HCJ 746/07

1. Naomi Ragen

2. Mor Lidor

3. Tali Goldring

4. Eliana Avitzur

5. Efrat Kfir

6. Center for Jewish Pluralism – Israel Movement for Progressive Judaism (Registered NPO)

v.

1. Ministry of Transport

2. Egged Israel Transport Cooperative Society Ltd.

3. Dan Public Transportation Co. Ltd.

Amici Curiae

1. Betzedek – the American-Israeli Center for the Promotion of Justice in Israel

2. Kolech: Religious Women's Forum

3. Ne'emanei Torah Va'Avodah Movement

4. Yaacov Herzog Center

5. Yerushalmim Movement

The Supreme Court sitting as the High Court of Justice

[November 21, 2010**]**

Before Justices E. Rubinstein, S. Joubran and Y. Danziger

Israeli legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992

Civil Wrongs Ordinance [New Version]

Prohibition of Discrimination in Products, Services and Entrance into Places of Entertainment and Public Places Law, 5761-2000, & ss.3(a), 3(d)(3)

Transport Regulations, 5721-1961, reg. 455

Israeli Supreme Court cases cited:

[1] HCJ 217/80 *Segal v. Prime Minister* [1980] IsrSC 34(4) 409.

[2] HCJ 806/88 *Universal Studios Inc. v. Council for Censorship of Films and Plays* [1989] IsrSC 43(2) 22.

[3] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1.

[4] CrimA 10828/03 *Najjar v. State of Israel* (unreported).

[5] HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [1999] IsrSC 53(5) 337.

[6] PLA 4201/09 *Raik v. Prison Service* [unreported, 24.3.2010].

[7] HCJ 953/01 *Solodkin v. Beit Shemesh Municipality* [2004] IsrSC 58(5) 595.

[8] CA 6024/97 *Shavit v. Rishon Le-Zion Burial and Charitable* Society [1999] IsrSC 53(3) 600.

[9] HCJ 3267/97 *Rubinstein v. Minister of Defense* [1998] IsrSC 52(5) 481.

[10] HCJ 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religious Affairs* [2003] IsrSC 57(5) 485.

[11] HCJ 7052/03 *Adalah v. Minister of the Interior* [unreported, 14.05.2006].

[12] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [unreported, 11.05.2006].

[13] HCJ 1067/08 *"Halakhic Youth" Society v. Ministry of Education* (not yet reported).

[14] HCJ 5079/97 *Israel Women's Network v. Minister of Transport* [unreported].

[15] HCJ 2557/05 *Majority Headquarters v. Israel Police* [unreported, 12.02.2006].

[16] HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* [2006] IsrSC 60 (3) 464.

[17] CA 5121/98 *Issacharov v. Military Prosecutor-General* [unreported, 4.05.2006].

[18] HCJ 852/86 *MK Shulamit Aloni v. Minister of Justice* [1987] IsrSC 41(2) 1.

[19] HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications* [1994] IsrSC 48(5) 412.

[20] HCJ 7664/06 *A.N. Atmar v. Ministry of Agriculture* [unreported, 29.10.2008].

[21] HCJ 390/79 *Dawiqat v. Government of Israel* [1979] IsrSC 34(1) 1.

[22] HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94.

[23] HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Social Welfare* [1998] IsrSC 52(3) 630.

United States cases cited:

[24] *Cleburne v. Cleburne Living Ctr*. 473 U.S. 468-469 (1985)

[25] *Brown v. Board of Education* 347 U.S. 483 (1954)

For the petitioners — O. Erez-Likhovski, E. Horowitz

For respondent 1 — D. Briskman

For respondent 2 — O. Kedar, R. Moshe

For respondent 3 — Y. Rosenthal, C. Salomon, A. Michaeli

For *Amicus Curiae* 1 — I. Gur

For *Amici Curiae* 2-5 — R. Shapira-Rosenberg

JUDGMENT

Justice E. Rubinstein

1. The petition, filed at the beginning of 2007, concerns bus lines operated by respondents 2-3 for several years, in which men and women were customarily separated. This is how the petitioners described the prevailing reality:

> 'For approximately nine years, the public transportation companies — and primarily respondent 2 — have been operating bus lines which are called "*mehadrin* lines" [literally: "meticulous", for Orthodox or ultra-Orthodox Jews who meticulously observe the religious laws]. On these lines ... women are required to board by the rear door and to sit in the back of the bus, whereas men board by the front door and sit in the front seats. In addition, the women passengers are required to dress modestly ... Women who do not accept these coercive arrangements and who attempt to oppose them, such as petitioners 1-5, are humiliated and suffer severe verbal

> harassment; they are made to leave the bus and are even threatened with physical violence.'

The petitioners argued that these arrangements violate the principle of equality, the constitutional right to dignity, and freedom of religion and conscience — and that they are implemented without authority under the law. The principal argument raised against respondent 1 (hereinafter: the respondent or the Ministry of Transport) was that it was shirking its obligation to supervise the activity of respondents 2-3. What we have before us, then, is yet another issue that presents and represents a typical dispute between factions of Israeli society.

2. In effect, after four years of litigation (reviewed below), no one today disputes that the reality described above, in that it is coercive and dictated, is illegal. The Minister of Transport has adopted a report composed by a professional committee that was appointed as part of the proceedings in this petition and at our recommendation (hereinafter: the report). The report denounces any dictated — not to mention coercive — gender separation, while on the other hand allowing a certain degree of consideration for the wishes of those who seek to adopt voluntary separation for themselves. According to the parties' declarations, it appears that for now the dispute has been reduced to the question of how to implement the report, and the related measures that the Ministry of Transport must adopt. Before deciding this question, we will briefly review the procedural development of the case — which now places us a long way, legally speaking, from where we were when it was filed. We also recognize that over the years of litigation, various issues were raised (such as the question of the bus fares) which turned out to be irrelevant to the issues before us. For this reason, we will discuss below only those matters that we find necessary at this time.

The Procedural Development from 2007 through 2010

3. In their initial response to the petition (of April 30, 2007), the respondents **primarily** claimed that only respondent 2 operated "*mehadrin* lines" at that time (I expressed my opinion regarding that name in my ruling of February 18, 2010, and the committee established by the Minister of Transport also addressed that point, in sec. 2 of the report) and that the arrangements in question were **voluntary** arrangements that took religious sensitivities into consideration — and that they were therefore legal. The

respondents also referred to the 1997 report by the Committee for Examining Increased Use of Public Transportation Among the Ultra-Orthodox Sector, headed by Nahum Langenthal (then director-general of the Ministry of Transport) (hereinafter: the Langenthal Report), which recommended allowing separation arrangements. On the other hand, the petitioners, in their response of January 7, 2008 argued that the arrangements were not really voluntary; a woman who boards a bus operated as a "*mehadrin* line" is not free to sit wherever she wishes, and she is exposed to pressure and even to violence. These arguments were adequately supported by affidavits and official publications of respondent 2 — publications that state, *inter alia*, that "the first four rows are designated for men; the back rows are designated for women."

4. On January 14, 2008, at the first hearing on the petition, counsel for the petitioners argued, *inter alia*, that a separation arrangement *per se* "may be legitimate, but the [existing] arrangement is not." Regarding that statement, our ruling of January 21, 2008 stated that "we will begin with the assumption that there is nothing wrong with the idea of buses that are separated with a view to providing a response to the needs of the ultra-Orthodox population." However, the ruling reviewed the problematic nature of the present situation:

> 'This separation, which is not governed by any arrangement on the normative level, clearly presents problems .... We will list — not exhaustively — problems that arose in the court documents and the pleadings. For example, the need for a normative basis for these lines ... where there would be separated lines; the possibility of reasonable alternative travel for those who do not wish to travel on those lines; the question of appropriate signposting ... the driver's duties ... questions involving the fare; an effective mechanism for supervising and handling complaints; the position of the ultra-Orthodox rabbinical leadership in connection with the behavior....'

We further pointed out that reliance on the Langenthal Report is not

enough, both in view of the passage of time and the changes that have taken place since 1997, and because the rules of operation "differ, in various matters, from the recommendations of the Langenthal Report as approved." Under those circumstances, we were of the opinion that "it is appropriate for a new forum to examine the factual situation and the lessons of the years that have passed and to make recommendations, *inter alia*, with respect to the questions that were raised — within the bounds of tolerance and common sense."

5. This proposal was accepted and approved by the Minister of Transport, and on May 11, 2008, the Minister appointed a Committee to Examine the Public Transportation Arrangements on Lines Serving the Ultra-Orthodox Sector (the Committee), headed by the deputy director-general of the Ministry of Transport, Mr. Alex Langer. Pursuant to our proposal in our decision of March 27, 2008, the Committee also included extensive representation for women; the Attorney General was also represented, and the public was invited to apprise the Committee of its positions. Throughout 2008 and 2009 the Committee formulated its recommendations after receiving approximately **seven thousand** submissions from the public, holding 13 sessions and hearing testimony from private individuals and relevant public entities (for a detailed review, see secs. 34-79 of the Committee's report). Throughout this period, the parties from time to time, filed update notices; *inter alia*, the Ministry of Transport gave notice that, pending the final recommendations of the Committee, no new lines would be assigned to the ultra-Orthodox sector, although the existing lines would continue to operate. Concurrently, we heard a number of miscellaneous motions, including motions for the issuance of interim injunctions, and we rendered detailed decisions (*inter alia*, the decision of January 1, 2008; detailed decisions were subsequently issued on February 18, 2010 and August 1, 2010). On October 26, 2009, the Committee completed its work and submitted to the Minister of Transport a detailed and comprehensive document, which thoroughly addresses the various issues involved in the operation of "*mehadrin* lines."

The Committee's Report

6. It appears that the Committee's principal conclusions were: (1) "That the purpose and degree of the discrimination resulting from the separation sought as a state arrangement are improper and exceed what is

necessary, in terms of the resulting outcome ” (sec. 180) — in other words, the existing separation policy is prohibited; (2) In the opinion of the Committee, even an official declaration regarding the existence of a “voluntary” arrangement is illegitimate:

> ‘A declaration by the State regarding the existence of a voluntary arrangement on a certain line amounts, from both the theoretical and — as the Committee learned — practical standpoints, to a declaration on the part of the sovereign to the effect that the particulars of the arrangement are proper and desirable on that line with respect to all the passengers on the line’ (sec. 177).

This statement (especially “from the practical standpoint”) is particularly important because it reflects the Committee’s opinion, based on the comprehensive data it collected, that the existing arrangements are not actually “voluntary”. In fact, throughout the report, the Committee referred to the fiction involved in describing the present arrangement as voluntary :

> ‘The voluntary dimension of the arrangement is barely in evidence, and as far as the Committee is able to determine — it is not known to a considerable portion of the ultra-Orthodox passengers who make use of the lines, and they believe that the separation is obligatory... (sec. 107).

> Although it is theoretically voluntary, the arrangement tends to be enforced — whether it is enforced by the passengers and, at times, even by the driver... or whether passengers who are not interested in the arrangement prefer “not to be conspicuous, but to sit quietly,” in the words of one of the people who made a submission to the Committee’ (sec. 131).

On the other hand, the impression received by the Committee was “that the demand for public transportation which would allow for gender

separation reflects a genuine desire of parts of the ultra-Orthodox population" (sec. 179). In other words, the Committee held that any **policy** of separation — even if it seeks to reflect a "voluntary" arrangement — is wrong; however, the Committee believed that among a certain population group, there is a genuine desire to use gender-separated public transportation — and that it is fitting and proper to allow it to do so, as long as no harm to others is caused thereby:

> 'In brief, the problem with the arrangement is the dimension of coercion that it involves, and not the possibility that passengers will sit wherever they wish. The Committee must strive for a solution that, on one hand, will enable the passengers to ride in a manner that allows them to exercise their basic rights, including equality and liberty, to the greatest degree possible. This might also include separated seating for those members of the public who do not desire to sit next to members of the opposite sex. On the other hand, it is necessary to find a solution that will not contain any overt, or even covert, elements of coercion.'

I will state here and now, that these words do credit to their authors.

Interim Remark

7. It should be emphasized that the question with which the Committee has dealt, and with which we ourselves are now dealing, is not how the rights of the petitioners (and of the female population in general) can be protected when they board a bus on which there is gender separation, for in the absence of legal regulation, such an arrangement **is in no way lawful**. The question with which the Committee dealt is in what way — and up to what point — is it possible to accommodate those people and population groups who seek to use gender-separated public transportation, without placing the other women (and men) who use public transportation in prejudicial situations. We will therefore take the bull by the horns. The question before us is a practical one (as distinct from interesting theoretical questions of multiculturalism, attitudes toward women and attitudes toward the ultra-

Orthodox population), namely, whether it is possible to devise voluntary alternatives within an open framework, which **would not** be merely a cloak for coercive and insulting separation.

8. Obviously, those who seek to conduct themselves in the public arena in a manner that departs from the Israeli legal system's accepted concept of equality are subject to the Talmudic rule of "anyone who deviates has the lower hand" (*M. Bava Metzia* 6:2). If it cannot claim legislative legitimacy, this group must show, *inter alia*, that the manner in which it seeks to act is not forcibly imposed upon anyone who does not wish to act thus, in a way that infringes his rights. The sages stated long ago, in the words of the *Tanna* Hillel the Elder: "What is hateful to you, do not do to your fellow" (*BT Shabbat* 31a). On the other hand, as long as such a group of people complies with this requirement — really complies, with no concessions — not only is there no legal impediment to allowing it to act in this manner; it is even **possible** that we must try to help it to do so. This is because consideration of the religious needs and beliefs of every human being is one of the basic principles of the Israeli legal system (see e.g. HCJ 217/80 *Segal v. Prime Minister* [1980] IsrSC 34(4) 409; HCJ 806/88 *Universal City Studios Inc. v. Council for Censorship of Films and Plays* [1989] IsrSC 43(2); HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1).

9. I used the expression "it is even **possible** that we must try to help it to do so" because even "an argument with regard to diversity and cultural relativity cannot serve as a cloak for the subordination and oppression of a group within the population, and, in the present case, of women" (CrimA 10828/03 *Najjar v. State of Israel* (unreported); for a comprehensive review of "the question of intervention by the liberal state in the cultural practices of groups living within it," see M. Mautner, *Law and Culture in Israel at the Dawn of the 21st Century* (2008), 370-417 (Hebrew); for a discussion of the concrete question of gender-separation arrangements on public transportation, see A. Harel and A. Schnerch, "Segregation Between the Sexes on Public Transportation," *Alei Mishpat* 3 (2003), 71 (Hebrew) (hereinafter: Harel & Schnerch) ; Riemalt; G. Stopler, "The Boundaries of Equality: Reflections in the Margins of Ruth Halperin-Kaddari's Book '*Women in Israel – A State of Their Own*," *Mishpat U-Mimshal* 8 (2005) 391, 412-421 (Hebrew); R. Halperin-Kaddari, "Women, Religion and Multiculturalism in Israel," *UCLA J. Int'l & Foreign Affairs* 5 (2000-2001) 339, 362-364 (hereinafter: Halperin-Kaddari); G. Stopler, "The Free Exercise of Discrimination: Religious Liberty, Civic Community and

Women's Equality," *Wm. & Mary J. Women & L.* 10 (2003-2004) 459, 492-495; additional articles will be cited below). Please note that these authors do not speak in a single voice; at times, they demonstrate trenchant differences of opinion on how to cope with the approaches of different groups in society, including in the specific context of separation in transportation; terminology such as "multicultural liberalism versus feminism" would perhaps be overly simplistic.

10. Not every cultural group practice is permissible; it is not always possible to consider the "free" will of a member of a certain cultural group as free will, and not every "free will" should be respected. Coercion is coercion, and this is certainly so when it also involves discrimination. Although extensive measures have been taken toward creating a decent society for women in Israel — one of the major issues in most human societies — these measures are far from equal in various parts of society, and the transformations that have taken place are not identical in all parts of society, with all the relevant religious and historical hurdles. In any event, in the matter at hand, the Committee recommended cancelling the separation arrangements because they are currently being forcibly imposed on entire population groups that are not interested in observing them. It is therefore unnecessary to address the theoretical question of the legitimacy of such arrangements where the population in question was homogeneous and desirous of them — and, therefore, I do not need to express an opinion on this point (see paras. 28-30 below). With regard to giving **individuals** the option of practicing gender separation **among themselves** (for example, by opening the rear door in order to increase flexibility) the impression of the Committee was that this represented a genuine wish of men (and women) in ultra-Orthodox society. We do not believe there is any impediment to allowing those men and women to act according to their beliefs (I will further address the complexity of this issue below), just as they do with regard to modesty in celebration halls or in other places (not to mention separate seating in the synagogue, which is also maintained by circles that are not ultra-Orthodox). The Mishnah (Sukkah 5:2) describes a "great reform" that was instituted at the time of the water-drawing festivities in the days of the Temple: and what was this "great reform"? In order to prevent frivolity, women and men were separated. (*BT Sukkah* 51b).

Recommendations by the Committee on the Practical Level

11. In giving practical expression to its conclusions in principle — expression which would allow those who favor separation to fulfill their needs without infringing the rights of other public transportation users — the Committee issued a long and detailed series of recommendations (which also appears in our ruling of February 18, 2010). The following was stated, *inter alia*:

> '183. According to the Committee's position, every passenger shall be entitled to sit on any vacant seat in the bus, except for the special seats that are reserved for people with disabilities, etc. In addition, every passenger, irrespective of the passenger's gender, shall be entitled to board and leave the bus by any door that is permitted for the boarding of passengers on that line.
>
> 184. Therefore, no arrangement shall be made for public transportation lines on which separation between women and men is operational, nor shall there be any similar arrangement differentiating them substantively from the other public transportation lines in Israel...
>
> 185. On the other hand, the Committee does not seek to prevent a situation in which men and women who seek, **of their own free will**, to sit on the bus and even to board it in a certain way, are able to do so — i.e., insofar as sectors of the population are interested in separate seating, that is their affair, provided that the provisions of the law shall be upheld in their entirety, and that there shall be no signs of verbal or physical violence and no coercion whatsoever toward others who do not wish to act in that way' [emphasis in the original – E.R.].

The Committee recommended establishing a "general scheme" according to which public transportation operators would be obligated not to enact any "practices" of separation and discrimination against passengers; they would do everything in their power to prevent manifestations of coercion or violence by passengers or third-parties; they would not designate or advertise any lines as those in which a special arrangement applied. The Ministry of Transport would set up a system for the control, supervision and enforcement of provisions for the prevention of any manifestations of coercion and violence; such manifestations would give the supervisor cause to consider cancellation of lines. These are all solid recommendations.

12. The Committee also recommended the establishment of a "trial period" of one year, during which public transportation operators would also allow passengers to board by the rear doors of buses on those lines that are currently separated. The use of the rear door "shall be allowed for all passengers during the trial period" (sec. 193), and is apparently intended to provide greater freedom of action for those who seek to practice gender separation. The Committee decided that during this trial period, the Ministry of Transport would examine whether allowing boarding of the bus [from the rear door] causes "problems of fare collection, safety or security." The Committee also decided that "should it be found, during the trial period, that manifestations of violence are continuing, the supervisor of transport shall consider the possibility, *inter alia*, of prohibiting boarding by the rear door on those lines on which they occurred." Should the trial period yield positive results, "public transportation operators shall be permitted to allow all passengers to board through all doors of the bus, following the installation of means... that shall be determined." (The Committee also dealt with a number of additional matters, which need not be specified at this time.)

Responses by the Parties to the Committee's Report

13. On October 27, 2009, a second hearing on the petition was held; in our decision (rendered on that date), the parties were asked to submit their responses to the report to the Minister of Transport. We would add that, as early as January 13, 2009, we allowed a non-profit organization called "Betzedek – the American-Israeli Center for the Promotion of Justice in Israel" (hereinafter: Betzedek), which (according to its declaration) represents "the rights of the ultra-Orthodox public", to join the proceeding with the status of *amicus curiae* — and Betzedek also submitted its response

to the Minister of Transport. On January 28, 2010, the Minister of Transport submitted his detailed reply. After reviewing the considerations on both sides, the Minister presented a position that, in effect, **partially rejected** the conclusions of the Committee:

> 'Pursuant to all the above, and subject to the principle that it is not proper to establish a coercive arrangement for separation on buses, and that the State shall not institute or regulate such separation, the Minister believes that **the public transportation operators should be allowed to post signs displaying conduct guidelines that provide an explanation and a request for the passengers to sit in a gender-separated manner**, while stating, alongside that request, that it is not compulsory to do so. Along with the above-said explanatory signposting, enhanced supervisory and oversight powers are required, along with the establishment of an effective system for handling complaints about violence and aberrant behavior, which will enable the immediate handling of violent incidents... It should be emphasized that this arrangement is anchored in the existing legal system, it does not constitute regulation of '*mehadrin* lines' on the part of the State, and it involves no coercion in primary or secondary legislation' [emphasis added – E.R.].

In other words, the Minister's stated position (at that time) was that as a matter of **guiding** policy, gender separation arrangements could be implemented on public transportation lines (according to the criteria presented by the Minister), as long as passengers are entitled not to comply with the operators' request to maintain strict gender separation, and as long as no coercion or violence is used against those passengers. The Minister was of the opinion that granting state approval for public transportation operators to operate lines with gender separation does not require any legislative regulation.

14. On February 4, 2010 there was a third hearing on the petition. At the hearing, counsel for the State was asked to explain why the Minister had not adopted the conclusions of the Committee to the letter, and counsel for the petitioners argued against both the decision of the Minister and some of the Committee's recommendations on the merits. At the same hearing, Adv. Shapira-Rosenberg presented arguments on behalf of four non-profit organizations which, according to their declaration, represent the national-religious public (hereinafter: Kolech); those organizations, in fact, were also joined to the petition as *amici curiae*. Subsequently, on February 18, 2010, we issued a detailed decision that included an order nisi requiring the Minister of Transport to show cause why he should not act in accordance with the recommendations of the Committee:

> 'Indeed, both the petition and our decision of January 21, 2008 found nothing wrong, in principle, with the idea of separated lines, **on the basis of certain assumptions** as listed above. Nonetheless, as emerges from the Committee's report, these assumptions are not fully borne out. The Committee's position was based on a broad, reasoned and detailed foundation; the Minister's position, I fear, is not sufficiently justified on the legal and applicative level. We therefore have no choice but to issue an order nisi, whereby the Minister must show cause why he should not act in accordance with the Committee's recommendations, and this is what we are doing...' [emphasis in the original – E.R.].

That decision also included an interim injunction stating that those lines on which there was gender separation must operate according to the format recommended by the Committee and that, for the time being, there would be no additional lines operating in that manner.

15. On April 29, 2010, the Ministry of Transport submitted an "initial response" to the order nisi. The response was designated "initial" because, in fact, it stated that the Ministry wished to defer its response until the termination of the trial period mentioned in the Committee's report. The

Ministry described steps that it had already undertaken and explained why it was preferable to wait with the formulation of the Minister's position in principle until data from the operation of those lines in the format determined in the interim injunction had accumulated. The petitioners objected to this position, and the positions of the parties were heard at the fourth hearing on July 27, 2010. On August 1, 2010, we decided to allow the Ministry of Transport to submit its position by October 18, 2010, and said, *inter alia*:

> 'We will state clearly what goes without saying: that a court in the State of Israel must be the defender of egalitarianism and non-discrimination, tolerance and, of course, the fight against violence, in any form whatsoever, whether verbal or (God forbid) physical, while enabling various flowers in the public garden to live together, without interfering with each other. With these pillars of light illuminating our way, we will need to address ourselves to making a decision when the time comes' (paragraph 13).

The Current Position of the Minister of Transport

16. On October 20, 2010, the respondent announced that the Minister of Transport "has decided to adopt the recommendations of the Examination Committee... in the general scheme, in their entirety, on the basis of a detailed status report that was submitted to him at the end of the trial period, and the recommendations of the Supervisor of Transport" (as the Committee had determined in sec. 197). The concluding words of the statement (in the "general scheme") means that the Minister decided to allow passengers to board via **both** doors of the bus — on the assumption that it was found, during the trial period, that allowing this does not involve coercion and that, insofar as any gender separation occurred during that period, it was, in fact, entirely voluntary. It was further stated that "under these circumstances and in light of the wording of the order nisi... the hearing of the petition has become superfluous. Therefore, the honorable Court is hereby requested to deny the petition."

17. In their response (dated November 2, 2010, and at the fifth hearing, dated November 21, 2010), the petitioners argued against the Minister's

notice and asked that we issue "a prohibition on boarding by the rear door." In the response it was argued, *inter alia*: (1) that the standard of inspection and monitoring that was exercised by the Ministry of Transport during the trial period was not appropriate; (2) that the findings that the Ministry collected in inspections focused on the separation arrangements showed that pressure had been exerted in approximately one-third of the cases; (3) that checks carried out by the petitioners found a large number of cases in which women had been asked to change their seats. In other words, the petitioners argued that operating the lines in the experimental format (through the use of both doors of the bus) showed that the coercive practices were continuing. The petitioners further argued that, throughout that period of time, respondent 2 (at least up to a certain point) had continued to advertise the lines as "*mehadrin* lines". They noted that the Minister's policy (as shown by the appendices to his response) was to allow use of the rear door:

> 'On lines which the Supervisor of Transport will approve, at the request of a public transportation operator or on his own initiative, **pursuant to requests by residents of the ultra-Orthodox sector**, it will be possible to board by the rear door and to maintain, in a voluntary manner and on the basis of free will, separation between men and women' [emphasis added – E.R.].

According to the petitioners, to allow boarding the bus by the rear door on the lines that are currently operated as "*mehadrin* lines," and on additional lines in accordance with the demands of the ultra-Orthodox sector, would perpetuate the existing situation, which — as shown by the data collected in the field — is not a voluntary one. They contend that in view of the fact that the use of the rear door is related to the demands of the ultra-Orthodox sector, and in light of the data collected during the test period, the conclusion from the trial period should be a prohibition against boarding passengers by the rear door and more stringent enforcement against manifestations of coercion.

18. Respondent 2 admitted that due to an internal mistake on its part, the information centers had continued to provide information on the existence of "*mehadrin* lines," but that this had recently been rectified. It argued that

insofar as local problems arise, they should be handled locally, but that at the policy level, the Minister's position should be adopted. Counsel for Kolech stated that checks that had been made showed that the "*mehadrin* lines" had continued to operate during the trial period as well. Respondent 2 argued:

> 'The update notice given by respondent 1, according to which the arrangement was inspected and was found not to be coercive, is not consistent with the reality known to the *amicus curiae*, in which manifestations of violence and coercion continue to occur. Additionally, most of the measures that were reported by respondent 1 in its previous response as having been adopted for the purpose of implementing the trial, were not actually carried out... Nor was it made clear to public transportation users that the separated lines had been cancelled and that the present arrangement was entirely different.

On the other hand, Betzedek argued that it had encouraged publicity-related activities among the ultra-Orthodox public, and that the monitoring conducted by the Ministry of Transport — "which shows zero defects" — indicates that there is no coercion whatsoever. Betzedek further stated that "the correct way has been found to maintain separation, by opening the rear door to let passengers off and on" — and that, under those circumstances, the petition should be stricken (prior to the hearing, an additional joinder petition was filed by an entity called "The Israel Women's Network – Organization for Women's Rights", whose status was not made clear to us; under the circumstances, however, we have not seen fit to address it).

Discussion and Decision

19. A review of the situation up to this point reveals that not only has a great deal of time elapsed and a great deal of activity been engaged in (for which the petitioners should be congratulated) since the petition was filed; a considerable legal path has also been trodden. Today, the consensus is that operating the lines as they were operated until 2007 is prohibited. This is the present position of the Minister of Transport, and this is how he — as a regulator — will instruct the public transportation operators. To clarify the situation for anyone to whom the above statement is not clear, **we state as**

follows: a public transportation operator — like any other entity under the law — is not entitled to tell, ask or instruct women where they should sit on a bus merely because they are women, or what they should wear, and they are entitled to sit anywhere they wish. Naturally, the same applies to men; however, for reasons that are not hard to understand, all the complaints refer to an offensive attitude toward women. When I reread the lines that were just emphasized above, I am amazed that it should have been necessary to pen them in Israel in 2010. Have we gone back to the days of Rosa Parks (the African-American woman who, in refusing to give up her bus seat for a white passenger in 1955, helped to end racial segregation on buses in Alabama, USA, in 1955)?

20. Is there really any need to say that it is forbidden to **order** or **force** a woman to sit in the back rows of the bus, which, as cited above, was the guideline adopted by respondent 2 until recently — "the back rows are intended for women"? Must it really be said that an **attack** by men on a woman who deviated from the designated female seating area (as described in some of the affidavits that were filed) is prohibited, and is likely to lead to an action in criminal court? Is this not understood and self-evident to every decent person — secular, religious or ultra-Orthodox? In one of the affidavits that were attached to the petition, the following description (with reference to the year 2004) appears:

> 'The bus was completely empty of passengers. I chose to sit on a single seat at the front of the bus. When the bus began to fill up, several ultra-Orthodox men suddenly came up to me and demanded aggressively that I get up from my seat and move to the back of the bus. I was utterly horrified. I answered that I did not see rules anywhere regarding such an arrangement on the bus...
>
> I was subjected to an incessant barrage of verbal insults and physical threats; a large ultra-Orthodox man leaned over me and berated me very loudly throughout the entire trip. During all that time, the driver did not intervene... I felt as if I had been subjected to

> "psychological stoning", although I had not done anything wrong' (affidavit of petitioner 1).

Woe to the ears that hear this! And where is human dignity, "which supersedes [even] a scriptural prohibition" (*BT Berakhot* 19b). Can anyone say that this event was reasonable? In another affidavit, which refers to the year 2006, a woman doing her national service describes how, when traveling very late at night (the bus left Jerusalem for Ofakim after 11:00 p.m.), she did not object to being separated from her [male] traveling companion and sitting in the back rows. Nonetheless:

> 'From where I was sitting in the back, I noticed one of the passengers speaking to the driver, and after that, an uproar began next to the driver... **I understood that, as a woman, I was forbidden to approach the front of the bus myself.** I phoned my partner, who was sitting in the front of the bus.... My partner explained to me that passengers had spoken to the driver about how I was dressed. I should add that I was wearing a long-sleeved shirt and a skirt which came to just above the knees.
>
> The uproar did not die down, and the driver turned to my partner **and demanded that we get off the bus in the middle of the road, in the dead of night**, "to avoid problems," in his words. Only after my partner passed me a long shirt, with which I was forced to cover my legs, did the uproar subside... The driver answered that this was Egged's declared policy and that no one may board the "*mehadrin* lines" in immodest attire' (affidavit of petitioner 2) [emphases added – E.R.].

Even if we ignore the very fact of the gender separation, to which the female passenger was "resigned," can we resign ourselves, in Israel in 2010, to the sentence: "I understood that, as a woman, I was forbidden to approach the front of the bus myself"? Or to a driver who — Heaven help us — asks passengers to get off the bus in the middle of the road, in the dead of night,

because he claims that the girl's attire does not comply with Egged's modesty rules? I would not like to think that money — the wish to profit by operating the lines in question — would mean everything; as the sages said: "The Lord said, 'The cry of Sodom and Gomorrah is great' — on account of the maiden" (*Sanhedrin*109b). Another affidavit stated that even the petitioner's proposal to cover her bare shoulders with additional clothing was not accepted by the passengers and the driver, and she **was not allowed to board the bus** (affidavit of petitioner 5). Again: what about human dignity? And what is the source of the authority that the driver exercised? And on the basis of which rules did he determine that the petitioner's attire was not modest enough for her to be one of his passengers, when reg. 461(2) of the Transport Regulations, 5721-1961, only allows a bus driver to prevent a person "who has no clothing on his body" to enter a bus, but is tolerant of various forms of dress? Even if we were to state that the events in question are exceptional and cannot be justified even by the former policy of separation, it is the atmosphere generated by that policy that allowed them to take place, and their existence attests to the results of that policy and the ineffectiveness of its control and enforcement (over and above the question of its actual legality).

21. On the other hand, it should be emphasized that the criticism is not directed toward a man who chooses, for his own reasons, not to sit next to a woman on a bus, or even toward a woman who chooses not to sit next to a man, as long as they do so in a civil manner, "because civility comes before everything" (*Midrash Eliyahu Rabbah* (Ish Shalom edition.) 1: 4-5 s.v. *vayegaresh*), and that is their own affair. The problem arises when we deal with a dictated policy and with coercion, not to mention violence. In relation to a person who is strict with himself — and not one who forces his strictness upon another — the Israeli legal system can say, "[e]ach person shall live by his faith" (in the words of Justice Zamir in HCJ 1438/98 *Conservative Movement v. Minister of Religious Affairs* [1999] IsrSC 53(5) 337, 376), and there will also be those who refer to such a person with the original expression from the words of the Prophet, "[t]he just shall live by his faith" (*Habakkuk* 2:4). It is obvious, however, that it is that person's duty to accept the law and to **refrain** from harassing women whose opinion is different and whose ways are different — and the just shall also live by refraining.

22. The Committee's recommendations, with which the respondents

agree at this time, do not require any person — man or woman, ultra-Orthodox or not — to act contrary to his or her beliefs (for a similar distinction, cf. PLA 4201/09 *Raik v. Prison Service* (unreported)). From the legal standpoint, in the same way that the Committee's recommendations permit a woman to sit anywhere on a bus (provided that there are vacant seats), they permit an ultra-Orthodox man to sit anywhere that is appropriate to his lifestyle (subject to the same constraints). Just as the recommendations refrain from telling women where they must sit, they also do not tell ultra-Orthodox men where they should sit:

> 'It is important to remember that the absence of legitimacy under law for the deliberate creation of separation between men and women in various services of a public nature does not mean that the men and women in the community will not be able to maintain such separation by virtue of an internal agreement among them. The Prohibition of Discrimination in Services and Products Law can forbid Egged or any other company from instituting official, forcible separation on the buses in its possession, by virtue of the general principle of prohibition of discrimination established therein. However, this does not mean that, on the bus lines which definitively serve the ultra-Orthodox population, members of the community — both men and women — cannot sit separately from each other of their own free will. Successfully maintaining separation will, of course, be contingent upon everyone wanting to maintain it. No one will be able, under the auspices of Egged, to enforce a regime of separation on any other person; rather, the choice will be a free one' (Riemalt, 141).

And this — from a writer who criticizes "lawlessness" in issues involving a suspicion of gender discrimination.

23. It should also be noted that the phenomenon of "*mehadrin* lines" has

not always existed (for a concise survey of the appearance of the first lines, the objection to them, and the response to the objection, see Riemalt, 116-120). The members of our generation — of our generations — grew up in a society in which seating on buses was mixed, even in places where the population was largely ultra-Orthodox, such as Jerusalem and Bnei Brak. This is therefore a recent phenomenon; indeed, even the "Rabbinical Committee for Transportation," in its publications (Appendix J to the Committee's report), refers to the progress of "the **revolution** of *mehadrin* transportation" (emphasis added – E.R.). It is possible — as has been proposed in various articles — that this is part of a process of radicalization in ultra-Orthodox society (see e.g. G. Stopler, "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women," *Columbia J. Gender & L.* 12 (2003) 154, 205), or an expression of the desire "of the ultra-Orthodox community to challenge the liberal order and to demonstrate its unique identity in public" (A. Harel, "Segregation Between the Sexes on Public Transportation," in *My Justice, Your Justice: Justice Between Cultures* (Y.Z. Stern ed., 5770-2010), 221, 222 (Hebrew); A. Harel, "Benign Segregation? A Case Study of the Practice of Gender Separation in Buses in the Ultra-Orthodox Community in Israel," 20 *S. Afr. J. on Human Rights* (2004) 64, 65 (hereinafter: Harel 2004). It is quite possible, as has been argued by ultra-Orthodox elements, that this phenomenon results from the increased use of public transportation, which has made it more crowded and hence less "friendly" to ultra-Orthodox travelers. In any event, this context is also subject to the rule of "anyone who deviates" — from the travel arrangements which were in force for decades, since the institution of buses, and before that, carriages, passenger carts and trains — "has the lower hand" (on women and their rights during the British Mandate, see: *One Constitution and One Law for Men and Women — Women, Rights and Law Under the British Mandate* (E. Katvan, M. Shilo, R. Halperin-Kaddari eds., 2011) (Hebrew); on the struggle of women for status in the public arena and the relationship between that struggle and the positions of the ultra-Orthodox community descended from the old Yishuv, see M. Shilo, "Female Voices on Gender Equality and the Good of the Nation in the Struggle for Suffrage in the *Yishuv*" (*ibid*.) 221) (Hebrew).

24. And finally, ultra-Orthodox communities exist throughout the world, and ultra-Orthodox men or women who seek to avoid what they view as undesirable situations find places to sit (or stand) that comply as far as

possible with their wishes (in this context, the Committee consulted the *responsum* by the late Rabbi Moshe Feinstein, a major authority on Jewish law in the United States in the last century, "about traveling on the subway and on buses when it is impossible to guard against touching and pushing women because of crowding" (*Responsa Iggrot Moshe***,** *Even Ha-Ezer* II:14)). The same applies to cities in Israel in which no separation arrangements are in place. At one of the hearings, I brought up a story that was told (by Rabbi Shmuel Greenfeld) of the late Rabbi Shlomo Zalman Auerbach, a major decisor of Jewish law in Israel in the last century:

> 'My cousin, a righteous man, told me that once he sat next to the rabbi on the bus. A woman boarded the bus and had nowhere to sit. The rabbi told my cousin that either my cousin would give the woman his seat, or he [the rabbi – E.R.] would give her his seat. My cousin stood up, and the woman sat down next to the rabbi' (N. Stepanski, *And His Leaf Shall Not Wither* (vol. II, 5759-1999) 182 (Hebrew); the rabbi's son [Rabbi A.D. Auerbach] wondered whether the woman was pregnant or elderly).'

25. However, at present **the scope of the legal dispute is in fact narrow**. Consensus exists with regard to the legal situation, and the questions are practical ones — practical, but very significant, of the kind that are likely to overturn the entire situation. One of these is the question of the "rear door," and another is the question of how the aforesaid normative consensus is to be translated into a change in reality: how can we cause a **legal** accord between the parties to the present proceedings to change, in practical terms, the relationship between the passengers on an actual bus line? How can we bring about an end to coercion and violence, while still allowing those who so desire to adhere to their outlook on gender separation? The difficulty must not be dismissed lightly. We are not interested in declarations that will remain on paper, while the world of those who humiliate women and discriminate against them continues unchanged. This is the challenge.

A Brief Legal Review

26. Since the dispute has been narrowed to practical questions, legal

discussion of the various reasons for prohibiting non-voluntary separation is superfluous, but we will address these reasons very briefly as well. The Committee held a detailed, scholarly and comprehensive discussion of the issue, which appears in its report. Because the guidelines of the Committee are now legally binding, we order the respondent to publish the report, in its entirety, on the Ministry's website, if this has not yet been done. The Committee referred *inter alia* to the **balance** between the ultra-Orthodox public's right to religious freedom and protection of its religious sensibilities (values that have been recognized in the case law of this Court; see e.g. *Horev v. Minister of Transport* [3]; HCJ 953/01 *Solodkin v. Beit Shemesh Municipality* [2004] IsrSC 58(5) 595) and the right of women who are not interested in separated arrangements to freedom from religion and, even more importantly in my opinion, to dignity and equality. This balance, as the Committee stated — and rightly so — tends to favor the latter.

27. I will add that even had we (like the Committee) examined the situation from the perspective of violation of freedom from religion (see CA 6024/97 *Shavit v. Burial Society* [1999] IsrSC 53(3) 600) — if you will, freedom from religious coercion, for persons who see coercion in the very existence of any kind of separation — a suitable statutory authorization would still be required, and this does not exist in the present case (HCJ 3267/97 *Rubinstein v. Minister of Defense* [1998] IsrSC 52(5) 481; HCJ 3872/93 *Mitral Ltd. v. Prime Minister and Minister of Religious Affairs* [2003] IsrSC 57(5) 485). This is certainly so in relation to violations of equality that are "closely and materially related to human dignity" — and therefore constitute violations of the constitutional right to dignity (in the words of Supreme Court President Barak in HCJ 7052/03 *Adalah v. Minister of the Interior* (unreported), para. 39; see also HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (unreported), para. 40, *per* President Barak). This applies even if we do not consider the very fact of forcible gender separation in the case before us as true **humiliation**, and I have no doubt that at least some of the cases that were presented to us — certainly those cases in which women have been verbally attacked or, Heaven forbid, even worse — involve humiliation and direct violation of the very core of the right to dignity itself (an extremely grave event is described in the article by Anat Zuria, "Risking One's Life on the Bus," *Eretz Aheret* 51 (2009) 26 (Hebrew), although we do not have an affidavit regarding that event).

28. A comprehensive discussion of whether gender separation on public

transportation may comply with the requirements of the Prohibition of Discrimination in Products, Services and Entrance into Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: Prohibition of Discrimination Law), can be found in the articles of Harel & Schnerch and Riemalt. The former raise the **possibility** that the practice of separation is not inherently improper (especially if it is modified such that the separation does not require women to sit in the back of the bus, but in the front, or if the bus is divided lengthwise; see also our ruling of February 18, 2010); and that, even if it is improper, it may **possibly** be justified as "an integral part of a holistic socio-cultural fabric... which has value" (Harel & Schnerch, p. 95), as long as it is not "cruel or humiliating" — even though the authors too raise the possibility that the existing practice "is likely to be a humiliating practice of separation" (Harel & Schnerch, p. 98). This article was criticized by Riemalt. In her opinion –

> '[T]he law in a liberal state must not give legitimacy and protection to the creation of deliberate separation on public transportation, and if the Prohibition of Discrimination in Products and Services Law currently enables the creation of such separation, that is a fundamentally invalid result that does not withstand the test of equality between the sexes' (Riemalt, pp. 140-141).

Riemalt suspects that this is a dynamic "in which discrimination against women is perpetuated anew by the enlistment of the rhetoric of modern rights" (Riemalt, p. 142; see also Halperin-Kaddari, pp. 341-342), and also addresses the manner in which the "*mehadrin* lines" developed, as well as the various positions within the ultra-Orthodox community with regard to them.

29. However, this does not seem to be the relevant discussion in this case. The aforementioned discussion deals with the question of whether it is proper for a liberal, multicultural state to allow a certain cultural group to adopt a discriminatory practice **amongst its own members**. In this sense, it does not address a **critical** fact that characterizes the present case — that of the element of coercion vis-à-vis male and female passengers who are not interested in separation (within and outside ultra-Orthodox society), as well as the violence accompanying the present situation. In explaining why it is

necessary to examine the nature of the discriminatory practice from the standpoint of the ultra-Orthodox community (and, I will add, to the extent that it is possible to attribute a single viewpoint to this multifaceted population group), Harel & Schnerch state: "After all, the secular community is not the consumer of separated transportation services" (p. 90; see also Harel 2004, p. 66). In the State of Israel, however, there are not various kinds of "transportation services," and the situation is not one in which "there is a neutral public space alongside the ultra-Orthodox public space" (in the words of A. Margalit and M. Halberthal, "Liberalism and the Right to Culture," in *Multiculturalism in a Democratic and Jewish State* (M. Mautner, A. Sagi, R. Shamir eds., 1998) 93, 102-103 (Hebrew)). While the Committee noted that the conception of some of the ultra-Orthodox individuals who appeared before it was that "the buses [on which separation arrangements are in force – E.R.] belong to the ultra-Orthodox public" (sec. 44; see also secs. 106-107), this conception is, of course, devoid of any legal foundation. Public transportation in Israel belongs to all of Israeli society; it is part of the public space that belongs to all population groups and all citizens of the State as individuals — both those who are interested in separation and those who are not. Let us recall that we are not dealing with private transportation companies (regarding which the aforementioned academic articles are more relevant), a matter opposed by the Ministry of Transport (see also secs. 169-175 of the Committee's report).

30. This is not, therefore, a matter concerning the attitude of a liberal, multicultural approach to a "non-liberal" cultural group that adopts a discriminatory practice **internally** (cf. HCJ 1067/08 *"Halakhic Youth" Society v. Ministry of Education* (not yet reported)). Rather, we are dealing with the question of a certain cultural practice — even if it is legitimate and voluntary in its community of origin — which is being forced specifically upon groups and individuals who do not desire it, and upon the Israeli public space in general (on the distinctions between various levels of confrontation, see e.g. G. Barzilai, "Others In Our Midst: Law and Political Boundaries for the Ultra-Orthodox Community," *Iyyune Mishpat* 27 (2003) 587, 595 (Hebrew)). A description that is closer to the present case can be found in an article by Prof. Cohen-Almagor:

> 'Consider the example of orthodox Jewish factions that wish to establish separate means of public transportation for men and women in

> their neighborhoods in order to safeguard their dignity and to prevent "bad thoughts"… They strongly believe that this arrangement is necessary to uphold their cherished values and to secure stable community life. As long as they run their transport services in their own neighborhoods we may say, by implication, that an outsider has no call to interfere. But when they try to force their beliefs on people outside their own homogenous ultra-Orthodox community, then a case for state interference exists. Reciprocity in according due weight and respect to others' choices must be safeguarded as necessary' (R. Cohen-Almagor, "Israeli Democracy, Religion, and the Practice of *Haliza* in Jewish Law," 11 *UCLA Women's L.J.* 45, 52 (2000-2001)).

And in another, closely-related context, "even an insular minority that fears for the souls of its members cannot demand comprehensive control over the design of its habitat, irrespective of questions that concern the rights of those who do not belong to it, but who live in its environs" (I. Saban, "Allocating Resources of Expression, Hurt Feelings and Effect on Culture in a Split Society Undergoing Transformation: Municipal Theater in a City Becoming Ultra-Orthodox," *Iyyune Mishpat* 33 (2010) 473, 498 (Hebrew)). This, of course, is not the place to discuss the gender revolution in general, which we have seen taking shape in our generation, before our very eyes; although that revolution is much slower in conservative societies (including such societies in Israel), its beginnings can be identified in them as well.

Adopting the Committee's Recommendations

31. As stated, the question of whether a dictated **policy** of separation is likely to be appropriate with regard to a homogeneous population group that truly desires it is not the question requiring our decision; opinions on that question differ, and it calls for consideration of legal distinctions (for example, the question of the source of financing) and perhaps cultural ones (for example, the question of the values that underlie the practice of separation; see A. Harel, "Regulating Modesty-Related Practices," 1 *Law and Ethics of Human Rights* 211 (2007)), as well as concrete factual

circumstances (therefore, this is not an attempt to avoid a decision — an argument that was raised in the past against the recommendation of this Court to withdraw the petition that was filed following the Langenthal Report, HCJ 5079/97 *Israel Women's Network v. Minister of Transport* (unreported)). The present situation concerns bus lines that — even if there are those who think they "belong" to the ultra-Orthodox community — are actually, in both theoretical and practical terms, available to and used by the entire public and in any event, by users, ultra-Orthodox and not, who do not want separation arrangements. This latter group of passengers, and especially women passengers, are forced to comply with the separation arrangements against their will, and at times by means of verbal violence and beyond. This indisputably represents a **grave** and unconscionable violation of equality and dignity, including at the criminal level. The question, therefore, is how to secure the rights of all public transportation users on the one hand while, on the other, enabling those who wished to do so to preserve their cultural-religious approach. On this matter, the Committee's recommendations (which were reviewed above) are acceptable to the Minister of Transport — and as far as I am concerned, **subject to the comments below**, we cannot state that this constitutes an unreasonable policy requiring our intervention. At this time, and certainly given the position adopted by the Minister of Transport, the respondents (as well as the remaining public transportation operators that are not parties to the petition, since it is the position of the Ministry of Transport that is under discussion) must consider the Committee's recommendations that were adopted as a kind of *Magna Carta*, from which there should be no deviation whatsoever.

32. But words are not enough. We must also address actual deeds — that is, the practical part. Now that the respondents have agreed that coercion is prohibited, and in light of the affidavits that have been submitted to us — including those relating to the period after the granting of the interim injunction of February 18, 2010, in which the respondents were required to act in accordance with the Committee's recommendations, and which leave open questions, the question is this: How it is really possible to ensure that cases of coercive **arrangements**, or coercive **passengers**, will not recur? It should be emphasized that the State cannot shrug off cases of coercive passengers and cannot impose the responsibility on the public transportation operators. The State also has a **positive duty** — "There shall be no violation of the life, body or dignity of any person" (s. 4 of Basic Law: Human Dignity

and Liberty; see HCJ 2557/05 *Majority Headquarters v. Israel Police* (unreported), per President Barak, para. 13; HCJ 366/03 *Society for Commitment to Peace and Social Justice v. Minister of Finance* [2006] IsrSC 60 (3) 464, 479; CA 5121/98 *Issacharov v. Military Prosecutor-General* (unreported) per (then) Justice Beinisch, para. 67). The State must use all the means at its disposal — first and foremost, the administrative tools that are given to it for monitoring public transportation, but other tools as well (including criminal law), as necessary — in order to protect the passengers' constitutional rights. This applies at both the level of policy and the level of supervision and enforcement.

33. If not for the interim injunction, it might have been possible to believe that the very adoption of the Committee's recommendations would be sufficient to protect the rights of public transportation users. Yet the data presented by the petitioners reflect dozens of problematic cases, even during the period of the interim injunction. Therefore, we cannot assume that the mere declaration of the adoption of the Committee's conclusions will suffice. On the other hand, not only may eliminating the uncertainty with regard to the legal situation indicate change, but it also opens the way for the petitioners — and for the State, which is responsible for securing their rights — to obtain remedies and relief from other areas of law (civil, criminal and administrative), in order to enable local enforcement, if necessary, which is likely to generate a practical change and, in any event, to serve as a deterrent.

Specific tools of deterrence

34. We hope that such future action will not be necessary and that the decision in the petition or the deterrence engendered will have the desired result; therefore, we will not address ourselves to the legal basis of each of these channels, nor will we set them in judicial stone. We will, however, mention a number of possible remedies for cases of actual violation. Section 3(a) of the Prohibition of Discrimination Law states as follows:

> 'Anyone whose business involves the supply of a product or a public service or the operation of a public place shall not discriminate, in supplying the product or the public service, granting entry to the public place or providing a service in the public place, on the basis of race, religion or religious group, nationality, country of origin,

> sex, sexual orientation, viewpoint, political affiliation, marital status or parenthood.'

A violation of this provision, by way of act or omission, constitutes a tort (under s. 5) and a criminal offense (under s. 9). In fact, s. 3(d)(3) of that Law states: "The following are not deemed to constitute discrimination under this section:"

> 'The existence of separate frameworks for men or for women, where non-separation would deny to part of the public the supply of the product or the public service, the entry into the public place, or the provision of the service in a public place, provided that the separation is justified, taking into consideration, *inter alia*, the nature of the product, the public service or the public place, the degree to which it is essential, the existence of a reasonable alternative thereto, and the needs of the members of the public who are likely to be harmed by the separation.'

We should nonetheless mention — as we have said, without setting anything in stone in a matter that has not been brought before us — that, in the Committee's opinion, the separation arrangements **do not** comply with these conditions (sec. 130 of the report). We can also refer, on the civil level, to concrete torts under the Civil Wrongs Ordinance and to the violation of constitutional rights (see, e.g., A. Barak, *Interpretation in Law – Constitutional Interpretation* (1994) 777-792, and esp. 788; Y. Bitton, "Protecting the Principle of Equality in Tort Law and Liability for Negligence in the Balance of Power", in The Mishael Cheshin Volume (A. Barak, Y. Zamir and Y. Marzel, eds., 2009) 129 (Hebrew)). These and other legal tools are likely to be of relevance with regard to the public transportation operators and their employees, and to private persons as well.

35. On the criminal level, we would mention reg. 455(a) of the Transport Regulations, which states: "A passenger [on a bus – E.R.] shall not act in a manner likely to cause damage or unreasonable inconvenience to any other passenger." In my view, there can be no doubt that the behavior

described in the affidavits mentioned above is tantamount to causing "unreasonable inconvenience". As far as violent incidents are concerned, the clear solution is to press charges accordingly. On the administrative level, we will cite the recommendation of the Committee:

> 'The Ministry of Transport shall maintain a system for the supervision and enforcement of the provisions for preventing any manifestations of coercion and violence toward passengers. Manifestations of coercion or violence shall give the supervisor cause to consider canceling operation of the lines by the operator in question' (sec. 187(d)).

In view of the fact that the Minister of Transport announced the adoption of the Committee's recommendations, he obviously **undertook to establish an effective system of control and enforcement** as stated above — and it is to be hoped that the establishment of that system will have a positive effect, even without the actual use of those tools. Those tools of action are not a supplement on the part of this Court to the Committee's position; they are derived directly and independently from the adoption of its recommendations and their perception as a binding norm.

36. In relation to one matter, I will propose to my colleagues that we supplement the Committee's recommendations. As stated, even during the period when the lines were operated in accordance with the interim injunction, incidents of coercion were recorded, and it appears that the message did not get through. Respondent 2 even admitted that even among its employees (and especially the employees of the Information Center), the change was not internalized in a timely manner. Data presented by the petitioners show a series of cases in which drivers "lent a hand" to the separation arrangements ("It's not holy scripture, but you have to honor the agreement and sit in the back"), cooperated with them (e.g., by directing women to board the bus by the rear door), and refused to support the position of women passengers who were attacked. For this reason, I propose to my colleagues to rule that the public transportation operators be obligated to post a sign, in all the buses on which "*mehadrin* arrangements" have operated in the past, which will read as follows:

> 'All passengers are entitled to sit wherever they choose (except in the seats designated for

> persons with disabilities); harassing a passenger in this matter is liable to constitute a criminal offense.'

Obviously, the respondent will be able to order, as necessary, the posting of signs on additional lines as well. If it should it be decided in the future to allow passengers to board by all doors of the bus on additional lines, the signs will be posted there too. Such signs, of a reasonable size, will help women passengers, who feel that they are being pressured, to establish their position. Moreover, it will indicate that something has changed — that the arrangements that were considered legitimate until now have ceased to apply. For this reason as well, I will propose that respondent 2 (respondent 3, as we were told, stopped operating such lines approximately a decade ago) be required to publicize notices, through its information and publications centers (including its website), in two widely-circulated daily newspapers and in the relevant press in the ultra-Orthodox sector, regarding cancellation of the separation arrangements and the right of all passengers to sit wherever they wish (the duration and scope of the publication will be determined by the respondent within 10 days of the date of the judgment, and the respondent will monitor compliance with this obligation). In addition, suitable training must be provided for drivers. I admit that from certain points of view, such a sign may be considered as a type of memorial to a wrong, recalling that there were days, and there were lines, on which "all passengers" were not "entitled to sit wherever they choose." Nonetheless, if such a sign can help a woman insist on her rights and can remind the driver of his duties, such a step should not be avoided. The publication of the notices and the posting of the signs shall take place within 30 days of the date of the judgment.

The Question of the "Rear Door"

37. Specifically, it seems that opening all of the doors for **boarding** passengers on lines that were separated is what now constitutes the focal point of the dispute between the parties. According to the petitioners and their friends among the *amici curiae*, continuing to open the rear door to allow passengers to board should be viewed in light of the existing operation of the separated lines — in a way that perpetuates the separation arrangements in practice, if not in theory. They argue, *inter alia*, that "once the separation was internalized, it is not sufficient for the Committee to state

that all passengers would now be allowed to board by both doors: no ultra-Orthodox woman would dare to board by the front door." The petitioners further argue that what is necessary is "a real and visible change in the reality of the separated bus lines, in order to convey the message that something important has come to pass in Israel." On the other hand, the Ministry of Transport, together with the other respondents and an *amicus curiae* from the ultra-Orthodox side, relies on the recommendations of the inspection team that monitored the implementation of the Committee's recommendations during the interim period; this team also recommended allowing passengers to board by both doors, subject to the bounds of the Committee's recommendations. I will state here, that we do not lightly dismiss the apprehension expressed by the petitioners.

38. In this matter as well, we believe it is necessary to adopt the course of action proposed by the Committee. It will be recalled that the Committee proposed a one-year trial period, during which the effect of opening all the bus doors for boarding would be examined — and, "should it be found, after the trial period, that it is possible to implement the general scheme, the operators of the lines appearing in the list will be required to implement all the technological and operational measures to be determined by the supervisor." I believe that, along with the desire to ensure that the seating arrangements on the buses are entirely voluntary, there should be flexibility for those passengers who wish to adopt gender separation among themselves (provided, as explained above, that it does not become a means for harming women). For this reason, and in view of the list of measures mentioned above, it was indeed appropriate for the Committee to examine the possibility of permitting passengers to board by all the bus doors. We are aware of, and not comfortable with, the fact that the existence of this possibility is likely, to a certain degree, to facilitate preserving "social pressure" against women from ultra-Orthodox society who are not in favor of separation (although, at least on lines that serve a heterogeneous population, change appears to be possible in this context as well). Nonetheless, even if there is any real substance to the argument, it seems that **at the present time** it does not justify intervention in the Committee's conclusions (in this context, of the status of women within a cultural minority group, see, e.g., R. Gordin, "'A Beautiful Sabbath Morning' – The Struggle of Women in the Orthodox Community for Partnership in the Synagogue and in Religious Rituals," in *Studies in Gender Law and Feminism* (D. Barak-Erez, S. Yanisky-Ravid, Y. Biton and D. Pugacz, eds.,

2007) 143, 512ff.) (Hebrew)). Insofar as the closing of the rear door is intended to symbolize change — I believe we have found other indicators; this ought not to give rise to the coercive application of a policy of mixed boarding of buses or mixed seating within them. In any event, for the time being, it cannot be said that the position adopted by the Committee, when put to the tests of administrative law, is so unreasonable as to justify intervention.

39. Nonetheless, it is **possible** that the decision to allow passengers to board by all the doors of the bus rests on an insufficient factual basis (see HCJ 852/86 *MK Shulamit Aloni v. Minister of Justice* [1987] IsrSC 41(2) 1; HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Communications* [1994] IsrSC 48(5) 412; HCJ 7664/06 *A.N. Atmar v. Ministry of Agriculture* (unreported)). The trial period was intended to examine whether the deliberate and coercive arrangements, including the manifestations of violence that accompanied them, decreased. The Committee believed that, during the trial period, the Ministry of Transport was required:

> 'To exercise enhanced means of enforcement on the lines in the list, both with regard to the passengers' behavior and vis-à-vis the operators and the drivers.'

The evidence that was attached to the respondent's response of October 20, 2010 gives no indication of the implementation of "enhanced means of enforcement". Although a large number of inspections were performed on the lines included in the list, only 22 inspections involved "interventions" — i.e., inspections where an inspector on behalf of the Ministry boarded a bus on which separation was maintained, and attempted to sit other than in accordance with this arrangement. Even before commenting on the result of the inspections in question, it appears to me that settling for such a small number of inspections involving intervention is not consistent with the duty of "the authority to make its best efforts, in a reasonable manner, in accordance with the issue in dispute and its importance, to obtain all of the important evidence in the matter" (HCJ 3379/03 *Moustaki v. Office of the Attorney General* [2004] IsrSC 58(3) 865, 899 –Vice-President Orr).

40. Moreover, the findings that were presented (which were attached to the respondent's response of October 20, 2010) show that in five of those

twenty-two inspections, separation arrangements were not in operation; and that in six out of sixteen other trips, the passengers made remarks to the inspectors — who complied and changed their seats, "**so as not to become embroiled in conflicts with the local populace**" (in the words of the Deputy Director-General of the Ministry of Transport, in a letter appended to the respondent's response of October 20, 2010). In other words, **in more than one-third** of the cases in which separation arrangements were maintained, the passengers made remarks to the inspectors. If we add the inspections performed by the petitioners to the inspections performed by the Ministry of Transport, it is hard to say that the results of the trial period attest to any real, proper change in the trend, a change that would support continuing to allow passengers to board by all of the bus doors. It is sufficient to recall that the checks conducted by the petitioners, after the interim injunction was granted, revealed that drivers were directing women to board by the rear door (including by stopping the bus in such a way that the women [waiting to board] stood opposite the rear door) — and this, too, bears out the existence of a close relationship between the continued opening of the rear door, and the cancellation or continuation of the deliberate separation arrangements. We have not yet reached the "Promised Land" of peace and tranquility.

41. On the other hand, it is quite possible that enhanced enforcement and clarification of the normative situation will give rise, within a relatively short time, to real change, which entails proper use of both doors (we shall not go into the question of collecting the fare). I believe that in order to reach this outcome, an additional trial period will be necessary, following the rendering of judgment, the posting of the aforementioned signs, PR activity and enhanced supervision — and, needless to say, yet again, following proper training **for drivers** (sec. 199 of the report). In my opinion, this, too, derives directly from adopting the conclusions of the Committee — because, in my view, the former trial period was not utilized in proper compliance with the requirements of the Committee. During this additional period, a broader scope of "intervention" inspections will be necessary. In cases where the inspector is challenged by passengers, he should be instructed to explain to the passengers that the arrangement in question is only a voluntary one and to inform them of the existing legal situation. If elements within the Ministry of Transport really believe that the danger of "conflict with the local populace" is real — how do they expect an "ordinary" woman (who is not an inspector) to act in that situation? If that danger remains a realistic one, how

can we speak of voluntary arrangements? This is also the place to appeal to the leaders of the ultra-Orthodox public to speak out clearly and definitively to their communities on the subject of human dignity and upholding the law, and perhaps a solution will be found (we note that at the hearing on November 21, 2010, counsel for Betzedek stated that the leaders of the Gur and the Belz sects and of the "Lithuanian" circles had expressed the opinion that aberrant behavior was prohibited under Jewish law).

42. In our attempt to find a balance between giving those who desire gender separation the greatest freedom to act according to their views, and issuing an all-encompassing provision that the rear door will remain closed to boarding passengers, we believe we should refrain, at this time, from a sweeping "final" decision. Accordingly, we rule that the one-year trial period recommended by the Committee **shall begin anew** 30 days from the date of this judgment, after respondent 2 brings to the notice of passengers that the arrangements that prevailed till now have been canceled (as stated in para. 36) and the aforementioned signs are posted. Throughout the trial period, "enhanced means of enforcement" (as recommended by the Committee) will be implemented and a great deal more data will be collected by means of inspection "interventions". It is, however, obvious that if respondent 2 receives the impression that allowing the passengers to board by all of the bus doors prevents it from fulfilling its duties vis-à-vis **all passengers**, it may refrain from introducing that possibility, on a certain line or on all lines. At the end of the period, the Minister of Transport may reconsider whether it is indeed possible to continue opening all the doors to boarding passengers. If the answer is in the affirmative, the Minister may consider expanding this arrangement to additional lines. The Ministry of Transport will operate the various centers through which complaints of improper treatment on buses can be filed, and the petitioners and other interested parties will also be able to compile information and forward it to the Ministry for consideration, to ensure, as far as possible, that the complainants' voices will not be silenced. We assume that the aforementioned is also relevant to the light railway, which is about to commence operations in Jerusalem and perhaps in other places as well.

Conclusion

43. To summarize and conclude: now that the Minister has decided to adopt the Committee's recommendations, we do not see fit to intervene in

his decision in principle, and those recommendations (which will be displayed on the Ministry's website) will now become a binding arrangement — including the enhanced supervision. The implementation is the test. The Ministry of Transport's supervision will also ensure that the respondents abide by the Committee's recommendations that apply to them (for example, in everything pertaining to the information they give out to the general public, and with regard to training for drivers). In view of the evidentiary foundation that was laid before us, we order the respondent to instruct respondent 2 with regard to publicizing the cancellation of the separation arrangements (within 10 days of the date of this judgment), and we order respondent 2 to carry out its instructions within 30 days of the date of this judgment. Within that period of time, respondents 2 and 3 will also post the signs described above in all buses formerly operating "*mehadrin* arrangements," without exception. As for allowing passengers to board by all the doors of the bus, the trial period ordered by the Committee will begin 30 days after the date of this judgment. Complaints will be duly submitted to the Ministry of Transport.

44. Although I intended to devote my conclusion to a clear statement about the duty to act with civility and the need to preserve the dignity of others and to show tolerance — imperatives that apply to everyone — I will address another matter that seems to be of considerable importance in the present case: the argument about the increasing crowding on public transportation lines. A study of the various materials presented to us (including the Committee report) reveals that a major argument that was raised in support of the ultra-Orthodox public's need for separation is the crowded nature of the transportation lines, which gives rise to congestion and physical contact (an undesirable situation, not only for halakhic reasons; to the best of our knowledge, there are also ultra-Orthodox women who, although they do not wish to perpetuate inequality, prefer separation for reasons of environmental aesthetics). It would be a good idea for the respondents — the Ministry of Transport in its regulatory capacity, and respondents 2 and 3 as public transport operators — to consider this matter as well (see sec. 204 of the Committee report). Furthermore, if this justification is of any real importance, consumers would do well to demand solutions aimed at more spacious transportation, instead of resigning themselves to crowding and demanding separation. And, finally, we hope that this judgment will ultimately help to create a better society, one which preserves the dignity of all its members, women and men alike. We do not

know what the direct and indirect effects of this judgment will be, but we do know — and, today, the respondents also agree — that we cannot condone coercive discrimination against women. In view of the fact that the Minister has adopted the Committee's recommendations, **subject to the above comments and supplementations**, the petition has become moot. Respondent 1 will bear the legal fees of counsel for the petitioners, in the amount of NIS 30,000.

45. Indeed, without human dignity and tolerance, no proper society can exist. Rabbi Yohanan, in his commentary on the Biblical verse "His eyes shall be red with wine, his teeth white with milk" (*Genesis* 49:12), said: "Whitening one's teeth [i.e., smiling – E.R.] toward one's fellow is better than giving him milk to drink" (*BT Ketuboth* 111b); and in the words of Rabbi Baruch Epstein, author of the commentary *Torah Temimah*: "Showing one's teeth alludes to presenting a smiling face to one's fellow, which is a greater sign of love and affection than giving him milk to drink." "The words of wise men are heard in moderation" (*Ecclesiastes* 9:17) — to say anything more would be superfluous, even in this context.

Justice S. Joubran

1. I concur in the opinion expressed by my colleague, Justice E. Rubinstein. In his comprehensive opinion, my colleague took the bull by the horns and focused on the issues in dispute between the parties to this petition. Quite rightly, he emphasized that, after having come a long way since the filing of the petition, the question before us today is a practical, rather than a theoretical, one. In my opinion, my colleague's conclusions and practical proposals have achieved a proper balance between the various considerations on the agenda, and I truly hope that their implementation will lead to a real change in the relationship between passengers on the bus lines, which is the object of the petition, transforming it into one of mutual respect, in the spirit of the words of Hillel the Elder: "What is hateful to you, do not do to your fellow."

2. As I stated above, it appears that the normative issue involved in prohibiting coercive separation on public transportation lines is not in dispute in the present petition, and the main differences concern the manner of applying the principles. Nonetheless, we cannot conclude our discussion

of the present petition without commenting on the normative issue. One extreme approach whereby any gender separation, of any type whatsoever, is improper, is simplistic (see Alon Harel, "What Makes Social Practice Improper Practice? Separation Between the Sexes on Public Transportation," in: *My Justice, Your Justice: Justice Between Cultures* (Yedidiah Z. Stern ed., 2010) 221, 225 (Hebrew) (hereinafter: Harel)). On the other hand, it is obvious that the opposite extreme approach, whereby men and women should be separated in all areas, is absolutely unacceptable. The reality of our lives is more complex, and, as pointed out by Justice Marshall of the United States Supreme Court, "A sign that says 'Men Only' looks very different on a bathroom door than a courthouse door" (*Cleburne v. Cleburne Living Ctr*. 473 U.S. 468-469 (1985)) (see also Harel, p. 225). Therefore, the practice of separation in bathrooms and dressing rooms does not usually raise questions of equality between the sexes; similarly, separation between the sexes in sports is generally accepted in most liberal countries. Therefore, as noted by Harel, "not every segregation between men and women is discriminatory, and it is important to develop an analytical criterion that distinguishes between discriminatory practices and non-discriminatory practices of gender-based segregation" (*ibid*., p. 226).

3. In my view, the guiding principle in all that concerns the issue before us is that taking into account considerations of religion and religious lifestyle is permissible, as long as it is not intended to force religious precepts upon another person. This was pointed out by this Court in *Horev v. Minister of Transport* [3] IsrSC 51(4) 1, 34:

> 'Taking into account considerations of religion and religious lifestyle is prohibited if the exercise of authority is intended to force religious precepts upon another person. Taking into account considerations of religion and religious lifestyle is permitted if it is intended to express the person's religious needs… Indeed, religious coercion contradicts the right to freedom of religion and human dignity. Taking into account considerations of religion is compatible with freedom of religion and human dignity.'

This approach is also consistent with the multicultural approach that was

discussed in the opinion by my colleague, Justice Rubinstein. Multicultural liberalism recognizes the importance of culture and the importance of preserving culture in order to realize the individual's right to autonomy (see Joseph Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 170; see also Gershon Gontovnik, "The Right to Culture in a Liberal Society and in the State of Israel," *Iyyune Mishpat* 27 (2003) 23, 36 (Hebrew); Michael Walzer, "Which Rights Do Cultural Communities Deserve?" in *Multiculturalism in the Test of Israeli Identity* 53 (Ohad Nahtomi, ed., 2005) (Hebrew); Avishai Margalit and Moshe Halberthal, "Liberalism and the Right to Culture," in *Multiculturalism in a Democratic and Jewish State* (Menahem Mautner, Avi Sagi, Ronen Shamir, eds., 1998) 93); Yael Tamir, "Two Concepts of Multiculturalism," *ibid.*, 79; *Economic, Social and Cultural Rights in Israel* (Yoram Rabin and Yuval Shani, eds., 2004); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995). We, as a society, must respect the culture and customs of the other, while maintaining a balance among the various rights and interests. In the present case, my colleague, Justice Rubinstein, rightly emphasized that we are not dealing only with the question of the attitude of multicultural liberalism toward a non-liberal cultural group that adopts a discriminatory internal practice (para. 30 of his opinion); we are also discussing the question of the enforcement of a certain social practice in the public domain vis-à-vis individuals who do not want it. In other words, in the present case, the issue before us is not only an "internal" one that examines the attitude of liberal society to the relationships within the cultural group, but also an "external" one that examines the impact of a specific cultural practice on liberal society itself, in Israel's public arena. Both the "internal" issue and the "external" issue give rise to weighty questions from the realm of multicultural theory, which we do not need to discuss in depth, in light of our focus on the practical questions in this case.

4. Nonetheless, I think it should be emphasized that an important value that ought to guide us on these fraught issues is the value of tolerance (see Michael Walzer, *On Tolerance* (1999); Yitzhak Zamir, "Tolerance in Law," in *The Menachem Goldberg Volume* (2001) (Hebrew). See also: Lee C. Bollinger, *The Tolerant Society* (1986); *On Toleration* (Susan Mendus & David S. Edwards, eds., 1987); David A.J. Richards, *Toleration and the Constitution* (1989). This value is the key to the formulation of the attitude toward non-liberal cultures. Liberal tolerance requires the individual to come

to terms with opinions and cultural customs with which he does not agree. Liberal multicultural society is, first and foremost, based on the value of tolerance, and recognizes all cultures as worthy of protection, in order to allow the individual to exercise the autonomy of his personal will and to tell his life story. Within this framework, liberal multicultural tolerance requires be tolerance of non-liberal persons as well. Someone who has chosen a different lifestyle should not be treated with intolerance. We must even be tolerant of those who are not tolerant of us and do not share our world views. We must react appropriately to the behavior of another person in society, even if that person's behavior is not acceptable to us (see Aharon Barak, *Proportionality in Law: Violation of the Cultural Right and its Limitations* (2010) 338 (Hebrew) (hereinafter: Barak)). A statement by Supreme Court President Barak in *Horev v. Minister of Transport* [3] applies to the present case as well:

> 'But what is the law, if there are elements in society who are not tolerant? Does tolerance not work with regard to them? In my opinion, we must be consistent in our democratic concepts. According to the concept of democracy, the tolerance that guides the members of society is tolerance of everything — even of intolerance… We must be tolerant, even of those who are not tolerant of us. This is because there is no other way for us; this is because, if we are not tolerant of intolerance, we will undermine the basis for our common existence. This existence is based on a wide range of opinions and concepts, including outlooks that do not appeal to us at all, among which is the outlook that tolerance is not mutual' (pp. 79-80).

Tolerance is an important social principle that must be promoted — even, at times, at the cost of infringing individual rights (see Barak, p. 338). "Mutual tolerance and compromise are the way to live together in a multifaceted society, such as Israeli society" (*Horev v. Minister of Transport* [3], at p. 120).

5. The requirement to be tolerant of other persons, and of different

persons, is by no means simple, and it requires every member of society to be considerate of the opinions and feelings of every person, as a member of humankind, even if he perceives those positions and opinions to be outrageous, abhorrent and negative. This was pointed out by Prof. David Heyd:

> 'Tolerance, by its very nature, is a paradoxical position, because it calls for refraining from the exercise of force against positions and actions that are perceived as unjustified, contemptible or negative. Why do we have to tolerate outlooks and expressions that seem blatantly wrong, or even abhorrent, to us…?
>
> The answer to this question, as a general rule, is that this is the only way to maintain a pluralistic society in which there is no consensus on political, religious or ethical values' (from the Introduction to Rafael Cohen-Almagor, *The Boundaries of Tolerance and Liberty: Liberal Theory and the Struggle Against Kahanism* (1994) 13 (Hebrew). See also *Horev v. Minister of Transport* [3], at p. 120).

Tolerance is therefore very difficult to achieve, and, unfortunately, it is often a rare commodity in Israeli society. Tolerance must be expressed in concrete actions, and not only in lofty phrases that are not implemented. We must avoid a situation whereby "everyone admits that people must act tolerantly and make concessions — but all this applies to the other litigant" (*Shavit v. Burial Society* [8], at p. 633). At the same time, it is important to emphasize that tolerance is bidirectional and does not apply to only one group in society. In *Horev v. Minister of Transport* [3], this Court emphasized that:

> 'The duty to act tolerantly is not a one-way duty. It does not apply only to members of the secular community. It also applies to members of the ultra-Orthodox community, which wishes its feelings and its lifestyle to be

> respected. Members of that community must also show tolerance of phenomena to which they are opposed. Only through mutual tolerance is it possible to achieve genuine co-existence, which reflects authentic compromise' (p. 120).

6. However, it is important to state clearly that tolerance, too, has its limits. Even a society that respects the different cultures of its members must set boundaries, as it is not possible to realize every cultural practice to its fullest extent. The limits of tolerance must be set by balancing the various considerations — recognition of the importance of realizing the culture as part of the autonomy of individual will, versus violation of basic human rights, such as equality and human dignity, as a result of the cultural practice in question. This balance will determine the limits of tolerance, which limits will delineate the multicultural "playing field" and determine which cultural enterprises will be recognized and respected, and which cultural enterprises will be removed from the "field". As I pointed out, the coercive application of a religious lifestyle is inadmissible in our society; nonetheless, consideration of individuals' feelings must guide each and every one of us.

7. I believe that the path to a proper balance can be found within the confines of the limitations clause, which is the criterion for balancing the various rights and interests in their struggle for superiority (see Barak, p. 208). The tests of the limitations clause, and primarily the requirement of proportionality, are the proper legal framework for clarifying and fine-tuning the complex issues that arise in a multifaceted and multicultural state, which, unfortunately, is also characterized by rifts, such as Israeli society (on the importance of proportionality, see Barak, p. 555). Proportionality is a legal structure of balance, which is sustained by data external to it, and which may contain various theories of human rights (see Barak, p. 563). Within the bounds of proportionality, the various theories of liberalism and multiculturalism can find their proper place. At the end of the day, what we must deal with is a balance among various considerations, rights and interests, and the generally accepted way to achieve that balance in our constitutional system is through proportionality. Within the framework of that balance, various balancing equations and considerations may be introduced. Thus, for example, Prof. Rubinstein points out that it is possible to assess the force of the harm done by the religious norm to individuals, and the weight of the religious norm within its own culture (see Amnon

Rubinstein, "The Decline, but Not the Fall, of Multiculturalism," *Hapraklit* 49(1) (2006) 47, 88 (Hebrew)). Moreover, in the case of separate frameworks for women and men, there is a specific balancing equation, which is found in s. 3(d)(3) of the Prohibition of Discrimination Law (see para. 34 of the opinion of my colleague, Justice E. Rubinstein, and sec. 130 of the Committee's Report)).

8. As we have said, in the present case the scope of the difference of opinion has been narrowed, and the question facing us today is primarily on the practical level. On the legal-normative level, as was emphasized by my colleague, Justice Rubinstein, coercion in the public arena that constitutes a major violation of equality and dignity is unacceptable (see para. 31 of his opinion). Such coercive practice is outside the multicultural playing field. There is no room for tolerance of such demeaning coercion. We cannot condone such a major violation, and, as I have already pointed out, my colleague's conclusions and practical proposals bring us closer to a situation in which we will no longer see coercive arrangements or coercive passengers. On the practical side, I personally would also like to emphasize the duty of bus drivers and transportation operators to uphold the Committee's recommendations as well as what we wrote in our judgment. The driver is the captain of the bus, and he must protect the passengers' rights. Without proper training for drivers, and without the cooperation of drivers and public transportation operators, we will not be able to bring about the desired change. I would therefore like to quote the Committee's report on this subject, in order to stress the importance of the issue, and the sanction that is liable to be exercised in the absence of suitable cooperation:

> 'The operators of the service lines are obligated to train and instruct their drivers and to ensure that the rights of all passengers are secured, in accordance with this general outline, to monitor the functioning of their drivers and, if necessary, to impose sanctions on a driver who does not endeavor to ensure that public order is maintained on the bus. **The Committee further emphasizes the direct responsibility of the bus driver for endeavoring to uphold the principles set down in this general scheme, throughout**

> **every trip on the service line, without exception.** In light of the above, the operators must maintain a supervision and control system on their service lines to prevent any manifestations of coercion or violence of any type. The Committee states clearly that a breach of the operator's duty will be considered a breach of the terms of the line license and, therefore, such a breach may lead to the imposition of sanctions on the operator, including cancellation of the line license in the appropriate cases' (sec. 199 of the Committee's report) [emphasis added – S.J.].

9. As a parallel to Justice Marshall's statement, it can be said, in the present case, that a sign that says "Men Only" looks very different on a bathroom door than on the door of a public bus. Let us hope that this ruling will lead to unity and tolerance and will bring people together, and will not give rise to disunity or deepen the rifts in Israeli society. However, we are obligated to rule according to the law, to the best of our own understanding, as stated by this Court in HCJ 390/79 *Dawiqat v. Government of Israel* [1979] IsrSC 34(1) 1, 4:

> 'There is still great concern that the Court will appear to have abandoned its proper place and descended into the arena of public debate, and that its decision will be greeted by part of the public with applause and by another part with total and vehement rejection. In this sense, I consider myself here as one whose duty is to rule according to the law in any matter that is duly brought before a court. It gives me no leeway whatsoever, as I am well aware that the general public will not pay attention to the legal reasoning, but only to the final conclusion, and the status befitting the Court as an institution is likely to be harmed, over and above the disputes that divide the public. But what can we do? This is our job and this is our duty as judges.'

Justice Y. Danziger

I concur in the comprehensive and scholarly opinion of my colleague, Justice E. Rubinstein, and in the operative result proposed by him.

1. At the outset I will emphasize that in my opinion, our willingness to allow an additional trial period, in which the effect of the "door-opening" arrangement on the coercive application of separation and dress codes will be examined, cannot legitimize coercion as stated; and if it transpires that such coercion persists, this will obviously constitute a very weighty consideration that may lead to the conclusion that this arrangement should be terminated because, in effect, it promotes patently illegal coercion, as stated. I also find it appropriate to emphasize the importance of maintaining a broad, efficient and effective control mechanism to check for the existence of coercion during the trial period. At the end of the day, the respondent's decision at the conclusion of the trial period will be based on the results of this control mechanism and on reports that will be provided by male and female inspectors on behalf of the respondent (and, hopefully, also on the direct impression of the general public which makes use of the relevant lines). If the trial period is not properly utilized for the compilation of a well-established factual base as aforesaid, it will be truly difficult for the respondent to make a reasonable and proper decision in the matter.

In addition, I believe that the role of respondent 2, together with its managers and its employees, in ensuring the implementation of the arrangement recommended by the Committee should be emphasized. Respondent 2 must not contribute, indirectly or tacitly, to the forcible application of separation or dress codes, and it is subject to the duty — as a company providing a public service — of maintaining absolute compliance with the guidelines laid down by the Committee, to which we have added in this ruling.

I welcome the fact that ultimately, the respondent accepted the conception that structured and enforced separation in the public arena in which public transportation is provided is illegal. This restricted the scope of the dispute to the question of how to implement this conception and to ensure that there are no arrangements that force separation or a certain type of attire on women. Nonetheless, I cannot stop at this point, and I would like

once again to briefly emphasize some basic concepts regarding dignity and equality.

2. Israel's Declaration of Independence states that the State of Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex." Separation of people on the basis of gender (as on the basis of race or religion) violates the principle of equality and constitutes discrimination. In HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94, Justice D. Dorner emphasized in her ruling — which some believe is perhaps the most important ruling she ever handed down (see: Mordechai Kremnitzer, Khaled Ghanayim and Alon Harel, "Portrait of Dalia Dorner," in *The Dalia Dorner Volume* (Shulamit Almog, Dorit Beinisch and Yaad Rotem, eds., 2009) 418 (Hebrew)) — the humiliation that accompanies gender-based discrimination as a basis for her position that discrimination against that background constitutes a violation of the right to dignity which is anchored in Orsdin. In that ruling, she referred to the ruling of the United States Supreme Court in *Brown v. Board of Education* 347 U.S. 483 (1954), which rejected the "separate but equal" approach to education that had been generally accepted up to that time. In that context, Justice Dorner stated, *inter alia*:

> 'Such discrimination is based on attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature. This, of course, entails profound humiliation for the victim of the discrimination' (ibid., at 132).

The humiliation that accompanies gender-based discrimination was also pointed out by (then) Justice M. Cheshin in HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Social Welfare* [1998] IsrSC 52(3) 630 , who stated as follows:

> 'Discrimination against a woman — for being a woman — is generic discrimination... Generic discrimination, as already stated, is discrimination that mortally wounds human dignity' (pp. 658-659).

3. This humiliation becomes gross humiliation when violence — verbal or physical — is used to enforce it, or when the state authorities legitimize it,

even indirectly and certainly directly. As a man, I suggest that every man ask himself if he would want one of the means of coercion which my colleague described in his opinion (see para. 20 of the opinion) to be used against a woman in his family, and if he would want a woman in his family to be forced to dress in a way that is not in line with her beliefs whenever she seeks to use a public service. Even more importantly, I would suggest that all the men in question ask themselves how they would feel if, merely because they belonged to a certain group, people were to fence off the public area in which they are entitled to be present and to require them to wear a certain type of attire. I would ask those women who support coercive separation to ask themselves the same questions — for example, whether forcing them to dress in a way that is not in line with their beliefs as a prerequisite for using public transportation, would not humiliate them and violate their dignity. In fact, there were periods — dark ages — in which norms such as those that constitute the object of the petition before us were applied throughout the entire world (and, unfortunately, there are places in which they are still applied). Nonetheless, such norms cannot apply to, and cannot be binding upon a public area within the State of Israel, merely because that public area also serves, *inter alia*, the religious and ultra-Orthodox population.

4. I cannot refrain from commenting that many generations of Jews lived in societies in which separation of the type that some people are now seeking to enforce was not practiced. Were they less devout in their belief than those who now seek to enforce such separation? Did they have the audacity to enforce separation in the public space that they shared with all those people who did not desire such separation? Are the solutions that were found by the great sages of those generations inferior to the solution of coercive separation? In my view, the answers to these questions are obvious, and the fact that some people are seeking to exploit their power, including their consumer and political power, in order to apply and even to establish the said coercion, gives rise to real discomfort, especially against the background of these circumstances.

Even without relating to the situation from a historical perspective, in the Jewish and democratic State of Israel, the state authorities cannot support the establishment of the said coercion, and the state must take action — positive action — to uproot it. The coercion in question reflects a violation of human dignity and individual autonomy; it is nothing but the oppression and humiliation of women, for which there is no place in our society, either in

the name of multiculturalism or under any other banner. On this matter, the message that must be voiced by the state authorities, in all areas in which the state has influence, must be unequivocal and insistent: there shall be no such coercion.

5. I feel bound to conclude by citing a statement of (then) Justice M. Cheshin in *Israel Women's Network v. Minister of Labor and Social Welfare* [23]. His words should be recalled by all those who seek to enforce separation and certain types of attire on any man or woman who does not want them:

> 'Both the male and the female were created — created together — in the image of God. Woman and man are one: she is a human being; he is a human being; both are human beings.
>
> Thus it was — and was rightly; thus it is — and is rightly; thus it shall be — and shall be rightly. We shall remember and we shall be on guard' (at p. 663).

Held as per the opinion of Justice E. Rubinstein.

29 Tevet 5771.

5 January 2011.