deal with these needs. Thus, for example, a society that imposes limitations on water consumption due to a year of severe drought has an interest to prosecute a person who did not comply with such limitations, even if before the end of the criminal proceeding there was a year of abundant rain and the limitations on water consumption were lifted"** (***ibid***, page 25)

I am of the opinion that a criterion in this spirit should be adopted.

54. From now on it should be said that as a rule, criminal norms that by their very nature are subject to change from time to time are norms that reflect arrangements that were meant to deal with the needs of the hour. The main advantage embedded in this definition is its (relatively) low level of abstraction. It appears to me that as a result this criterion can realize the underlying rationales of the provision of the section, and can concurrently eliminate the need to examine the essence of the change that occurred in the legislator's perception or to attribute any value-based interpretation thereto. However, it is not denied that there may be rare cases, in which it shall be justified to retroactively be lenient with the individual even with respect to offenses of this kind, if indeed a substantial conceptual change occurred with respect thereto (compare: **Rabin and Vaki**, on page 150).

55. The criterion proposed above concentrates on the content of the offense, and this is indeed the essence. However, there is also significance to its 'format'. Thus, for example, the normative level in which the criminal prohibition was anchored; whether it was prescribed in the body of the act of legislation or in an addendum thereto; the procedure required for changing it; the amount and nature of the amendments made thereto; and such other characteristics – can indicate whether the arrangement at issue was meant to address the needs of the hour. Notwithstanding, these are only 'assisting' indications, that are not necessarily binding for any intents or purposes.

56. Towards the end of this chapter, I shall state that the 'temporariness' of a norm, in and of itself, could be a temporary matter. It is clear that an offense which was prescribed in advance to be in effect for a certain period of time, could change such that the limitation is removed therefrom, and thus it shall become an 'ordinary' offense. Additionally, there could be situations in which an offense, which by its very nature is perceived as temporary, shall change its essence and become 'ordinary'. Thus, for example, if one of its circumstantial elements is the existence of a state of emergency, which in fact lasts for a very long time and has no end in sight (**Bein**, pages 588-589). On the other hand, it is possible that an offense which to begin with was perceived as 'ordinary' shall in hindsight be discovered to be temporary, in light of the various legislative 'techniques' the legislator applied. Thus, for example, it is possible to redefine the act of legislation as a temporary order, to prescribe preservation provisions for a fixed period of time or transitional provisions limited in time, and the like. Such legislative 'tools' have great importance, and their use is particularly desired in situations in which a criminal offense was cancelled or mitigated. By using them the legislator can reveal its opinion as to the 'temporariness' of the act of legislation, express its desire that a retroactive amelioration not be approved, lead to the application of Section 6 at the expense of Sections 4 and 5, all while also preventing a significant degree of uncertainty (**Hallevy**, pages 322, 352-353, 368-369; and also see the **Muchtaseb** Case, paragraphs 14 and 16 of the judgment of Justice **I. Amit**).

From the General Rule to the Specific Case

57. Prior to its amendment, the relevant sections of the By-Law, which is the subject of the dispute, prescribed as follows:

> "**<u>Payment of a Parking Regulation Fee</u>**
> **12(a) Subject to that stated in Section 4, a person shall not stand nor park a car… in a Regulated Parking Place, unless he paid a Parking Regulation Fee…"**
>
> **"<u>Parking for Residents in a Regulated Parking Place</u>**
> **4(a) If a parking zone, or a part thereof, is designated as a Regulated Parking Place, those who live in that zone shall be permitted to park their car in a place that was designated as a Regulated Parking Place in the zone of their residence, without paying a fee… unless said permission was restricted and the restriction was marked by a parking sign"**.

The Respondent, a resident of the city, parked his car in a Regulated Parking Place, not in the zone of his residence, without paying the fee as required and therefore committed an offense pursuant to said Section 12(a). Shortly thereafter, the By-Law was amended and Section 4(a1) was added thereto as follows:

> **"<u>Parking for Residents in a Regulated Parking Place</u>**
> **4(a) …**
> **4(a1) If a parking zone, or a part thereof, is designated as a Regulated Parking Place, those who live in the area of the municipality shall be permitted to park their car in a place that was designated as a Regulated Parking Place that is not in the zone of their residence, without paying a fee… if such permission was marked by a parking sign"**.

There is no dispute that this amendment reflects a relief for the residents of Tel Aviv-Jaffa, the Respondent included. Had the Respondent acted the way he did a few weeks after the time he violated the provisions of the By-Law, his acts would not have constituted an offense at all.

58. As we have seen, the application of Sections 4 and 5 of the Penal Law, in and of themselves, is not limited in advance to 'monumental' changes or to offenses of any certain 'level of importance'. The exercise thereof is not impacted, to begin with, by the normative level in which the criminal prohibition was anchored. In this sense, there is nothing that in principle prevents the Respondent from benefiting from a retroactive mitigation by virtue of these sections, and especially when the case at hand addresses the amendment of 'only' a municipal by-law.

59. However, the application of Sections 4 and 5 of the Penal Law is dependent on the fact that the relief was granted to the individual in an **'act of legislation'**. It is clear that each of the By-Law and its sections, constitute general norms that comply with the definition of the term '**act of legislation**'. However, in my opinion, in the circumstances at hand, this is not enough. It is indeed true that Section 4(a1) of the By-Law is the origin of the authority for the relief granted to the residents of Tel Aviv-Jaffa. If it were not for it, they would not be permitted to park their cars in a Regulated Parking Place that is not in the zone of their residence, without paying a fee. Notwithstanding, the said section, in and of itself, did not change this starting point. It, itself, did not grant any practical relief. In effect, the 'turning point' in the

city's residents' freedom in this matter, derived from two: the sweeping distribution of parking signs permitting free parking to residents of Tel Aviv-Jaffa in Regulated Parking Places throughout the city, and the 'non-enforcement' policy that the municipality adopted. However, neither of these constitutes an '**act of legislation**' (CrimA 402/63 **Ronen v. The Attorney General**, IsrSC 18(3) 172 (1964); HCJ 508/83 ***Maof Netivei Avir*** **Ltd. v. The Minister of Transportation**, IsrSC 38(3) 533, 536-545 (1984); the **Muchtaseb** Case, paragraph 13 of the judgment of Justice **I. Amit**; and compare to the different starting point of the arrangement that is prescribed in Section 4(a) of the By-Law, pursuant to which the city residents are permitted to park their cars in a Regulated Parking Place, in the zone of their residence, without paying a fee, **unless such permission was explicitly restricted** by a parking sign).

60. Our discussion could, allegedly, have ended here. If the mitigation itself is not reflected in an '**act of legislation**' (and it is clear that any 'governing' act that is made with authority, but is not an act of legislation, is based on an act of legislation), then it follows that there is no application of Sections 4 and 5 of the Penal Law, even if at hand is a "**material change**" (to use the language of the District Court in the case at hand), a "**polar change**" and a "**conceptual change of values**" (to use the language of the of the Tel Aviv-Jaffa Local Affairs Court in Parking Case 29389640 **The State of Israel v. Lapid Itzchak** (November 5, 2013)). However, the Parties did not raise any such argument in any of the stages of these legal proceedings, and even the courts that addressed this matter did not question that this condition was fulfilled. Therefore, and for the sake of caution, **I shall, for now, assume,** for the Respondent's benefit, that the mitigation upon which he wishes to rely was made by an '**act of legislation**'.

61. The next question, then, is as follows: Was the "**prohibition**" that is incorporated in the offense that was committed by the Respondent indeed **cancelled**, as is required in order to apply Section 4 of the Penal Law? The answer to that is negative. Even after the legislation of the ameliorative amendment, the municipal legislator did not forgo the value that is protected by the Section 12(a) of the By-Law (which is still in effect), and its protection continues, albeit in a different, narrower, format. The prohibition to park in a Regulated Parking Place without paying a fee remains in effect, while the population of Tel Aviv-Jaffa residents has been excluded therefrom. Meaning, the mitigation which is the subject of the discussion is not directed towards all, but rather only towards a 'non-specific' group. This conclusion is not sufficient to apply the sweeping provisions of Section 4 of the Penal Law, but it does amount to fulfilling a pre-requisite for the application of the following Section 5.

62. A final judgment was not yet delivered in the Respondent's case. Therefore the relevant alternative is the one prescribed in Section 5(a) of the Penal Law, and in any event the application of Section 5(b) is not possible. As stated above, neither the ability to identify a substantial change of direction in the legislator's perception nor the intensity thereof are relevant for these sections. The exclusion of the residents of Tel Aviv-Jaffa from the rule anchored in Section 12(a) of the By-Law, and their exemption from paying a parking regulation fee also outside of their zone of residence, constitute a "**change with respect to the definition [of the offense] or the liability therefor**", in the sense of the above Section 5(a).

Therefore, the matter of the Respondent should be ruled, retroactively, in accordance with the "**ameliorative act of legislation**". Considering the assumption that was assumed for his benefit (in paragraph 60 above), and since acts of the Respondent, who is a resident of the city, are no longer prohibited, then, if he overcomes the last hurdle, prescribed in Section 6 of the Penal Law, he will have to be acquitted from the offense attributed thereto.

63. The offense of which the Respondent was accused was not prescribed as 'temporary in advance'. It was not linked to any passing event and no explicit date for its expiration was stated. The offense was also not prescribed as 'temporary in hindsight', as it could have been, for example, by legislating a 'preservation' provision for a fixed period of time that prescribed that the old law shall continue to remain in effect until the date the ameliorative amendment comes into effect. This is regretful, since using such a legislative 'technique' could have, at the time, established the position of the municipality, which is deduced from the mere conduct of these proceedings, and could have avoided great uncertainty. It thus follows that the alternative prescribed at the beginning of Section 6, which addresses an "**an act of legislation, in which or in respect of which it has been prescribed that it shall be in effect for a certain period of time**", does not apply in the case at hand.

64. Notwithstanding, I have reached the conclusion that we are dealing with an arrangement "**which by its very nature is subject to changes from time to time**", as stated at the end of Section 6 of the Penal Law. As explained above, the main criterion for this matter is related to the content of the act of legislation, and the question whether it reflects an arrangement which was meant to deal with the 'needs of the hour'. I am of the opinion that parking arrangements are among the most obvious types of matters that fit this description. In the words of the attorney for the State, in his arguments before us:

> **"Naturally, parking regulations in the area of a local authority, reflect the needs of the hour… the determinations relating to the permitted parking hours, the permitted parking zones, the period of time during which parking is permitted… and the populations for which different rules are set – can change from time to time in accordance with the needs of the residents and the authority. Thus, the balances and rulings can change in accordance with the amount of vehicles entering the city, considerations regarding encouraging residents of other cities to enter with their vehicles, compared to opposite considerations: the existence of alternative means of transportation, the state of the city's purse, the amount of available parking lots and the available parking places, the number of residents living in the city and more…"**

To this one must add that even if I were to accept the thesis that at hand is a "**material change**", a "**polar change**" and even a "**conceptual change of values**" (see paragraph 60 above), I was not convinced that it is sufficient to 'radiate' retroactively. After all, also changes that were intended to 'only' apply prospectively can be of principled significance and far-reaching importance.

65. For the sake of portraying a complete picture, I shall state that the 'format' characteristics, which in any event are secondary, do not change my conclusion as to the temporariness of the said norm. The anchoring of the prohibition in a municipal By-Law allegedly testifies to it being an arrangement that reflects the needs of the hour. The procedure of changing the By-Law indeed is not simple, perhaps is even complex, however in the circumstances of the case before us, the termination of the 'non-enforcement' policy and the removal of a number of parking signs, pursuant to temporary constraints, would be sufficient to lead to 'cracks' in the said arrangement (if not more than that), all without any real procedural difficulty. Furthermore, I did not find that the extended period of time that was required to promulgate the ameliorative amendment amounted to changing its essence and nature, or tilting the scales, considering the many contrary considerations. Additionally, the number of the amendments that were made in the arrangement until now leads to quite a neutral position, as does the manner in which Section 12(a) of the By-Law is subject to Section 4 thereof. Allegedly, this could be indicative of a 'frenetic' arrangement, but on the other hand, at hand is not an item that was promulgated in an addendum, but rather in provisions that stand alone, which are anchored in the body of the By-Law.

66. I shall clarify that the outcome I have reached is not contrary to the ruling of the majority judges in the **Sachi** Case. That case addressed the matter of a person who accumulated more than 150 parking tickets, in the amount of tens of thousands of New Israeli Shekels. **"The petitioner, who for years had made a laughing stock of the law, ignored the fines and continued to commit parking offenses to his heart's desire"** (***ibid***, on pages 563, 573-574). As time passed, his convictions became final and the main question that arose related to the statute of limitations on the punishments. At the time the offenses of which the petitioner was accused were committed, the law related to them as 'misdemeanors', and the statute of limitations that was prescribed therefor was 10 years. Following Amendment no. 39 of the Penal Law, the said offenses were reclassified as 'transgressions', and a statute of limitations of only 3 years was prescribed therefor. The petitioner's argument was that the ameliorative change applies retroactively, also with respect to offenses that were committed before the amendment came into effect. As such, the statute of limitations for fines that were imposed upon him for many tickets he accumulated already lapsed. Despite harsh criticism from the minority judges, this Court ruled that the statute of limitations indeed lapsed for the fines, while (primarily) making an analogy to Section 5 of the Penal Law and emphasizing the underlying rationales of the retrospective application of an ameliorative act of legislation. As we have seen Section 5 also supports the Respondent in this case, perhaps even *a fortiori*, in light of the significant difference between the circumstances of the case at hand and the circumstances of that case. However, the **Sachi** Case addressed a sweeping change in the classification of offenses, along the length and across the breadth of the entire legal system, and it is clear that it was not a temporary arrangement reflecting the needs of the hour.

Summary

67. There is great doubt whether the relief upon which the Respondent wishes to rely is reflected in a 'real' "**act of legislation**". In any event, it does not reflect the

cancellation of a criminal norm, as is required in Section 4 of the Penal Law, but rather only an ameliorative **change** thereto. Nevertheless, allegedly, such a change is sufficient to lead to the acquittal of the Respondent, in whose matter the judgment did not yet become final, by virtue of Section 5(a) of the Penal Law. However, the arrangement at hand was meant to address the needs of the hour, and therefore, it derives from its very nature, that it is subject to changes from time to time. This qualification, which is anchored in Section 6 of the Penal Law, is enough to eliminate the retrospective application of the ameliorative rule upon the Respondent.

68. Now, therefore, I shall suggest to my colleagues to instruct that the judgment of the District Court be cancelled, the judgment of the Local Affairs Court be reinstated, the Respondent's conviction of the parking offense be validated, and his obligation to pay a fine in the amount of NIS 100 be in effect.

JUSTICE

Justice E. Rubinstein

a. I accept the fine analysis of my colleague, Justice Sohlberg, to the issue in dispute and his interpretational journey between Sections 4, 5 and 6 of the Penal Law, 5737-1977. I would like to add remarks regarding two matters, one of which is interwoven with judicial policy in matters such as these, and the other – related to the "laws of pennies (*peruta*)".

b. We must take note that generally we would not address the interpretation of Sections 4-6 of the Penal Law in "classic" criminal offenses of the severe kind, which have been offenses since the beginning of time, and the prohibition thereof was not and shall not be cancelled. It appears that only in a relatively small number of cases it shall be due to an evident social change (such as the position of the legislator or the court with regard to intimate relations between same sex partners). And indeed, my colleague cited (in paragraph 32) the words of Prof. Kremnitzer that the "phenomenon of an ameliorative law in the punitive field is relatively rare and that almost always, not only does it reflect a value-based-conceptual change but it also constitutes a delayed amendment of what – at least according to our current perception – was also distorted and unjustified in the past…". In these circumstances, the provisions of the sections which my colleague addressed by and large involve matters which are not of dramatic public criminal significance, and in his words (paragraph 35) they sometimes deal with criminal norms which "do not reflect protected values of particularly eminent importance". In the case at hand the issue is a parking fee alongside a blue and white painted curbstone, the main significance of which is to the municipality's purse, and the reference thereto does not reveal a position of values, except of course the mere respect of the law.

c. In these circumstances, it is my opinion that the interpretation should also include reference to a judicial policy of not letting a sinner benefit from his transgression, meaning, that a person who paid the parking payment on time, an ordinary law-abiding citizen, shall not be what is commonly referred to as a "sucker", i.e., a fool, while someone who did not pay, as in the case under review, should be "laughing all the way to the bank". This has a moral-value aspect; the

Respondent's share should not be better and his blood should not be thicker than anyone who paid the fine on time. If such things can happen, meaning, that there could be people who benefit from not paying, the court, in its acts of interpretation, must narrow such possibility and not expand it, and must not allow a "sinner at the time" to benefit when the law abiders paid their debt to society. Fairness justifies that their share be the same. Indeed, Deputy President Elon, in CrimA 63/89 **Mizrachi v. The State of Israel**, IsrSC 43(4) 388, 396 speaks of the "General trend in Jewish Law, that one must, to the extent possible, try to search for the innocence of the person accused of a crime", and see the references there – however, in my opinion this trend should be examined based on the concrete factual and value-based circumstances.

d. In the case at hand there was indeed a change in the norm, but not one that changes the laws of nature or that is indicative of any kind of social change; all it is, is the municipality's trend to benefit its residents as compared to the many who visit and enter Tel-Aviv from outside of the city, and there is nothing legally wrong with this, but it is appropriate for its time and not before its time.

e. My colleague reached this conclusion in his analytical manner. I added and commented with respect to the aspect of policy and fairness towards all.

f. Before conclusion, I shall also address an additional facet that supports the outcome we have reached. Not only is the matter at hand not a change of social laws of nature, but it is rather a punitive sanction that even if it shall be said that it is not an inconsequential matter, it is a small amount, in the case at hand of NIS 100. At the opening of his words, my colleague mentioned "the laws of pennies ("*peruta*")". The *Amora* Resh Lakish (***Bavli Sanhedrin*** 8a) stated that "You shall treat a case of one *peruta* with the same care and mind as you would treat a case involving a hundred *manas*. To what purpose was this said? Is this not self-evident that the court will review and examine its substance (as interpreted by Rashi)? It means, in terms of priority - do not hear the case of a hundred before the case of a *peruta*" and as per the words of Rashi ***ibid*** "If a case of a *peruta* comes before you and another case of mana comes, first address the one that came before your first". That was attributed by the sages of Jewish Law to the passage "Ye shall hear the small and the great alike" (**Deuteronomy** 1, 17). In LCA 9615/05 **Shemesh v. Fucacheta** (2005), I had the opportunity to note (in paragraph e(2)) as follows:

> **"Indeed, when dealing with small claims, the legislator prescribed a special procedural framework. On the one hand it requested to allow a quick and inexpensive procedure for the examination of such claims, and on the other hand it set restrictions, such as shortened timeframes and an appeal procedure that is only by leave. The purpose of these restrictions, *inter alia*, is to prevent the flooding of the courts, which are heavily laden, with procedures of small amounts, and even according to he who said 'You shall treat a case of one *peruta* with the same care and mind as you would treat a case involving a hundred *manas*' (*Bavli Sanhedrin* 8a), the *Amora* Resh Lakish, not always must the law pierce the mountain."**

g. Rabbi Moshe Chaim Luzzatto (the Ramchal – Italy – the Land of Israel – the 18th century) states in his book *Mesilat Yesharim* (The Path of the Just) that "in the matter of the weighing of deeds, those which are less weighty are placed upon the balance just as the weightier ones are; for the latter will not cause the former to be forgotten, nor will the Judge overlook them, just as he will not overlook the weighty ones. But he will consider and attend to all of these equally…" (Chapter 4, "Acquiring Watchfulness"). These comments are eminent moral insights, but in terms of judicial policy, even if it is clear that the case of a *peruta* should be reviewed properly – and the dedicated work of my colleague in his judgment testifies to this – this dedication is especially justified when in reality, as the attorney for the State mentioned, at hand is not a single case of a *peruta*, and there are 3,000 additional cases such as that of the Respondent. With all due legal respect to the law of a *peruta*, this is *a fortiori* the case also given that "each and every *peruta* join to make a large account" ***Bavli Sotah* 8b** (pursuant to the passage "adding one thing to another, to find out the account" (**Ecclesiastes**, 7, 27), and in the words of Rashi "Even though they have not been paid by him the first and second time, they have not waived it, but they rather add it to the account".

h. The combination between the value based judicial policy and the practical significance thus adds to my colleague's insights.

JUSTICE

Justice U. Vogelman

I agree with the ruling of my colleague, Justice **N. Sohlberg** – in his comprehensive and reasoned judgment – that due to the fact that the alternative prescribed at the end of Section 6 of the Penal Law, 5737-1977, applies in the case at hand, the provisions of Section 5 of this law do not apply. Therefore, the appeal is to be accepted.

JUSTICE

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

Delivered on this 3rd day of Tevet, 5775 (December 25, 2014).

JUSTICE JUSTICE JUSTICE