HCJ 5026/04

Design 22 Shark Deluxe Furniture Ltd
and 18 others

v

1. **Tzvika Rosenzweig, Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs**
2. **Ministry of Industry, Trade and Employment**
3. **Attorney-General**
4. **Knesset**
5. **Haifa Regional Labour Court**

The Supreme Court sitting as the High Court of Justice

[4 April 2005]

Before President A. Barak and Justices A. Procaccia, M. Naor

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petitioner, a company that owns a chain of furniture shops, was fined for employing Jews on the Sabbath, contrary to the Hours of Work and Rest Law, 5711-1951. Subsequently, the petitioner applied under the law for a permit to employ Jews on the Sabbath, but this application was rejected by the first respondent. The petitioner therefore filed a petition in the Supreme Court, arguing that the first respondent's refusal to grant a permit was unreasonable in the extreme, in view of the economic loss that the petitioner was caused by not being able to employ Jews on the Sabbath. The petitioner further argued that the Hours of Work and Rest Law was unconstitutional, since it violated the basic human right of freedom of occupation.

Held: The Basic Law: Freedom of Occupation, which was originally enacted in 1992, has since 2002 applied not only to laws passed after the Basic Law was introduced but also to laws passed before it came into effect. Therefore the Hours of Work and Rest Law, 5711-1951, is subject to constitutional scrutiny under the Basic Law: Freedom of Occupation.

The provisions of the Hours of Work and Rest Law concerning the weekly day of rest satisfy the constitutional tests, since they befit the values of the State of Israel as a Jewish and democratic state, are intended for a proper purpose and are not excessive.

The refusal of the first respondent to grant the first petitioner a permit to employ Jews on the Sabbath was not unreasonable, since the first petitioner failed to present a factual basis to show that its activity during the hours of the weekly rest was essential for the public or a part thereof.

Petition denied.

Legislation cited:

Administrative Offences Law, 5746-1985, s. 8.

Administrative Offences (Administrative Fine — Hours of Work and Rest) Regulations, 5758-1998, rr. 1, 2.

Basic Law: Freedom of Occupation, 5752-1992, s. 6.

Basic Law: Freedom of Occupation, 5754-1994, ss. 2, 4, 10.

Basic Law: Freedom of Occupation (Amendment).

Basic Law: Freedom of Occupation (Amendment no. 2).

Basic Law: Human Dignity and Liberty, s. 5.

Government and Justice Arrangements Ordinance, 5708-1948, s. 18A.

Hours of Work and Rest Law, 5711-1951, ss. 7, 9, 9A, 12, 12(a), 26(a), 27, 30.

Israeli Supreme Court cases cited:

[1] LCA 10687/02 *Handyman Do-It-Yourself v. State of Israel* [2003] IsrSC 57(3) 1.

[2] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.

[3] HCJ 337/81 *Miterani v. Minister of Transport* [1983] IsrSC 37(3) 337.

[4] HCJ 144/72 *Lipevsky-Halipi v. Minister of Justice* [1973] IsrSC 27(1) 719.

[5] HCJ 338/87 *Margaliot v. Minister of Interior* [1988] IsrSC 42(1) 112.

[6] HCJ 1452/93 *Igloo Plumbing Works, Building & Development Contracting Co. Ltd v. Minister of Industry and Trade* [1993] IsrSC 47(5) 610.

[7] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[8] HCJ 2334/02 *Stanger v. Knesset Speaker* [2004] IsrSC 58(1) 786.

[9] HCJ 4746/92 *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [1994] IsrSC 48(5) 243.

[10] CA 239/92 *Egged Israel Transport Cooperation Society v. Mashiah* [1994] IsrSC 48(2) 66.

[11] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.

[12] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.

[13] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

[14] AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [2004] IsrSC 58(3) 782.

[15] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [1988] IsrSC 42(2) 221; **IsrSJ 8 186**.

[16] HCJ 1683/93 *Yavin Plast Ltd v. National Labour Court* [1993] IsrSC 47(4) 702.

[17] HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**.

HCJ 6652/96 *Association for Civil Rights in Israel v. Minister of Interior* [1998] IsrSC 52(3) 117. [18]

HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [1998] IsrSC 52(2) 433. [19]

HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**. [20]

HCJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [1999] IsrSC 53(4) 673; **[1998-9] IsrLR 537**. [21]

HCJ 4330/93 *Ganem v. Tel-Aviv District Committee, Bar Association* [1996] IsrSC 50(4) 221. [22]

HCJ 1008/01 *Arkia Israel Airlines Ltd v. Minister of Transport* [1996] IsrSC 50(4) 207. [23]

HCJ 953/01 *Solodkin v. Beit Shemesh Municipality* [2004] IsrSC 58(5) 595; **[2004] IsrLR 232**. [24]

HCJ 7852/98 *Golden Channels & Co. v. Minister of Communications* [1999] IsrSC 53(5) 423. [25]

HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193. [26]

HCJ 4915/00 *Communications and Productions Network Co. (1992) Ltd v. Government of Israel* [2000] IsrSC 54(5) 451. [27]

HCJ 5812/00 *Samandin Mediterranean Sea v. Director of Oil Concerns at Ministry of National Infrastructures* [2004] IsrSC 58(4) 312. [28]

HCJ 4676/94 *Meatreal Ltd v. Knesset* [1996] IsrSC 50(5) 15. [29]

CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529. [30]

HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255. [31]

HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [1989] IsrSC 43(2) 22; **IsrSJ 10 229**. [32]

EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [2003] IsrSC 57(4) 1. [33]

LCA 2316/96 *Isaacson v. Parties Registrar* [1996] IsrSC 50(2) 529. [34]

CA 506/88 *Shefer v. State of Israel* [1994] IsrSC 48(1) 87; **[1992-4] IsrLR 170**. [35]

HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**. [36]

CrimA 217/68 *Isramax Ltd v. State of Israel* [1968] IsrSC 22(2) 343. [37]

HCJ 287/69 *Miron v. Minister of Labour* [1970] IsrSC 24(1) 337. [38]

HCJ 171/78 *Eshkar Ltd v. Minister of Labour and Social Affairs* [1982] IsrSC 36(3) 141. [39]

HCJ 5073/91 *Israel Theatres Ltd v. Netanya Municipality* [1993] IsrSC 47(3) 192. [40]

HCJ 987/94 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [1994] IsrSC 48(5) 412. [41]

HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1. [42]

HCJ 8238/96 *Abu Arar v. Minister of Interior* [1998] IsrSC 52(4) 26. [43]

HCJ 1255/94 *Bezeq, the Israel Telecommunication Corp. Ltd v. Minister of Communications* [1995] IsrSC 49(3) 661. [44]

HCJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728. [45]

HCJ 4644/00 *Jaffora Tabori Ltd v. Second Television and Radio Authority* [2000] IsrSC 54(4) 178. [46]

HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [2003] IsrSC 57(6) 212; **[2002-3] IsrLR 225**. [47]

HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**. [48]

Israel District Court cases cited:

CrimC (Jer) 3471/87 *State of Israel v. Caplan* [1988] IsrDC 5748(2) 265. [49]

Israel National Labour Court cases cited:

LabA 300271/98 *Tepco Energy Control Systems and Environment Production Ltd v. Tal*, IsrLC 35 703. [50]

LabA 255/99 *Civil Security Ltd v. Shahidem* (unreported). [51]

American cases cited:

McGowan v. Maryland, 366 U.S. 420 (1961). [52]

Canadian cases cited:

R. v. Edwards Books and Art [1986] 2 S.C.R. 713. [53]

Jewish law sources cited:

Deuteronomy 5, 11-15. [54]

Exodus 20, 8-11. [55]

For the petitioner — R. Krupnik.

For respondents 1-3 — H. Ofek.

JUDGMENT

President A. Barak

Is the prohibition against the employment of Jews on the Sabbath[1] under the Hours of Work and Rest Law, 5711-1951, contrary to the provisions of the Basic Law: Freedom of Occupation? That is the main question before us in this petition.

The facts

1. The first petitioner, a furniture marketing company with branches throughout Israel, employs Jewish employees at its branches (petitioners 2-19). These branches are open every day of the week, including on the Sabbath. On 12 March 2003, a fixed-sum administrative fine was imposed on the petitioner in the sum of NIS 15,000, under s. 8 of the Administrative Offences Law, 5746-1985, and rr. 1-2 of the Administrative Offences (Administrative Fine — Hours of Work and Rest) Regulations, 5758-1998. The fine was imposed because of the employment of Jewish employees during the 'weekly rest,' contrary to ss. 9, 9A, 26(a) and 27 of the Hours of Work and Rest Law, 5711-1951 (hereafter — the Hours of Work and Rest Law). When it received the notice that the fine had been imposed, the petitioner applied to the first respondent to receive a permit to employ Jewish employees on Sabbaths and religious holidays. At the same time, the petitioner elected to stand trial, and therefore on 22 May 2003 an indictment was filed against it in the Haifa District Labour Court. An application that it submitted to the Attorney-General to stay the proceedings in the file was rejected on 10 May 2004. This was the reason for the petition, which requires the respondents to come and show cause why the provisions of the law that prohibit the work and employment of Jews on the Sabbath should not be

[1] The Jewish Sabbath begins shortly before sunset on Friday and ends at nightfall on Saturday.

repealed, and why the petitioner should not be given a permit under the Hours of Work and Rest Law.

The petition

2. The petition aims to achieve two main reliefs. *In the constitutional sphere*, the petitioner attacks the constitutionality of the provisions of the Hours of Work and Rest Law that prohibit the employment of Jews on the Sabbath. It argues that these provisions violate the freedom of occupation that is enshrined in the Basic Law: Freedom of Occupation, and they do not satisfy the conditions of the limitations clause. According to the petitioner, the prohibition of employment on the Sabbath violates the right to freedom of occupation and causes significant economic harm to it and to its employees. It argues that if it is compelled to close its branches on the Sabbath, this will lead to a restriction of its activity and even to the closure of some of its branches that will not be competitive with other companies that do business in the marketing of furniture. It says that its branches are located far away from residential areas and that opening them on the Sabbath does not disturb other people who wish to enjoy rest on the Sabbath. The petitioner does not dispute the need for a day of weekly rest, but it complains that this day has been designated only on the Sabbath. It argues that the employee should be allowed to choose what day of rest he prefers, and act accordingly. *In the administrative sphere*, the petitioner attacks the discretion of the respondent who refused its request for an employment permit on the Sabbath. According to it, this discretion is unreasonable and disproportionate in the extreme. The unreasonableness derives from the fact that the respondent did not consider the economic harm that is likely to be caused to the petitioner and its employees, who are interested in working on the Sabbath. The petitioner also argues that the respondent ignored its undertaking that it any case its employees would have a weekly rest, in accordance with the law.

3. The first three respondents ask the court to deny the petition. According to them, the prohibition against working on the Sabbath serves two purposes. *One* is a social purpose that is based upon a concept of social welfare, which recognizes the right of a person to rest from his work.

Repealing the prohibition against employment on the Sabbath will lead, so it is alleged, to an injury to workers from the weaker echelons of society, who require the protection of the legislature against potential exploitation by their employers. The *second* is a national religious purpose, which realizes the social purpose. It is argued that the Sabbath is the weekly day of rest for Jews, and therefore it is only logical that the legislature prescribed this day as the day of rest in the law. Prescribing a uniform day of rest is capable of furthering the purposes of the day of rest and contributing to the realization of an 'atmosphere of rest,' which is consistent with the accepted outlook around the world. With regard to the alleged constitutional violation, the respondents are of the opinion that the purpose underlying the prohibition of employment on the Sabbath befits the values of the State of Israel as a Jewish and democratic state, is for a proper purpose and its violation of the freedom of occupation is proportional. The respondents further argue that the question of the constitutionality of employment on the Sabbath has already been decided in this court, in the decision, *per* Justice D. Dorner, in LCA 10687/02 *Handyman Do-It-Yourself v. State of Israel* [1], in which it was held that the provisions of the law are not void notwithstanding the violation of the freedom of occupation. As for the petitioner's claim with regard to defects that occurred in the decision of the respondent not to give it a permit for employment on the Sabbath, it was argued that the petitioner does not satisfy the criteria in s. 12 of the law, and therefore its application was rejected.

The normative framework

4. Section 7 of the Hours of Work and Rest Law provides:

'Hours of the weekly rest

7. (a) At least thirty six consecutive hours per week are the weekly rest of the worker.

(b) The weekly rest shall include —

(1) For a Jew — the Sabbath;

(2) For someone who is not a Jew — the Sabbath or Sunday or Friday,

> all of which in accordance with what is acceptable to him as his day of weekly rest.'

Further on the legislature provided that no one should be employed or work during the weekly rest, unless work as aforesaid has been permitted (ss. 9, 9A and 12 of the law, respectively):

> 'Prohibition of employment during the weekly rest
>
> 9. Employing a worker during the weekly rest is prohibited, unless it has been permitted under section 12.
>
> Prohibition of work during the weekly rest
>
> 9A. (a) On the prescribed days of rest within the meaning thereof in the Government and Justice Arrangements Ordinance, 5708-1948, the owner of a workshop shall not work in his workshop, not shall the owner of a factory work in his factory, nor shall the owner of a shop trade in his shop.
>
> …
>
> Permit for employment during the weekly rest
>
> 12. (a) The Minister of Labour may permit the employment of a worker during the hours of the weekly rest, or during a part thereof, if he is persuaded that stopping the work for all or part of the weekly rest is likely to harm the defence of the state or the safety of persons or property, or seriously to damage the economy, the work process or the supply of

necessities that are, in the opinion of the Minister of Labour, essential for the public or for a part thereof.

(b) A general permit under subsection (a) shall only be given by a decision of a ministerial committee composed of the prime minister, the Minister of Religious Affairs and the Minister of Labour.

(c) A special permit under subsection (a) shall give details of the professions or jobs of the workers for whom the permit was given or the departments at the place of work for whose workers the permit was given.'

Against the background of these sections, let us turn to examine the petitioners' arguments.

The constitutional scrutiny

5. Freedom of occupation has been a basic right in Israeli law since the founding of the state. Before the enactment of the Basic Law: Freedom of Occupation, it was a part of the Israeli version of common law. This was discussed, shortly after the founding of the state, by Justice S.Z. Cheshin, who said:

> 'It is a major principle that every person has a natural right to engage in such work or occupation as he shall choose for himself, as long as engaging in work or an occupation is not prohibited by law… this is their right. It is a right that is not written in statute, but it derives from the natural right of every person to look for sources of livelihood and find for himself work by means of which he can support himself' (HCJ 1/49 *Bajerno v. Minister of Police* [2], at p. 82).

Since the court gave its decision in *Bajerno v. Minister of Police* [2], the Supreme Court has affirmed it on several occasions (see A. Barak, *Legal Interpretation* (vol. 3, 1994), at p. 574). The following remarks of Justice M. Shamgar are well known:

> 'The premise that is accepted in a free society is that a person may engage in any work or occupation, as long as no restrictions or prohibitions are prescribed with regard thereto, and these should only be imposed and enforced by the express provision of statute' (HCJ 337/81 *Miterani v. Minister of Transport* [3], at p. 353).

The main case law emphasis has been directed towards the question of the circumstances in which it is possible to interpret a legislative arrangement as one in which there is an express restriction or express prohibition on the freedom of occupation. The basic approach was that the legislator may restrict the freedom of occupation, provided that he expressed this desire clearly, expressly and unambiguously (see *Miterani v. Minister of Transport* [3], at p. 353; HCJ 144/72 *Lipevsky-Halipi v. Minister of Justice* [4], at p. 723; HCJ 338/87 *Margaliot v. Minister of Interior* [5], at p. 114). It follows that no constitutional restrictions were placed on the power of the legislature to harm the freedom of occupation (see Y. Klinghoffer, 'Freedom of Occupation and Licensing of Businesses,' 3 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1973) 582; see also HCJ 1452/93 *Igloo Plumbing Works, Building & Development Contracting Co. Ltd v. Minister of Industry and Trade* [6]).

6. When the Basic Law: Freedom of Occupation was passed, a major change took place in the normative arrangement (a 'constitutional revolution' in the words of my opinion in CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 353; see also Barak, 'The Constitutional Revolution — Twelve Years On,' 1 *Law and Business (Mishpat veAsakim)* 3 (2004)). The freedom of occupation underwent a change in its normative status (see HCJ 2334/02 *Stanger v. Knesset Speaker* [8], at p. 791). It became a constitutional super-legislative right (see HCJ

4746/92 *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [9]; CA 239/92 *Egged Israel Transport Cooperation Society v. Mashiah* [10]; HCJ 4769/95 *Menahem v. Minister of Transport* [11]; HCJ 1030/99 *Oron v. Knesset Speaker* [12], at p. 658). The Knesset (as a constitutive body) restricted the power of the Knesset (as a legislative body) to harm the freedom of occupation (see HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [13], at p. 383). It is not sufficient for the law to impose a restriction on the freedom of occupation expressly, clearly and unambiguously. The constitutionality of this restriction must satisfy the requirements of the limitations clause (s. 4 of the Basic Law: Freedom of Occupation). This leads to the conclusion that 'the legality of a certain occupation does not constitute a criterion when examining the constitutionality of the freedom to engage in that occupation. The constitutionality of this criminal prohibition shall be determined in accordance with its compliance with the conditions prescribed in the limitations clause' (*per* Justice A. Grunis, in AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [14], at p. 803). Only when these requirements are satisfied can the freedom of occupation be violated. This also gives expression to the idea that the freedom of occupation, like every other human right, is not absolute. It is relative in nature. 'It is a major principle of ours that every basic right is not absolute but relative, and it is upheld and observed by finding the proper balance between the various legitimate interests of two individuals or of the individual and the public, interests that are all enshrined and protected in law' (*per* Vice-President M. Elon in HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [15], at p. 242 { }; see also HCJ 1683/93 *Yavin Plast Ltd v. National Labour Court* [16]; *Israel Investment Managers Association v. Minister of Finance* [13], at p. 383; *Stanger v. Knesset Speaker* [8], at p. 791; *Menahem v. Minister of Transport* [11], at p. 258). A balance should be found between it and proper considerations of the public good ('horizontal balancing': see HCJ 2481/93 *Dayan v. Wilk* [17], at p. 475 { }).

7. In the original Basic Law: Freedom of Occupation (enacted on 12 March 1992) there was a temporary provision to the effect that laws enacted prior to the Basic Law would remain in force. Originally it was provided that legislation that was valid prior to the commencement of the Basic Law, which conflicted with the provisions of the Basic Law, would remain valid until two years had passed from the date of commencement of the Basic Law (s. 6). When the original Basic Law was repealed and replaced by a new Basic Law on 10 March 1994, the temporary provision was extended for two years from the date of commencement of the new Basic Law (s. 10). In the amendment made to the Basic Law in 5757-1996 (Basic Law: Freedom of Occupation (Amendment)) — an amendment that was made after the two years provided in the temporary provision had expired (see HCJ 6652/96 *Association for Civil Rights in Israel v. Minister of Interior* [18]) — it was provided that a law that conflicted with the provisions of the Basic Law would remain valid until four years had expired from the date of commencement of the Basic Law. This provision was changed in 5758-1998 (Basic Law: Freedom of Occupation (Amendment no. 2)) — once again after the four years had expired — and it was provided that legislation that was valid before the commencement of the Basic Law would remain valid until 11 Nissan 5762 (14 March 2002). When this date passed, the provision was not changed. It follows that after March 2002 there is no constitutional protection for a law that was valid before the commencement of the Basic Law and that conflicts with the provisions of the Basic Law. It therefore became possible to examine whether legislation — whether it was enacted before the Basic Law: Freedom of Occupation was passed, or whether it was enacted subsequently — violates the freedom of occupation, without satisfying the provisions of the limitations clause. Therefore one of the laws that is now subject to constitutional scrutiny is the Hours of Work and Rest Law.

8. Since *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], it is accepted that, for the sake of clear analysis and precise thinking, the constitutional scrutiny is carried out in three stages (see *ibid*. [7], at p. 428;

HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [19], at p. 440; HCJ 6055/95 *Tzemah v. Minister of Defence* [20], at p. 258 {}; *Menahem v. Minister of Transport* [11], at p. 259; *Oron v. Knesset Speaker* [12], at p. 657; *Stanger v. Knesset Speaker* [8], at p. 792). The *first* stage examines whether a law violates the freedom of occupation, as it is defined in the Basic Law: Freedom of Occupation. For this purpose, we must of course interpret the constitutional provision concerning freedom of occupation (constitutional interpretation) and the provision of the law that is alleged to violate it (legislative interpretation). If there is no violation, the constitutional scrutiny ends. If there is a violation, the constitutional scrutiny progresses to the second stage. The *second* stage examines whether the violation of the freedom of occupation satisfies the requirements of the limitations clause. If these requirements are satisfied, the constitutional scrutiny ends. If the requirements of the limitations clause are not satisfied, we must progress to the next stage. The *third* stage examines the constitutional remedy. Let us now turn to the constitutional scrutiny that is required in the case before us.

First stage: does the Hours of Work and Rest Law violate the freedom of occupation?

9. Section 3 of the Basic Law: Freedom of Occupation provides:

> ‘Freedom of occupation
>
> 3. Every citizen or resident of the state is entitled to engage in any occupation, profession or trade.’

I discussed the purpose underlying this provision in one case, where I said:

> ‘The freedom of occupation as a constitutional right is derived from the autonomy of the individual will. It is an expression of how a person defines himself. By means of freedom of occupation, a person shapes his personality and his status and contributes to the social fabric. This is true according to the values of the State of Israel as a democratic state. It is also true

> according to the values of the state as a Jewish state. Work makes man unique and is an expression of the image of God in him' (*Israel Investment Managers Association v. Minister of Finance* [13], at p. 383; see also *Menahem v. Minister of Transport* [11], at p. 256).

Indeed, the freedom of occupation is the freedom of the individual to engage (or not to engage) in any occupation, trade or profession as he sees fit. This is mainly a 'protective' right that usually acts against a violation thereof by a government authority (see HCJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [21], at p. 692 {   }). It follows that any legislative arrangement that restricts the liberty of the citizen or the resident to enter into an occupation, profession or trade, or to manage them as he chooses, violates his freedom of occupation:

> 'Freedom of occupation is the freedom to act within the framework of an occupation, profession or trade, without prohibitions or restrictions. An act of the government that imposes restrictions on the manner of realizing an occupation, profession or trade, violates… the freedom of occupation' (HCJ 4330/93 *Ganem v. Tel-Aviv District Committee, Bar Association* [22], at p. 233).

Therefore, any provision in the law that requires a permit or licence to conduct business violates the freedom of occupation:

> 'The law imposes a duty of licensing. A business that was "free" from any licensing obligation becomes a profession when admission into it becomes "regulated." This transition violates the Basic Law: Freedom of Occupation' (*Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [19], at p. 442).

It has therefore been held that the need for a licence in order to practise as a lawyer is a law that violates the freedom of occupation (see *Stanger v. Knesset Speaker* [8]. at p. 791); the need for a license in order to be a pilot

violates the freedom of occupation (HCJ 1008/01 *Arkia Israel Airlines Ltd v. Minister of Transport* [23], at p. 214); the need for a permit in order to do business as an employment agency violates the freedom of occupation (see *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [19]); the need for a licence in order to operate a taxi violates the freedom of occupation (see *Menahem v. Minister of Transport* [11], at p. 261); the need for a permit in order to operate a business that involves gambling violates the freedom of occupation (see *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [14]). This license or permit can relate to the place or substance of the occupation (such as a licence to sell pig meat within the boundaries of a local authority: HCJ 953/01 *Solodkin v. Beit Shemesh Municipality* [24], at para. 21); a licence to sell a television cable package (HCJ 7852/98 *Golden Channels & Co. v. Minister of Communications* [25], at p. 429); a licence for gambling within the framework of a members' club (*Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [14]). Finally, the freedom of occupation applies also to the freedom of competition without interference by the state and equality of opportunity (see HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [26], at p. 227; HCJ 4915/00 *Communications and Productions Network Co. (1992) Ltd v. Government of Israel* [27], at p. 463; HCJ 5812/00 *Samandin Mediterranean Sea v. Director of Oil Concerns at Ministry of National Infrastructures* [28], at p. 347; *Oron v. Knesset Speaker* [12], at p. 658; *Menahem v. Minister of Transport* [11], at p. 256; *Arkia Israel Airlines Ltd v. Minister of Transport* [23]).

10. Against this background, it follows that the provisions of the Hours of Work and Rest Law that prohibit work during the weekly rest violate the freedom of occupation. 'The prohibition of working on the Sabbath violates the Basic Law: Freedom of Occupation, as defined in s. 3 of the Basic Law: Freedom of Occupation' (*per* Justice D. Dorner in *Handyman Do-It-Yourself v. State of Israel* [1], at p. 5). The restriction on occupation concerns time. It does not address the content or character of the occupation, but the hours when it takes place. The Hours of Work and Rest Law violates the realization

of a person's will to develop his business during the hours of the weekly rest. This violation of freedom of occupation exists whether we are speaking of a private business or a corporation. Both the former and the latter have a right to freedom of occupation. Moreover, the prohibition of working on the Sabbath also violates the freedom of occupation of the worker, who wishes to work in the business on the Sabbath. The prohibition also sometimes violates the freedom of competition of the owner of the business. In view of this conclusion, with regard to the existence of a fundamental violation of the freedom of occupation, we do not need to examine whether the Hours of Work and Rest Law violates additional human rights, such as the right to freedom of religion and freedom from religion (see HCJ 4676/94 *Meatreal Ltd v. Knesset* [29] and cf. *R. v. Edwards Books and Art* [53]). Indeed, in the petition before us the constitution debate focused merely on the violation of freedom of occupation by the Hours of Work and Rest Law. Within this framework, the respondents agreed that 'the Hours of Work and Rest Law does involve a violation of the employer's freedom of occupation' (para. 16 of the respondents' reply). Their argument was that this violation satisfies the requirements of the limitations clause. Let us now turn to this question, which constitutes the *second* stage of the constitutional scrutiny.

Second stage: does the Hours of Work and Rest Law satisfy the requirements of the limitations clause?

11. A law that violates the freedom of occupation is not unconstitutional for that reason alone. There are many laws that violate constitutional human rights without thereby becoming unconstitutional. For example, the penal laws, the laws concerning arrests and extradition, violate the prohibition against denying or restricting 'a person's liberty… by imprisonment, arrest, extradition or in any other way' (s. 5 of the Basic Law: Human Dignity and Liberty). No one claims that all these laws are unconstitutional (see CrimA 4424/98 *Silgado v. State of Israel* [30]). We must distinguish between the scope of the right and the protection given to it; between the application of the right and the ability to realize it (see HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [31], at p. 270; HCJ 806/88 *Universal City*

Studios Inc. v. Film and Play Review Board [32], at p. 33 {}; A. Barak, *Legal Interpretation* (vol. 3, 1994), at p. 371). The scope of human rights is also broader than the protection given to them and the ability to realize them under the law. Indeed, human rights are the rights of a person as a part of society. It is possible to restrict human rights in order to realize social goals. Only when these goals are realized is it possible to have human rights. 'The constitutional right and the violation thereof derive from a common source' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 433). This is why the limitations clause is so central. It is the fulcrum where we find the constitutional balance between the private person and the public, the individual and society. It reflects the approach that alongside human rights there are also human duties (*ibid.* [7]). The limitations clause has a double function: it is intended to ensure that the human rights provided in the Basic Laws are only violated when certain conditions are fulfilled; it provides the conditions for violating human rights (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 433; *Stanger v. Knesset Speaker* [8], at p. 793). Thus we see that human rights are not absolute; they can be restricted. Notwithstanding, there are limits to the restrictions that can be placed on human rights. These are set out in the limitations clause.

12. The limitations clause in the Basic Law: Freedom of Occupation provides (in s. 4):

> 'Violation of freedom of occupation
>
> 4. Freedom of occupation may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or under a law as stated by virtue of an express authorization therein.

This clause provides that it is possible to violate the freedom of occupation, and the violation will be constitutional, if the violation satisfies the following conditions: (a) the violation is made by a law or under a law by virtue of an express authorization in the law; (b) the law violating freedom of

occupation befits the values of the State of Israel; (c) the law violating freedom of occupation is for a proper purpose; (d) the violation caused by the law to the freedom of occupation is to an extent that is not excessive. For a law that violates the freedom of occupation to pass the constitutional scrutiny in the limitations clause, it must satisfy the four requirements. Are these requirements satisfied by the Hours of Work and Rest Law?

13. The *first* requirement of the limitations clause is that the violation of the freedom of occupation is made 'by a law.' We do not need to examine the significance of this expression (see Barak, *Legal Interpretation*, *supra*, at p. 489). There is no dispute that the Hours of Work and Rest Law is a law. The first requirement provided in the limitations clause is satisfied.

14. The *second* requirement provided in the limitations clause is that the law that violates freedom of occupation 'befits the values of the State of Israel.' The limitations clause does not define these values. These can be derived from the purpose clause in the Basic Law: Freedom of Occupation, which provides:

> 'Purpose 2. The purpose of this Basic Law is to protect freedom of occupation in order to enshrine in a Basic Law the values of the State of Israel as a Jewish and democratic state.'

Thus we see that the 'values of the State of Israel' (the limitations clause) are 'the values of the State of Israel as a Jewish and democratic state' (the purpose clause) (see A. Barak, *The Judge in a Democracy* (2004), at pp. 82, 345), What are these values and does the Hours of Work and Rest Law befit them?

15. We have no need, within the framework of the petition before us, to examine in detail the combination of constitutional terms 'the values of the State of Israel as a Jewish… state' and 'the values of the State of Israel as a… democratic state.' For the purposes of the petition before us the following

three points are sufficient: *first*, the State of Israel is a Jewish state. I discussed this in one case, where I said that:

> 'There are many democratic states. Only one of them is Jewish. Indeed, the reason for the existence of the State of Israel is that it is a Jewish state. This character is central to its existence' (EDA 11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi* [33], at p. 21).

Similarly it has been said:

> 'The fact that Israel is a Jewish state lies at the heart of our existence here… the Jewish people established the Jewish state. This is the beginning and from this we will continue the journey' (*per* Justice M. Cheshin in LCA 2316/96 *Isaacson v. Parties Registrar* [34], at p. 547).

The Jewish state has two main aspects: a Zionist aspect and a traditional-religious aspect (see *Central Elections Committee for the Sixteenth Knesset v. Tibi* [33], at p. 22; Barak, *The Judge in a Democracy*, *supra*, at p. 87). The Zionist aspect is based on the world of Zionism. The traditional-religious aspect is based on the world of Judaism. Underlying the essence of these two aspects — without exhausting them —

> '… lies the right of every Jew to immigrate to the State of Israel; that Jews will constitute a majority therein; Hebrew is the main official language of the State, and its main religious holidays and symbols reflect the national revival of the Jewish people. Jewish tradition is a central element in its religious and cultural heritage' (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [33], at p. 22).

Thus we see that 'a Jewish state' is a rich and multi-faceted concept. *Second*, the State of Israel is a democratic state. Underlying the essence of democracy — without exhausting this concept — are several characteristics. These are based on —

> '… a recognition of the sovereignty of the people as reflected in free and equal elections; a recognition in the essence of human rights, including dignity and equality, the principle of the separation of powers, the rule of law and an independent judiciary' (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [33], at p. 23).

Indeed, democracy is based on both the sovereignty of the people and the rule of values that characterize democracy. There is no democracy merely with the sovereignty of the people; there is no democracy merely with the rule of democratic values. So we see that the world of democracy is multi-dimensional and complex (see Barak, *The Judge in a Democracy*, *supra*, at p. 90). *Third*, the constitutional interpreter should make an effort to achieve an accord and harmony between the values of the State of Israel as a Jewish state and its values as a democratic state. Indeed, the expression 'the values of the State of Israel as a Jewish and democratic state' should be regarded as one idea that is comprised of two elements (Jewish and democratic). Between the two there should be a synthesis and compatibility. 'Judges, as faithful interpreters of the constitutional text, should do everything in order to achieve this synthesis' (*Central Elections Committee for the Sixteenth Knesset v. Tibi* [33], at p. 19). The interpreter should find what is common to both and what unites them. Justice M. Elon rightly said that:

> 'It is in the nature of such a synthesis that it seeks what is common to both systems, the Jewish and the democratic, the principles that are common to both, or at least that can be reconciled with them' (CA 506/88 *Shefer v. State of Israel* [35], at p. 167 {277}; see also the books and articles cited in Barak, *The Judge in a Democracy*, *supra*, at p. 437, note 345).

16. Does the prohibition against employing someone and working during the weekly rest, which is provided in ss. 9 and 9A of the Hours of Work and Rest Law, befit the values of the State of Israel as a Jewish and democratic state? As we shall see (in para. 20 below), these prohibitions are based on the social need to provide hours of weekly rest to the worker by determining one

uniform day of rest that will allow a whole family to be together on the day of rest. This involves a determination based on a religious-national consideration that the weekly rest will include 'for a Jew — the Sabbath; for someone who is not a Jew — the Sabbath or Sunday or Friday, all of which in accordance with what is acceptable to him as his day of weekly rest' (s. 7). This determination befits the values of the State of Israel, both as a Jewish state and as a democratic state. Normative unity and harmony, to which we are obliged to aspire, is thereby achieved. This was discussed by Justice D. Dorner, who said:

> 'Prescribing the day of rest for Jews on the Sabbath realizes the values of the state as a Jewish and democratic state. These two values combine in full harmony in the law under discussion' (*Handyman Do-It-Yourself v. State of Israel* [1], at p. 5).

17. The values of the State of Israel as a Jewish state well befit the prohibition of employing persons and working during the weekly rest, which is the Sabbath for Jews, and Sunday or Friday for non-Jews. This is the case both for social reasons and for national-religious reasons. An expression of this can be found in the fourth of the Ten Commandments:

> 'Observe the day of the Sabbath to sanctify it as the Lord your God commanded you. Six days shall you labour and do all your work. And the seventh day is a Sabbath to the Lord your God; you shall not do any work, either yourself or your son or your daughter or your man-servant or your maid-servant or your ox or your ass or any animal of yours or your stranger that is within your gates, so that your man-servant and your maid-servant shall rest as you do. And you shall remember that you were a slave in the land of Egypt and the Lord your God took you out from there with a strong hand and an outstretched arm; therefore the Lord your God has commanded you to keep the day of the Sabbath' (Deuteronomy 5, 11-15 [54]]; for a slightly different text, see Exodus 20, 8-11 [55]).

Indeed, the social aspect and the national-religious aspect of a weekly rest is a golden thread that runs through the world of Jewish religious law. The combination of these two led to the result that observance of the Sabbath became a central element of Judaism. I discussed this in one case where I said:

> 'Observance of the Sabbath is a central value in Judaism. The Sabbath is the fourth of the Ten Commandments. It constitutes an original and important Jewish contribution to world culture… it constitutes a cornerstone in Jewish tradition. It is a symbol that clearly expresses the nature of Judaism and the character of the Jewish people. Remove the Sabbath from Judaism and you have removed its soul. Indeed, the Sabbath is a synopsis of the character of Judaism. Many of our people have given their lives for the Sabbath over the course of our bloodstained history' (HCJ 5016/96 *Horev v. Minister of Transport* [36], at p. 43 {___}).

In a similar spirit, Justice Dorner said:

> 'Judaism, which bequeathed to mankind the concept of the weekly day of rest, sanctified the Sabbath as the day of rest of the Jewish people. The Sabbath is a national value no less than a religious value. "The Sabbath is the most ingenious creation of the Jewish spirit" wrote H.N. Bialik… and Ahad HaAm said: "Whoever feels in his heart a real connection with the life of the people throughout the generations cannot in any way imagine a reality of the Jewish people without its Sabbath queen"' (*Handyman Do-It-Yourself v. State of Israel* [1], at p. 5).

18. The prohibition of employing someone and of working provided in the Hours of Work and Rest Law befits the values of the State of Israel as a democratic state. The social need to ensure hours of a weekly rest for the worker, while determining a uniform day of rest for all the workers in the economy, in order to allow joint family activity, and by choosing hours of

rest against a background of national-religious considerations — the Sabbath for Jews and Friday or Sunday for non-Jews — befits the values of the State of Israel in a democratic state. This was discussed by President S. Adler, who said:

> 'The Hours of Work and Rest Law should be interpreted as a law that gives expression to a proper social policy. This policy provides a normative framework of hours of work in the economy and prevents an employee and his employer from agreeing to a framework of work hours that harms the employee's quality of life. The law restricts the freedom of the individual to determine his work hours, but the purpose in this restriction is to protect the worker against a violation of his humanity. The initial purpose is to advance the quality of life and to protect the dignity of whoever does work by limiting the work day, and thereby in practice defining also the hours of rest' (LabA 300271/98 *Tepco Energy Control Systems and Environment Production Ltd v. Tal* [50], at p. 710).

A democratic state seeks to guarantee the rest of the worker and the family bonds that exist if all members of the family have one uniform day of rest. A democratic state takes religious feelings into account in that the day of rest is determined on a religious and national basis. An expression of this can be found in the Weekly Rest (Commerce and Offices) Convention, 1957 (Treaties 12, 693), which provides that all human beings subject to the convention shall 'be entitled to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of seven days' (art. 6(1)). The convention further provides that 'The weekly rest period shall, wherever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district' (art. 6(3)). It is also provided that 'The traditions and customs of religious minorities shall, as far as possible, be respected' (art. 6(4)). In various countries that have democratic values, the day of weekly rest has been determined in this spirit (see the Sunday Trading Act 1994 in England, which determines Sunday as

the weekly day of rest). The same is true in Canada (see P. Hogg, *Constitutional Law of Canada* (fourth edition, 1997), at p. 491) and in the United States (see J. Choper, *Securing Religious Liberty* (1995), at p. 136). See also and cf. CrimC (Jer) 3471/87 *State of Israel v. Caplan* [49], and the references cited there.

19. The *third* requirement that is enshrined in the limitations clause is that the violation of the freedom of occupation should be made in a law 'that is intended for a proper purpose.' A purpose is a proper one —

> '… if it serves an important social purpose that is sensitive to human rights. Therefore, legislation that is intended to protect human rights is certainly enacted for a proper purpose. Moreover, legislation that is intended to realize general social purposes, such as a welfare policy or protecting the public interest, is enacted for a proper purpose' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 434).

A purpose is a proper one 'if it furthers public purposes that are important to the state and to society with the purpose of providing an infrastructure for communal life and for a social framework that seeks to protect and promote human rights' (*per* Justice D. Beinisch in *Menahem v. Minister of Transport* [11], at p. 264). A purpose is a proper one if it seeks to balance between the interests of the public as a whole and the harm to the individual; if it is 'intended to realize important social goals, whose realization is consistent with the character of society as the protector of human rights' (*per* Justice T. Or in *Oron v. Knesset Speaker* [12], at p. 662). In examining the question whether a purpose is a proper one, we should examine two aspects: *one* aspect concerns the content of the purpose. A purpose is a proper one if it constitutes a social purpose that is sensitive to human rights, or if it is intended to achieve social purposes, such as a welfare policy or protecting the public interest; the *second* aspect concerns how necessary it is to realize the purpose. A purpose is a proper one if the need to realize it is important for the values of society and the state (see *Horev v. Minister of Transport* [36], at p.

52 {}). What is the purpose of the Hours of Work and Rest Law with regard to the weekly rest, and is its purpose a proper one?

20. There are two purposes that underlie the arrangements concerning the hours of weekly rest in the Hours of Work and Rest Law, and these complement one another (see Y. Eliasof, 'Work during the Weekly Rest,' *Menachem Goldberg Book* (2001) 116; see also the debates in the Knesset: *Knesset Proceedings* vol. 9, at p. 1729): *one* purpose is a social purpose, which is concerned with the welfare of the worker and gives him social protect (see LabA 255/99 *Civil Security Ltd v. Shahidem* [51]). The law seeks to realize the social purpose involved in ensuring the health and welfare of workers, by preventing them 'from work and occupations that exhaust a person, and by requiring his periodic rest' (*per* Vice-President Silberg in CrimA 217/68 *Isramax Ltd v. State of Israel* [37], at p. 357). This day of rest was determined on a uniform basis for the whole economy, thereby promoting the social value whereby the members of the family have the day of rest at the same time. The *second* purpose is a national-religious purpose, which regards the observance of the Sabbath by Jews as a realization of one of the most important values in Judaism that has a national character. In a similar spirit, designating other days of rest for persons who are not Jewish realizes their religious outlook. These two purposes have been discussed by the court on several occasions. Thus, for example, it was held *per* President S. Agranat that the reason underlying the weekly rest arrangement in the Hours of Work and Rest Law is:

> 'The social value involved in ensuring the health and welfare of employees… it is also clear that it is not a coincidence… that the "weekly rest" includes — for a Jew — specifically the Sabbath, something that shows that the issue of Sabbath observance was regarded… as a national treasure of the Jewish people, which should be protected in the State of Israel, and also in view — in the words of Justice Berinson — "of the religious feelings, which are held by large sectors of the public," for whom the social value inherent in the legislator's prohibition against

> employing Jews on the Sabbath is also sacred to them as a religious value' (HCJ 287/69 *Miron v. Minister of Labour* [38], at p. 349).

In a similar vein Justice M. Elon said that the arrangement concerning the prohibition of employing persons and working on the Sabbath 'is based on a whole range of national-religious, social and welfare considerations' (HCJ 171/78 *Eshkar Ltd v. Minister of Labour and Social Affairs* [39], at p. 154). The same approach was confirmed by President M. Shamgar:

> 'In determining the principle of having a weekly day of rest and fixing it on the Sabbath the legislator sought to realize two interrelated purposes: first, a social purpose, according to which a weekly day of rest should be given to every person so that he can rest from his work, be with his family or with friends and devote time to leisure and recreation according to his choice and preference. The determination of the day of rest is also intended to protect the health of the employee and guarantee him decent work conditions. Second, fixing the day of rest on the Sabbath was done against the background of dictates of Jewish law and Jewish tradition' (HCJ 5073/91 *Israel Theatres Ltd v. Netanya Municipality* [40], at p. 206).

This is also the approach of Justice D. Dorner, who says:

> 'The purpose of the Hours of Work and Rest Law is therefore a double one: first, it upholds the social right to a weekly day of rest, which requires a public day of rest for the purpose of enforcement… Second, the law is intended to preserve the character of the State of Israel as a Jewish state' (*Handyman Do-It-Yourself v. State of Israel* [1], at p. 6).

21. Do the two interrelated purposes — the social purpose and the religious purpose — combine to form a 'proper purpose'? My answer to this is yes. Guaranteeing a day of rest for the employee and employer, determining a uniform day of rest for the whole economy, in a manner that

guarantees the welfare of the family, and fixing this day of rest on a national-religious basis (for a Jew — the Sabbath; for someone who is not Jewish — Friday, Saturday or Sunday, according to what is accepted by him as his day of rest), constitutes a 'proper purpose,' within the meaning of this expression in the limitations clause. The social purpose serves an important public purpose. It is intended to protect the individual (the employee and the employer) and it is intended to guarantee the welfare of the whole family, all of which while ensuring equality between the religiously observant person and someone who is not religiously observant. I discussed this in one case, where I said:

> 'Protecting the rights of the employee is a proper purpose; ensuring social security for the employee is a proper purpose; preserving the framework of protective laws that will protect employees is a proper purpose. Indeed, this protection of the rights of the employee has a fundamental social importance in our society. It constitutes a proper purpose from a constitutional perspective' (*Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [19], at p. 444).

The national-religious purpose is also a proper one. It is mindful of the feelings of the religious public in Israel. It gives expression to the national ties that bind us together as one people. It reflects the tradition and customs in Mandatory Palestine and in Israel (see Eliasof, 'Work during the Weekly Rest,' *supra*). Indeed, in many democratic countries there are laws that establish a weekly day of rest in the economy, and as a rule they provide a uniform day that is consistent with the most common religious outlook in that country (Sunday) (see *R. v. Edwards Books and Art* [53] (Canada); *McGowan v. Maryland* [52] (the United States)).

22. The petitioners argue that they accept that an employee must be assured of a weekly rest. Notwithstanding, they ask that the hours of rest should be 'flexible.' The meaning of this is that every employer or employee may choose the hours of weekly rest that are convenient for them. According to the petitioners, the choice that requires uniform hours of rest for all Jews

involves an improper purpose. I cannot accept this approach. Determining uniform hours of rest for the whole economy is a social-national interest. It makes it possible to take advantage of the rest and to incorporate it in the welfare of the employee and his family. This was discussed by Chief Justice Dickson of the Supreme Court of Canada in a judgment that considered the constitutionality of laws that required business to close on Sunday. Chief Justice Dickson wrote:

> 'I regard as self-evident the desirability of enabling parents to have regular days off from work in common with their child's day off from school, and with a day off enjoyed by most other family and community members…
>
> A family visit to an uncle or a grandmother, the attendance of a parent at a child's sports tournament, a picnic, a swim, or a hike in the park on a summer day, or a family expedition to a zoo, circus, or exhibition – these, and hundreds of other leisure activities with family and friends are amongst the simplest but most profound joys that any of us can know. The aim of protecting workers, families and communities from a diminution of opportunity to experience the fulfilment offered by these activities, and from the alienation of the individual from his or her closest social bonds, is not one which I regard as unimportant or trivial… I am satisfied that the Act is aimed at a pressing and substantial concern. It therefore survives the first part of the inquiry under s. 1' (*R. v. Edwards Books and Art* [53], at p. 770).

Admittedly, in determining uniform hours of rest on the Sabbath (for Jews), there is a violation of the freedom of occupation of the employer and the employee. Notwithstanding, this violation serves an important social purpose, and therefore it is a 'proper purpose' within the context of the limitations clause.

23. It may be argued that even if it is proper to determine uniform hours of rest, it is not proper to determine these for Jews on the Sabbath. This involves religious coercion for those who wish to employ persons or work on the Sabbath. This religious coercion is undesirable, and its realization leads to the result that the purpose underlying the Hours of Work and Rest Law is improper. I cannot accept this argument. It has been rejected both in the United States (see *McGowan v. Maryland* [52]) and in Canada (see *R. v. Edwards Books and Art* [53]). Once we have determined that social considerations rule out a flexible determination of the hours of the weekly rest and justify fixing a day of the week on which the weekly rest can be realized, the fixing of the Sabbath (for Jews) as the day of weekly rest does not involve religious coercion. The coercion is in the very obligation to have the hours of the weekly rest on the day that the law determines, and not according to the wishes of the employer or the employee. The fact that the day chosen to realize this obligation coincides with the Jewish outlook on the Sabbath does not make the coercion religious (see Prof. S. Shetreet, 'Some Reflections on Freedom of Conscience and Religion in Israel,' 4 *Isr. Y. H. R.* 194 (1974), at p. 214). This was discussed by Chief Justice Dickson in *R. v. Edwards Books and Art* [53], where he said:

> 'Religious freedom is inevitably abridged by legislation which has the effect of impeding conduct integral to the practice of a person's religion. But it is not necessarily impaired by legislation which requires conduct consistent with the religious beliefs of another person. One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion…
>
> Legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion' (*ibid.* [53], at pp. 760, 761).

Indeed, fixing the hours of the weekly rest on the Sabbath does not involve religious coercion; it is an expression of the values of the State of

Israel as a Jewish state. Moreover, the case before us concerns the prohibition of working on the Sabbath. Notwithstanding, the law prohibits work not only on the Sabbath but also on additional days of rest which are mainly religious holidays (see s. 9A of the law and s. 18A of the Government and Justice Arrangements Ordinance, 5708-1948). Even in this context of a prohibition of working on religious holidays we should reject an argument that we are speaking of a prohibition that involves religious coercion.

24. The *fourth* condition for the constitutionality of a law that violates the freedom of occupation is that the violation is 'to an extent that is not excessive.' This is a requirement of proportionality. If 'the proper purpose' focuses on the purpose of the law that violates the freedom of occupation, proportionality focuses on the measures that the law prescribed to achieve the desired purpose. These measures must be proportionate. In comparative law, an attempt has been made to concretize the requirement of proportionality (see J. Schwarz, *European Administrative Law* (1992); N. Emiliou, *The Principle of Proportionality in European Law* (1996); *The Principle of Proportionality in the Laws of Europe* (Evelyn Ellis ed., 1999); M. Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights,' *The European System for the Protection of Human Rights* (R.St.J. Macdonald, F. Matscher, H. Petzold eds., 1993) 125; M. Fordham and T. de la Mare, 'Identifying the Principle of Proportionality,' *Understanding Human Rights Principles* (J. Jowell and J. Cooper eds., 2001) 27; J. Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality,' 21 *Melbourne U. L. Rev*. 1 (1997); R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000); D. Beaty, *The Ultimate rule of Law* (2004)). The Supreme Court, when interpreting the requirement of proportionality in the limitations clause, has adopted this approach (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 436; *Israel Investment Managers Association v. Minister of Finance* [13], at p. 385; *Oron v. Knesset Speaker* [12], at p. 665; HCJ 987/94 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [41]; HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [42], at p. 12;

Menahem v. Minister of Transport [11], at p. 279; *Horev v. Minister of Transport* [36], at p. 53 {}; HCJ 8238/96 *Abu Arar v. Minister of Interior* [43], at p. 41; HCJ 1255/94 *Bezeq, the Israel Telecommunication Corp. Ltd v. Minister of Communications* [44], at p. 687; HCJ 3648/97 *Stamka v. Minister of Interior* [45]; HCJ 4644/00 *Jaffora Tabori Ltd v. Second Television and Radio Authority* [46]; HCJ 9232/01 *Noah, the Israeli Federation of Animal Protection Organizations v. Attorney-General* [47], at p. 261 {}; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [48]; see Z. Segal, 'The Ground of Disproportionality in Public Law,' 39 *HaPraklit* 507 (1990); I. Zamir, 'The Administrative Law of Israel Compared to the Administrative Law of Germany,' 2 *Mishpat uMimshal* 109 (1994), at p. 131; D. Dorner, 'Proportionality,' *The Berinson Book* (vol. 2, 2000) 281). According to the accepted approach, the requirement of proportionality is satisfied when the law passes three subtests. We shall discuss there briefly.

25. The *first* subtest of proportionality is the suitability test. This test requires there to be a relationship according to which the arrangements provided in the law (the means) are suited to the realization of the proper purpose (the end). The means chosen should lead rationally to the realization of the end (see *Ben-Atiya v. Minister of Education, Culture and Sport* [42], at p. 12). The *second* subtest of proportionality is the least harmful measure test or the necessity test. According to this, the measure chosen by the law should harm the human right to the smallest possible degree. It is possible to employ an analogy of rungs of a ladder. 'The legislature should begin with the least harmful "rung," and slowly ascend the ladder until it reaches the rung that allows the proper purpose to be achieved without harming the human right more than necessary' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 444; see also *Menahem v. Minister of Transport* [11], at p. 279. For the analogy of ascending the rungs of a ladder, see D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (second edition, 1997), at p. 274). The *third* subtest provides that the measure that was adopted by the law and that violates the human right must be proportionate to the purpose. This is the test of proportionality 'in the narrow

sense.' Within the framework of this subtest 'the benefit accruing to the public from the legislation under discussion is weighed against the violation to the constitutional right of the individual as a result of adopting the measure chosen' (*per* Justice Beinisch, in *Menahem v. Minister of Transport* [11], at p. 279). This subtest is a balancing test. By employing these subtests we can discover the legislature's margin of appreciation. We should recognize the legislature's margin of appreciation or margin of proportionality (see *Menahem v. Minister of Transport* [11], at p. 280; *Beit Sourik Village Council v. Government of Israel* [48], at para. 42).

26. Do the provisions of the Hours of Work and Rest Law in so far as they concern the weekly rest satisfy the proportionality tests? My answer is yes. The *first* proportionality test (the rational connection test) is satisfied. There is a rational connection between the realization of the purposes underlying the Hours of Work and Rest Law and prescribing a prohibition of employing a worker on the day of weekly rest. The *second* subtest (the least harmful measure test) is also satisfied in the case before us. A choice of flexible hours of rest would not have realized the purpose of the law. Fixed hours of rest are required. The legislature's choice of the Sabbath (for Jews) and Sunday and Friday (for non-Jews) is consistent with the requirements of proportionality. In this respect it should be recalled that an integral part of the Hours of Work and Rest Law are the provisions concerning matters to which the law does not apply at all, such as policemen, civil servants whose jobs require them to be at the state's disposal even outside ordinary working hours, sailors and aircraft personnel (s. 30). We should also take into account the matters in which the law gives the Minister of Labour discretion to give (general or special) permits that allow work during the hours of rest. By virtue of this power, various permits have been given, such as in the sectors of hotels, security services, the various emergency services, etc. (see M. Goldberg, *Labour Laws* (vol. 2, 2003) at p. 21). We should also take into account arrangements in various laws, such as the Municipalities Ordinance [New Version], which authorizes a municipality to regulate the opening and closing of various businesses, including cinemas, restaurants, theatres and cultural

institutions within its municipal boundaries or a part thereof. The *third* subtest is also satisfied in this case. The law realized an important social interest, and the violation of the freedom of occupation is limited. This violation — which is mainly a prohibition of working on the Sabbath — applies in principle equally to all owners of businesses, and therefore *prima facie* it cannot give an unfair competitive advantage to one competitor or another. This fact is also relevant to the proportionality of the law. Since the three subtests are satisfied, the requirement that the violation of freedom of occupation 'is not excessive' is satisfied. This was discussed by Justice Dorner in *Handyman Do-It-Yourself v. State of Israel* [1]:

> 'The prohibition of employing someone on a day of rest without doubt realizes its purposes, and therefore it satisfies the rational connection test, whereas the discretion to give work permits for the Sabbath, which can be exercised, *inter alia*, also because of the need of the public or parts thereof to receive services on the Sabbath, allows the violation to be minimized… the granting of discretion also realized the test of proportionality because within its framework a balance is struck between the benefit offered by the day of rest and the damage caused by the violation of the freedom of occupation' (*ibid.* [1], at p. 7).

We agree with this approach.

27. In summary, we accept that the Hours of Work and Rest Law, in so far as it concerns the hours of the weekly rest, violates the freedom of occupation of the employer and the workers. This violation does not lead to the unconstitutionality of the law. This is because it satisfies the conditions of the limitations clause. It befits the values of the State of Israel as a Jewish and democratic state. It was enacted for a proper purpose — a social purpose that is achieved by means of realizing a national-religious consideration. The violation of the freedom of occupation is not excessive. It therefore follows that the constitutional argument of the petitioners should be rejected.

The administrative scrutiny

28. The petitioners' second argument is that the refusal of the Minister of Labour to give a work permit for the weekly rest is unlawful. This is because of the serious economic harm that the minister's refusal to give the permit causes them. This argument revolves around s. 12(a) of the Hours of Work and Rest Law, which provides:

> 'Permit to employ persons during the weekly rest
>
> 12. (a) The Minister of Labour may permit the employment of a worker during the hours of the weekly rest, or during a part thereof, if he is persuaded that stopping the work for all or part of the weekly rest is likely to harm the defence of the state or the safety of persons or property, or seriously to damage the economy, the work process or the supply of necessities that are, in the opinion of the Minister of Labour, essential for the public or for a part thereof.'

The question before us is whether the refusal of the minister to give a permit to the petitioner is unlawful? In my opinion, the answer is no. The petitioners did not succeed in presenting a factual basis to show that its activity during the hours of the weekly rest is 'essential for the public or for a part thereof.' Likewise no factual basis was brought before us in support of the claim that the petitioners are being discriminated against, to show that other businesses of the same kind have received permits to work during the hours of the weekly rest, and are competing against them unlawfully.

The result is that the petition is denied.

Justice M. Naor

1. I agree with the opinion of my colleague President Barak. I would like to add a few words with regard to the claim of religious coercion raised by the petitioners.

2. The petitioners are asking for 'flexible' hours of rest. According to them, mandating the hours of rest to be specifically on the Sabbath (for Jews) constitutes improper religious coercion (see paras. 22 and 23 of the President's opinion). In my opinion, it is precisely an arrangement that supposedly allows the worker to choose for himself a day of weekly rest as he wishes that is an arrangement that involves, or at least may involve, coercion. If the law allowed each worker to choose for himself a day of rest, as the petitioners request, in many cases the real choice will be made by the employer and not by the workers. A person who observes the Sabbath and is told by an employer to choose a weekday as his day of rest as a condition for being given employment will refrain for accepting the employment. Even someone who does not observe the Sabbath but prefers that his day of rest will be specifically on the Sabbath, so that he can enjoy being with the members of his family, will not have a free choice. When he goes to find work, the employer may make it clear to him that he will give preference to workers who are prepared to work on the Sabbath. The constraints of obtaining a livelihood may lead to the result that the worker 'chooses' a day of rest that is not really his preferred day of rest, and we cannot verify that the choice of *another* day of rest that is not the Sabbath is really a free choice. Therefore, in addition to all the reasons given by my colleague, in my opinion there is a justification for the law to mandate one day of rest, which is, for Jews, the Sabbath. In my opinion, this binding law protects workers more than a law that allows them, supposedly, a free choice.

Justice A. Procaccia

1. I agree with the opinion of my colleague, President Barak, according to which the prohibition of employing Jews in work on the Sabbath that

derives from the Hours of Work and Rest Law, 5711-1951, satisfies the constitutionality test in the sense that although it violates the freedom of occupation of the employer and the workers, it satisfies the conditions of the limitations clause since it befits the value of the State of Israel, promotes a proper purpose and satisfies the proportionality test.

2. I would like to add the following comment:

As the President said, and according to our well-established approach, by having the weekly day of rest on the Sabbath for Jews the legislature sought to realize two interrelated purposes — a social purpose, which is based on a perspective of social welfare, and a national-religious purpose, which is based on the dictates of Jewish religious law and tradition. The essence of the social purpose is that a person can rest on the day of weekly rest, which promotes his physical and spiritual welfare. The day of rest is intended to allow a person to spend time with his family and friends; it is intended to allow him free time for various activities that are important to him, including being involved in cultural and spiritual activities and using his leisure time according to his interests and tastes.

The national-religious purpose of the Sabbath gives equal weight to the religious dictates concerning the day of rest, which reflects the fact that the Sabbath is a national treasure of the Jewish people that should be observed in the Jewish community.

A proper internal balance is required between these two purposes that underlie the prohibition against the employment of a Jew on the Sabbath. Alongside the protection of Sabbath observance from the national-religious aspect, the law leaves the social aspect of the day of rest open to be shaped in accordance with the variety of different lifestyles and tastes in the many sectors of Israeli society. Indeed, there are many different ways in which people decide how to act on the day of weekly rest given to them, each person in accordance with his way of life, belief and lifestyle.

3. The need for balancing the religious aspect against the social aspect of the Sabbath may sometimes justify a departure from the rule that prohibits

work on the Sabbath, in order to allow an individual to fashion the way in which he spends his day of rest as he wishes and also in order to make available to him certain public frameworks that will allow him to realize this right. In the Hours of Work and Rest Law the legislature recognized this, by providing in s. 12(a) of the law that the Minister of Labour has discretion to allow work on the Sabbath where essential needs of the State and the public so require. According to the language of the section, it is obvious that the aforesaid exception will apply to essential needs concerning the defence of the state, the safety of persons and property, economic needs, and work processes. But the provision goes on to provide in a general manner that a work permit may be given also for '*the supply of necessities that are, in the opinion of the Minister of Labour, essential for the public or for a part thereof*.' This broad power that was given to the minister to permit work on the Sabbath with regard to necessities that are essential for the public or for a part thereof is intended to add to those essential needs of society that concern ensuring the requirements of the physical existence of Israeli residents in the spheres of security, the economy or work processes. It is intended to extend the power to grant permits not only to the supply of essential physical necessities, but also in order to ensure essential necessities of the public or of parts thereof in spiritual matters and the spheres of, culture, art, leisure and entertainment. It is intended to ensure the individual's quality of life in a free society that has freedom of religion and freedom from religion. It is intended to allow a person to realize in a proportionate manner the social aspect of the Sabbath in accordance with his tastes and his lifestyle, and to give expression thereby to customs, lifestyles and the various cultures in the many strata of Israeli society. The power to give permits for employment on the Sabbath is intended, *inter alia*, to promote essential needs of the different sectors of the population in order to allow them to fashion their Sabbath as a day of rest according to their own desires.

4. The scope of the essential departure from the framework of prohibiting employment on the Sabbath that was intended to allow a person to spend his day of rest in accordance with his choice and custom requires

constitutional balances between the needs of the individual and those of the public as a whole and between various sectors and cultural groups in Israeli society, which have different beliefs and lifestyles. The designation of the Sabbath as the day of rest for society in Israel requires a proportionate balance between the social aspect and the national-religious aspect of the Sabbath. Making the social aspect completely subservient to the religious aspect will not achieve the proper balance, whereas putting sole emphasis on the social aspect, while recognizing the multifaceted nature of its content, is inconsistent with the recognition of the traditional nature of the Sabbath and its dual nature. Within the framework of the social aspect of the Sabbath we require a recognition of the needs to depart from the prohibitions of employment where this is essential in order to allow the Sabbath to be shaped as the day of rest for the general public in a free, pluralistic and tolerant spirit, without causing disproportionate harm to other social groups, and without uprooting the unique national character of the Sabbath from among the Jewish people. We should thereby recognize that in order to realize the individual character and leisure culture of the individual, we also need public frameworks that will assist and allow this, including public transport that will allow the public to move freely, the opening of museums and cultural institutions, the activity of theatres and cinemas, the holding of lectures and congresses, and the like. Allowing the activity of these institutions may justify giving work permits on the Sabbath to those that operate them. On the other hand, the scope of the concept of 'a necessity that is essential for the public' for the purpose of granting work permits on the Sabbath is, by its very nature, limited and restricted, since a careful balance needs to be made between the right of the non-observant individual to realize his liberty to determine the social content of his Sabbath according to his tastes and the sacred value of keeping the Sabbath as a general day of rest of a national-religious character. This requires giving considerable weight and consideration to the needs and beliefs of the religious public, and preventing injuries to its feelings. The proper balance between the social aspect and the national-religious aspect of the Sabbath will benefit the public as a whole,

and achieve equality for all citizens, which is the basis of freedom of conscience and religion. This will make it possible to preserve the Sabbath as a national treasure and, at the same time, also as a day of rest reserved for the individual, for his physical and spiritual welfare, according to his personal beliefs and lifestyle.

5. The fashioning of the Sabbath as a general day of rest that allows the individual a certain degree of freedom to determine what he does according to his lifestyle and beliefs may justify, in appropriate circumstances, granting permits for work on the Sabbath, that will allow this freedom to be realized *de facto*. This freedom is not unlimited because of the balancing required to protect other values. But within its proper and proportionate framework, it may constitute an 'essential need' that may make it possible to depart from the general prohibition of work on the Sabbath. The discretion of the Minister of Labour in this regard is very broad (*Miron v. Minister of Labour* [38], at p. 355; *Eshkar Ltd v. Minister of Labour and Social Affairs* [39], at pp. 149, 153; *State of Israel v. Caplan* [49], at pp. 281-283).

6. In the proceeding before us, the petitioner, a company that markets furniture, is seeking relief that asks us to order the Minister of Labour to give it a permit under s. 12 of the law to employ Jews in its shops on the Sabbath and religious holidays. Its arguments is that it must open its shops on Sabbaths and religious holidays in order to withstand the strong competition that exists in the field, since otherwise it anticipates major economic hardships in its future business activity, to the extent that it may need to close down its business altogether.

There is no basis for intervening in the discretion of the competent authority that refused to give a permit for work on the Sabbath in this case. The ground on which the petitioner relies for this purpose — contending with economic competition in the business sector in which it does business — does not satisfy the criterion of essential necessities of which s. 12 of the Hours of Work and Rest Law speaks. The law even clarified in s. 9A that, as a rule, on days of rest '… *the owner of a workshop shall not work in his workshop, not shall the owner of a factory work in his factory, nor shall the*

owner of a shop trade in his shop.' Engaging in trade, in the normal manner, falls within the general prohibition of work on the Sabbath, and not within the framework of the exceptions thereto.

In view of all of the aforesaid, I agree with the President's conclusion that this petition should be denied.

Petition denied.

24 Adar II 5765.
4 April 2005.