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When the right to compensation for "regulatory takings" goes to extreme: The case of Israel

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Tucked away in a corner of the Mediterranean is one of the world's most generous compensation rights for decline in property values due to planning decisions. As counterintuitive (to some) as this might seem, Israel'[2]s jurisprudence gradually developed a legal doctrine about what Americans call "regulatory takings" which, viewed through a comparative perspective, represents an extreme in "property rights friendliness".

Israeli law regarding compensation for regulatory takings evolved from an almost dormant letter of the law into a major legal doctrine. This evolution occurred without significant changes in the legislation, through a series of Supreme Court decisions that interpreted the language of the statute from an increasingly enhanced property-rights perspective. The result has been the creation of a doctrine about the right to compensation for many types of land-use regulations. This doctrine has had an enormous impact on everyday planning practice, on the economics of real-estate development, on municipal budgets, and potentially on the macro-economy.

In this chapter, I report on the statutory law, its relationship with constitutional law, and the ways the courts have interpreted key elements in this legislation. I will offer some conjectures about the factors that possibly lie behind the steep increase in the number of claims and the impact

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[2] The discussion here applies to Israel in its international borders, and not to the occupied areas. A different set of laws and practices applies to the latter – those areas held by Israel and those administered by the Palestinian Authority.

these have had. Occasionally, I shall incorporate my own views and suggestions for partial reform, intended to bring the compensation spree back to scale.

A brief history

The State of Israel inherited its planning law from the British Mandate over Palestine. The British introduced planning law into this quasi-colony as early as 1921[3], soon after fighting subsided in World War I. That legislation was still rudimentary, but in 1936 the British administration introduced a new and comprehensive law, called the Town Planning Ordinance[4]. This legislation has molded Israel's planning law and administration and its (largely positive) legacy is apparent to this very date. The right to compensation dates back to that time.

The British colonial administrators brought with them the latest concepts about planning law that at that time were being introduced or debated in their homeland. The question of how planning law should treat the changes in values caused by planning decisions – both the "compensation" and the "betterment" sides - was at the time a hot issue in Britain[5]. Whereas in Britain the law on these matters oscillated back and forth with the change of party in power, in Palestine (and some other colonies) the law remained constant. It granted compensation rights – probably intended to be highly limited - for injuries to property values caused by the approval of a new plan. In parallel, the legislation imposed a tax on the increase in property values[6]. This ostensibly symmetrical set of rules was never intended to be truly symmetric, nor was it ever so in practice. But the ideology of "betterment and compensation" – long dead in its motherland, Britain - still hovers today above the interpretation of Israel's compensation law.

The 1936 Town Planning Ordinance[7] establishes the right to compensation thus:

> " 30 (1) Any person whose property is injuriously affected by [a] scheme otherwise than the expropriation thereof may, within three months from the date at which the scheme comes into force by notice in writing served at the office of the Local Commission, claim compensation in respect of such injury…" *(The three months period was later extended by the British to six months.)*

After the State of Israel was established in 1948, the 1936 Town Planning Ordinance (along with most other laws enacted by the British administrators) was kept intact and recognized as Israeli

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[3] Laws of Palestine, p. 142 (1922).

[4] In the colonial structure and the absence of a parliament, these and all other laws of the time were termed "Ordinances", but they should not be confused with subsidiary legislation.

[5] See: Hagman D.G. and Misczynski D.J. Eds. (1978), Windfalls for Wipeouts: Land Value Recapture and Compensation. Chicago: American Society of Planning Officials.

[6] See: Alterman, Rachelle, 1979. Land Betterment Taxation Policy and Planning Implementation: Evaluation of the Israeli Experience. Urban Law and Policy 2: 201-240. (Will be posted on my web page.). See also: Alterman, Rachelle. 1982. Land value recapture: Design and evaluation of alternative policies. Occasional Paper No. 26, Center for Human Settlements, University of British Columbia.

[7] Official Gazette of Palestine 1936, Add. 1, p. 153

domestic law. When the Knesset finally got around to enacting a new Planning and Building Law in 1965[8] it incorporated the sections about compensation almost intact.

Constitutional law

Most other chapters in this volume open with a presentation of how the constitution relates to property right. In Israel, there is no single document called "constitution". Instead, a set of key decisions by the High Court of Justice or the Supreme Court have incrementally established most areas of civil rights and forms of governance, and are know as Israel's "unwritten constitution. In addition, a series of laws with quasi-constitutional status – called Basic Laws – has been gradually enacted, anchoring in writing some of the "unwritten constitution" decisions and adding rules and norms[9].

The basic law where the protection of property rights is anchored was enacted in 1992. By that time, civil rights in general and among them property rights, had been were well established in through the "unwritten constitution".

The "unwritten constitution" and the status of property rights

Long before the Basic Law: Human Dignity and Liberty[10] was enacted in 1992, the Supreme Court repeatedly recognized property rights as holding "constitutional status". One such statement dates back to 1966. Justice Agranat, then the President of the Supreme Court (the Israeli equivalent to Chief Justice) said:

*One can say that the right to compensation not only carries today a universal character, but stands on a pedestal… of a "basic right". This is so even though there is no [written – r.a.] constitutional dictum to this effect" (*my translation; r.a.).[11]

These sentences are still cited often by judges who wish to stress that property rights preceded the enactment of the written Basic Law. Interestingly, although the quoted statement was made in connection with a physical expropriation ("eminent domain") rather than a regulatory injury, it was cited in a recent decision in the context of a regulatory–injury compensation claim[12]. This is

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[8] Law of the State of Israel., Vol. 19, 1965, p. 330. Official (but legally non-binding) English translations of Israeli laws are available in libraries, but include laws enacted only until the early 1980s. Because the planning law has been extensively amended since then, I have used here a commercially published translation, with some adjustments by me. Aryeh Greenfield – A.G. Publications, P.O. Box 7422, Haifa, Israel.

[9] Further analysis can be found in any text on Israeli constitutional law; I have not yet located a good English source.

[10] It is customary not to include the year of enactment when Basic Laws are cited.

[11] Civil Appeal (Supreme Court) 216/66City of Tel Aviv vs. Abu Daia. *Piskei Din* 20 (4), 520: 546. (In Hebrew). No decisions in the planning area are available in official English translations. All translations here have been made by the author.

[12] Additional Hearing 1333/02 Local planning and Building Commission of Raanana vs.Yehudit Horowitz. Delivered May 2004. Like all Israel Supreme Court or High Court decisions since 1970, it is accessible in Hebrew through the web site of the Supreme Court. www.court.gov.il

an illustration of what I observe as an increasing tendency in Court decisions to blur the distinction between the law of expropriation and the law of "regulatory takings"[13] by inserting into the latter expectations for full or nearly-full compensation that apply to the former. This is a further indication of the high regard in which the Israeli Supreme Court holds the right to compensation for regulatory takings.

The Basic Law – Human Dignity and Liberty

In the absence of a single document called "constitution", the Basic Laws hold quasi-constitutional status (of varying degrees and forms)[14] and are the highest in the legislative hierarchy. The Basic Law: Human Dignity and Liberty enacted in 1992 is regarded by many constitutional scholars[15] (though not all) as holding the highest constitutional status accorded so far to any legislation in Israel. This is where property rights are anchored – in Section 3.

Basic Law – Human Dignity and Liberty

Section 3: "There shall be no violation of the property of a person."

Section 8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.

Section 10. This Basic Law shall not affect the validity of any law (din) in force prior to the commencement of the Basic Law.

Section 11. "All governmental authorities are bound to respect the rights under this Basic Law".

The wording of Section 3 has no qualifiers, but along with all the other rights protected by the Basic Law, is it qualified by Section 8. Thus, a violation of property rights is constitutional if they pass the following four conditions: 1) Enacted in a law (or subsidiary legislation authorized by law); 2) Befits the values of the State of Israel; 3) Is for a proper purpose; 4) Is of an extent no greater than necessary.

[13] Analysis of this trend is beyond the scope of this paper.
[14] The status of the Basic Laws is not uniform. They differ one from another in the degree to which they are protected from amendment compared to a regular law. Some of the early ones may be amended or abolished like a regular law, but later laws have a variety of clauses requiring a variety of special procedures.
[15] A leading person is Justice Aharon Barak, the current President (=chief justice) of the Israel Supreme Court.

Existing laws – including the planning law - are "grandfathered" in by Section 10 and do not have to pass the tests of Section 8. But Section 11 obliges all authorities to respect the protected rights in their day to day decisions, including those under pre-existing laws (that is, when they have discretion, to apply it in the light of the Basic Law's prescriptions).

The incorporation of the right to property into a constitutional law of this stature has raised the degree of protection – already anchored in prior Supreme Court decisions – to an even higher pedestal. Where the right to compensation for regulatory takings is concerned, enactment of the Basic Law at an earlier date would, in my view, have made only marginal difference. This is because by 1992, the Supreme Court had already delivered several of the most important decisions which interpreted major aspects of compensation law with a rather generous property-rights orientation. Since its enactment, Section 3 of the Basic Law is cited in almost every opinion of the courts as an additional legal anchor for interpreting the right to compensation in yet more generous way.

Because the right to compensation as interpreted by the courts is already so broad, if the judge-made rules were to be codified in law, it would have no problem, if challenged, clearing the tests of Section 8. If, however, some of my recommendations[16] to bring compensation rights for regulatory takings back to reasonable proportions were to be adopted, the legislators would have to be convinced that the proposed changes pass the tests of Section 8.

Why the dramatic rise in the number of claims?

Between 1936 and 1977 section 197 hardly "troubled" the courts. Very few claims for compensation were at that time made around the country, and those made were rejected by the local planning commissions and not appealed to the courts. Why? Well, that's a matter of sociological conjectures that I can offer: One explanation might be that the country and its people were relatively poor (Israel started off in a developing-country category). In less well-off societies around the world, people are generally less litigious; litigation costs a lot and requires a high degree of economic security. Another explanation might be that society – people – had been focuses more on state-building than on private interests. The individualistic ideology that is dominant today in Israel as in most advanced-economy countries had not yet arrived full-force.

But these explanations cannot account for why the better off persons or corporations were not claiming more compensation before the 1990s. Possibly, the lethargy in decision making by the local planning commissions deterred them. Data that we collected in the latter 1980s showed that the local commissions were refusing all but a few claims. In the absence – at that time – of a specialized appeals body, landowners had to appeal to the regular planning bodies – and they were not geared to handle such objections or appeal within any predictable time frame.

In the late 1980s and in the 1990, when the courts had more opportunities to hear compensation claims, they began interpreting the statutory law. As I shall show, the interpretations represented

[16] I have been asked to offer my recommendations to an inter-Ministerial team composed of representatives of the Ministries of Justice, Interior, Finance, and Construction and Housing. My recommendations are not the topic of this paper, but their general direction could probably be discerned from the discussion here.

a very liberal perspective on property rights. With the more property-rights friendly interpretation of the law, came more claims. This process perseveres today.

In 1996, an amendment in the Law established 6 district-level appeal committees to hear appeals on the decisions of the local commissions – among them on compensating issues. With an efficient out-sourced administrative machine and legislated time limits for reaching decisions, these committees work efficiently Headed by an impartial lawyer, they act like tribunals, and have authority to appoint a third appraiser to resolve differences among the appraisers of the two sides. The numbers of claims that reach these committees has increased sharply. The estimate is that today, the claims for compensation amount to about $1 billion. Not all will be awarded, but other claims will come in.

The establishment of the appeals committees cannot, however, fully explain the dramatic increase in appeals. Probably, many cumulative changes in Israeli society - more efficient public administration, more transparency, more lawyers, more individualistic ethics, higher GDP per person - contributed to this dramatic change in quantum that one will never be able to trace back.

The 1965 Planning and Building Law and its interpretation by the courts

Sections 197-202 (Chapter 9) of the 1965 Planning and Building Law establish the right to compensation for adverse effects caused by the approval of plans and sets out the procedure for claiming it. The language is very similar to the Town Planning Ordinance. The Law adds procedural improvements (further improved in a 1995 amendment) and extends the period of time for submitting claims from 6 months to 1 year (extended to 3 years in 1995). The Law also grants the Minister of the Interior authority to extend this period – an authority that did not exist under the Ordinance.

Even though the sections granting the right to compensation remained basically the same as under the Ordinance, other changes introduced in the 1965 law indirectly created a significant expansion of compensation rights in ways that the legislators of the time may not have intended nor anticipated. Foremost among these indirect effects is the introduction by the 1965 law of two additional layers of plans – district plans and national plans.

Although anchored in the Law, the depth and breadths of the right to compensation was in fact molded by the courts. The task of interpreting the letter of the legislation has by February 2006 engaged the Supreme Court (or, on a few topics, the High Court of Justice) in about 30 decisions[17]. To the best of my knowledge, this is a comparatively large body of jurisprudence on this issue.

The key sections in the Law are 197 and 200. Section 197 lays the grounds for claiming compensation. Section 200 deals with exemptions from the obligation to compensate.

[17] I undertook a quick and rough computer search, which brought up 28 cases. But the data base does not cover cases before 1970 – so one should add a few more cases (not many). In about 20 among these, the Court addressed major issues of regulatory takings law.

Interpretation of Section 197 was the focus of court decisions up to the 1980s and by it has been largely clarified. Since the 1990s, the focus of the courts' attention has shifted to the conceptually more difficult and much more discretionary Section 200.

Section 197: Establishing the grounds for a compensation claim

Section 197 sets out the elements for establishing compensation claim. This Section remains almost unchanged since it was enacted in 1965 and, as noted, is very similar to its original 1936 version. The first important Supreme Court decision interpreting this section (in its Ordinance form) was in 1961, and since then, most elements of this Section have been interpreted and clarified. The only major legislative change made in Section 197 dates back to 1981 and it, too, is due to a Supreme Court decision (which I shall discuss in detail). For convenience I have divided the discussion of Section 197 into two sub-parts: The pre-conditions for making a claim, and the definition of injury and cause of injury.

Section 197

(a) If real estate *located in or abutting on the area of a plan** was adversely affected by that plan, otherwise than by expropriation, then the person who was the owner of or holder of any right in that real estate on the day on which the plan came into effect shall be entitled to compensation from the Local Commission, subject to the provision of section 200.

(b) Claims for compensation shall be filed with the office of the Local Commission within *three years*** after the date on which the plan came into effect; the Minister of the Interior may – *for special reasons which shall be recorded*** – grant an extension, even if the said three years already have expired.

** The phrase in italics is a 1981 amendment ** 1995 amendment.*

The pre-conditions for making compensation claim

The discussion of the pre-conditions for making a claim is organized under 5 headings: The burden of proof, who may submit a claim, the time limit, and the issue of information.

The burden of proof

Since the 1980s, the Supreme Court has repeatedly emphasized that the claimant is only required to carry the burden of establishing the basic conditions enumerated in Section 197. Once these are established, if the authorities wish to argue that in the particular case, they should be exempt,

the burden shifts to them. They must then show that the particular claim passes the conditions of Section 200[18].

Though seemingly only procedural matter, this interpretation of the burden of proof has made it easier for landowners to win compensation claims. Because the Court's interpretations of the other pre-conditions and conditions of Section 197 are rather liberal, and its interpretation of Section 200's conditions for exemption have been rather strict, the chances for a landowner to win a compensation case are high.

Who may submit a claim?

Section 197 says that the claim may be submitted by "the person who was the owner of or holder of any right in that real estate on the day on which the plan came into effect". The term "holder of any right in that real estate" has been incrementally broadened by the Supreme Court, so as to include longterm leaseholders, protected tenants, and even farmers who hold only a 3-year automatically renewable right-of-use contracts.

A question not yet addressed by the Supreme Court is whether the right to claim compensation can be contractually transferred with the transfer of the property rights, or whether only the original owner may claim it. (My view is that the right is transferable).

What types of planning decisions are grounds for compensation?

Types of plans covered:

As already noted, the enactment of the 1965 Law, introduced two new higher-level types of statutory plans beyond the local level. This change created the potential for another quantum leap in the number and size of compensation claims. There are three reasons: First, such plans often apply to much larger areas of land than the typical local amendment plans. Second, national and district plans often deal with public goods such as infrastructure and open space preservation on the other. Third, the implementation of such plans is often more long-range than local plans (this latter point is especially problematic also for landowners because of the three-year time limit).

The introduction of national and regional plans has created a major legal conundrum: Because these plans are often less detailed in scale than local plans, it is often difficult for a landowner to know whether a new national or district plan indeed applies to his or her land; yet the time-limit clock is ticking. This has been a very tough issue for the courts (as well as for a whole set of real-estate professionals and administrative quasi-judicial bodies) to resolve. To date, legal guidance on this issue is very inadequate (and I shall not attempt to survey it here). Some courts have denied compensation claims, arguing that the landowner should wait until a more detailed plan is approved at some later date and the injury becomes concrete. Other court decisions say that if a decline in value can be shown as a result of the higher-level plan, reflecting the

[18] Additional Hearing 1333/02 Local planning and Building Commission of Raanana vs.Yehudit Horowitz. Delivered May 2004.

uncertainty of the situation (rather than the certainty of injury), the landowner should submit a claim (and if the time has elapsed….) .

This basic legal uncertainty comes at a bad time: In recent year national and district planning bodies have greatly jacked-up their efforts to approve new and better national and district plans so as to make the management of land more sustainable for the future generations of Israel (and indirectly, its neighbors too).

Types of decisions not covered

Section 197 recognizes only final approval of a new or amendment plan as establishes the right to claim compensation. Israeli planning law does not recognize the right to claim compensation for injuries caused by a variety of other decisions. For example, decline in property value incurred because of decisions made in the interim stages before a plan is finally approved does not provide cause for a compensation claim.. (Might this be one more reason why many local authorities tend to drag on the plan-approval process for many years?)

Similarly, non-plan decisions too cannot serve as grounds for a compensation claim. These may include approval of a subdivision plat, granting a variance, or issuing a building permit (both relevant to the property values of neighbors). Refusal to grant a building permit in itself does not provide ground for compensation because under Israeli planning law (as in most planning laws in this volume) there is a general presumption that a building permission should be granted "as of right" if it fully accords with the plan in force[19] (The degree of discretion allowed is a separate and tough issue, beyond this paper's scope).

How are landowners to be informed?

Here is, in my view, is the weakest point in the otherwise generous protection of property rights in Israeli law.

At no stage in the plan-approval process are the authorities obliged to serve personal notices to potentially injured landowners, even if the injury is clearly extensive, such as where a buildable plot is rezoned for public open space (I discuss this type of situation later). Whereas in the case of physical expropriation a personal notice must be served, where an injury is caused by approval of a plan, the authorities have no additional obligation beyond the regular information requirements that apply to any plan approval process.

Approval of a plan (which is a pre-condition for submitting a compensation claim and sets off the "time clock") only requires publication of a standard notice in daily newspapers announcing that a particular plan has been approved. Such notices are usually only slightly larger than stamp-size. There is also no obligation to serve personal notice in the earlier stages of the planning process, when a proposed plan is deposited for public review. Since 2004 there is also a requirement that a notice about every deposited plan be physically posted at or near the site in question.

[19] The interested party might try to petition the court to order the authorities to issue the permit.

This is certainly an improvement, but is not directly targeted to making sure that landowners likely to incur an injury will see the sign and understand its impacts As in any society, access to government-based information in Israel is often correlated, at least in part, with socio-economic factors (such as the capacity to hire professionals to monitor the laconic announcements or to lobby). Therefore, I have recommended that the authorities be required to send a personal notice where a significant injury is anticipated. Israeli compensation law is rather generous; but unless information is provided pro-actively, the distribution of its protection is bound to be unequal on socio-economic lines.

What is the time limit?

The time limit today is 3 years after the injurious plan was approved. Until 1996, when the time limit was one year, the Minister of the Interior was quite generous in granting extensions and there were few if any petitions to the High Court of Justice on this issue. When the Law was amended in 1995 and the time limit was raised to 3 years[20], the legislature's intent was that the Minister's discretion would be reserved for "special reasons which shall be recorded" (Section 197 (b)). Since then, there has been a policy to be less generous in awarding requests for extension[21] - but there is still wide degree of discretion left to the Minister.

The few petitions heard by the High Court of Justice on this issue have displayed a rather strict approach taken by the Court (quite at odds with the otherwise liberal interpretation of the law). For example, a petition recently denied concerned injured property owners affected by a plan for a new (or extended) highway who ostensibly did not know about the plan. However, another group of landowners which did access the information in time, will likely be awarded compensation.

The limited jurisprudence on this issue has not developed guidelines to the Minister. I would expect an important criterion to be the extent of injury. The issue of the time limit and its extension should be closely linked with question of how landowners are informed. Fair enforcement of such a time limit should also take into account that until a policy of serving individual notice is adopted, access to information has social-distributive aspects.

The definition of injury and its implications

What is an injury? the basic rule:

An injury is to be measured by comparing the appraised economic value of the property under the previous plan (or, theoretically, no plan) and under the new plan. The claimant has to show a causal linkage between the approval of the new or amendment plan and the injury. The injury is

[20] The amendment

[21] Being based on discretion, this policy has varied among the various persons who have held the Minister's office.

not to be assessed "horizontally", in comparison to what similar lots may have been granted[22], but only in comparison with the "before" and "after" value of the specific plot in question.

A leading case on this point is Birenbach vs. Tel Aviv[23] decided in 1987: As part of Tel Aviv's pioneering attempts at historic preservation, the owner of a building known as the "Pagoda" was denied a request for additional development rights. Other plots in the area (without buildings meriting preservation) had received approval for rezoning with additional development rights. The Supreme Court ruled on appeal, that Birenbach did not have a right to receive compensation because the regulations of the existing plan have not been altered and a landowner does not have the right to receive a rezoning. (The Court did not, however, rule out the possibility that where an amendment to an exiting plan "closes the lid" on expectations for a rezoning, this might constitute an injury; but that was not the situation there.)

American readers will note that the concept of "highest and best use" is not a criterion under Israeli compensation law. That is, the right to compensation cannot be claimed simply for the denial of a "rezoning" request (to borrow an American term).

Should land value reflecting expectations for "upzoning" be taken into account?

The simple definition of injury by comparing the "before new plan" and "after new plan" is not as clear and simple as it might seem. Recent efforts to protect the few remaining contiguous open spaces in Israel's high-density central areas have increasingly been posing challenges to the simplicity of this rule. Similar questions have arisen regarding planning initiatives to designate existing buildings for historic preservation. The issue is whether the value of an *anticipated* "upzoning" should be taken into account. The most common situation is where land previously designated agricultural is now redesignated, in addition, as, "preserved open space" (or similar). Even though all existing farming and related rights remain intact, land appraisers can show that the market value of that land has now suffered a decline because the likelihood of a future redesignation to buildable land has been greatly reduced[24].

A 2003 Supreme Court decision [25] suggests that where a rezoning is not a remote probability, the loss of "anticipation value" should be taken into account in determining the degree of injury. This issue has not yet been resolved through case law.

The question of anticipated value is often closely related to the issue discussed above, regarding the level of plan in the hierarchy that creates a cause of action. What should be the law where the

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[22] Of course, a person might argue that some decision has been discriminatory, or unreasonable, or similar flaws grounded in constitutional or administrative law, but these are not the subject of this paper (nor are easy to argue).

[23] Civil Appeal 483/86, Birenbach vs. the Tel Aviv Local Commission, P.D. 42 (3): 288.

[24] The appellant claiming compensation held property rights in an area previously zoned agricultural, that the new plan declared a national park. Agriculture and related rights remained. Furthermore: The municipality had proposed a type of "clustering" with development rights. The Court did not rule out tended to accept the argument that declaration as park would "close the lid" on possible rezoing in the future. See 4390/90 Eliashar vs. The State of Israel, P.D. 47 (3): 872.

[25] 1968/00 Block (gush) 2842 Lot 10 Co. Ltd. Vs the Local Commission of Netanya. Available on the internet.

plan for which an injury is claimed is general and requires approval of a more detailed plan (whether on the local or higher level) before development can be permitted?

With increasing planning efforts to protect scarce open spaces, and with Israel's high land prices and relatively high growth rates, this type of question will require clear jurisprudence on whether, or when, anticipated value constitutes an injury under Section 197. If a broad definition is adopted (as is likely under the logic of the current jurisprudence), the fiscal and economic impacts will be enormous. Planning bodies, might, in some cases, have no choice but to compromise or withdraw plans for open space preservation.

Should assessment of an injury take into account site-specific circumstances?

The Court has interpreted "injury" broadly, so as to include special circumstances that may render a particular plot more "sensitive" to an injury than an otherwise identical plot[26]. Such factors might be physical or contractual. For example, an existing plot currently designated for commercial is redesignated in an amendment plan for residential, but currently happens to have some building on it, whereas an adjacent plot likewise affected, does not. In the empty plot, the decline in land value is small; but in the built up lot, in order to be able to develop according to the new plan' s land use and design regulations, the building would have to be demolished. The court is likely to decide that these costs are to be added to the compensation claim.

Is there need to demonstrate a real loss?

Under Israeli law (unlike some other countries in this volume), there is no need to demonstrate that the landowner has incurred a direct loss. The decline in value may remain "on paper". Thus, it does not matter at what price the land was purchased by the particular person claiming compensation and whether that particular person will be suffering a real loss when the plot is sold.

What would be the law if a landowner had only part of the development rights and after three decades the plan is revised so that the "extra" development rights are abolished and the new plan allows only the built-up rights? Suppose too, that there have been no transactions related to that land, nor immediate plans to build. Under current Israeli jurisprudence, the landowner will likely be eligible for compensation[27]. There is no time limit for implementing the original development rights. Nor it there a doctrine that requires proof of "investment backed expectations" or any other real losses.

It (probably) also makes no difference – at least for establishing a cause of action – whether the landowner knew that an injurious amendment will soon be approved, yet went ahead and purchased the plot. Nor does it (probably) matter if the owner has not taken any initiative to reduce the injury.

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[26] C.A. 761/85 Lifshitz vs. the Local Commission for Rishon leZion, P.D. 46 (1): 342.

[27] This hypothetical is close to the Supreme Court decision in: C.A. 6826/93. The Local Planning Commission for Kfar Sabba vs. Hayat.

Doesn't Israeli compensation law sound like a wonderful real-estate insurance policy? As surprising as this may seem to most readers, the issues I have raised here have not yet come up for decision by the courts (I am not even sure whether local planning commissions have argued them) . In my view, some of these additional tests could be developed under the types of exceptions in Section 200, especially by interpretation of the "injustice" clause (to be discussed below**).** But at present, the courts have not gone in this direction. So, at present, Israeli compensation law does sound like a wonderful real-estate insurance policy?

The relationship between compensation for a regulation and for an expropriation

Those accustomed to the way in which the "takings issue" is often framed under US constitutional law might be baffled by the clause in Section 197 that says: "otherwise than by expropriation". After all, much of American takings jurisprudence revolves around the need to determine when a regulation goes "too far" so as to be tantamount to a "taking". Does the wording of the Israeli law imply that a 'bright line" does distinguish the rights to compensation where there is an expropriation from such rights when the injury is regulatory (a plan) is revised)? Under Israeli compensation law, the issue takes a different form, and in many ways, there is a "brighter line" in place. But one aspect of this issue did required "acrobatics' by the courts in order to resolve.

The problem:

The problem is that neither the planning law nor the law that deals with expropriation[28] addresses the common interim situation, where land in private hands is designated for a typically-public use (such as a road or a school or a park), long before expropriation procedures actually take place. Such a redesignation often entails a sharp decline in the value of the property. The long time gap between land-use designation and actual expropriation is a problem in many countries represent in this volume: governments may lack the funds for full compensation, may be reluctant politically to undertake expropriation, or may simply be administratively lethargic.

Which right to compensation may a landowner invoke in such "twilight zone" situations: The right under Section 197 or the right to compensation under expropriation law? In Israeli's early decades, government bodies tried to benefit from this ambiguity, thus hoping to avoid having to pay for the loss in value due to the land-use designation in the first stage (often meaning the bulk of the decline)[29]. Their argument was anchored in the phrase "otherwise than by expropriation".

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[28] Analysis of the law of "eminent domain" in Israel is beyond the scope of this paper. It will suffice if I say that the jurisprudence in this area has evolved greatly since Israel's early decades. After a landmark decision in the late 1990s, one can say that a decision such as reached by the majority in the US supreme Court in *Kelo vs. New England*, would probably not be similarly decided in Israel today.

[29] A case brought before the Administrative Court of the Northern District in 2005 shows that some government bodies still try to revive variants of this old argument in order to save on compensation money. This time it was a central-government transportation authority, but it did not succeed because the Court adapted the decades-old doctrine to this case too. See Administrative Petition 001025/04 Local Commission for Afula vs. Mordechai Ziv. Not yet published.

They proposed that it should be interpreted so as to exclude from the canopy of Section 197 the entire process leading to expropriation – that is, the land use redesignation as well. Because the legislation covering expropriation states that compensation should be based on a comparison of market value "on the eve of expropriation" and subsequently, that interpretation would have meant that landowners whose property was designated for public use and later expropriated, would not have a right to claim compensation either under Section 197 or under expropriation law.

The two-stage compensation doctrine

But, as early as 1961 the High Court of Justice came to landowners' rescue. To the chagrin of government authorities, the Court interpreted Section 197 so as to cover the pre-expropriation stage as well. Aware that it was providing just a "patch" to cover the gap, the Court called then (and since) to the Knesset to repair the hole, but to date the Knesset has not done so.

This is how the doctrine known as the "two stage compensation" rule came into existence. Sadly, most real-estate and planning practitioners, and even legislative advisors, seem to have forgotten the temporary intentions of the judges when they decided upon this solution and the judicial call for repair. The problem with this doctrine is that only the second stage – often the least valuable – carries with it the right to receive a personal notice. Because a claim for the first stage has a time limit of 3 years (and before 1996 only 1 year), the landowner may forfeit the right to claim compensation for what is often the major part of the decline in value. Furthermore, because the two-stage solution is, as I have shown, not an intuitive solution, even if landowners do know of the new plan, they might logically think that they should await expropriation to occur . Last, the two-stage solution is also a two-stage hassle and two sets of costs for the property owners to pay.

Do landowners have the right to oblige the authorities to expropriate?

Given the inadequacy (in my view) of the "two-stage compensation doctrine", what is the solution? One can either pull the second stage forward in time, or push the first stage down to the actual expropriation stage. Assuming that some landowners won't wish to wait for the latter stage, it would be logical to grant them the right to oblige the authorities to buy or expropriate the land earlier. This legal institution – called a "blight notice" in British and Irish law – exists in many (but not all) the countries represented here, but not in Israel. I have proposed that such a legal right be enacted into Israeli law[30].

Do owners of neighboring properties have the right to compensation?

The most dramatic single court decision interpreting the language of the law was delivered in 1979. It is also the one that that was to have the greatest direct impact on the expansion of compensation rights. Although the great "explosion" in the number of claims started only a decade later, this decision had set the legal stage. It is also the only decision that has led to a major legislative change.

[30] In 2005, as an advisor to a government steering committee about revisions to the planning law.

The Varon case[31]

In Varon vs. the Jerusalem Local Planning Commission, the lawyer for the appellants [32] presented an audacious argument: The right to compensation under Section 197 is not restricted to the property which is subject to the plan amendment, but extends to any property impacted by the change, regardless of where it is located. The Supreme Court faced the need to decide, for the first time, about the geographic extent of the right to compensation[33].

The case involved a low-rise home in Jerusalem in a prime location with a view to the Old City Wall. The adjacent plot was rezoned from a low-rise residential, to high-rise commercial. A tall building would block the view (increase noise, etc.), so the property suffered immediate decline in its market value.

The wording of Section 197 at the time excluded the phrase marked in italics (see text-box). That is, the Section simply said "real property" with no reference to whether the right to compensation applies only to the property subject to the amended plan, or also to other properties – adjacent or distant - that might suffer a decline in value due to the amendment use or density approved for another plot.

Theoretically, two types of situations could be distinguished here: where the plan amendment increases the value of the parcel to which is applies but reduces the value of another parcel, or when the plan amendment reduces the values of both parcels – one through the change in regulations, the other through anticipated negative externalities. The facts in the Varon case fall in the first category.

The Supreme Court was split on this issue. The in-depth and philosophical opinions indicate that the judges were keenly aware that they are faced with a major legal and ethical question. The court was split, the 3 judges taking two polar sides:

The majority view was, that in the absence of any geographic stipulation in the wording of the legislation, the right to compensation should be interpreted broadly so as to apply to *any and every* geographic location (so long, of course, as a causal relationship between the new or amended plan and the decline in value could be shown). The judges in the majority offered two major arguments:

- First, to achieve just distribution of burden: When a planning commission approves a new or amended plan for the public interest, the public pocket should pay compensation and an individual owner should not have to bear the brunt.

[31] Additional Hearing 28/79 The Local Planning and Building Commission for Jerusalem vs. Varon. P.D. 35 (1) 561

[32] This rather audacious argument was made by a young lawyer, Naomi Weil, who, after winning the case, was regarded as an expert on 197 claims.

- Second, the need to pay compensation would encourage the planning authorities to be more careful when considering a plan that is likely to cause negative externalities to the neighbors.

Theses justifications are offered in many court decisions about compensation rights since Varon – for both direct and indirect injuries.

The minority opinion by Justice Aharon Barak (later to become the President (Chief Justice) of the Supreme Court) was that the law grants the rights to compensation only where government alters the normative status (the plan) that directly applies to a given parcel. Justice Barak argued that a direct injury should be distinguished from an indirect one: In the first case, the reduction in property value is caused by the change in the regulation itself, whereas in the second case, the reduction is created by the anticipation that the use of the neighboring plot will harm the value of parcel in question.

The legal import of the decision did note escape the judges' attention. The President of the Supreme Court decided to grant an Additional Hearing – a rare procedure reserved for the most important issues on which the Supreme Court is split. An additional hearing is held with an enhanced number of judges (typically 7 or 9). (By the way, this was not the last time when Additional Hearings would be granted in cases concerning regulatory taking issues).

In the additional hearing, the Supreme Court was split once more, but the majority opinion was upheld. This meant that landowners anywhere in the city could demonstrate that their land value has declined as a result of the approval of a new use (whether public or private), they would have cause for claiming compensation from the local planning commission.

I agree with Justice Barak's opinion. It is the reasonable interpretation of what the legislators in Israel in 1965 and their predecessors among the British administration in the 19303 had intended. But the minority opinion never had the opportunity to resurface in future court decision because the majority opinion had become an entrenched and uncontested doctrine. I would recommend that either the Court reverse its own opinions and adopt this view, or the Knesset revise the law.

How can one explain such an out-of-context interpretation of the language of an old British piece of legislation? What is the source for the majority's relentlessly wide interpretation of the right to compensation for a "downzoning"? The judges of the majority do not present an inquiry into the historic sources of the legislation in Britain and ask whether similar laws were ever were ever similarly interpreted (they were not); not do they undertake comparative research about whether such extensive compensation rights exist in most other democratic countries (they do not).

Without significant precedents to learn from, what then were the reasons that drove on which the majority based its decision? One might offer many conjectures, all vague. Perhaps the majority opinion indirectly reflected the gradual transformation of Israeli society from a collectivity-focused to a more individualistic culture? Perhaps this was a way of balancing the Court's earlier orientation towards public goals and public property. Perhaps the Justices felt that a broader definition of compensation rights regarding planning decisions would contribute to a new balance point.

Whatever may have been the judges' underlying rationale, of one thing I am almost sure: They did not anticipate the far-reaching impacts that their decision would have. And at the time they made the decision, they were absolutely right: There were very few compensation claims even regarding direct injury, so why would they expect more claims on indirect injuries? Indeed, research that I and a (then) student showed that even a decade after Varon, there were almost no claims in the entire country based on the Varon decision![34].

After the Varon decision

The Varon decision hardly received any media attention at the time; public opinion was not yet geared to such seemingly technical matters. But the national government did realize that in the future this decision might unleash a wave of compensation claims that would impose a severe financial burden not only on local authorities, but on the national budget as well. So, the government quickly drafted a bill to amend the Planning and Building Law in order to make it clear that compensation rights apply only to direct injuries. The Knesset, however, preferred a compromise between the Court's interpretation and government's wishes. The result was the language of the amendment enacted in 1981 that I have marked in italics: Compensation rights would be granted not only to directly injured parcels but also to abutting ones.

This, however, was not the end of the story. The Hebrew term "*govlim"* (here translated as *abutting)* could also mean "bordering on" or "close" or "proximate"[35]. But how close is close? By the 1990s many landowners (or active lawyers) had discovered the ambiguity of this all important word, "abutting", and submitted claims to the local planning commissions. A set of district-court decisions had accumulated where different judges interpreted this word in very different ways – some taking a very narrow approach, others coming close to reinventing the original Varon interpretation. Not knowing how to assess claims or decide about them, nor how to anticipate the impact of new planning proposals, many planning commissions, appeal boards, and landowners found that their day to day decision making was stalled.

The real-estate and planning communities eagerly waited for the Supreme Court to clarify this issue. In 2005 the Supreme Court combined several appeals with contradictory district court decisions, and delivering its decision in September 2005[36]: It ruled that "abutting" should, in most cases, be limited to physically bordering parcels. However, the Court left some room for case by case interpretation by noting two specific exceptions: Where a "narrow road" separates otherwise related plots of land, or where a "public footpath or narrow green strip" creates a similar separation. The Court's purpose in allowing such exception was to deter local

[34] Rachelle Alterman and Orli Naim, Compensation for decline in land values due to planning controls. Published jointly by the Land Use Research Institute, Jerusalem and the Klutznick Center for Urban and Regional Studies, 1992 (Hebrew).

[35] A set of dictionary definitions is included in the key Supreme Court decision on this issue: Appeal to an Administrative Petition 2775/01. Witner vs. The Sharonim Local Planning Commission. Available on the web site of the Supreme Court

[36]. See above.

commissions from the temptation to insert such minor separations in order to save on compensation claims. But how narrow is narrow? One can anticipate that this issue will come before the courts many more times.

Implications for national infrastructure

Since the Varon interpretation of Section 197 as applying to neighboring plots, the local planning commissions have become the "address" for handling not only private-to private claims, such as in the facts in Varon, but also private-to public claims. Compensation claims for the adversary effects of major regional and national infrastructure such as highways, railways, waste disposal, etc, would all be placed at the doorstep of the local planning commissions.. (You might be wondering what was the situation before the Varon decision. The answer is that such claims were probably never compensated.)

In my opinion, the legal mechanism of section 197 was never intended for this purpose. Nor are the local planning commissions – or indeed, any planning body - appropriate for handling the numerous claimants and the enormous financial impacts that such infrastructure entails. In the Israeli context of high densities and high growth rates, a different legal and institutional format should be designed for handling such claims.

Who should pay the compensation?

Section 197 places the onus for paying successful compensation claims on local governments. The problem is that Section 197 does not distinguish among the various levels of plans that may have caused the reduction in property values, nor among the types of developers who are to benefit. Because district and national plans are not exempt from compensation claims, there are many situation where there is a disparity between the public that the new plan serves (for example, all those who travel on highways) and the public expected to pay the bill (the local taxpayers where the plan in question is located).

So long as the number of claims nationally was small, such cases could be resolved through agreements negotiated case by case among the different levels of government. With time, more or less uniform rules emerged, especially regarding national roads and railways: About 70% of the compensation claims would be covered by the relevant national government bodies, and the remaining 30% by local governments. In the case of highways, this practice was codified as an amendment to the planning law. In other areas the issue of who should pay continues to be contested.

The most publicly visible conflict on this issue has been raging since 2005 between local government and the cellular companies (with national government caught in the middle). Neighbors to where cellular antennas are placed have since 2005 been submitting their claims to the local authorities. This has become a hot issue for the media, for NGOs, for the Cabinet, and for the Knesset (quite a change from the 1970s).

The practice of requiring reimbursement commitments from developers

The logical reaction to the Varon decision would be for the local authorities to attempt to shift the burden to the party enjoying the enhanced rights. How can they cause those who create the externalities, to "internalize" them, rather than having the entire community pay for the compensation claims?

The Varon decision gradually created a new practice that is on its way to becoming a new "institution" (and a similar process happened in the Netherlands). After the number of claims submitted by neighboring landowners increased dramatically in the 1990s, a new practices gradually emerged (independently within each local authority). An increasing number of local governments began to require that the developers sign a contract that would oblige it to reimburse the municipality for any compensation claims it might be required to pay. This practice is new and uneven, and one can expect many issues to arise in the future.

When a general amendment to the Law was made in 1995, a clause inserted that indirectly recognized the existence of such contracts. The law now grants developers who sign such contracts third-party rights in proceedings where compensation claims are discussed. There are, however, many questions pending. While the Israeli Courts (unlike their Dutch counterparts) have not rejected the idea of mitigation commitments, they have also not "blessed" it either. There are no Court rulings (nor clear administrative guidelines) that set out the rules for this emerging institution. So long as compensation claims can be submitted for externalities, where one party gains and another loses, reimbursement contracts are the logical and fair solution.

Section 200: Exemptions from the obligation to pay compensation

Section 200 sets out the exceptions to the right to claim compensation. Although this section was "born" alongside Section 197, and was clearly intended by the legislators to serve as an essential counterpart to the right to compensation, this clause has to date received less attention by the courts. Until the 1990s the courts did not devote much attention to Section 200, usually only mentioning its existence while citing Section 197.

This seeming anomaly likely reflects the low number of claims submitted until the 1990s. Local authorities, in defending their decision to reject a claim, would raise arguments that the grounds for submitting a claim in Section 197 have not been met. In order to decide upon these cases, the courts first had to clarify the basic elements of a compensation claim. In recent years, local authorities have been relying on the exemptions clause much more than in the past.

The three conditions of Section 200

Section 200 contains three condition for claiming exemptions. The conditions are:

a) The injury is caused by one of the 11 types of "provisions" – regulations contained in the injurious plan.

b) The harm is not reasonable

c) The interests of *justice* do not require compensation.

The Supreme Court repeatedly emphasizes that the three conditions are *cumulative.* [37] A local commission must therefore prove that it fulfills each one on the conditions independently. The complex syntax of this clause and the "double negative" of the third condition merits explanation: It means that even if an authority has proven that the injury is reasonable, it will still have to pay, unless it can also proven that it won't be just (perhaps one should say, "fair") to pay compensation to the injured party[38].

Section 200: Exemption from payment of compensation

Land shall be deemed not to have been affected adversely, when it was affected by one of the following kinds of provisions of the plan, provided the harm does not exceed what is *reasonable* under the circumstances of the case, and provided that the interests of *justice* do not require compensation to be paid to the injured party: *(my emphasis).*

1) a change in the delineation of zones, or in the conditions of land use in them2) the determination of setbacks around and between buildings

3) a restriction on the number of buildings in a particular area

4) regulation of the sites, size and height, planned shape and external appearance of buildings

5) permanent or temporary prohibitions or restrictions of building in a place where the erection of buildings on the land is liable – due to its location or nature – to cause dangers of flooding, of soil erosion, of dangers to health and life, or excessive expenditure of public funds for the construction of roads, drains, water supply or other public services;

6) prohibition or restrictions on the use of land, otherwise than by building prohibitions or restrictions, if the use is liable to involve danger to health or life or any other serious disadvantage to the vicinity;

7) restrictions on the manner in which buildings are used

(8) determination of a line, parallel to a road, beyond which no building shall project;

(9) imposition of obligations to provide - near a building intended for any business, trade of industry - place for loading, unloading and refueling vehicles in order to avoid traffic obstructions;

(10) imposition of obligations to provide – in or near a building intended for any business, trade or industry or for residential purposes or as a lodging house or for use by the public-a place for parking vehicles or a shelter or refuge against air raids;

(11) provisions of a plan to which section 81 applies

The relationship between the two parts of Section 200

Section 200 has posed the most difficulty for the courts. It is indeed a strange piece of legislation. It harbors two parts that are so different in "styles" that they are almost contradictory (in format, not in contents). The list of 11 items exempt from compensation is very detailed,

[37] Additional Hearing 1333/02 Local planning and Building Commission of Raanana vs.Yehudit Horowitz. Delivered May 2004.

[38] See above, especially Justice Matza's explanation.

specific, rational, and technical, whereas the preamble is very evaluative and discretionary. The courts have to date sidestepped this problem by almost ignoring the 11-item list of exemptions.

The result is that the jurisprudence on the issue of compensation revolves entirely on two open-ended criteria – reasonableness and fairness – perhaps the most evaluative and discretionary one can think of. Justice Cheshin – who has written some of the Supreme Court's most poetic judge – has put it thus:[39]

"… Section 200 is anomalous and special. The legislature has transformed the local commission and the Court – and first and foremost, the Court - into legislators… The criteria that the legislature has set for us to decide upon in compensation claims are *"reasonableness" and "fairness".* .. These – needless to say – are deeper than the ocean, higher than the skies, and one can find everything within them".

The jurisprudence on "reasonableness" and "fairness"

Although the Court's interpretation of these concepts began only a decade ago, if has already produced several intensive debates, split courts, and even a recent Additional Hearing – as one would expect where reasonableness and fairness must be applied to each compensation claim case by case. The opinions often delve deep into the philosophy, ethics, and economics of the relationship between planning regulation and land values. But to date, despite the recent Additional Hearing intended to help in clarifying the criteria, there is no clear majority view on what criteria should be applied when judging reasonableness and fairness.

Until 2004, in most of the decision on section 200, the courts had focused on the quantitative side of the degree of decline in value. The facts of the cases that came before them and were judged unreasonable went from about 30%, to 20%, to 10%. The latter level caused some alarm among local and central governments, and led to the Additional Hearing. The Horwitz decisions – on appeal and on Additional hearing- are very rich in the discussion of the various criteria that the justices suggest – but a close reading shows that there no discernable majority view on any specific criterion.

The Horwitz Case[40]

Yehudit Horwitz and her late husband bought a plot of land in the city of Raanana in 1972. At the time, they could build 5 housing units on stilts. In 1983 the local planning commission reduced the number of permitted units to 4, and – based on a new policy – no longer allowed stilts. The appraised diminution in value had been established at 11%. The district court thought that this is beyond a reasonable degree, and the city appealed.

The Supreme Court unanimously decided to reject appeal, but they applied very different criteria: Justice Tirkel, in a long and detailed opinion, came to the conclusion that the line of

[39] See above, Judge Cheshin's opinion., section 5.
[40] Horwitz, cited above.

reasonableness passes at the 1-3% mark because it should be understood as "*de minimis"* (he used the Latin – meaning something like "not worth the trouble").

President Barak suggested a new criterion – a balancing test between the importance of the public purpose and the degree of injury. According to this test, he concluded that the degree of injury in the Horwitz case is not unreasonable. However, in his opinion the facts of the case, the "justice" criterion was not met at one point, and therefore could not benefit from the exceptions clauses. The third justice joined Justice Tirkel in thinking that the level of injury was not reasonable, but he did not specify whether or not he adopt the de minimis level.

Needless to say, the idea that the local authorities would have to compensate for any decline in value beyond 2-3 % caused some concern. Realizing the importance of developing clearer guidance, the President authorized an additional hearing with 7 justices. They agreed unanimously that the appeal should be rejected, but once more, each justice applied somewhat different criteria.

Although, as I have said, a close reading shows that there is no single set of criteria that has a majority, one of the justices in a subsequent Supreme Court decision delivered in 2006 does summarize what he views as the *ratio* in *Horwitz*. I shall translate it:

Reasonableness and fairness (according to Justice Rubinstein)[41]*:*

> "Reasonableness is to be determined by balancing property rights and the public interest. This should be done according to these three considerations:
>
> a) The extent of decline in the injured property's value
>
> b) The degree of "distribution" of the harm
>
> c) An essential public interest served by the plan.
>
> These considerations are not a closed list; additional considerations that should be taken account are left to future development of jurisprudence.
>
> Fairness is an open and flexible criterion, based on a variety of considerations. These differ from case to case, according to the concrete facts that come before the court".

The bottom line?

In 2006, seventy years after the legislation about compensation rights was fist legislated, there are no valid and reliable criteria that can help planners, commissioners, lawyers, landowners, appraisers, or the courts to anticipate whether a particular level or type of injury would be judged compensable or exempt. From a comparative perspective, however, the general picture is clear:

[41] C.A. 8736/04 Orah Cohen vs. Local Commission for Raanana.

Israel has an extremely generous law that protects landowners and holders of lesser property rights from even minor reduction in property value that may be caused by planning decisions.

Conclusions: What can one might learn from the Israeli case

The Israeli case represents an "extreme point" (or arguably next to extreme) along the range of approaches to compensation rights represented in this volume. The steep increase in the number and sizes of compensation claims in Israel may serve as a "preview" for what might happen if the rights to compensation for regulative takings becomes too extensive. While the experiences of one country (or state) may not be easily transferable to another, the conclusions from the Israeli experience may add new dimensions to the property-rights debates in various countries.

Once property owners (or lawyers) in Israel began make more claims and the number of cases to come before the courts increased, the courts had more opportunities to interpret the language of the law. The direction of their interpretation, for the most part, recognized a broader and broader definition of compensation rights. In recent years, the compensation clause has become a "household word" among landowners and professionals, and its impact has become a major consideration in almost every land-use planning decisions.

From a comparative planning law perspective, by shifting its focus largely on two discretionary criteria, the Court has turned Israel's law on compensation from statutory law, almost into an area of constitutional law. It has thus become more akin to American takings jurisprudence than to that of Germany, The Netherlands, or Sweden. In the USA, in most States there is no statutory law on compensation, therefore the courts are called to apply directly their interpretation of the Constitution.

The Israeli story of compensation rights also exemplifies an interesting relationship between written law and judge-made law. The statutory law regarding compensation rights has been "on the books" since 1936, and remains largely unchanged today. But in the meantime, the contents of the right to compensation changed dramatically. Through the prism of this rich jurisprudence – and the philosophical debates among the judges that characterize it – one can sense the transformations in Israeli society and economy.