Verdict of the Supreme Court of Israel

Foie Gras

August 2003

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CHAI – Concern for Helping Animals in Israel

Legal Terminology Reviewed by Yossi Wolfson, Attorney

At the Supreme Court – Sitting as the High Court of Justice

Appeal 9232/01

Before:	Her Honor Justice T. Strasberg-Cohen (retired)
	His Honor Justice E. Rivlin
	His Honor Justice A. Grunis
Plaintiff:	"Noah", the Israeli Federation of Animal Protection Organizations
Respondents:	1. The Attorney General 2. The Minister of Agriculture 3. The Egg and Poultry Board 4. Moshe Benishty and 31 Colleagues
	An appeal for an *order nisi*
Date of hearing:	July 10th, 2002
On behalf of the plaintiff:	Advocates D. Sherman and E. Peleg
On behalf of respondents 1-2:	Advocate A. Leicht
On behalf of respondent 3:	Advocate T. Manor
On behalf of respondents 4:	Advocates B. Naor and A. Hakikat

Verdict

Justice A. Grunis:

1. In this appeal, where an *order nisi* was issued, the plaintiff asks to rule that geese force-feeding is forbidden under Israeli law. Specifically, the plaintiff asks the Court to declare that the Animal Welfare (Animal Protection) (Geese Force-Feeding) Regulations of 2001 are annulled, to order respondent 2 to issue regulations that would ban geese force-feeding, and also to oblige respondent 1 to direct the police to investigate and prosecute those who conduct geese force-feeding.

Factual Background

2. Geese force-feeding is an agricultural procedure whose aim is the production of an enlarged and fatty liver, the raw material for foie gras ("fatty liver") (for abbreviation we shall use the term "goose liver"). The procedure of force-feeding begins when the goose's body weight is about 4 kg and its age 8-10 weeks. During the process, the goose is fed forcefully, by inserting a tube into its esophagus. This is repeated several times per day. The food is high in energy, in an attempt to render the liver particularly fat. The amount of food given forcefully is much higher than the amount required to maintain the goose. Force-feeding continues for several weeks, until the liver reaches the optimal size. At this stage, the dimensions of the liver are several times its natural size. During the period of force-feeding, the goose is fed only this way (but continues to drink water in a natural manner).

3. In Israel, around 100 family farms are involved in geese rearing, 45 of which conduct force-feeding (the others rear animals up to the stage of force-feeding and also breed these birds). Some of the farmers are among respondents 4 to this appeal. Every year, more than 500 tons of goose liver are produced in Israel, about half for local consumption and the rest for export. The annual turnover in this industry is tens of millions of Israeli shekels. In addition to the farmers, there are accompanying systems of service providers. Thus, the livelihood of hundreds of families is dependent upon this agricultural industry. The industry has existed in Israel for about 40 years. It is clear that the farmers invested considerable sums of money in developing their specialized farms. Part of the investment was funded by the State. The Ministry of Agriculture supported and encouraged the development of the industry.

4. The country mostly associated with production and consumption of goose liver is France. In France, this food is considered to be a gastronomical delicacy. France is responsible for about 85% of world consumption. Other European countries where goose liver is produced are Belgium and Spain. We mention the European aspect, since, as we shall later see, the issue of geese force-feeding was considered by the European Justice system. Goose liver is also produced in Tunisia, in China and in several South-American countries (these data appear in a report of December 16th 1998 by the Council of Europe's "Report of the Scientific Committee on Animal Health and Animal Welfare: Welfare Aspects of the Production of Foie Gras in Ducks and Geese" – hereinafter, "**the Scientific Committee**" and "**the Report of the Scientific Committee**").

5. The plaintiff is the umbrella organization of animal protection organizations in Israel. In an earlier appeal submitted by the plaintiff in 1999 (HCJ 8357/99), the Court was asked to order respondent 2 to issue regulations, under **his** authority according to the Animal Welfare (Animal Protection) Law, 1994 (hereinafter – "**the Animal Protection Law**"), that would ban geese force-feeding. While the appeal was pending in this Court, the regulations were issued. Hence, the plaintiff withdrew its former appeal and submitted the present appeal.

The Legal Rules Concerning Geese Force-Feeding

6. The Animal Protection Law was enacted in 1994. The Law defined "animal" as "any vertebrate excluding man". Clause 2 says:

> (a) No one shall torture an animal, treat it cruelly or abuse it in any manner.
> (b) No one shall set one animal on another.
> (c) No one shall organize competition fights between animals.
> (d) No one shall cut live tissue in an animal for beauty sake.

The relevant provision is the one in clause 2(a). In addition, we shall already mention clause 19, concerning implementation and regulations (quoted in paragraph 19 below). Respondent 2 issued the regulations under the authority granted to him by this clause. The regulations gained the approval of the Education and Culture Committee in the Knesset [the Israeli Parliament] (hereinafter – "**the Education Committee**"), as mandated by Law. Regulation number 1 is exceptional in both secondary and primary legislation, since it describes the aim of the regulations. It says:

> The aim of these regulations is to prevent geese suffering during force-feeding for goose liver production, and to freeze the goose liver industry in Israel, all in the spirit of the Recommendations of the Standing Committee working under the Council of Europe's European Convention for the Protection of Animals Kept for Farming Purposes … (See paragraph 10 below on these Recommendations).

The regulations include various provisions that regulate force-feeding. Regulation 3 rules that no force-feeding facility shall operate but according to the regulations. Among others, the regulations say that force-feeding will be conducted only with a pneumatic machine, and standards were set for the maximum length of the feeding tube and its maximal diameter. The regulations also set the maximum amount of food for each day of force-feeding. In addition, respondent 2 ordered, in regulation 7, that the industry be frozen, so that no new force-feeding facility be established and that no existing facility be expanded. The regulation also provided that a person who violates regulation 7 is liable to six months imprisonment or to a fine in the sum indicated in clause 61(a)(1) of the Penal Code, 1977 (hereinafter, "**the Penal Code**"). The regulations came into force on 12th March 2001, and will remain valid for three years. In other words, the regulations will expire on 11th March 2004.

Arguments of Both Sides

7. The plaintiff argues that the practice of force-feeding of geese is forbidden under Israeli Law. In particular, the plaintiff points to specific components of the force-feeding procedure and to its influence on the animal's liver: the insertion of a

tube to the goose esophagus, forcing, under high pressure, special food through the tube, and abnormal enlargement of the liver. According to the plaintiff, the process of force-feeding has also bearing on the ability of the goose to move and the stability of its legs. The plaintiff adds that force-feeding constitutes cruel treatment of animals, a practice forbidden by clause 2(a) of the Animal Protection Law. As mentioned above, following the enactment of the Law, Respondent 2 issued the regulations in 2001. According to the position of the plaintiff, the regulations contradict the Law, since they allow agricultural practice that is inconsistent with this Law. The plaintiff adds that the provisions of the regulations are impractical and cannot be enforced, and indeed are not enforced.

The respondents argue that if the appeal is to succeed, the entire industry shall be eliminated, since without geese force-feeding, the product which consumers want cannot be produced. The respondents argue that the practice of geese force-feeding has existed in Israel for decades, and that the annulment of the industry will leave those who depend on it without livelihood. It is also argued that the above-mentioned practice does not constitute cruel treatment of animals, and that the aim of the regulations was to reduce the suffering of the birds during force-feeding. They add that the regulations were approved by the Education Committee, and therefore one should be particularly careful when considering their validity. Furthermore, the respondents point out that the Council of Europe and the European Union did not ban geese force-feeding, and that the legal arrangements in Israel followed those in Europe. They further argue that the High Court of Justice should not interfere in this issue, since the plaintiff can, under clause 15 of the Animal Protection Law, submit a private criminal indictment. The plaintiff can also appeal, under clause 17a of the same Law, to the Magistrates' Court and ask for an injunction to prohibit an offence in breach of clause 2 of the Law.

Prevention of Cruelty to Animals – in General

8. In recent decades, the relationship between humans and other animals has been the focus of much public attention. This issue raises problems and questions from different aspects. If we were to try and summarize the topic from the moral point of view, we should ask if and to what extent should animals be used as means for Man. One extreme point of view, which it appears that few would condone today, argues that Man, as the supreme creature on Earth, is entitled to do whatever he likes to any other living creature. On the other extreme is the view that animals, or at least sentient animals, are entitled to the same standing as humans. For example, this view argues that animal experimentation should be completely banned. The middle-way view rejects both extreme views. According to the middle-way view, Man must be considerate towards animals and must safeguard their welfare. In other words, the first, extreme instrumental approach, according to which Man can do whatever it likes to animals, should be rejected. The middle-way view argues that limits should be put on the ways humans use animals, in an attempt to gradually improve their condition. It appears that the term *Tsa'ar Ba'aley Haim* (preventing animal suffering) in Jewish Law is equivalent to the animal welfare philosophy nowadays (for a summary of the various philosophical approaches see: Z. and N. Levi, *Ethics, Feelings and Animals: on the Moral Standing of Animals,* 2002 [Hebrew], chapter 7; for a detailed discussion of the view that animals should have the same rights as humans, see: Tom Regan, *The Case for Animal Rights* (London, 1998)). There is no doubt that the other approach, the one arguing for equality between animals, or at least some animals, and humans,

is not reflected in the Israeli law, or in the laws of any other country. Nevertheless, it is important to note that the constitution of India, as well as the German constitution (Grundgesetz – the Basic Law) includes several clauses regarding animals. Clause 51A of the Indian constitution establishes that every Indian citizen has the obligation, among others, "… to have compassion for living creatures". Clause 20A of the German constitution, as amended in 2002, establishes that the State has the duty to the next generations to defend the natural foundations of life and animals.

It is clear that the status of animals in our society differs from their status in the past. As we shall see, this change is reflected in recent Israeli legislation. The issue in this case is of unique characteristics. The issue is neither animal experimentation, nor is it working animals, animals used for entertainment purposes or pets. In this case, the issue is rearing animals in a specific manner so that at the end they, or more specifically an organ of their body, is used as food for humans. We emphasize this, since it may distinguish this case from previous Court cases. Furthermore, our ruling could have implications for other agricultural practices concerning rearing animals for human consumption.

9. In 1975, the first edition of the book *Animal Liberation*, by Australian philosopher Peter Singer, was published (the 1995 edition was translated into Hebrew by S. Dorner and was published in Hebrew in 1998 by the Or-Am Publishing House). The book was the focus of much interest and made an important contribution to the increasing awareness of animal suffering. We mention the book since an important part of it was dedicated to what can be called factory farming. This refers to the rearing of animals for human consumption in industrial systems. It is no longer the family farm where hens roam freely in the yard, cows in the meadow, and sheep wander around, searching for food. Today, when we speak of rearing hens for egg production, or poultry for meat, this is being practiced in a totally different way. Thousand of animals are kept together in highly crowded conditions, their ability to move is very restricted, and the food given to them is not natural, but rather designed to bring about the best result with respect to quality of food and the price it will get on the market. In particular we shall mention the issue of rearing calves. Veal, like goose liver, is a culinary delicacy. In order to produce high quality veal, the calves are reared in special conditions. They are being kept in small crates that do not allow any movement. The food they are being given is also special. Among other things, it does not contain iron, in order to guarantee that the meat is as pale as possible. This is being done despite the fact that calves need iron in their diet, and the result of lack of iron is anemia. As we shall see, the issue of rearing calves was dealt with by the secondary legislator in England and by European supra-national bodies. Another practice in factory farming is forced molting of laying hens. The aim of this practice is to renew the ability of the hens to lay eggs, and thus to increase the profits of the farmer. In Israel, forced molting is practiced by starving the hens (see research by the Research and Information Center of the Knesset: D. Lahav, *Banning Forced Molting of Laying Hens – an Economic Perspective* [Hebrew], 2001).

The Legal Situation in Europe

10. In 1976, the Council of Europe enacted the European Convention for the Protection of Animals Kept for Farming Purposes (hereinafter, "**the Convention**"). The Convention was amended in 1992. The European Union joined the Convention

and the member states of the Union ratified it. We shall bring two provisions of the convention that are relevant to this case:

> Article 3
>
> … No animal shall be kept for farming purposes unless it can be reasonably expected, on the basis of **its** phenotype or genotype, that it can be kept without detrimental effects on its health or welfare.
>
> Article 6
>
> No animal shall be provided with food or liquid in a manner, nor shall such food or liquid contain any substance, which may cause unnecessary suffering or injury.

The first of these two provisions stipulates that animals should be kept for farming purposes only if it can be assumed that it is possible to keep them without negative effects on their health or welfare. The other provision rules that animals must be fed in a manner that will not cause them unnecessary suffering or injury. As we shall see, the term "unnecessary suffering" appears in different contexts in legislation and in court decisions, and is important with respect to this case. It should be pointed out that the European Court of Justice ruled that the provisions of the Convention are indicative only (clause 34 of the verdict in the case of *Compassion in World Farming v. Minister of Agriculture, Fisheries and Food [1998] All ER (EC) 302*).

Another European document that we must mention is the European Union's Directive of 1998 – 98/58/EC (hereinafter, "**the Directive**"). The Directive aims to implement, throughout the European Union countries, the provisions of the Convention, even though its provisions are general and do not refer to the practices of rearing specific animals. Clause 3 of the Directive instructs the member states to issue arrangements that would guarantee that owners of animals and animal keepers shall take all reasonable measures to safeguard their welfare. Like clause 6 of the Convention, this clause also speaks of a prohibition to cause unnecessary pain, suffering or injury. Clause 14 of the annex to the Directive refers to feeding animals. This clause stipulates among other things that an animal must not be fed in a manner that may cause it unnecessary suffering or injury. Neither the Convention nor the Directive refers specifically to geese force-feeding. This topic was addressed in the recommendations included in the report of the Scientific Committee (see paragraph 4 above) and also in a 1999 Recommendation by the Convention's Standing Committee – *Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes: Recommendations Concerning Domestic Geese and Their Crossbreeds* (hereinafter, "**the Standing Committee**" and "**Recommendation of the Standing Committee**"). The Recommendation is in fact a very detailed document, where the conditions under which geese should be reared are determined. In the preface to the Recommendation it is said, among other things, that certain methods for the production of goose liver are not consistent with the requirements of the Convention. The Recommendation includes provisions with respect to the employees that treat the animals, the buildings where they are to be kept, their rearing conditions, etc. Clause 25 of the Recommendation includes a specific reference to goose liver. Clause 25(1) stipulates that the countries where the production of goose liver is

permitted should support research on the different aspects of rearing and on alternative methods that would not include force-feeding. Clause 25(2), which states as follows, is particularly important to this case:

> Until new scientific evidence on alternative methods and their welfare aspects is available, the production of foie gras shall be carried out only where it is current practice and then only in accordance with standards laid down in domestic law.
>
> In any case, the competent authorities shall monitor this type of production to ensure the implementation of the provisions of the Recommendation.

This provision teaches us that although the practice of geese force-feeding is problematic since it could cause them suffering, the authorities in Europe decided not to completely ban the practice, but rather to allow the *status quo*, so that in those countries where geese are reared for goose liver, the present production method could still be used. Clause 26 of the Recommendation determined that in 5 years, the issue will be reappraised. There is no doubt that the arrangements detailed in the regulations issued by respondent 2, against which the plaintiff argues, are based at least in part on the Recommendation of the Standing Committee (for general discussion of the relationship between the Convention, the Directive and the Recommendation of the Standing Committee, with respect to the rearing conditions of calves, see the above mentioned verdict (*Compassion in World Farming v. Minister of Agriculture*).

We shall now return to the 1998 Report of the Scientific Committee (mentioned in paragraph 4 above). This 90-page Report discusses various aspects of geese rearing for liver production. The committee points out, throughout the Report, that there is not enough information with respect to the implications of force-feeding the animals. Nonetheless, the final conclusion in the Report is that the practice of force-feeding is detrimental to the welfare of the birds. Despite this conclusion, the report does not recommend banning this practice (although one of the committee members, in a minority opinion, called for a complete ban on the force-feeding of geese). The Report of the Scientific Committee does not mention any European country that specifically banned geese force-feeding**.** (In a hearing before the Education Committee on 31st October 2000, where the regulations were discussed, several European countries where geese force-feeding was banned were mentioned. These countries, with the exception of the Czech Republic, are not mentioned in the report of the Scientific Committee as countries where this practice existed**.)**

In summary, although awareness of the problems associated with geese force-feeding for goose liver production exists in Europe, the present legal arrangements – the Convention, the Directive and the Recommendation of the Standing Committee – did not ban this practice (see also the September 2001 response of the European Commission to questions submitted by David Martin, Member of the European Parliament – E-2284/01, E-2285/01 and E-2286/01, and also the April 2003 response of the Commission to the question of the Baroness Ludford – E-0703/03EN on the English site http://europa.eu.int/). It appears that not only was a ban not imposed, but it was decided to allow the *status quo* to continue.

Local Legislation Concerning Animals

11. Many pieces of legislation refer to animals, from different perspectives and for different purposes. We shall mention some of them.

As we have seen, clause 2(a) of the Animal Protection Law prohibits torture, cruel treatment and animal abuse. When the Law was enacted, clause 495 of the Penal Code was cancelled. Clause 495(1) said that a person commits an offence if he "cruelly beats, overloads, tortures or otherwise abuses a domestic animal or a wild animal in captivity…" It is important to note that the Animal Protection Law made penalty stricter, so a person convicted of violating clause 2 is liable to up to 3 years imprisonment. The former penalty, under clause 495 of the Penal Code, was one month imprisonment. In its former form, clause 495 appeared as clause 386 of the Criminal Law Ordinance, 1936. There is much resemblance between the clause in the Criminal Law Ordinance and the opening of clause A(1)(1) of the Protection of Animals Act, 1911. This English Act, still valid today, is an integrative law whose origins go back to legislation of 1822. Already in the time of the British Mandate**,** we find a specific provision putting certain limits on sea transportation of livestock and birds, and this is still valid today. Thus, for example, it was stipulated that during the import or export of a beast, it must not be slashed (regulation 19 of the Livestock and Birds Regulations (Sea Transportation), 1936 (hereinafter, "the Sea Transportation Regulations"). Another Mandatory provision still valid today is a provision in the Fishing Ordinance that prohibits the use of explosives for fishing (clauses 5 and 10(3)).

12. A special view sees animals as property. Some argue that the root of the problem with respect to the way humans regard animals lies in the fact that the Law views animals as any other property (this is the view of the scholar Gary L. Francione in his book *Animals, Property, and the Law* (1995)). We shall mention in this context several provisions in Israeli laws. Clauses 451 and 457 of the Penal Code refer to offences of causing damage to an animal and infecting an animal with a contagious disease. The prohibition in both clauses refers to "an animal that can be stolen". Another interesting provision is in clause 6 of the Restoration of Lost Property Law, 1973, which mentions "a lost property which is an animal". Clause 22 of the Execution Law, 1967 lists several goods that cannot be confiscated, including animals without which the debtor can't work, and also pets, provided they are not kept for commercial purposes. The perception of animals as property is also found in provisions that grant compensation to owners of an animal that was injured or killed. For example, clause 16 of the Animal Diseases Ordinance [new version], 1985 grants owners the right to compensation by the State, if the animal was killed since it was believed to be infected with one of the diseases mentioned in the Ordinance.

13. A different kind of reference to animals is found in various provisions that require licensing for keeping animals or for performing various operations with them. By nature, licensing arrangements restrict the right of property. Sometimes, these restrictions are intended to protect a public interest in the narrow sense, sometimes they are intended to protect animals, and sometimes both aims are combined. We shall mention the Animal Diseases (Imports of Animals) Regulations, 1974, which stipulate that an animal shall be imported only under a license by the Director of the Veterinary Services at the Ministry of Agriculture or by someone authorized by him. Another provision of these regulations stipulates that certain animals (cattle, pigs,

sheep, goats and poultry) shall not be let in the territory of a local municipality or be removed therefrom, without a permit by a government veterinarian. The Shepherds Ordinance (Licensing), 1946 determines that it is not allowed to graze sheep on land decreed by the Ministry of Agriculture but in accordance with the license granted. Another law that requires **a** license for keeping an animal is the Regulation of Dogs Inspection Law, 2002, to enter into force on September 2003. The Law stipulates, among other things, that a dog aged 3 months or more shall not be kept without a license. It is interesting to note that the competent authority must take into consideration, before granting a license, past convictions of the owner, including convictions under the Animal Protection Law. Another important example of licensing appears in the Wildlife Protection Law, 1955. Clause 2 of this law forbids hunting of wildlife without a license. The law also lists certain hunting methods that are not to be used (clause 5). Another area where a license is required is that of an exhibition, show or contest of animals (the Animal Welfare (Animal Protection) (Exhibitions, Shows and Contests of Animals) Regulations, 2001, hereinafter "**the Animal Shows Regulations**"). These regulations determine that no one shall organize such a show without a permit from the Controller appointed under the Animal Protection Law. It shall be mentioned that the Supreme Court of India found nothing wrong in a secondary legislation issued under the Prevention of Cruelty to Animals Act, 1960, which banned training or shows of bears, monkeys, tigers, panthers and lions (*N.R Nair **v.** Union of India (2002) 6 SCC 84)*.

14. The legislation does not employ a unified and systematic use of terms or certain expressions to define when harming an animal becomes forbidden. One term, originating in Jewish scriptures, is *Tsa'ar Ba'aley Haim*. This phrase appears in the headline of [the Hebrew version of] two laws, the Animal Protection Law and the Animal Welfare (Animal Experimentation) Law, 1994 (hereinafter, "**the Animal Experimentation Law**"). The term appears also in the Animal Shows Regulations. The term *tsa'ar* [suffering], separate from the expression *Tsa'ar Ba'aley Haim*, appears in regulation 4 of the Animal Diseases (Slaughter) Regulations, 1964. The regulation stipulates that anyone chaining a beast, pulling it down and slaughtering it, shall employ "methods that would reduce the beast's *tsa'ar* and pain". Another expression in the legislation is "annoyance". Regulation 2 of the Nature Reserves (Arrangements and Behavior) Regulations, 1979 prohibits harming wildlife, plants and inanimate objects within a nature reserve. The term "harming", as defined in regulation 1, includes a long list of forbidden behaviors, among which is "annoying a wild animal, harming its well-being or its freedom".

Another term used is "suffering". This term is mentioned in clause 2 of the Veterinary Doctors Law, 1991, which says that the duty of a veterinarian is among others "to prevent and alleviate the suffering of animals". Clause 4 of the Animal Experimentation Law defines the roles of the Council for Animal Experiments. It stipulates that the Council shall issue regulations for conducting experiments, "in order to ensure minimization of the suffering caused to the animal…" Clause 8(c) of the same law says that "animal experiments shall be conducted in such a manner that animal pain and suffering be minimized" (also see the appendix to the law). We shall now mention again an expression of much importance in the legal history concerning animal protection. We refer to the expression "unnecessary suffering", which appears in clause 1 of the Animal Experimentation Law. The term "killing" is defined there as "killing an animal while preventing unnecessary suffering". Clause 6(e)2 of the

Regulation of Dogs Inspection Law stipulates that the killing of a dog "shall be performed while preventing unnecessary suffering". The expression "unnecessary suffering", in its English original form, also appears in regulations 13 and 15 of the Sea Transportation Regulations. After mentioning the words "unnecessary suffering", we shall return to the first piece of legislation we referred to, the Animal Protection Law, on which the arguments of the plaintiff rest. The important provision of this law appears in clause 2(a), which states: "No one shall torture an animal, treat it cruelly or abuse it in any manner". The clause introduces three terms: torture, cruel treatment and abuse. The plaintiff argues that force-feeding is forbidden under clause 2(a).

Intermediate Summary

15. From this short survey of different Israeli pieces of legislation we learn that:

a. The law treats animals as property. Sometimes there are restrictions concerning what the owner can do to its animal property. The provisions that grant compensation to owners whose animals were harmed also point to the perception of animals as property. Some argue that this approach is inappropriate, since it does not distinguish between an animal and real estate or other goods.

b. Nonetheless, many other pieces of legislation, especially those enacted in recent decades, point to a certain change. Indeed, already in the past the approach of *Tsa'ar Ba'aley Haim* or animal welfare considerations are reflected in the legislation. We mentioned clause 495 of the Penal Code (replaced by clause 2(a) of the Animal Protection Law), which originated in English legislation of 1822. The change is manifested in new legislation that prohibits certain uses of animals and strives to improve their rearing conditions. A salient example appears in the Animal Experimentation Law, enacted in 1994, the same year the Animal Protection Law was enacted. The Law put restrictions on animal experimentation (on this law, see appeal to the HCJ 9374/02 *Let the Animal Live v. Brigadier General Dr. Giora Martinovitch* (not published yet)).

Torture, Cruel Treatment and Abuse under the Animal Protection Law

16. The question that we now have to answer is whether geese force-feeding is forbidden by clause 2(a) of the Animal Protection Law: does it constitute torture, cruel treatment or abuse (the text of the clause appears in paragraph 6 above). The precise meaning of these terms was thoroughly discussed in the verdict of Justice M. Cheshin in LCA 1684/96 *Let the Animals Live v. Hamat Gader Recreation Industries.* In that case (hereinafter, "**the Crocodiles Case**") the issue was whether a show where a fight is held between a man and a crocodile is in violation of the above mentioned 2(a) clause. The verdict stipulated that the three terms – torture, cruel treatment and abuse – share three elements: First, it is necessary to examine whether the beholder would consider the specific acts as constituting one of the three terms. Second, the degree of pain or suffering caused to the animal does not have to be particularly high. Third, test of proportionality, i.e., is there a proper relation between the particular means and its purpose (this examination is at the heart of discussion under the English law when the question arises whether an act causes unnecessary suffering; see: M. Radford, *Animal Welfare Law in Britain*, Chapter 10, Oxford, 2001). The most important and problematic of the three is of course the third element, since it requires determining whether the purpose reflects a proper social value. Justice Cheshin added:

> …One can distinguish between various purposes, and each purpose differs. Some purposes can atone for even small amount of suffering caused to an animal, while other purposes won't atone for any suffering whatsoever (Ibid).

In the same case it was ruled that the purpose of the show was to amuse the audience, and that this purpose does not justify the suffering caused to the crocodile during the fight. How should we apply the tests in the present case?

17. We shall now reiterate the complaints of the plaintiff. Geese force-feeding is performed by inserting down the esophagus a tube, through which special food is introduced with an air pump. The purpose of the process is enlargement of the liver, much beyond its natural size. It appears that no one shall disagree that in the eyes of the beholder, according to the first test, these actions constitute the above mentioned terms, or at least one of them. The second test, referring to the amount of suffering caused, is also passed in this case. Both in the appeal and in the responses to it, as well as during the hearing before the Education Committee before the regulations were approved, expert opinions were presented. Those experts were divided with respect to the question whether the geese suffer during force-feeding. We need not elaborate on this controversy, since for us, in light of the conclusion of the Scientific Committee, there is no doubt that the geese do suffer. We already mentioned that the conclusion of the Scientific Committee was that force-feeding is detrimental to the welfare of the geese (paragraph 10 above). The respondents refer and re-refer to the position of the European supra-national institutes – the Council of Europe and the European Union – that did not ban geese force-feeding. The respondents also point out that the arrangements in the regulations resemble in part a recommendation by the Standing Committee. This Committee stipulated, as already said, that in countries where force-feeding exists, it could continue within the existing framework, and that a reappraisal will be done in 5 years (as of 1999). The respondents cannot have their cake and eat it. They cannot justify the local legal arrangements by alluding to the European arrangement, without accepting the conclusion therein, i.e., that geese force-feeding is contradictory to the welfare of the animals. In this context we shall comment that a certain saying in regulation 1 is somewhat inappropriate. This regulation (partially quoted in paragraph 6 above) says that the aim of the regulations is "… to prevent suffering of the geese…" It is clear that the regulations don't prevent suffering of the geese. In the best scenario, they somewhat reduce their suffering.

Even though we accept that the geese endure suffering during force-feeding, we must add a reservation. We already mentioned other agricultural practices that raise difficult questions, for instance, rearing calves under special conditions and forced molting of laying hens through forced starvation. It seems that these procedures also cause animal suffering. It appears a hard, or even impossible, task to grade animal suffering. Is the suffering of the geese indeed greater than the suffering of the calves and laying hens?

18. The next question, which seems to be the core of the controversy, is whether the specific purpose justifies the means employed. What is then the purpose? The purpose of geese force-feeding is the production of food for humans. The same purpose exists in the cases of rearing laying hens, poultry, and cattle for meat and milk, including calves. One can think of other examples of rearing animals for human consumption. We mentioned on purpose the issue of rearing hens and calves. This

topic is raised again and again in any discussion of animal welfare. In the USA alone, billions of animals are killed every year for human consumption. In all developed countries, agriculture has changed dramatically in recent decades, partly due to the need to provide food for a richer society and a growing population. The traditional agriculture, based upon family farms, has disappeared. Instead, huge farms where animals are reared in conditions of hardship developed. For example, thousands of laying hens are kept in cages in horrible overcrowding. Calves are kept in especially narrow crates, without being allowed to move, and are being fed a special diet. The purpose, in the case of the calves, is to obtain high quality meat. We brought these examples since they indicate that a total ban on a certain agricultural industry could have far-reaching implications, both economically and socially. We shall mention that the American Animal Welfare Act, 1966 specifically excludes farm animals intended for human consumption from the definition of "animal" under the Act. Clearly, when grading purposes, the purpose of producing food for humans stands above the purpose of entertainment, as was in the Crocodiles Case. Indeed, goose liver is considered a gastronomic delicacy, surely in Europe, and therefore should not be regarded as ordinary basic food (the plaintiff, in an attempt to form parallels with the Crocodiles Case, uses the expression "gastronomic entertainment" with respect to goose liver). Yet we may find ourselves tangled in very fine distinctions. What shall we say about veal? It is obvious that alternatives can be found for both goose liver and veal.

Another element we should pay attention to, and which distinguishes between geese force-feeding and other agricultural industries, is the implications of accepting the position of the plaintiff. There is no controversy that this agricultural industry is wholly based upon geese force-feeding as currently practiced. To date, no alternative method was found, although the Europeans emphasize the need to conduct research in the field, in the hope of finding such a method. As we shall see in other cases, with respect to the crowded conditions under which food animals and laying hens live, certain provisions that provide minimal standards were adopted. The plaintiff did not point out a single other case where an entire agricultural industry, that produced food, was eliminated at once, due to animal welfare considerations.

"Needs of Agriculture" and the Perspective of the Animal Protection Law

19. We just examined the terms torture, cruel treatment and abuse in clause 2(a) of the Animal Protection Law. We focused on the question of the relationship between the means – geese force-feeding**,** and the purpose – food production, while disregarding other provisions of this law. Now we shall examine various provisions of the same law that can contribute to and influence the interpretation of those three terms, within the context of geese force-feeding. And these are the words of clause 19:

> The Minister of Agriculture is responsible for implementing this law, and he may, with the approval of the Education and Culture Committee of the Knesset, while giving due consideration to *needs of agriculture,* issue regulations to implement and achieve the aim of this law, including with respect to –
>
> (1) Husbandry conditions of animals, including keeping animals in pet shops;
> (2) Conditions for transportation of animals;

(3) Methods of killing animals, with the exception of killing animals for human consumption;
(4) Training animals;
(5) Exhibitions, shows and animal contests;
(6) Procedures for beauty sake that include cutting of living tissue

The Minister of Agriculture, respondent 2, has wide authority with respect to issuing regulations. The law names, without being exhaustive, areas where the Minister may issue regulations, all under the approval of the Education Committee. The regulations, against which the plaintiff argues, were issued by respondent 2 under clause 19. When the Minister issues regulations, he must consider both "needs of agriculture" and the "aim of the law", as said in the opening of clause 19. The aim of the law is improving the welfare of animals. It seems that the fear that the importance of this aim may be overemphasized, while ignoring other considerations, such as food production and the interests of farmers, is what led to the specific stipulation in clause 19, according to which the Minister, and of course the Education Committee, must take into account the needs of agriculture. Geese force-feeding is one of the needs of agriculture. From this point of view, it is no different from rearing cows for milk or meat, from rearing calves or from rearing laying hens or poultry. For this purpose, it should be emphasized that the needs of agriculture and the interests of farmers may not necessarily be identical. "Needs of agriculture" include also the issue of food production, which is an interest of the public at large. Indeed, one may distinguish between various kinds of animal food according to its necessity, and argue that a gastronomic delicacy, such as goose liver, should not enjoy the same consideration as other types of food. And yet, as we have already said, to distinguish in such manner could open the door to finer and finer distinctions. We mentioned the obligation of respondent 2 to consider "needs of agriculture" when issuing regulations. This obligation leads to the conclusion that needs of agriculture should not be ignored when interpreting the meaning of the three terms – torture, cruel treatment and abuse. It is inconceivable that the interpretation of the direct prohibition issued by the primary legislator be different from the interpretation concerning the authority of the secondary legislator under the very same law. Once determined that while issuing regulations, respondent 2 must give weight to needs of agriculture, we must say that the same needs should be reflected when the meaning of the three terms is examined. This point is important, among other things, in light of the difference in purpose between the Crocodiles Case and the present case. In the Crocodiles Case, the issue was crocodile-human fights, and the purpose was entertainment of the audience. Therefore, there was no need to discuss the issue of food production and "needs of agriculture". It appears that the purpose of food production should have more weight than entertainment, surely when the law specifically ordered that the needs of agriculture must be taken into account.

20. The Animal Protection Law employs various devices to improve the welfare of animals. One of these is listing criminal offenses. Clauses 2 and 3 of the Law contain criminal prohibitions. While clause 2(a) contains a prohibition with wide application, and uses vague terms, other prohibitions are narrow in scope (see the Crocodiles Case by Justice Cheshin and also HCJ 6446/96 *The Cat Welfare Society v. the Arad Municipality* (Justice E. Goldberg)). Thus, clause 2(b) bans animal fights, and clause 3(b) forbids working animals to exhaustion. As we have seen, the geese force-feeding industry has existed in Israel for about 40 years. It therefore follows that

when the Law was enacted, this fact was not unknown. And yet, no specific provision to forbid geese force-feeding was issued.

21. We have seen that on the one hand, the Animal Protection Law contains various criminal prohibitions, one of which is of wide application, and on the other hand, the Minister of Agriculture was authorized, subject to the approval of the Education Committee, to issue regulations on various issues, including husbandry conditions of animals, transportation conditions of animals, etc. This system, whereby an administrative body was authorized to stipulate conditions concerning animal husbandry along with criminal offenses, is similar to the method used by the English legislator. The main criminal provisions in England are included in the Protection of Animals Act, 1911. Another relevant law is the Agriculture (Miscellaneous Provisions) Act, 1968. Indeed, clause 1 of this law contains a criminal provision that prohibits causing unnecessary pain to animals, including animals used for food. In this, it adds nothing to the prohibitions of the 1911 law. The main provision in the 1968 law that is relevant to the present case is the one that authorizes two Ministers – Minister of Agriculture and Home Secretary – to issue regulations "with respect to the welfare of livestock… situated on agricultural land". Since the law was enacted, various regulations were issued, the latest of which that are still valid are the Welfare of Farmed Animals (England) Regulations, 2000. These regulations contain not merely provisions of **a** general nature, but specify detailed arrangements with respect to the husbandry of specific animals. Thus, for example, the second schedule determines the minimal sizes of cages in which laying hens can be kept. We already mentioned that the issue of rearing calves raises serious problems. And indeed, the fourth schedule of the regulations determines the minimal space in which a calf is to be kept. It is important to point out that transition arrangements were made, i.e., the duty to provide a minimal space to each calf did not come into effect immediately. The reader may ask why, in both England and Israel, laws were enacted that authorized Ministers to issue regulations with respect to animal husbandry. Was it not possible to suffice with the criminal provisions, especially in light of the fact that some of them are of wide application, so they could, on the face of it, encompass many different agricultural practices? There are three explanations for this: First, it is hard to accept that an established practice, used by farmers for years, is to be considered a criminal offense, with all the implications therein. Second, the criminal offenses listed were designed to define a minimal framework of animal welfare. The authority given to the Ministers is intended to improve animal welfare by stipulating stricter conditions with respect to animal husbandry and treatment. Third, granting the authority to Ministers allows a detailed and focused handling of problems, for example, determining the minimal space for each animal.

Transition Provisions

22. If we were to accept the view of the plaintiff and conclude that geese force-feeding is banned under clause 2(a) of the Law, this would mean that an entire agricultural industry would become instantly illegal. As we shall see, in those cases where supra-national bodies in Europe and also the authorities in England decided to change common agricultural practices, such as rearing of calves, transition periods were defined. This approach is obligatory also since the issue at stake has bearing on the freedom of occupation.

23. We mentioned more than once that the issue of rearing calves for food raises a similar problem, due to the way calves are kept and the food provided to them. In order to produce a culinary delicacy, these animals were kept in crates that prevented their movement, and the food they received wasn't an ordinary food, but food designed to produce meat of the highest quality. In England, regulations (Welfare of Calves Regulations, 1987) were issued, and these stipulated, among other things, that the width of the stall in which a calf is to be kept shall not be less than the height of the calf as measured in the highest point of its back. The regulations were issued in 1987, but came into force only at the beginning of 1990. The 1987 regulations were replaced in 1994 by the Welfare of Livestock Regulations, 1994. The later stipulated, among other things, that when calves are kept in a herd, each calf weighing 150 kg or more shall have a minimal space of 1.5 square meters. With respect to calves kept in separate crates, the regulations stipulated that at least one of the walls separating the crates should be constructed in such a manner that the calf could watch the animal in the nearest crate. It was explicitly stipulated that these conditions would apply to facilities that existed prior to 1994 only in 2004. The 2000 regulations (see paragraph 21 above) contained improved arrangements with respect to the way calves are to be kept, and they also include a transition period. We shall further point out that the same regulations also stipulated that calves must be provided with food containing enough iron to ensure a minimal concentration of hemoglobin. Provisions concerning husbandry conditions of calves were determined in a Directive of the European Union in 1991 (91/629/EEC) and in an amending Directive of 1997 (97/2/EC). We need not discuss the details of the Directives. Suffice to say that both include transition provisions. The amending Directive determined that specific provisions, with respect to the sizes of the pens in which calves are to be kept, would come into force at the end of 2006.

Why were transition provisions set both in England and the European Union? The answer to this question seems straightforward. The new provisions were designed to change long-standing arrangements according to which farmers have acted for a long period. It is inappropriate that provisions concerning the size of the stalls in which calves are to be kept would come into force immediately. It is necessary to allow farmers time to organize, especially given the fact that the necessary changes are associated with new investments, and that the price of the specific food produced is likely to rise. We should point out once again the fundamental difference between the case of the calves (or laying hens or poultry) and the geese. In the case of the calves, the provisions would not bring about the annulment of the agricultural industry. The European farmers must adjust the crates and the food given to the calves to the new arrangements. That is to day, a farmer that would adjust to the new requirements could continue to produce calves for meat, although the quality of the food may be somewhat reduced. In contrast, in the case of the geese, the practical meaning of banning force-feeding is the annulment of the industry, since without geese force-feeding, the product which consumers like cannot be made. Had we accepted the view of the plaintiff, we had to say that these actions constitute criminal offense, and therefore, the activities of farmers that force-feed geese should stop immediately.

24. How does new legislation usually treat an occupation that was not regulated before, or an occupation whose licensing conditions were changed? Does a person who practiced, in the past, a certain occupation legally, like respondents 4, have to

uphold the new requirements immediately? It appears that in such cases, it is customary to permit a transition period, so that the worker could adjust to the new requirements, and won't have to uphold them instantly. In professions unregulated in legislation, for which new licensing requirements were introduced, it is customary to give a transition period, allowing people to continue to practice the occupation for a limited period without upholding the new criteria. Thus, in the past, real estate agencies were not regulated by any law. Real estate agents were not required to obtain a license or to meet any criteria. When the Real Estate Agents Law, 1996, that stipulated the requirement of a license, was enacted in 1996, it set a transition period that allowed agents to continue working, even without the required license, for two years (see clause 20(a) of the law). In HCJ 1715/97 *Chamber of Investments Brokers in Israel and others. v. Minister of Finance and others.,* the validity of the Investment Counseling and Investments Portfolio Management Law, 1995 was discussed. In the past, no license was required of those working in this profession. The law regulated the profession and determined that those who practice counseling and investments portfolio management must be licensed. The law came into force on 10th August 1995, but the provisions concerning licensing came into force at a later date. This date was changed several times, and eventually, the licensing provisions came into force on 1st July 1997 (Law for the Regulation of Investment Counseling and Investments Portfolio Management (second amendment), 1996). The fact that the licensing requirement was not operative immediately means that in fact, a transition period was set. Furthermore, the provisions of the law allowed practitioners who worked for more than seven years before the law came into force, to be licensed even if they didn't meet the new requirements. This Court ruled, by President of the Court A. Barak, that applying a licensing system to practitioners who worked in the profession in the past harms their freedom of occupation. With respect to the question of when a transition provision is proportional, the verdict said as follows:

> Transition provisions that set the applicability of a new licensing regime on an old practitioner would be proportional with respect to old practitioners if they pay due regard to the status of the old practitioner, the experience he gained in management and the implications of this experience on the need to apply to him the licensing conditions that apply to the new practitioner, all or in part; if they apply the new system to such a degree that would guarantee a smaller damage to the old practitioner, given the aim of the law; and if the benefit to the public at large is greater than the damage to the old practitioners" (Ibid).

Eventually, it was concluded that the provision that required a minimal period of occupation of seven years to deserve an exemption from the new requirements was not proportional. Following the verdict, the law was amended (The Regulation of Investment Counseling and Investments Portfolio Management Law (fourth amendment), 1998).

25. Even in professions that were already regulated by law, but for which a new licensing condition was added, a transition period, allowing these professions to be practiced for several years under the former requirements, was set. For example, when it was decided to change the licensing conditions required of real estate assessors, and require an academic degree, the new law included a transition provision, making the requirements of the old law valid for another 5 years (see clauses 7(a)(1) and 45(a)(a) of the Real Estate Assessors Law, 2001, and clause 6(2) of the former law, the Real

Estate Assessors Law, 1962). Another example is regulation 86(a) of the Shipping (Seamen) Regulations, 2002, according to which the former licensing conditions remained valid for a few years after the regulations were published. In this case, if we were to accept the view of the plaintiff, those who practice geese force-feeding would find themselves in a condition worse than the situation of other professionals who were required to adapt, through a transition period, to new and additional legal requirements. The farmers, even if they wish to do so, will not be able to adapt to a new requirement in their profession, but would have to find their livelihood in another occupation. Therefore, all the more so they must be given a transition period. The view of the plaintiff, according to which geese force-feeding is torture, cruel treatment or animal abuse, does not allow any flexibility with respect to transition period. This view has, of course, implications on the proper interpretation of these three terms. It is unacceptable that those who have practiced geese force-feeding in Israel for decades turn overnight into criminal offenders. This could be put in a slightly different manner. We should ask ourselves how we would regard an explicit ban on geese force-feeding, had such a ban been included in the Animal Protection Law. It appears that the validity of such a ban would have been subject to the inclusion of a reasonable transition provision (see HCJ 5936/97 *Dr. Oren Lam v. General Director of the Ministry of Education* (Justice Dorner)). Therefore, one should reject the view that the general and vague provision that prohibits torture, cruel treatment or animal abuse includes a ban on geese force-feeding, when it lacks a transition provision.

Intervention of the Court in Secondary Legislation approved by Knesset Committees

26. Clause 19 of the Animal Protection Law states, as already mentioned, that regulations issued by respondent 2 are subject to approval by the Education Committee. The regulations against which the plaintiff argues were indeed approved by the Committee. Before granting its approval, the Committee held several hearings, in which officials from various government departments (Ministries of Agriculture, Environment and Justice) and representatives of farmers who perform geese force-feeding, of the Poultry Board and of various animal protection organizations, participated. The decision was reached after a thorough and serious discussion (see protocol of hearings on 31st October 2000 and 2nd January 2001). When secondary legislation approved by a Committee of the Knesset is at stake, the Court must be particularly cautious in examining its validity (see HCJ 108/70 *Manor and others v. Minister of Finance;* CA 2313/98 *Minister of Commerce and Industry v. Mincol;* HCJ 971/99 *The Movement for Quality Government in Israel v. the Knesset Committee*). We shall mention once again that the regulations, issued in 2001, are temporary and will expire in three years from their enactment. In 2004 will also pass the period of five years assigned by the Standing Committee (see paragraph 10 above). As already said, the regulations stipulated that no new geese force-feeding facilities are to be established, and no existing force-feeding facility is to expand. This is yet another line of resemblance to the approach taken by the Standing Committee in its Recommendation of 1999. Under these circumstances, it is not to be accepted that the regulations, approved by a Committee of the Knesset, are invalid. Furthermore, if we were to accept the argument of the plaintiff that geese force-feeding is prohibited in light of clause 2(a) of the Animal Protection Law, we would have to say that both the Minster of Agriculture and the Education Committee worked in vain and issued regulations that contradict the law.

Enforcement and Implementation of the Regulations

27. Clause 1 of the Animal Protection Law stipulates that the Controller of this law (hereinafter, "the Controller") be appointed by the Director of the Veterinary Services at the Ministry of Agriculture (hereinafter, "the Director"). The law gives the Controller authorities that are designed to help him enforce the law, such as authority to enter premises and to conduct interrogations (clause 6) and authority to confiscate animals (clause 8). Clause 5 of the law stipulates that the Director appoint inspectors that have similar authorities to those of the Controller (clauses 6 and 8 of the law). After the regulations were issued, the Ministry of Agriculture decided that the Controller should verify their enforcement. Following this decision, an inspector inspected geese force-feeding facilities and geese slaughter houses. On February 2002, the Controller at that time, Dr. Hagay Almagor, submitted a detailed report to the Ministry of Agriculture. This report analyzes the findings of the inspector. The conclusion of the report was that the provisions of the regulations are unenforceable and are not followed. In light of this conclusion, the Director, Dr. Oded Nir, reappraised the data on which the conclusions of the Controller were based. His conclusion was completely different from the one reached by the Controller. The Director concluded that the vast majority of the regulations can be implemented and enforced, and are indeed mostly implemented by the farmers and force-feeders. Nevertheless, he added that several provisions in the regulations require re-examination or re-definition. While the respondents agree with the conclusions of the Director, the plaintiff argues, in light of the opinion of the Controller, that the regulations are unenforceable and should therefore be annulled. We need not discuss the technical details of the controversy between the Controller and the Director. In any case, it is hard to see what the plaintiff should gain had it been determined that the regulations are unenforceable. This fact, by itself, will not turn geese force-feeding into an illegal occupation. As we said more than once, and we shall return to this later, the regulations will expire in 2004, and before that date, the issue will be reappraised in any case, including with respect to implementation and enforcement.

The Conclusions with Respect to the Remedies Requested

28. The remedies asked for by the plaintiff were a declaration that the regulations are annulled, an order obliging respondent 2 to issue other regulations that would ban geese force-feeding, and an order obliging respondent 1 to guide the police to investigate and prosecute the farmers that practice geese force-feeding. The starting point for the plaintiff is that geese force-feeding is an offence under the Animal Protection Law, in light of the prohibition in clause 2(a) against torture, cruel treatment and animal abuse. The conclusion of the discussion above is that the view of the plaintiff should not be accepted. Had this view been accepted, the regulations would be in any case invalid, since regulations cannot allow activities prohibited in primary legislation. If we were to find substance in the plaintiff's argument, we had to say that the enactment of the Animal Protection Law turned those who practice geese force-feeding into criminals. These are people who have practiced the profession for many years, and have enjoyed support and encouragement from the State. We shall remind ourselves once more of the legal situation, in respect to geese force-feeding, in the European Union. The European Union did not ban geese force-feeding. Its institutions stipulated in 1999 that countries where this practice exists could continue it, subject to reappraisal in 2004. In the present case, the purpose of geese force-feeding is the production of food, which, it may be agreed upon, is not a routine and standard food, but a gastronomic delicacy. The purpose of food must have more

weight than the purpose of entertainment, as was the issue in the Crocodiles Case. Furthermore, the Animal Welfare Law explicitly ordered that the Minister of Agriculture should consider the needs of agriculture when issuing regulations. The needs of agriculture include both the interests of the farmers and the interests of the public at large in food production. This should also lead to the conclusion that the present practice of geese force-feeding is not illegal. It also follows that respondent 1 should not be forced to order the Israeli Police to investigate farmers who practice force-feeding in order to prosecute them. These considerations, discussed at length, must lead to the conclusion that respondent 2, and in fact the Education Committee, should not be forced to issue regulations that would completely ban geese force-feeding.

Alternative Legal Proceedings and the Right of Standing

29. Before closing we shall refer to a preliminary argument raised by the respondents, which, under the circumstances of the present case, should not be accepted. According to the argument, the High Court of Justice should not interfere in the case, since the plaintiff has alternative ways to reach its goal. The respondents point to clause 15 of the Animal Welfare Law, whereby animal protection organizations, approved by the Minster of the Environment after consultation with the Minister of Agriculture, can submit a private criminal indictment against offenders of this law, subject to approval by the district attorney. Another provision on which the respondents base their argument is to be found in clause 17a of the Animal Protection Law. This clause stipulates that an animal protection organization, the Director and even a prosecutor may ask the Magistrates' Court to issue a injunction that would forbid actions, or the continuation of actions, that violate clauses 2 and 4 of the law. Hence the claim that the plaintiff, and if not the plaintiff then those other organizations approved under clause 15 of the law, may start criminal and civil proceedings against those who practice geese force-feeding. We did not see fit to accept this argument, if only since that in alternative proceedings, the plaintiff would not be able to obtain a declaration annulling the regulations. We shall add that those two alternative ways, i.e., private criminal indictment and a request for an injunction, that allow pro-animal organizations to represent their interests, are a solution to a problem sometimes encountered in other countries, when it is argued that animals have no standing in Court (see Cass R. Sunstein, *Standing for Animals 47 UCLA L. Rev* (2000) 1333).

Before Closing

30. I read the verdict of my honorable colleague, Justice Strasberg-Cohen. It appears that while we both analyze the legal situation similarly, there is considerable difference between us with respect to the appropriate remedy. My colleague's conclusion, according to which the regulations suffer from a substantive fault, seems extreme to me. As I pointed out, the arrangement in the regulations follows the European arrangement. We also didn't find a single country, where geese force-feeding existed, that decided to ban force-feeding. Had it been possible to determine, according to current knowledge, that the existence of this agricultural industry is possible while reducing the suffering of the geese, I would also reach the conclusion that the regulations are invalid. However, at present there is no indication that the industry can be sustained by introducing further significant restrictions on geese force-feeding. A legitimate option is for the competent authorities to issue regulations that would completely ban geese force-feeding. Of course, as I explained at length,

such a ban cannot apply instantly, and the workers in this agricultural industry must be given a sufficient and appropriate transition period.

Epilogue

31. The issue of this appeal was whether geese force-feeding is allowed under Israeli law. As we have seen, during force-feeding, food is forcefully inserted into the goose's body, the purpose being to produce an enlarged, fatty liver. The liver produced in this manner is used for human consumption. In Israel, several hundred families earn their livelihood in this agricultural industry, which has existed for about 40 years. I reached the conclusion that the claim that geese force-feeding constitutes torture, cruel treatment or abuse, in violation of clause 2(a) of the Animal Protection Law, should not be accepted. In this case, the main issue was whether there exists the right proportionality between the means – force-feeding – and the purpose – food production. The starting point being that force-feeding does cause suffering to the geese. In spite of this it was found that, in this case, there exists the right proportionality, although it is a gastronomic delicacy and not an ordinary food. In this context weight was given to the present legal situation in the European Union, which did not ban geese force-feeding, but ruled that this practice can continue in those places where it existed in the past. One should also remember that along with the practice of force-feeding there are other agricultural practices that raise similar problems. We pointed out the issue of rearing calves, while preventing their freedom of movement and feeding them special food, the purpose being to obtain meat of higher quality. Another example is forced molting of laying hens through forced starvation. These do not exhaust the problematic cases. We saw that the Animal Protection Law stipulated that respondent 2, and following him the Education Committee, must consider "needs of agriculture" while issuing regulations under this law, with respect to the husbandry conditions of animals, among other things. "Needs of agriculture" include both the interest of the public at large in food production and the interests of the farmers, in this case, those who perform geese force-feeding. It is not to be accepted that those who rear geese turn instantly from farmers working lawfully to offenders. To remove any doubt I shall clarify that I do not intend to mean that in future, the terms torture, cruel treatment and abuse shall necessarily have the same meaning they had when the law was enacted in 1994. As pointed out, these terms are vague, and by nature open the door to flexible interpretation, taking into consideration economic and social changes and the up-to-date cultural climate.

The regulations issued in 2001 will expire in 2004. This means that in the near future, decisions must be reached about how to act. The competent authorities will have several options. The present arrangement is temporary, as stated therein. It is not to be accepted that this arrangement shall continue in the future indefinitely, since the suffering of the geese must not be ignored. One should also not agree that the regulations shall expire and no other arrangement is set instead, so that a legal void be created. The competent authority, i.e., the Minister of Agriculture with the approval of the Education Committee, is of course authorized to issue new regulations that would place stricter requirements as compared with the current legal arrangement, with the purpose of further reducing the plight of the birds, assuming that stricter restrictions will not in fact bring about the closure of the industry. It is to be expected that any different arrangement made will consider, among other things, the developments that may occur in the European law, and also the conclusions drawn from the implementation of the current regulations. Another option open to the above

mentioned authorities is to completely ban geese force-feeding, as practiced now, subject to a reasonable transition provision. In this context the right weight should be given to the interests of the farmers, who have worked in force-feeding for many years, with the support and blessing of the State. As for the length of the transition period, various data would have to be considered, among which are the extent of the damage to the practitioner in this industry and the time required to adjust to an alternative occupation. At the end of day I found that force-feeding does cause suffering to the geese. Nevertheless, in my opinion, one should not justify preventing suffering to geese by causing suffering to farmers – the result of instantly depriving them of their livelihood.

32. Therefore, if my opinion were to be heard, we would have cancelled the *order nisi* and reject the appeal, subject to the things said above.

Justice [A. Grunis]

Justice (retired) T. Strasberg-Cohen:

1. This appeal raises the question whether an agricultural procedure of geese force-feeding, for the production of fatty liver (hereinafter, "goose liver") for human consumption, is legal or not. The plaintiff argues that geese force-feeding should be banned, since it constitutes animal abuse forbidden by law. In contrast, the respondents argue that the practice passes the legal test and should not be banned.

The issue is complex, the problem is complicated and the decision is not simple. It requires the creation of a multi-factorial system of balances, taking into account "the essence and importance of the conflicting principles, our perception of their relative superiority and the amount of protection we wish to grant to each principle or interest" (HCJ 448/85 *Dahar v. Minister of the Interior*). On the one hand lies the interest of protecting animals and their welfare. On the other hand lies the right of a person to use animals for his livelihood and welfare.

I read carefully and with much interest the comprehensive and thorough verdict of my colleague, Justice Grunis. Since I don't see eye to eye with my colleague with respect to some questions on the agenda, I would like to give my own personal discussion. I shall permit myself to refer to the material in my colleague's opinion whenever it is necessary for expressing my position.

The Duty to Protect Animals

2. The starting point for our discussion is the existence of a duty to protect animals. This duty is entrenched in Jewish tradition and in our legal system from old times. The Jewish law states that the prohibition of *Tsa'ar Ba'aley Haim* [animal suffering] is from the Torah [bible]: *"Tsa'ar Ba'aley Haim is from the Torah, and overrides later scholars"* (Shabat, 31, 1; 128, 2; see also A. S. Abraham, "Medical Experiments in Animals and in Humans" [Hebrew], *Asya* 10(2) (1984) 20 and references therein). The need to protect animals was described as "part of our culture and of an internal feeling, of value and utilitarian nature alike, concerning the duty and need to protect all that was created upon earth with a living spirit" (HCJ 6446/96

The Cat Welfare Society v. the Municipality of Arad (hereinafter, "**the Society Case**"). It was also said that "an enlightened society is measured not only by its treatment of humans, but also by its treatment of animals (explanatory notes to the Animal Welfare Bill, 1992 (hereinafter, "**Explanatory Notes**")).

It was further said that "the sense of compassion we feel towards an abused animal comes from a source deep in our heart, from our feeling of morality, a feeling shaken in face of an injury and harm to the weak and defenseless… Man is therefore ordered to protect animals as part of the moral order to protect the weak" (Justice M. Cheshin, in LCA 1648/95 *Let the Animals Live vs. Hamat Gader Recreation Industries* (hereinafter, "**the Crocodiles Case**")). Some argue that animals don't, by themselves, have values, and cannot be the object of human morality. And yet, they must be protected, and the reason for this is not necessarily a moral obligation, but rather the reflection of human compassion in animals:

> The reason for the prohibition of *Tsa'ar Baaley Haim* is compassion, and this reason, like any other feeling, finds in animals its human reflection, and this reflection is the factor that urges man not to cause suffering to animals (A. Ben-Ze'ev, "The Reason for the Prohibition of Causing Suffering to Crocodiles" [Hebrew], *Law and Government 4* (1988), 763, 780).

Some see protecting animals as part of "man's education, that man shall not become cruel, that cruelty and insensitivity shall not find **a** place in his soul", and part of the "educational objective of reaching human perfection" (Justice Goldberg in the Society Case, referring, in concordance, to the words of Justices Cheshin and Turkel in the Crocodiles Case). This view is reflected in studies that claim there is a link between cruelty to animals and violence to humans (see, for example, R. Lockwood, "Animal Cruelty and Violence against Humans: Making the Connection", *Animal L.*, 5 (1999) 82; L.S. Antoncic, "A New Era in Humane Education: How Troubling Youth Trends and a Call for Character Education are Breathing New Life into Efforts to Educate Youth about the Value of all Life", *Animal L. 9* (2003) 183)). In this respect, some believe that the struggle against animal suffering is not merely a fight over an interest of the animals, but also a reflection of human dignity and showing consideration to the feeling of fellow-humans who wish to protect animals (P. Lerner, "Thoughts on Feeding Street Cats – in the Aftermath of Criminal Case 897/01 State. v. Yorovsky" [Hebrew], *Justice* 16 (2003) 74, 83).

3. Under the roof of the theoretical basis for animal protection there is a wide spectrum of attitudes and perceptions. At one end of the spectrum of opinions are those who say that Man is the Master of the earth, and as such has the right to subordinate animals to his wishes and desires and use them for his needs (see: R. Descartes, "Animals are Machines", in: *Animal Rights and Human Obligations* (P. Singer & T. Regan Eds. (New Jersey, 1989) pp. 13-19; See also L. Letourneu, "Toward Animal Liberation? The New Anti-Cruelty Provisions and Their Impact on the Status of Animals" *Alberta L. Rev 40* (2003) 1041, 1042). At the other end of the spectrum of opinions are those who believe that animals have independent rights and inherent moral value. Therefore, these rights should not be violated and any "use" of animals as means for the advancement of human welfare is morally doubtful (see: E.L. Hughes & C. Meyer, "Animal Welfare Law in Canada and Europe", *Animal L. 6* (2000) 23, 33 ("Hughes & Meyer"); See also: T. Regan, "The Case for Animal

Rights", in: *Animal Rights and Human Obligations* (P. Singer & T. Regan (Eds.), New Jersey, 1989, pp. 105-114; L. H. Tribe, "Ten Lessons Our Constitutional Experience can Teach us about the Puzzle of Animal Rights: the Work of Steven M. Wise, *Animal L. 7* (2001), 1; Y. Wolfson, "The Status of Animals in Ethics and in Law" [Hebrew], *Law and Government 5* (2000), 551). Between these two ends of the spectrum are various intermediate beliefs and views. The common ground for all these views is acknowledging the interest of animal protection on the one hand, and the possibility that in some cases, this interest may withdraw in the face of human needs, on the other hand. These intermediate approaches are characterized by the attempt to find the right balance between the conflicting interests, although there is no agreement with respect to the balance point. Intermediate approaches are acceptable both to those who consider animals independent entities worthy of protection by their own right, and to those who do not consider animals to be independent entities, but argue that they should not be denied any protection (see, for example, D. R. Shmahmann & L. J. Polacheck, "The Case against Animal Rights for Animals", *B.C. Envtl. Aff L. Rev. 22* (1995), 747).

4. A prominent scholar among those who believe that the interests of any living creatures should be taken into account before reaching an ethical decision with respect to "using" it is Singer, whose theory is based on the philosophical school known as utilitarianism. In his view, the criterion which determines when we should take into consideration the interest of a living creature is not its level of intelligence, but its ability to experience suffering. The result of this view is that when reaching ethical decisions, it is necessary to give equal consideration to the interests of each individual – human or animal – who is capable of experiencing suffering (P. Singer, *Practical Ethics* (2nd Ed. Cambridge, 1993) pp. 57-58). Those cases where causing suffering to an animal will result in a utility that justifies causing it are, in his view, rare. And yet, even he acknowledges the fact that sometimes the interest of protecting animals shall withdraw in the face of human interests, other than food production (see: P. Singer, "Ethics and Animals", *Behavioral & Brain Sct. 13* (1990) 45, 46). Other approaches emphasize the wide recognition that animals are worthy of protection in their own right, due to their ability to experience suffering. Therefore, the use of animals by humans is acceptable, but must be balanced against the need for a humane treatment. And as the authors wrote:

> The approach in both Canada and Europe is *based on the utilitarian notion that human use of animals is acceptable, but should be balanced against the need for humane treatment.* There is, however, a broad spectrum of ideas as to what constitutes an acceptable balance between human and animal interests… Even if Western societies are not yet prepared to consider animal 'rights' (which is arguable), there has been a clear move away from a Cartesian view of animals as insensate property. There is broad acceptance of the notion that animals should be protected 'in their own right because they have a capacity to suffer (Hughes & Meyer, at p. 48). (Emphasis is mine – T. S.C).

<u>The Balance between Conflicting Interests</u>

5. Hence we see that in the complex issue before us, there is no agreement with respect to the status of animals and the amount of protection they deserve. Nonetheless, it is clear that the extreme views at either end of the spectrum do not represent the view accepted today by scholars in Israel and abroad, and are not

reflected in legislation and juridical decisions. One may say that the leading tendency with respect to this issue strives to reach the appropriate balance between the interest to protect animals and the right of Man to use them for his livelihood. Well said in this respect are the things included in a background document by the Canadian Ministry of Justice, published when procedures to amend clauses in the Canadian Penal Code that address animal abuse were on the agenda:

> … There is also a *broad spectrum of attitudes and opinions in our society about how people should treat animals.* Some people view animals as independent beings capable of feeling pain and emotion and therefore worthy of consideration in every way that people are, while others view animals as little more than machines or products to use in any way that benefits humans, regardless of the process. Falling somewhere *between these two extremes is the great majority who generally feel that it is acceptable to use animals in some circumstances and for some purposes, but that every reasonable effort should be made to reduce or eliminate unnecessary animal suffering and pain* (Dept of Justice Canada, *Crimes against Animals: A Consultation Paper* (1998) 3) (Emphasis is mine – T.S.C.).

6. Balancing between interests, as **a** means to decide in issues concerning conflicting rights, is not alien to our legal system. The starting point is that each of the conflicting interests is worthy of protection, and therefore, neither of them can be absolutely protected, while living the other without any protection. Hence, conflicting rights or interests are always relative, and not absolute. This relativity is based on the view that "values, principles and liberties are not of the same importance" (CA 6024/97 *Fredrike Shavit v. Hevre Kadishe Rishon Lezion*). The same applies to human rights underpinned by constitutional laws (see, for example, HCJ 2481/93 *Yosef Dayan v. Yehuda Wilk, Commander of the Jerusalem District*; CA 6821/93 *Hamizrahi Bank v. Migdal Cooperative Village*; LCA 7504/95 *Ganam Yassin v. "Yemin Israel";* HCJ 7015/02 *Kifah Mahmed Ahmed v. Commander of the Israeli Defense Army in the West Bank*), and the same applies to other interests. If human rights, protected by constitutional laws, are of **a** relative nature, all the more so is this the case when the interest of protecting animals stands against the interest of man to use them for his livelihood.

7. The circumstances under which the interest of protecting animals shall withdraw in the face of other interests cannot be defined or outlined in a precise manner. The position of human society with respect to animal protection is complex and is influenced by various theoretical approaches. It is "dependent upon the culture, the values and the view of each society and its individuals, and these may change with time, place and circumstances" (The Society Case). The culture, the values and the view of the society in which we live, reflected, among others, in legislation, in juridical decisions and in scholar writings, dictate the need to look for the balance point that necessitates taking all reasonable measures to prevent the suffering caused to animals, or at least to reduce it. These notions were reflected in my position in the Society Case, where I stipulated that when considering the right of local authorities to cull the population of stray cats, due to the sanitary risk they pose, "we must consider the right of animals to live" (Ibid). In my view, the right of animals to live leads to the inference that we also have the duty not to cause them unnecessary suffering while they are alive. And yet, I said there that this right is relative and may be modified for a

worthy cause. Thus, I ruled that under the circumstances, in light of the danger that rabies might be spread among humans, culling the cat population was justified.

The modern Israel legislation with respect to animals also adopts the principle of balances (it is to be mentioned, thought, that a series of legislative arrangements that view animals as property, reviewed by my colleague Justice Grunis, remains valid side by side with the modern laws).

The Animal Welfare Law

8. The law applicable in this case is the Animal Welfare (Animal Protection) Law, 1994 (hereinafter, "**the Animal Welfare Law**" or "**the Law**"). Of the other many pieces of legislation pertaining to animals, the most relevant to our case is the Animal Welfare (Animal Experimentation) Law, 1994 (hereinafter, "**the Experimentation Law**"). Indeed, the legislator gave the same explanatory notes to both laws, which were initially designed to be one law, and were subsequently separated into two. In the Explanatory Notes it was said that the Israeli arrangement with respect to animal experimentation is "the result of a compromise between those who oppose all animal experiments and those who believe that these experiments can be conducted without any controls. The proposed solution allows experiments to be conducted, but under controls and while attempting to minimize suffering as much as possible" (Ibid, p. 299).

The Experimentation Law does not prevent animal experiments. And yet, it stipulates a series of restrictions on the way experiments are to be conducted and on the conditions for performing them. The aim of these restrictions is to minimize the suffering of experimental animals. Among other things, the number of animals used in each experiment was limited; it was stipulated that experiments of certain types and for certain purposes must be licensed; and it was also ruled that "no license shall be given for an experiment on an animal if the purpose of the experiment can be obtained through reasonable alternative methods" (clause 9). Under the law, the Animal Welfare (Animal Experimentation) Rules, 2001 were issued. These contain detailed arrangements for husbandry, methods of experimentation, conditions for accrediting an employee as a qualified researcher, including training in the minimizing of animal suffering, etc. It was ruled that a license shall not be given for an additional experiment on the same animals "solely for the reason that the use of another animal entails a substantial expense" (clause 7) and more. The provisions of this law and the regulations issued under it have bearing on the issue before us, which concerns the Animal Welfare Law.

9. The Animal Welfare Law includes a series of prohibitions, the first of which is general in nature: "No one shall torture an animal, treat it cruelly or abuse it in any manner" (clause 2(a)). Later on, the law contains particular prohibitions of animal abuse, such as the prohibition against setting one animal on another (clause 2(b)), against organizing fight contests between animals (clause 2(c)), working an animal to exhaustion (clause 3(b)), and more. The general prohibition is not independent and is not absolute. The Law does not apply this system of prohibitions on certain uses of animals for human needs. Thus, clause 22(1) stipulates that the law shall not apply to "killing animals for human consumption". From this exemption we learn that despite the fact that killing an animal harms an interest that the law was designed to protect, the legislator balanced this interest against the subsistence needs of humans, and

reached the conclusion that the needs of human consumption override the animal's right for life. Similarly, clause 19 of the Law rules that "the Minister of Agriculture is responsible for implementing this law, and he may, with the approval of the Education and Culture Committee of the Knesset, while giving due consideration to the *needs of agriculture,* issue regulations to implement and achieve the aim of this law…" (Emphasize is mine – T. S.C.). This provision contains an internal system of balances. Although the Minister responsible for implementing the Law is the Minister of Agriculture, the regulations issued by him require the approval of the Education and Culture Committee of the Knesset. The mission of the later – it appears – is to guarantee that while issuing the regulations, due consideration is given to the interest of animal protection. The Law rules that the regulations shall be issued to enforce "and achieve the aim of this law" "while giving due consideration to needs of agriculture". These needs may, from their very nature, stand in conflict with the interest of animal protection. Hence the problematic nature of the issue that lies before us.

Purpose of Animal "Use" vs. Prohibition of Abuse

10. How should we interpret the general and overriding ordinance in clause 2(a), which prohibits animal abuse, and how should we reconcile it with the consideration given to "needs of agriculture"? The wording of the clause is unequivocal. It prohibits any type of torture, cruel treatment and animal abuse (hereinafter jointly, "**abuse**"). The difficult question that we need to answer is what kind of behavior constitutes animal abuse? Does any case where someone causes suffering to an animal constitute abuse, in the sense alluded to by clause 2(a) of the Law? In order to answer this question, it is not enough to look at the language of this clause, since the work of interpretation starts with the language of the law, but never ends with it. The purpose of interpretation of a law is to give it the meaning that fulfills its aim in the best manner (HCJ 693/91 *Efrat v. Head of Population Registry*). For this reason, "the interpretation is performed against the background of its legislative environment, which includes other provisions in the same law and in other laws pertaining to the same issue… As well as the whole system of accepted principles, primary goals, values and interests that a legal norm in the same legal system reflects and was designed to achieve" (CrimA 2947/00 *Abraham Meir v. the State of Israel*; See also CA 165/82 *Kibbutz Hazor v. Assessing Officer Rehovot*; A. Barak, *Interpretation in Law – Interpretation of Legislation* [Hebrew] (vol. 2, 1993, 341-343). In our case, examination of all these factors leads to the clear conclusion that the accepted approach in our legal system requires a balance between the interest of animal protection and other worthy social values. The Court took this approach in the Crocodiles Case and ruled that in order to determine whether causing suffering to an animal constitutes abuse, a balance between the amount of suffering caused to the animal, the purpose of causing the suffering and the means to obtain this purpose must be reached. As we hear from Justice Cheshin in the Crocodiles Case:

> … After ruling that one caused an animal suffering and torments that *may* constitute torture, cruel treatment or abuse, we must examine and find out *what was the purpose* for which one did what he has done, and does this purpose reflect a worthy social value? Where we find that the purpose is worthy, we shall continue to examine whether the *means* which one took are worthy**.** And finally: Is there a *balance* between the suffering and torments endured by the animal and the purpose and

> means? Does it pass the *Proportionality* test? (Ibid; Emphasis in the source)

See also HCJ 9374/02 *Let the Animals Live v. Brigadier General Dr. Giora Martinovitch, Chief of Medical Corps*, clause 6 of Justice Barak's verdict.

We hear similar things from Justice Hawkins in the case of *Ford v. Wiley*:

> … The legality of a painful operation must be governed by the necessity for it, and even when a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable that the object should be abandoned rather than that disproportionate suffering should be inflicted (*Ford v. Wiley* (1889) 23 QBD 203, 220)

See also the verdict of the Québec Court of Appeals in Canada in the case of *R. v. Menard:*

> Thus men… do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of means employed (*R. v. Menard* [1978] 43 C.C.C. (2nd) 458, 46)**.**

11. One can find analogies between the approach taken by Court in the Crocodiles Case, i.e., employing tests of purpose and proportionality, and the principles guiding the Court when balancing between a constitutional human right and other right, or between it and public values, principles and interests that may justify modifying this right. The tests for reaching the balance, as set in the constitutional laws, are the *purpose of modifying the right* and the *proportionality* of the means to attain this purpose (see HCJ 5016/96 *Lior Horev v. Minister of Transportation; Barak*, p. 388). These tests are similarly used by the Court to balance not only between human rights, but also in other cases, including the present case. Within this framework, tests of purpose and proportionality are used not just to rule whether harming the interest of animal protection is justified and hence legal, but also to define the scope of the interest itself, that is to say, "Suffering and torments, which may constitute abuse, <u>are not abuse</u> if done for a purpose which reflects a worthy social value" (The Society Case, Emphasis is mine – T. S. C.).

<u>"Needs of Agriculture" and Protection of "Farm Animals"</u>

12. This appeal raises the intrinsic and acute tension between the interest of animal protection and the use for which animals are employed in intensive agricultural industries that rear animals for human consumption. The question of the applicability of the Animal Welfare Law on agricultural practices – in this case, the practice of force-feeding for goose liver production – has not been discussed yet in this Court and clause 2(a) of the Law has not yet been interpreted in this context. Ruling in the question before us necessitates answering complex normative questions.

However, once the question was put before us, we must rule in the same manner where the Court is required to reach morally and legally difficult decisions (see for example CFH 2401/95 *Ruthy Nahmany v. Daniel Nahmany;* HCJ 2458/01 *New Family v. the Committee for Approval of Surrogate Mothers' Agreements, Ministry of Health*). We shall be assisted by the verdict of this Court that paved the way for the interpretation of clause 2(a) of the Law with respect to the use of animals for entertainment purposes (the Crocodiles Case). I shall therefore refer to the scope of applicability of the Animal Welfare Law.

Does the Animal Welfare Law apply to the process of rearing farm animals? The answer to this question is not readily clear. The Law exempts, as already said, "killing animals for human consumption". It could therefore be argued that if killing an animal is not controlled under the Law, then also the rearing of an animal that will eventually be slaughtered and eaten is not controlled. I disagree with this view. And why? With the exception of killing animals for human consumption (and animal experiments which are regulated by the Experimentation Law), the Law does not include any further exemptions. This teaches us that the Law applies to rearing animals for human consumption and for other purposes. Furthermore, the fact that the law exempts killing animals for human consumption, as well as the fact that farm animals are doomed to die at the end of the rearing process, does not justify, in itself, that up to the act of killing, the animal's life shall be one of continuous suffering. Moreover, had the Law not applied to farm animals, it would not have included, in clause 19, the requirement to consider "needs of agriculture" while issuing regulations under the Law.

Comparative Law

13. Another question arising from the conclusion that the Animal Welfare Law applies to rearing farm animals for human needs is whether the prohibition in clause 2(a) should be interpreted in such a manner that would allow defining established agricultural practices as abuse? Taking the comparative approach, two main tendencies emerge with respect to the applicability of animal protection laws on agricultural practices. One tendency, dominant in the USA and Canada, exempts established agricultural practices from the applicability of animal protection laws. In the USA, where most animal protection is regulated by state legislation, 30 states exclude accepted animal husbandry practices from the applicability of the Law (for a review of American State legislation with respect to animal protection, updated to 1999, see: P.D. Frasch, S.K. Otto, K.M. Olsen & P.A. Ernest, "State Animal Anti-Cruelty Statutes: An Overview", *Animal L. 5* (1999) 69; A.N. Rowan, H. O'Brien, L. Thayer & G.J. Patronek, *Farm Animal Welfare – the Focus of Animal Protection in the USA in the 21st Century* (Tufts Center for Animals and Public Policy, 1999) 57-61 (hereinafter, "**Rowan**")). Provisions that exclude established agricultural practices from the applicability of animal protection laws are also included in Canadian state legislation (see, for example, clause 24 of the Prevention of Cruelty to Animals Act of British Columbia, R.S.B.C., ch. 372 § 24(1)-24(2); clause 2(2) of the Animal Protection Act of Alberta, R.S.A., CH. A-41 (2000) (Can.); and clause 11(4) of the Animal Cruelty Prevention Act of Nova Scotia, S.N.S., ch. 22 § 11(4)). The fact that these provisions are included in the law indicates that in the absence of these provisions, those "established" and "reasonable" practices might be regarded as animal abuse. The problem with this approach is that it may allow cruel practices that are not performed for a worthy purpose, or practices that cause disproportional

suffering, without any fear of sanctions (see: D.J. Wolfson, "Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food Production", *Animal L. 2* (1996), 123, 132).

14. A different tendency, dominant in Europe and in other countries, emphasizes animal welfare. This approach does not exempt agricultural practices from animal protection laws, but sets specific legislative arrangements, including rules as to the implementation of various agricultural practices. Such legislative arrangements, based largely on scientific studies – 70% of which are produced by European research (Rowan, p. 6) – reflect the manner in which the balance required by the legislator there is reached. In England, rules as to the husbandry of farm animals were set, including detailed arrangements with respect to specific farm animals (The Welfare of Farmed Animals (England) Regulations 2000 (hereinafter: "**the English Regulations**"); The Welfare of Farmed Animals (England) (Amendment) Regulations 2002). Similarly, the Swiss Animal Protection Ordinance contains general provisions concerning the husbandry, rearing and treatment of farm animals, including specific arrangements for particular animals (Swiss Animal Protection Ordinance, 1981 (hereinafter, "**the Swiss Ordinance**") and also the Swiss Federal Act on Animal Protection, 1978). Similar arrangements exist in Germany, Denmark, Norway, Finland, Iceland, Sweden and the Netherlands (see Rowan, p. 64). As for the supra-national European framework, including a 1976 Convention, a 1998 Directive and 1999 Recommendations, these were thoroughly reviewed by my colleague, and I shall refer to them later.

15. The New Zealand Animal Welfare Act, 1999 contains general provisions concerning animal protection, and arrangements for the development of Welfare Codes, designed to set minimal standards for the treatment of animals and relevant recommendations. And here is the wording of one of the Codes:

> "Welfare Considerations are becoming increasingly important for the keeping and farming of animals, both in New Zealand and internationally. Practices which may once have been deemed acceptable are now being reassessed and modified according to new knowledge and changing attitudes. High standards in animal welfare are not only important legally, but also have direct economic benefits by enhancing productivity and facilitating international market access" (Recommendations and Minimum Standards for the Welfare of Pigs – Code of Animal Welfare No. 13 (November 1999))

An Animal Welfare Advisory Committee (AWAC) is responsible for development of Codes, which are published by the Minister of Agriculture, following a public consultation process. Under the law, a long series of Animal Welfare Codes have been developed, including Codes concerning specific farm animals. Violation of the provisions of the Codes is not considered, in itself, violation of the provisions of the law, but it constitutes an evidential presumption to the existence of such a violation. Similarly, following the provisions of the Welfare Code constitutes good defense to those charged with a violation of the New Zealand law (see: Guide to the Animal Welfare Act – Code of MAF Policy Information Paper No. 27 (December 1999) 12). It is interesting to note that in countries where rules to enhance the welfare of specific

animals were set, the practice of geese force-feeding is not mentioned. It may arise from the fact that this practice does not exist in these countries.

In the case of farm animals, it appears that the Israeli approach resembles the European and the New Zealand legislation more than the American-Canadian legislation. This approach does not ignore the need to provide protection and welfare to farm animals subjected to agricultural practices, but it outlines a clear framework of action for those who rear farm animals for food, and allows flexibility which enables the legislator to adjust the rules and to change them in light of cumulative scientific knowledge and changing social perceptions.

"Needs of Agriculture", Practice of Force-Feeding

16. Clause 2 (a) of the Law reflects the protection afforded to animals, while clause 19 stipulates that when issuing regulations intended to achieve the aim of the law, the Minster must consider "needs of agriculture". The phrase "needs of agriculture" embodies the public interest in the existence and development of agriculture, including the production of animal food. Clause 19 of the Law gives the secondary legislator (hereinafter, "**the legislator**") a tool to concretize the balance between the aim of the Law and "needs of agriculture", through regulations.

How should we interpret the phrase "needs of agriculture"? Although "needs of agriculture" do not necessarily overlap farmers' needs, the phrase constitutes a framework wide enough to include both needs of agriculture and farmers' needs, that have an interest in the continued existence of an agricultural industry on which their livelihood is based, which is also a public interest. As for the relation between clause 19 and the provision about prohibition of abuse, as set in clause 2(a) of the Law, I believe, as my colleague Justice Grunis believes, that "needs of agriculture should not be ignored when interpreting the meaning of the three terms – torture, cruel treatment and abuse", that is to say, causing suffering to a farm animal shall not constitute abuse as defined in clause 2(a) if "needs of agriculture" justify causing the suffering. And yet, in my view, "needs of agriculture" do not override the interest of animal protection in a sweeping manner, and not all suffering caused to animals should withdraw when confronting "needs of agriculture". Long established agricultural practices are not immune from the applicability of clause 2(a) of the Law, although they may indicate legitimacy granted to them by society.

The conclusion of the above is that in any given case, the essence of "needs of agriculture" at stake should be examined vis-à-vis the suffering caused to animals, the type of suffering, its intensity, etc., and by these it shall be determined if the practice of force-feeding is legal or not.

17. There is no real controversy with respect to the fact that the practice of force-feeding causes suffering to the geese. There is also no controversy that where this practice is used, it sustains an agricultural industry designed to produce food for humans. Hence the difference between some countries that give more weight to goose welfare and ban the practice, and other countries that give more weight to human needs, and allow the practice. My colleague described the process of force-feeding and the suffering caused to the goose. I shall summarize the things and say that during force-feeding, the goose is prevented from eating freely and is forcefully fed several times a day with high energy food and in quantity far above its physiological

requirements. The process – whereby a metal tube, through which the food is packed into its stomach, is introduced into the goose's body – is violent and harmful. The process causes a degenerative disease in the goose's liver and enlargement of the liver up to ten times its normal size. There is no controversy that without the injury to the goose liver, it is not possible, at present, to produce goose liver (see the words of Dr. Almagor, the Controller of Animal Welfare at the time the regulations were issued (hereinafter, "**the Controller**"), in the protocol of the hearing before the Education and Culture Committee of the Knesset on 31st October 2001; *Background Document for Hearing on Animal Welfare (Geese Force-Feeding) Regulations,* Research and Information Center in the Knesset (hereinafter, "**Background Document**")). My colleague refers to the report by the Council of Europe's Scientific Committee on Animal Health and Animal Welfare, published on 16th December 1998. This report discusses at length the practice of force-feeding, while reviewing and analyzing the scientific knowledge that existed up to the day of its writing, with respect to geese force-feeding. The report also examines the influence of force-feeding on geese welfare, using various indicators, such as state of health, productivity, physiological condition and behavior (clauses 1.2-1.4 of the report). My colleague adopts the report's conclusion that the process of force-feeding causes suffering to the goose, and I also agree with this conclusion. However, my colleague says he was unable to find in it unequivocal conclusions. Indeed, the report states that the present scientific knowledge about the effects of force-feeding on geese is not perfect, and that in some instances, the results of studies are inconclusive, but despite all this, the report's unequivocal conclusion is that the practice of force-feeding harms geese welfare. As stated in the report:

> "The Scientific Committee on Animal Health and Animal Welfare concludes that force-feeding, as currently practiced, is detrimental to the welfare of the birds" (Ibid, at Sec. 8.2) .

Comparative Law: the Practice of Force-Feeding

18. The variety of attitudes and opinions are manifested in reality, as some European countries allow the practice of force-feeding (see clause 2 in the Report of the Scientific Committee, where France, Spain and Belgium are mentioned as countries where the practice exists). Along these lines are the Recommendations of the European Convention's Standing Committee, where geese force-feeding was not banned in those countries where this practice is established, but provisions and guidelines as to measures to be taken in order to reduce geese suffering were set (see below). In contrast, some countries ban force-feeding of animals or stipulate provisions as to the manner animals are to be fed. Thus, for instance, the law in Norway prohibits force-feeding of animals (The Welfare of Animals Act of 20th December 1974 No. 73 § 8 (4)). Thus, according to the Background Document, Germany, Austria, Denmark, the Czech Republic, Poland and Luxembourg banned force-feeding (see also the letter of the Minister of Environment to the Attorney General, 24th September 2000). The material suggests, although not unequivocally, that in those countries where force-feeding was banned, the practice did not exist prior to legislation banning it. General provisions with respect to conditions and restrictions on animal feeding are to be found, for example, in clauses 22-24 of the English farm animals Regulations; in clause 5 of the Irish Protection of Animals Kept for Farming Purposes Act (1984 § 5); in clauses 1 and 2 of the Swiss Ordinance**;** and in clauses 3 and 4 of the Swedish animal protection law (Swedish Code of Statutes, SFS 1988:

534). The European Convention contains general provisions with respect to farm animal husbandry, with no detailed reference to geese force-feeding. It stipulates, among other things, that animals shall be kept for farming purposes only if it can be expected that they can be kept without detrimental effects on their health or welfare (clause 3 of the Convention). Clause 6 of the Convention states that animals must not be provided with food in a manner which may cause them unnecessary suffering or injury. A similar provision is included in clause 14 of the annex to the Directive.

19. The Convention's Standing Committee wrestled with the problem, discussed geese force-feeding and its problematic nature, and published its Recommendations in 1999 (Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes – Recommendations Concerning Domestic Geese and Their Crossbreeds) (hereinafter, "**The Recommendations of the Standing Committee**" or "The **Recommendations**"). The Standing Committee did not recommend cessation of the practice of force-feeding in countries where it exists. Nonetheless, the Recommendations refer to the need to safeguard the welfare of geese and to reduce their suffering in those countries where the above-mentioned practice takes place. Clause 17 of the Recommendations states, among other things:

> "All geese shall have appropriate access to adequate, nutritious, balanced and hygienic feed… *Methods of feeding and feed additives which cause distress, injury or disease to the geese or may result in the development of physical or physiological conditions detrimental to their health and welfare shall not be permitted"* (Emphasis is mine – T.S.C.)

The Recommendations contain detailed instructions with respect to the equipment to be used, veterinary care of geese, the manner in which they are to be kept, their rearing and feeding prior to force-feeding, and supervising all these. The Scientific Committee recommends that countries that allow goose liver production shall encourage scientific research concerning the effects of the process of force-feeding on animal welfare, and concerning alternative methods for goose liver production, without force-feeding (clause 25(1)). The Committee rules that until new scientific evidence on alternative force-feeding methods and their effects on animal welfare is collected, the practice of force-feeding shall continue only in those places where in existed prior to the publication of the Recommendations.

<u>The Law and the Regulations</u>

20. The problematic nature of the practice of force-feeding, vis-à-vis the provisions of the Animal Welfare Law, was noted by the Israeli legislator, and in 1999, close to the date when the Recommendations of the Standing Committee were published, the Ministries of Justice and Agriculture held consultations on "the right way to deal with the problematic nature of geese force-feeding" (clause 23 to the response of respondents 1 and 2). Subsequently, the Director of Veterinary Services at the Ministry of Agriculture (hereinafter, "**the Director**"), Dr. Oded Nir, appointed a committee, which submitted its recommendations on March 2000. The committee recommended the adoption of the European decision, i.e., to freeze the industry by limiting production to those farms already practicing liver production and by "setting binding provisions that would guarantee minimal suffering during force-feeding, by regulations issued under the law" (clause 25 to the response of respondents 1 and 2).

The Education and Culture Committee of the Knesset held two comprehensive hearings on the text of the regulations presented by the Minister of Agriculture, and after introducing some changes, the Committee approved the Animal Welfare (Animal Protection) (Geese Force-feeding) Regulations, 2001 (hereinafter, "**the Force-Feeding Regulations**" or "**the Regulations**"). The Regulations were designed to regulate the practice of force-feeding in Israel's goose liver production industry. The fact that the Regulations are oriented towards the European arrangement is explicitly stated in clause 1 of the Regulations, the Purpose clause, which says:

> "The aim of these regulations is to prevent geese suffering during their force-feeding for goose liver production, and to freeze the goose liver industry in Israel, *all in the spirit of the Recommendations of the Council of Europe's Standing Committee working under the European Convention for the Protection of Animals Kept for Farming Purposes"* (Emphasis is mine – T. S. C.)

Clause 7 of the regulations states that "no one shall operate a geese force-feeding facility that did not exist before these regulations came into force, and shall not expand an existing force-feeding facility". Clause 8 of the regulations sets a prison sentence of 6 months or a fine (or both) to one who violates the provisions of clause 7. Clause 4 of the regulations prohibits the operation of a force-feeding facility unless "its workers are competent in handing geese, the facility has enough employees, and the workers are competent to evaluate the health status of the geese and to understand changes in their behavior". In clause 5, the regulations give instructions with respect to the force-feeding regime, including restrictions on geese age, their weight and the manner of force-feeding (minimal weight and age at which a goose shall be put into the force-feeding facility; the material of which the force-feeding tube shall be constructed, its length and diameter; the amount of food to be force-fed to the goose daily during the force-feeding period, etc **.**) and also instructions on the timing of geese slaughter (clause 6 of the regulations).

21. The regulations did not ban geese force-feeding. And yet, as already said, the regulations banned the establishment of new geese force-feeding facilities or the expansion of existing force-feeding facilities. In this the legislator testifies that he is not content with the existing practice and he does not wish it to expand. And yet, the legislator is aware of the existence of the practice as an established agricultural industry in Israel, and in an attempt to consider "needs of agriculture", while fulfilling the duty to protect animals, the regulations contain provisions designed to allow geese force-feeding without constituting abuse, which is forbidden by clause 2(a) of the law. Therefore, the regulations were issued in an attempt to find the right balance between the interest of animal protection and "needs of agriculture", which are perceived as needs worthy of consideration.

According to the plaintiff, the regulations are to be annulled, since they contradict the law. In this context, the plaintiff argues that in issuing the regulations, respondent 2 exceeded his authority. It was not argued, and rightly so, that the procedure of issuing the regulations was defective. It was argued that respondent 2 exceeded his authority since his authority is restricted to issuing regulations only for achieving the aim of the law, that is to say, to "prevent" animal suffering. This argument does not truly reflect the purpose of the law and the authority to issue

regulations under it. The legislator set, contrary to the prohibition of animal abuse, the interest of "needs of agriculture", which should be taken into account when animal welfare is considered. It appears that the legislator asked to embody in the regulations the required balance between the interest of animal protection and "needs of agriculture". Hence, for example, the decision to freeze the industry and to set operative provisions concerning the process of force-feeding. So too in the decision to restrict the validity of the regulations for three years, in order to appraise developments in the industry and assess accumulative scientific knowledge. In these respects, it cannot be argued that the regulations were issued in excess of authority. Furthermore, I am aware of the fact that there are differences of opinion with respect to the substance and amount of suffering associated with goose liver production (the position of the Director versus the view of the Controller, as reflected in the protocol of the hearings before the Education and Culture Committee of the Knesset). And yet it appears that there is no controversy with respect to the fact that the geese indeed suffer during force-feeding. I am also aware of the fact that it would be problematic to define a practice – supported by the authorities for years – as an abuse and thus to stain it as a criminal offense, as pointed out already by my colleague Justice Grunis. Despite all this, I reached the conclusion that after viewing the picture as a whole, the regulations do not stand the "abuse prohibition" test of the law. What does this mean?

22. The force-feeding regulations were supposed to define the means to achieve the aim of the law, which in its basis is the prevention of animal abuse. The regulations testify that they were designed to prevent geese suffering, by stating: "The aim of these regulations is to prevent geese suffering during force-feeding for goose liver production". It is obvious that the regulations don't achieve this goal. The means they employ cannot prevent the suffering caused to the goose. Even if one should be satisfied in reducing the suffering, the arrangement contained in the regulations is far from attaining this goal and far from living up to the prohibition on animal abuse, as set by the law. Indeed, it appears that the regulations were issued in order to advance the aim of the law. They include various requirements which could potentially improve and better the situation as compared with the situation before. But the provisions in the regulations are not enough to reach the appropriate balance between the conflicting interests. We heard and read descriptions of the process of force-feeding about which there is no controversy, and we watched the video films that did not "speak" in one voice. Even when we consider needs of agriculture – and these were clarified by my colleague – the regulations must still reflect the price society is willing to pay by harming geese welfare in order to produce the delicacy known as goose liver. The current price is too high. The regulations employ means that seriously harm the interest of animal protection, and consequently, they do not reflect a right proportion between the advantage to "needs of agriculture" and the harm to animals allowed under these regulations. They partially stand the test of rational correspondence between means and their purpose, but they don't suffice to stand this test. They don't set the means that cause reduced harm, and they do not stand the test of proportionality with respect to the relation between profit and damage (see for example HCJ 3477/95 *Yisrael Ben-Atya v. Minister of Education, Culture and Sports*; HCJ 3648/97 *Yisrael Stamka v. Minister of the Interior*; HCJ 4769/95 *Ron Menahem v. Minister of Transportation*).

23. Examination of the relation between the profit arising from geese force-feeding (goose liver production) and the harm they suffer during force-feeding

necessitates a discussion on the aspects of the advantage arising from goose liver production. Indeed, as my colleague said, "the purpose of food production should have more weight than entertainment, [the Crocodiles Case], surely when the law specifically ordered that needs of agriculture must be taken into account". And yet, the more that "food production" is required to supply the living needs of humans, the more weight it will have. Hence basic foods and luxury foods should not be considered the same. Unlike my colleague, I don't believe that one should totally ignore the distinction between different kinds of foods according to a scale of necessity. This is particularly true when the food concerned is a delicacy and is produced through a practice associated with severe suffering to animals. This notion is reflected in the Animal Experimentation Law, designed to allow experiments for human health needs, that does not allow conducting experiments for any purpose. Indeed, one should consider the legitimate interest of farmers in preserving their livelihood within an industry promoted by the authorities. But this interest cannot automatically override the conflicting interest of protecting animal welfare. The legislator considered both interests, but it appears that he didn't give each of them the right weight, both with respect to the internal balance of each one and in the external balance of the one against the other. One received too much weight, the other too little.

The Regulations and the Recommendations of the Standing Committee

24. The regulations state that they were issued "in the spirit of the Recommendations of the Standing Committee appointed by the Council of Europe under the European Convention for the Protection of Animals Kept for Farming Purposes". But the regulations don't include all those recommendations of the Committee that express their spirit. While the recommendations determine that countries that allow goose liver production should encourage research into geese welfare and the development of alternative means for goose liver production, without force-feeding, the Force-Feeding Regulations don't refer to this aspect (see Background Document, p. 6). The respondents didn't indicate that measures are being taken to improve the current situation existing under the regulations, or to enforce it in reality, except for the claim that there is a plan to enforce the existing regulations. Thus, for example, the regulations don't refer to the veterinary treatment the geese shall be given daily, and in cases of distress; to the environmental conditions under which the geese are to be kept (lighting, temperature, humidity, cleanness, etc .); to the way the geese are to be reared and fed prior to force-feeding, etc. With respect to the equipment used in force-feeding, regulation 5(2)(a) stipulates that "a goose shall be force-fed only with a pneumatic machine", instead of traditional mechanic methods. During the discussions and hearings on the text of the regulations, it was indeed argued that the use of a pneumatic machine reduces geese suffering (see the words of the Director in the protocol of the Education and Culture Committee of the Knesset of 31st October 2001). However, clause 5.3 of the report of the Scientific Committee, which discussed this issue at length, states explicitly that no difference was found between the pneumatic method and the manual-mechanical method with respect to their effect on geese welfare. This position was also supported by the expert on behalf of the plaintiff, Dr. Martin Cooke. The regulations limit the period of force-feeding to 24 days, while the report of the Scientific Committee, after reviewing the situation in Europe, states in clause 3.2 that the force-feeding period for geese is between 15 and 18 days and up to 21 days. Clause 4 of the regulations, supposedly designed to define the qualifications of the worker in a force-feeding facility, is vague

and does not provide any real criterion to examine the qualifications and competence of a worker, or to determine the required number of workers. In light of the fact that the regulations prima facie derive the arrangement set in them from the Recommendations, the unavoidable conclusion is that the omission of a considerable part of the Recommendations from the regulations also indicates that the regulations don't stand the test of choosing the means that cause reduced harm.

Conclusion

25. All that was said above leads to the conclusion that the regulations suffer a material fault. The question is whether this fault is substantial enough to bring about their annulment within the framework of juridical review the Court applies to secondary legislation**.** My colleague Justice Grunis insists – and I agree – that the Court shall interfere in secondary legislation approved by one of the Knesset's committees only rarely, and that the Court shall not interfere in such legislation lightly. And yet, one should note that secondary legislation is not immune from juridical review, even if granted parliamentary seal (see, for example, HCJ 491/86 *Municipality of Tel Aviv v. Minister of the Interior;* HCJ 4769/90 *Amer Salah Zaydan v. Minister of Labor and Welfare* (hereinafter, "**the Zaydan Case**"); CA 2313/98 *Minister of Trade and Industry v. Mincol*). Secondary legislation can be annulled when it deviates substantially from fulfilling the aim of the law (the Zaydan Case; HCJ 389/80 *Golden Pages Ltd v. the Broadcasting Authority*). This is the case with respect to the geese force-feeding secondary legislation.

I examined carefully all the facts before us. I considered all aspects involved in the complex issue on the agenda, taking into account the views of scholars in different disciplines, the legal situation in various countries and in the international community, the legal situation in Israel and the extra-legal questions rising with respect to this issue, and I reached the conclusion that the provisions of the regulations that deal with the force-feeding process are in substantive deviation of fulfilling the aim of the law, and must therefore be annulled. Nonetheless, one should consider the complexity of the issue and the implications of annulling the regulations and banning force-feeding, as practiced according to the regulations, on the goose liver industry in Israel and on those who earn their living from it. All these necessitate allowing the respondents, or some of them, time to re-examine the issue, in all its aspects, before the annulment comes into force. A situation where a "legislative void" is created by an immediate annulment of the regulations must be avoided (see HCJ 1715/97 *Chamber of Investments Brokers in Israel v. Minister of* Finance (hereinafter, "**the Investments Brokers Case**")).

26. This approach is part and parcel of the school of "relative invalidity" or "relative consequence" that has long become established in the verdicts of this Court. This school provides a tool of legal approach which the Court employs "while considering the circumstances of the given case and examining the possible implications of the probable alternative rulings, all in an attempt to reach, as much as possible, a practical result that does relative justice to all those who may be influenced by the ruling" (HCJ 10455/02 *Boaz Alexander Amir v. the Bar Association*). One of the expressions of the relative invalidity school is the option of suspending a ruling of annulling a piece of legislation for a period of time whereby the legislator shall amend the current situation, although it is illegal:

> "Even when the fault in an arrangement or provision necessitates its annulment, the annulment shall not necessarily be immediate, even when the provision concerned is in regulation or in law. Annulment by Court may, in such case, be in the future (prospective). In other words, *the court may declare that the arrangement or provision be annulled at a certain time in the future, as ordered by Court, and until this time, the arrangement or provision, although faulty, shall remain valid. Such future declaration is given, in the appropriate cases, since the balance between the various relevant considerations, including considerations of the rule of law, the public interest and the damage to those concerned, leads to the conclusion that it is appropriate that the current situation, although illegal, shall continue for a while, until amended as necessary.* This is one expression of the relative invalidity school" (Justice Zamir in HCJ 551/99 *Shekem Ltd v. Director of the Customs and VAT*) (Emphasis is mine – T.S.C.).

According to the relative invalidity school, "the question of when the annulment declaration shall apply is at the discretion of the Court. The Court may grant the annulment a retroactive (or retrospective), an active or prospective effect", even when employing juridical review on the constitutionality of primary legislation (*Barak*, p. 749). Thus, in the Investments Brokers Case, this Court suspended the annulment of a provision in primary legislation due to lack of proportionality, for a period during which the legislator can establish his position anew (Ibid, pp. 415-417; see also HCJ 6652/96 *Association for Civil Rights in Israel v. Minister of the Interior*). If this applies to primary legislation, all the more so to secondary legislation approved by a committee of the Knesset.

27. Therefore I propose to accept the appeal and to rule that the provisions of the regulations, with respect to the force-feeding procedure, be annulled and that the practice of force-feeding, according to the regulations, be banned. And yet, the decision, with respect to annulment of the regulations and banning the use of the above mentioned practice, shall be suspended until 31st March 2005. The regulations, which are supposed to expire on 11th March 2004, shall remain valid until the day of their expiration or until another day within the period of suspension, should their validity be extended.

During this period, all relevant factions shall wrestle with the problem and consider the appropriate policy with respect to geese force-feeding. In this context, the development of the industry in Israel and in other countries shall be examined; the 2004 activities of the European Standing committee, expected to re-examine its position concerning the practice of geese force-feeding, shall be followed-up; and up-to-date information on this issue will be collected. If it is decided to allow the goose liver industry to continue and exist, the legislator would have to issue regulations that would guarantee the use of means that would substantially reduce the suffering caused to the geese, as compared with the practice set by the present regulations. Also, procedures of control and inspection of force-feeding should be established, to ensure full, exact and constant implementation of the regulations, as long as they remain valid during the suspension period and of any legislative arrangement that would replace them.

Justice (retired) [T. Strasberg-Cohen]

Justice E. Rivlin:

I read carefully the comprehensive verdicts of my colleagues, Justice T. Strasberg-Cohen and Justice A. Grunis. I cannot add to their thorough reviews. With respect to the issues where they disagree, I adopt the view of my colleague Justice T. Strasberg-Cohen. Hence, I join her verdict.

As for myself, there is no doubt in my heart that wild creatures, like pets, have emotions. They were endowed with a soul that experiences the emotions of joy and sorrow, happiness and grief, affection and fear. Some of them nurture special feelings towards their friend-enemy: man. Not all think so; but no one denies that these creatures also feel the pain inflicted upon them through physical harm or a violent intrusion into their bodies. Indeed, whoever wishes to may find, in the circumstances of this appeal, prima facie justification for the acts of artificial force-feeding, justification whose essence is the need to retain the farmer's source of livelihood and enhance the gastronomic delight of others; in paraphrase on the text (Job, 5:7), the justifier shall say that it is appropriate that the welfare of man shall ascend even at the cost of trouble to the sparking birds. But this has a price – and the price is reducing the dignity of Man himself.

Like my colleague Justice Strasberg-Cohen, I also think that the regulations concerning the force-feeding procedure are to be annulled, and the acts of artificial force-feeding, as allowed by the regulations, are banned.

Justice [E. Rivlin]

Ruled by majority opinion, as stated in the verdict of Justice T. Strasberg-Cohen.

Today, 11th August 2003.

Justice (retired) Justice Justice