

---

HCJ 5016/96

HCJ 5025/96

HCJ 5090/96

HCJ 5434/96

HCJ 5016/96

HCJ 5025/96

1. Lior Horev
  2. Member of Knesset Ophir Pines
  3. Member of Knesset Yosef Sarid
  4. Arnon Yakutiali
  5. Aliza Avinezer
  6. Yehuda Gabay
  7. Meretz–Democratic Israel Faction
  8. The Association for the Rights of the Religious Community in Israel
- v.
1. The Minister of Transportation

The Supreme Court of Israel sitting as the High Court of Justice

[April 13,1997]

*Before President A. Barak, Deputy President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, Ts. A. Tal, D. Dorner*

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

**Facts:** The Minister of Transportation, assuming the powers of the Traffic Controller, ordered the closure of Bar-Ilan Street in Jerusalem to motor traffic on Sabbaths and Jewish holidays during hours of prayer. Petitioners are secular residents of the area and representatives of the secular population in Jerusalem, who claim that the decision of the Minister infringes their right to freedom of movement. One petitioner—the Association for the Rights of the Religious Community in Israel—counter-petitioned that Bar-Ilan should be closed to motor traffic for all hours on the Sabbath and Jewish holidays.

**Held:** The Court held that the Traffic Controller was to weigh the freedom of movement of those who chose to use Bar-Ilan Street against the possible injury of such traffic to the religious sensibilities and lifestyle of the local residents. The Court noted that the latter consideration was a valid one in a democratic society. The Court held that the Minister of Transportation, in his capacity as the Traffic Controller, did not adequately consider the interests of the local secular residents of Bar-Ilan Street. As such, the Court struck down the Traffic Controller's decision. Several dissenting Justices contended that the Minister had no authority at all to close Bar-Ilan Street to traffic.

#### **Israeli Supreme Court Cases Cited**

- [1] HCJ 174/62 *The League for the Prevention of Religious Coercion v. Jerusalem City Council*, IsrSC 16 2665.
- [2] HCJ 531/77 *Baruch v. The Traffic Comptroller*, IsrSC 32(2) 160.
- [3] HCJ 390/79 *Dawikat v. The Government of Israel*, IsrSC 34(1) 1.
- [4] HCJ 935/87 *Poraz v. Mayor of Tel-Aviv/Jaffa*, IsrSC 42(2) 309.
- [5] HCJ 98/54 *Lazarovitch v. Food Products Comptroller (Jerusalem)*, IsrSC 10 40.
- [6] HCJ 3872/93 *Meatrael v. The Prime Minister*, IsrSC 47(5) 485.
- [7] HCJ 217/80 *Segal v. Minister of the Interior*, IsrSC 34(4) 429.
- [8] HCJ 351/72 *Keinan v. The Film and Play Review Board*, IsrSC 26(2) 811.
- [9] HCJ 806/88 *Universal City Studios Inc. v. The Film and Play Review Board*, IsrSC 43(2) 22.

- 
- [10] HCJ 230/73 *S.T.M. v. Mayor of Jerusalem—Mr. Teddy Kolek*, IsrSC 28(2) 113.
- [11] HCJ 7128/96 *The Temple Mount Faithful v. The Government of Israel*, IsrSC 51(2) 509.
- [12] Crim. App. 217/68 *Izramax. v. The State of Israel*, IsrSC 22(2) 343.
- [13] HCJ 612/81 *Shabbo v. Minister of Finance*, IsrSC 36(4) 296.
- [14] F. Crim. A2316/95 *Ganimat v. The State of Israel*, IsrSC 49(4) 589.
- [15] CA 506/88 *Yael Shefer v. The State of Israel*, IsrSC 48(1) 87.
- [16] HCJ 935/89 *Ganor v. Attorney-General*, IsrSC 44(2) 485.
- [17] IA 1/65 *Yardor v. Chairman of the Central Election Committee*, IsrSC 19(3) 365.
- [18] IA 2/84 *Neiman v. Chairman of the Central Election Committee*, IsrSC 39(2) 225.
- [19] CA 294/91 *Jerusalem Burial Society v. Kestenbaum*, IsrSC 46(2) 464.
- [20] CA 105/92 *Re'em Engineers and Contractors Ltd. v. Municipality of Upper Nazareth*, IsrSC 47(5) 189.
- [21] HCJ 73/53 *Kol Ha'Am Company Ltd. v. Minister of the Interior*, IsrSC 7 871.
- [22] HCJ 153/83 *Levy v. Southern District Commander of the Israel Police*, 38(2) 393.
- [23] HCJ 448/85 *Dahar v. Minister of the Interior*, IsrSC 40(2) 701.
- [24] HCJ 148/79 *Saar, v. Minister of the Interior and of Police*, IsrSC 34(2) 169.
- [25] HCJ 399/85 *Kahane v. The Broadcasting Authority*, IsrSC 41(3) 255.
- [26] HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, IsrSC 42(2) 221.
- [27] HCJ 2481/93 *Dayan v. Jerusalem District Commander*, IsrSC 48(2) 456.
- [28] CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Agricultural Cooperative*, IsrSC 49(4) 221.
- [29] FH 9/77 *Israel Electric Company. v. "Ha'aretz" Newspaper Publications*, IsrSC 32(3) 337.
- [30] HCJ 389/80 *Dapei Zahav v. The Broadcasting Authority*, IsrSC 35(1) 421.

- 
- [31] HCJ 376/81 *Lugassy v. Minister of Communications*, IsrSC 36(2) 449.
- [32] HCJ 341/81 *Moshav Beit-Oved Ltd. v. Traffic Comptroller*, IsrSC 36(3) 349.
- [33] HCJ 910/86 *Ressler v. Minister of Defense*, IsrSC 42(2) 441.
- [34] HCJ 953/89 *Indoor v. Mayor of Jerusalem*, IsrSC 45(4) 683.
- [35] HCJ 14/86 *Laor v. The Film and Play Review Board*, IsrSC 41(1) 421.
- [36] HCJ 6163/92 *Eizenberg v. Minister of Construction and Housing*, IsrSC 47(2) 229.
- [37] HCJ 4541/94 *Miller v. Minister of Defense*, IsrSC 49(4) 94.
- [38] HCJ 693/91 *Efrat v. Population Registrar*, IsrSC 47(1) 749.
- [39] HCJ 257/89 *Hoffman v. Appointee over the Western Wall*, IsrSC 48(2) 265.
- [40] HCJ 549/75 *Noah Film Company v. The Film and Play Review Board*, IsrSC 30(1) 757.
- [41] HCJ 606/93 *Kiddum Yezmot (1981) v. The Broadcasting Authority*, IsrSC 48(2) 1.
- [42] HCJ 111/53 *Kaufman v. Minister of the Interior*, IsrSC 7 534.
- [43] Crim. A 255/68 *The State of Israel v. Ben-Moshe*, IsrSC 22(2) 427.
- [44] HCJ 243/81 *Yeki Yosha v. The Film and Play Review Board*, IsrSC 35(3) 421.
- [45] Crim. A 126/62 *Disentzik v. The Attorney General*, IsrSC 17 169.
- [46] HCJ 680/88 *Schnitzer v. Chief Military Censor*, IsrSC 42(2) 617.
- [47] HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Police Commander*, IsrSC 38(2) 449.
- [48] HCJ 2725/93 *Salomon v. Jerusalem District Commander, Israel Police*, IsrSC 49(5) 366.
- [49] HCJ 5510/92 *Turgeman v. Minister of Defense*, IsrSC 48(1) 217.
- [50] HCJ 987/94 *Euronet Kavei Zahav (1992) Ltd. v. Minister of Communications*, IsrSC 48(5) 412.
- [51] HCJ 3477/95 *Ben-Attiyah v. Minister of Education, Culture, and Sport*, IsrSC 49(5) 1.

- [52] HCJ 1064/94 *Computext Rishon Le Zion (1986) Ltd. v. Minister of Transportation*, IsrSC 49(4) 808.
- [53] HCJ 287/69 *Miron v. Minister of Labour*, IsrSC 24(1) 337.
- [54] HCJ 672/87 *Atamalla v. Northern Command*, IsrSC 42(4) 708.
- [55] P.L.A. 6654/93 *Binkin v. The State of Israel*, IsrSC 48(1) 290.
- [56] HCJ 3914/92 *Lev v. Tel-Aviv/Jaffa District Rabbinical Court*, IsrSC 48(2) 491.
- [57] HCJ 297/82 *Brenner v. Minister of the Interior*, IsrSC 37(3) 29.
- [58] HCJ 2911/94 *Baki v. Director General of the Ministry of the Interior*, IsrSC 48(5) 291.
- [59] HCJ 2918/93 *Municipality of Kiryat-Gat v. The State of Israel*, IsrSC 47(5) 832.
- [60] HCJ 161/80 *San Tropez Holtel Ltd. v. Israel Lands Authority*, IsrSC 34(4) 709.
- [61] HCJ 465/93 *Tridet v. Local Council for Planning and Building, Herziliya* IsrSC 48(2) 622
- [62] HCJ 400/89 *Levitt v. President of the Military Tribunal, Southern District*, IsrSC 43(3) 705.
- [63] HCJ 166/71 *Halon v. Head of the Local Council of Ousfiah*, IsrSC 25(2) 591.
- [64] HCJ 155/60 *Elazar v. Mayor of Bat-Yam*, IsrSC 14 1511.
- [65] HCJ 512/81 *The Archeological Institute of the Hebrew University, Jeruslaem v. Minister of Education and Culture*, 35(4) 533.
- [66] HCJ 5277/96 *Hod Matechet Ltd. v. Minister of Finance*, IsrSC 50(5) 854.
- [67] HCJ 398/79 *Abdallah v. Mayor of Nazareth*, IsrSC 34(1) 522.
- [68] HCJ 379/71 *Levy v. Municipality of Petach-Tikvah*, IsrSC 26(1) 785.
- [69] HCJ 112/88 *The Local Council for Planning and Building, Ramat-Gan v. The District Committee for Planning and Building, Tel-Aviv District*, (unreported case).
- [70] HCJ 1869/95 *Gasoline Import Company v. Minister of Transportation*, IsrSC 49(5) 559.

- [71] HCJ 6111/94 *Guardians of the Tradition v. The Chief Rabbinical Council of Israel*, IsrSC 49(5) 94.
- [72] P.Cr. A. 6795/93 *Aggadi v. The State of Israel*, IsrSC 48(1) 705.
- [73] HCJ 4267/93 *A.M.I.T.I.—Citizens for Efficient Government v. The Prime Minister of Israel*, IsrSC 47(5) 441.
- [74] HCJ 4712/96 *Meretz-Democratic Israel Faction v. Jerusalem District Commander, Israel Police*, IsrSC 50(2) 822.
- [75] HCJ 122/54 *Axel v. Mayor of Netanya*, IsrSC 8 1524.
- [76] HCJ 72/55 *Mendelson v. Municipality of Tel-Aviv/Jaffa*, IsrSC 10 734.
- [77] HCJ 1520/91 *Vilensky v. National Labor Court*, IsrSC 46(5) 502.
- [78] HCJ 150/69 *Reich v. Head of the Antiques and Museums Administration*, IsrSC 24(1) 204.
- [79] HCJ 70/50 *Michlin v. Minister of Health*, IsrSC 4 319.
- [80] HCJ 74/51 *The National Center of Contractors Associations v. Minister of Commerce and Industry*, IsrSC 5 1544.
- [81] HCJ 231/63 *Retef Food Supplies v. Minister of Commerce and Industry*, IsrSC 17 2730.
- [82] HCJ 392/72 *Brenner v. District Committee for Planning and Building, Haifa District*, IsrSC 27(2) 764.
- [83] HCJ 4676/94 *Meatrael Ltd. v. The Knesset*, IsrSC 50(5) 15.
- [84] HCJ 4769/90 *Zidan v. Minister of Labor and Welfare*, IsrSC 47(2) 147.

**United States Cases Cited:**

- [85] *Kent v. Dulles*, 357 U.S. 116 (1958).
- [86] *People v. Grant*, 117 N.E. 2d 542 (N.Y. Ct. Appeals 1954).
- [87] *NYS Public Emp. Fed. v. City of Albany*, 527 N.E. 2d 253 (N.Y. Ct. Appeals 1988).

**English Cases Cited:**

- [88] *Ex parte Lewis* (1888) 21 Q.B D. 191.
- [89] *Vanderplant v. Mayfair Hotel Co.* (1930) 1 Ch. 138.

**German Cases Cited:**

[90] 6 BverfGE 32 (1957).

**Israeli Books Cited:**

- [91] 1-2, I. Zamir, *The Administrative Authority* (1996).  
[92] 1 A. Rubinstein, *The Constitutional Law of the State of Israel* (1997).  
[93] 2 A. Barak *Interpretation in Law: Interpretation of Legislation* (1993);  
[94] 3 A. Barak *Interpretation in Law: Constitutional Interpretation* (1993);  
[95] R. Cohen-Almagor, *The Limits of Tolerance and Tolerance—Liberal Theory and the Struggle Against Kahanism* (1994).  
[96] Y. Weisman, *Property Law* (1993).  
[97] H. Klinghoffer, *Administrative Law* (1957)  
[98] S. Eizenstadt, *Roman Law: Its History and Substance* (1954)  
[99] B. Bracha, *Administrative Law* (1996).  
[100] Y. Dotan, *Administrative Guidelines* (1996).

**Israeli Articles Cited**

- [101] A. Barak, *Freedom of Expression and its Limitations*, 40 HaPraklit 5 (1991-1993).  
[102] Z. Segal, *The Grounds for Disproportionality in Administrative Law*, 39 HaPraklit 507 (1990-1991).  
[103] I. Zamir, *Israeli Administrative Law as Compared to the Administrative Law of Germany*, 2 Mishpat U'Mimshal 109 (1994-1995).  
[104] H. Klinghoffer, *An Empowered Authority's Internal Guidelines—Their Validity*, 3 Hod Hamishpat 38 (1948)

**Foreign Books Cited:**

- [105] R.M. Dworkin, *A Matter of Principle* (1985).  
[106] R.W. Leake, *Roman Private Law* (3<sup>rd</sup> ed. 1961).

**Foreign Articles Cited:**

- [107] F. Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1986).

**Miscellaneous:**

- [108] 31 The Jewish Encyclopedia (1979).
- [109] The Laws of England (4<sup>th</sup> ed. 1995).

**Jewish Law Sources Cited:**

- [110] Babylonian Talmud, Tractate Beitza 16a.
- [111] Habbakuk 2:4
- [112] Isaiah 36:6
- [113] Numbers 22:21-22.
- [114] Mishna, Tractate Baba Bathra 6:7.
- [115] Tractate Baba Bathra, With the Modern Commentary of Shimon Ben-Shemen 92b (1981)
- [116] Babylonian Talmud, Tractate Baba Bathra, 99b-100a
- [117] Babylonian Talmud, Tractate Nedarim 39a.
- [118] Proverbs 3:17.
- [119] Exodus 31:16-17.
- [120] Jeremiah 17: 24-27.
- [121] Ezekiel 20.
- [122] Amos 8.
- [123] Nehemia 9, 10, 13.
- [124] Jerusalem Talmud, Tractate Brachot 1:8.
- [125] Babylonian Talmud, Tractate Shabbat 119b.
- [126] The Book of Sabbath: The Sabbath Portion, its Value, its Manifestation and Influence in the Lives of the People of Israel in Ancient Times and Until Today (1963).
- [127] A.J. Heschel, The Sabbath: Its Meaning for Modern Man (1951).
- [128] Midrash Leviticus Rabbah 32A

**JUDGMENT****President A. Barak**



1. In Israeli public discourse, Bar-Ilan Street is no longer simply a street. It has become a social concept reflecting a deep-seated political dispute between the Ultra-Orthodox and the secular populations in this country. This debate is not limited to the matter of freedom of movement on Bar-Ilan Street on Friday evenings and on the Sabbath. It is, in essence, a difficult debate involving the relationship between religion and state in Israel, which pierces through to Israel's very character as a Jewish or a democratic state. It is a bitter debate about the character of Jerusalem, which has found its way to the Court's doorstep. This being the case, it is incumbent upon us to decide this case irrespective of its political and social ramifications. The dispute before us is a legal one.

Our concern is with the scope of the Central Traffic Authority's powers under Regulation 17 of the Traffic Regulations-1961. More specifically, the issue at bar involves the scope of the Central Traffic Authority's discretion to direct its local counterpart in regulating traffic on Bar-Ilan Street, so that the street will be closed to traffic during certain hours during the Sabbath. The answer to these questions must be drawn from the Regulation's wording and purpose. Our decision will be made in accordance with legal criteria, as has always been the practice in Israel. For this Court has dealt with similar issues in the past. Indeed, this Court ruled on the closing of a particular section of King George and Shmuel HaNagid streets in Jerusalem during morning hours of the Sabbath and Jewish festivals, in order to avoid disturbing worshippers at the "Yeshurun" Synagogue over thirty years ago. *See* HCJ 174/62 *The League for Prevention of Religious Coercion v. Municipality of Jerusalem* [1]. In a similar vein, twenty years ago, this Court decided to close a certain section of HaShomer Street in Bnei Brak on the Sabbath and Jewish holidays. *See* HCJ 531/77 *Baruch v. Tel-Aviv District Central Traffic Supervisor* [2]. And so, this time too, we will decide these matters according to legal criteria. Significantly, our concern is not with the social debate; our considerations are not political. Rather, we are concerned with the legal dispute, with normative considerations. Our concern is not with the relationship between the secular and the religious

in Israel; nor is it with the relationship between religion and state in this country. Nor is our concern the character of Jerusalem. We are simply concerned with Bar-Ilan Street, in its literal sense, and with the Central Traffic Authority's powers and the scope of its discretion. We will examine the balance between the freedom of movement and any resulting injury to religious sensibilities and the observant way of life.

This having been said, I am well aware that many members of the public will not read our decision. Their interest will lie with the social ramifications of our decision, not with the legal reasoning underlying it. They will not examine our normative considerations and will occupy themselves with the political ramifications of our ruling. We are quite conscious that our legal decision will have extra-legal ramifications. This, we cannot prevent. Our judicial role obligates us to rule on the state of the law in accordance with our best understanding. In this context, I need only cite the words of Acting President Landau, who in H CJ 390/79 *Dawikat v. The Government of Israel* [3], at 4, wrote:

There is still great fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am forced to rule in accordance with the law, in complete awareness that the public at large is not interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the stature of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges.

In dealing with the *Bar-Ilan* case, I cannot help but feel as Justice Landau felt in *Dawikat* [3], but what can I do? This is my role and this is my obligation.

2. I begin with a description of the factual background, based on the briefs before us and upon an examination of the material before the Public Committee Appointed for the Purpose of Making Recommendations Regarding Sabbath Traffic on Bar-Ilan Street [hereinafter the Tzameret Committee.] Subsequent to the factual description, I shall examine the normative framework. Within the confines of this framework, I will proceed to address the principles in question. Namely, to what extent it is possible to limit human rights, in order to spare human feelings. I will also address the issue of whether it is possible to limit freedom of movement because of the harm caused to religious sensibilities. I shall conclude by applying the general law to the particular instance at bar.

#### *The Facts*

3. Bar-Ilan Street is a main traffic artery. Its length (including a segment of Yirmiyahu Street) is approximately 1.2 kilometers. In its southern section, it joins Yirmiyahu Street, reaching the entrance to the city. To the north, it merges with Harel Brigade Street, which becomes Eshkol Boulevard. Bar-Ilan Street connects the city entrance to Jerusalem's northern neighborhoods, including Ramat-Eshkol, Ma'alot Dafna, Givat Shapira, and Pizgat Ze'ev. Bar-Ilan Street cuts through an Ultra-Orthodox neighborhood. It serves the residents of this neighborhood. It also serves those who, entering the city, wish to reach its northern neighborhoods, or those who, leaving Jerusalem's northern neighborhoods, wish to exit the city. It also serves the residents of those northern neighborhoods who enter the city for services and commerce. The volume of traffic on Bar-Ilan on weekdays is great. The traffic on Sabbaths and holidays is less significant, approximately 21-28 percent of weekday traffic.

4. Up until the Six Day War, Bar-Ilan Street was situated at the periphery of Ultra-Orthodox neighborhoods, which were located to its east. After the Six Day War, two phenomena occurred. First the Ultra-Orthodox neighborhoods expanded west of Bar-Ilan, transforming it from a peripheral street to one that cuts through the heart of the Ultra-Orthodox areas, which now envelop the street on both its sides. Second, after the Six Day War, the northern neighborhoods were built. Bar-Ilan Street became the main traffic artery that connected the central part of the city to its northern neighborhoods.

5. Since the Israel's establishment, and even before that, there have been clashes between the Ultra-Orthodox and secular populations in Jerusalem over traffic flow on the Sabbath. Demonstrations in Jerusalem around "Sabbath Square" took place at the beginning of the 1950s. Nearing the mid-1950s, these demonstrations spread to Jaffa Street, Beit HaDegel Square ("Dvidka Square"), Herzl Boulevard, and the Etz Haim neighborhood, situated at the entrance to the city. During the early 1960s, the city of Jerusalem discussed a proposal regarding the prevention of some traffic on the Sabbath. Following this proposal, the street near the "Yeshurun" synagogue was closed to traffic on the Sabbath during prayer times. This was done in reliance on a similar precedent in Tel-Aviv and Haifa. The petition challenging this decision was rejected. *See League* [1].

The tension between the secular and the religious increased during the 1960s and the 1970s. Essentially, these tensions revolved around the opening of swimming pools and the City Stadium. The clashes around the issue of Sabbath traffic were renewed and have persisted since the 1970s. This debate was sparked by a dispute over Ramot road, which connects the Ramot neighborhood to the downtown area. In the midst of these clashes, the Jerusalem municipality closed dozens of streets located in Ultra-Orthodox and other religious neighborhoods to traffic on the Sabbath.

6. The first of the demonstrations by Ultra-Orthodox groups on Bar-Ilan Street occurred in 1988. This struggle escalated following the street's one-time closure in June of 1991, on the occasion of the Satmar Rebbe's visit, and in November of 1995, on the occasion of the Vishnitzer Rebbe's visit. Moreover, the Ultra-Orthodox voters' increasing political clout gave rise to heightened expectations among the Ultra-Orthodox public that the street be closed to traffic on the Sabbath. In addition, the availability of surrounding streets, paved through the years, which could potentially serve as alternate routes, strengthened the Ultra-Orthodox belief that the secular public should accede to their request and refrain from traveling in their midst on the Sabbath.

Conversely, the request to close Bar-Ilan Street to traffic was perceived by the secular public as the continuation of an ongoing policy to effectively push the non-Ultra-Orthodox population out of Jerusalem. As a result, counter-demonstrations took place, accompanied by violent clashes. Against this backdrop, in August of 1994, the Mayor of Jerusalem, Mr. Ehud Olmert, appointed a committee headed by Mr. Elazar Sturm [hereinafter the Sturm Committee].

7. The Sturm Committee held a significant number of meetings. Dozens of city residents, among them representatives of neighborhoods, parties, and interested bodies, appeared before the Committee. The Committee heard from experts in the fields of transportation, geography, sociology, law and religion. In its report of September 29, 1995, the Committee noted:

The issue of traffic on the Sabbath divides Jerusalem's populace deeply. Solutions befitting the conflicting interests of the city's residents must be found. The situation is difficult and complicated. Accordingly, our examination was conducted in the spirit of compromise and in careful analysis of the conflicting needs. The testimony before the Committee, from every shade of the social and political rainbow, religious and

secular, reflected agreement and broad understanding. There is general agreement in favor of respecting the request of many religious neighborhoods to foster a public atmosphere befitting their own religious lifestyle, while bearing in mind the needs of others.

Against this backdrop, the Committee recommended closing particular streets, such as Keter Sofer Street, Shmuel HaNavi Street and Brandeis Street. It also recommended closing the neighborhood of Har-Nof to traffic on the Sabbath and Jewish holidays. Having said this, the Committee did note that it recommended leaving access routes open to secular residents and their visitors. Accordingly, it called on secular residents to inform them of their place of residence. Only after the secular residents' places of residence were mapped out and the relevant roads and accessways clearly marked, would the Committee make its recommendations. Additionally, the Committee decided not to recommend closing other streets, such as Malchei Yisrael Street, Yam-Suf Street, and Michlin Street. With respect to Bar-Ilan Street, it recommended that:

Bar-Ilan Street be closed during prayer times on Sabbaths and Jewish holidays.

More specifically, the Committee recommended that the street be closed on the eve of the Sabbath, from the beginning of the Sabbath (sunset) to an hour and forty-five minutes thereafter; on the Sabbath day the street would be closed from 7:30 a.m. to 11:30 a.m.. Bar-Ilan would also be closed for an hour and forty five minutes prior to the end of the Sabbath. It shall be noted that one of the Committee's members, Mr. Yitzhak Rubin, opposed closing the street during prayer hours, noting that the street is a main traffic artery.

8. While the Sturm Committee was still at work, the local and national media published articles regarding its recommendations. On the

heel of these publications, November 29, 1994, Mr. Langer, the National Traffic Controller, approached the Mayor, Mr. Ehud Olmert, regarding Bar-Ilan Street. In his letter Mr. Langer stated that:

In light of publications in the media and the situation on the street itself, I found it appropriate to apprise you of our position on the matter. The Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem's northern neighborhoods to the city's center and south, every day of the week. It would be unthinkable to close this route to traffic on the Sabbath or on any other day. Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

9. Jerusalem's City Council deliberated the Sturm Committee's report, and decided to close off a number of streets. In light of Mr. Langer's letter, and in view of the city's legal advisor's position, the Council held: "Jerusalem's City Council does not have the discretion to close off Bar-Ilan Street to traffic on Sabbaths and Jewish holidays." The Council added that it will take note of the Sturm Committee's recommendations and forward them to the Minister of Transportation "with a recommendation to consider the plight of the local public."

10. A number of requests to close off Bar-Ilan Street on the Sabbath reached the Minister of Transportation, Mr. Israel Kaiser. A meeting was held, on January 10, 1996, between the Minister and residents of Bar-Ilan Street—a meeting that Mr. Langer also attended. In concluding the meeting, the Minister asserted that:

the Traffic Controller is the highest professional authority in this area, and I, as Minister of Transportation, must act in accordance with his professional opinion. The Traffic Controller's professional opinion is that this street is a main

traffic artery and therefore cannot be closed on the Sabbath. I will only be able to change this decision if the Traffic Controller is swayed by the data presented here before him, and decides that, on Sabbaths during prayer times, the street may be closed. As I have said, the decision shall be on a professional basis, and if there is room to take a more lenient view—as the House of Hillel did in the times of the Talmud—I shall take that path. If, however, the Traffic Controller does not change his professional opinion, we will only close the street if the government or the Court compels us to do so.

Minister Kaiser concluded his meeting with the Mayor of Jerusalem, on February 13, 1996, on a similar note. During all this time, demonstrations against Sabbath traffic on Bar-Ilan Street grew more violent. The police were forced to intervene and traffic in the area was disrupted.

11. In May of 1996, Rabbi Yitzhak Levi was named the new Minister of Transportation. The National Traffic Controller, Mr. Langer, listened to the position of the new Minister, who noted that he had received many complaints regarding the offense to the sensibilities of the local Ultra-Orthodox public on Bar-Ilan Street. The Minister expressed his opinion that a compromise solution was desirable and notified Mr. Langer that, in light of the issue's ramifications, he planned on meeting with Israel's President to discuss it. After meeting with the President, the Minister of Transportation informed Mr. Langer that the President also believed in reaching a compromise regarding Bar-Ilan Street. Mr. Langer consulted with professionals—with the Ministry of Transportation's Chief Engineer and with its Legal Advisor. He revisited and reconsidered his original stance. After this assessment, Mr. Langer became convinced that he should change his previous decision.

12. On July 10, 1996, Mr. Langer submitted a new decision. According to this decision, Bar-Ilan Street was to be closed to traffic, in both directions, on the Sabbath and Jewish holidays, during prayer times.



On Friday evenings and holiday eves the street would be closed from 6:30 p.m. to 9 p.m.; on Saturdays and Jewish holidays from 7:30 a.m. to 11:30 a.m., and from 5 p.m. to 8:30 p.m. This traffic arrangement would be in force for a four month period. Intersections themselves would remain open to traffic. During this period, the impact on traffic in the area would be monitored. The Minister of Transportation informed the Knesset of his decision—a decision which the current petitions challenge.

*The Petitions*

13. The first petition before us (HCJ5016/96) was filed by Lior Horev, a resident of Jerusalem active in the struggle against the street's closure. He claims that the decision was illegal, as it was taken without consulting the Mayor or the residents of the affected secular neighborhoods. The petitioner further maintains that the decision is patently unreasonable, for it involves the permanent closure of a central traffic artery for a number of hours, as distinguished from a temporary closure for a particular event. The petitioner claims that the decision is based on political considerations. He also noted the problem with impeding the freedom of movement of emergency and security vehicles. Indeed, Bar-Ilan Street is used by such vehicles for the purpose of reaching the hospital on Mount Scopus. Consequently, the petitioner requests that we declare the Minister's decision invalid and issue a temporary restraining order, until we render a final decision.

14. The second petition (HCJ 5025/96) was filed by Member of Knesset Ophir Pines, a resident of the neighborhood of Ramot. M.K. Pines argues that he is liable to be harmed by the Traffic Controller's decision. He claims that the Minister forced the Traffic Controller to decide as he did. The decision, he submits, is patently unreasonable, for it leaves entire neighborhoods in Jerusalem without any reasonable alternative routes. Nor, he claims, did the respondents consult with representatives of the secular public prior to adopting the decision. He further contends that the placing of traffic signs, such as the ones

indicating Bar-Ilan's closure, is a regulatory act that requires official publication. There was no such publication and the new traffic regulations were made without proper authorization, when both the Prime Minister and the Mayor were overseas. The petitioner further emphasized that the parallel road, Yechezkel Street, had already been closed to traffic on the Sabbath and holidays in order to meet the religious needs of the Ultra-Orthodox public. Thus, closing Bar-Ilan Street would impose a total detour of about nine kilometers on motorists. The petitioner therefore requests that the Court strike down the Traffic Controller's decision. He also requests that we issue an interim order, prohibiting the placing of traffic signs, pending a final resolution.

15. Knesset Member Yosef Sarid and others filed the third petition (HCJ 5090/96). They argue that limiting traffic on Bar-Ilan Street on Sabbaths and festivals is a matter that should be determined by the Knesset, as it impacts basic civil rights. It was further argued that the decision was taken without consulting with the Prime Minister, the Head of the Regional Authority, the Head of the Local Traffic Authority, or with residents who were likely to be harmed by the decision. Petitioners maintain that a better solution would be to build pedestrian walkways over Bar-Ilan Street.

Petitioner number three is a resident of Tzefania Street, adjacent to Bar-Ilan. She works at Hadassah Ein Karem Hospital. Petitioner number three claims that closing Bar-Ilan Street on Sabbaths and festivals will force her to park her car about a kilometer away from her home and that, if she decides to visit her brother, also a resident of Jerusalem, she will have to walk about five kilometers. Petitioner number four is a disabled Israel Defense Force (IDF) veteran, with restricted mobility. His parents live on David Street, which intersects Bar-Ilan. He visits them every Friday and Sabbath. Petitioner number four argues that closing the street will prevent him from seeing his parents on Sabbaths and holidays. Petitioners also submit that the Controller's decision was made under the pressure of the demonstrations of the local Ultra-Orthodox public. These

demonstrations sometimes involved acts of violence, which ended in damage to both persons and property. They argue that the Controller's decision would give dangerous legitimacy to such violence. We were therefore requested to strike down the Controller's decision.

*Issuing an Order Nisi and an Interim Order*

16. The petitions were filed with the Justice on Duty, Justice D. Dorner, and transferred to a panel of justices, who decided that they would hear the petition the following day. During the hearing, before President A. Barak, Justice E. Mazza and Justice D. Dorner, it was decided to issue an *order nisi*. The interim order was also granted. Respondent was given fifteen days to file a response. It was decided that, upon receiving respondent's response, a date would be set for hearing the petition.

17. After the *order nisi* was issued, an additional petition was filed (HCJ 5434/96). The petitioner was the Association for the Rights of the Religious Community in Israel. They request that we order the Traffic Controller and the Minister of Transportation to show cause as to why Bar-Ilan Street should not be completely closed on Sabbaths and holidays. They claim that these areas are completely and exclusively religious and Ultra-Orthodox. This being the case, the use of the road for traffic on Sabbaths and festivals injures the sensibilities of the residents of Bar-Ilan Street and its environs. It also causes ongoing tension between this population and Jerusalem's secular population. As a result, there are repeated incidents of violence between these sectors of the public. Petitioner also claims that traffic on the Sabbath endangers the welfare of the local population, for whom the road serves as a pedestrian promenade on the Sabbath. It turns the Sabbath into a regular weekday, violating the beliefs by which the local residents abide. The secular population, they argue, has reasonable alternative roads on which to drive on the Sabbath. The petition was filed with the Justice on Duty, again

Justice D. Dorner, and an *order nisi* was issued as requested. A hearing was set and combined with the hearings of the other three petitions.

18. The continuation of the hearing of the four petitions was scheduled for August 15, 1996. The Traffic Controller's response to the four petitions was submitted to the Court prior to this hearing. With respect to the first three petitions, the Controller noted that, in his decision to partially and temporarily close Bar-Ilan Street, he had appropriately balanced between freedom of movement and the sensibilities of the religious residents of Bar-Ilan Street and its vicinity. Employing the information provided by the Sturm Committee, the Controller asserted that the volume of traffic on the Sabbath and festivals is only 12 per cent of the volume of traffic on regular days. According to the Controller, his decision did not leave motorists without alternate routes. These alternative routes, however, do require longer trips.

19. According to the data submitted by the Traffic Controller, Bar-Ilan's closure would mean that, instead of travelling 2.2 kilometers along the road, motorists wishing to reach the Sanhedria intersection from the entrance to the city would have to turn left at the entrance to the city, at Route no. 4 (Mie Naftoach) and then turn right at Golda Meir Boulevard prior to reaching the Sanhedria intersection. The trip would be lengthened by only 1.5 kilometers and the time difference would be only two minutes. For the residents of Jerusalem's eastern neighborhoods (Katamon, Talpiot and the German Colony) as well as for residents of the city center, the direct route to the northern suburbs is via Route no. One. For residents of the western neighborhoods (Beth Hakerem, Kiryat Hayovel and Kiryat Menachem) an alternate route to the northern suburbs through Route no. Four is available, which, as stated above, lengthens the trip by only 2.2 kilometers. Residents of Jerusalem's northern neighborhoods, for their part, can exit the city directly via Route no. Four to Tel-Aviv, as well as via Route no. 443 to Modi'in.

20. In light of this data, the Controller balanced the conflicting interests. He considered the intensity of the harm caused by alternate courses of action. He concluded that the appropriate balance between the relevant factors necessitated a partial closure of Bar-Ilan Street, during those times when a large portion of the religious population was on its way to or from the synagogue. As these times motor traffic along Bar-Ilan presents the greatest affront to religious sensibilities. Even so, the Traffic Controller was of the opinion that the closure ought to be on a temporary basis only. During the period of the closure, the damage caused motorists using Bar-Ilan and its alternate routes would be examined. The respondent's position is that, "at this stage," closing the road beyond prayer times should not be permitted.

21. In his response, the Traffic Controller addressed the change in his position. He asserted that his initial response only addressed the strictly traffic-related aspects of the matter and failed to give full attention to the scope of the offense to the Ultra-Orthodox public's sensibilities. His second decision was adopted following a renewed examination of all the circumstances. As a result, he is now convinced that the appropriate balance of the conflicting interests warrants the temporary, partial closure of Bar-Ilan Street during and around prayer times.

22. Further on in his response, the Traffic Controller discussed the arguments for consulting sections of the secular population. The Controller contended that he was not under a duty to consult but that, as a matter of fact, he was aware of the positions of both the Ultra-Orthodox and the secular. He had studied the Sturm Report and had been apprised of the Jerusalem City Council's stance regarding the Sturm Committee's recommendations. The Traffic Controller also asserted that placing a traffic sign does not require official publication.

23. Regarding the inconvenience caused to petitioners three and four (HCJ 5090/96), the Traffic Controller contended that:

the reasonableness of an administrative decision in a case is assessed subsequent to balancing all the relevant interests. The fact that a particular individual suffers in a more serious way does not affect the reasonableness of the decision as a whole.

24. In his reply, the Traffic Controller specifically related to the petition in HCJ 5434/96, which requests that Bar-Ilan Street be completely closed for the entire Sabbath. He noted that even though the alternate routes only lengthen the commute by about two kilometers, this still constitutes an infringement of the city residents' interests in general, and the interests of the residents of the northern suburbs in particular. Of course, their rights must be balanced against those of the Ultra-Orthodox population who live along the road, and their interest not to have their religious sensibilities offended on the Sabbath and festivals. The appropriate balance between these conflicting interests, argues the Controller, warrants the partial closure of the road, during the Sabbath and festivals. This closure will be temporary. After the trial period, the situation will be reexamined, with consideration for statistics regarding the volume of traffic on the street. Towards the end of his response, the Traffic Controller also raised the possibility of establishing an electric sign, which would advertise the times that the Sabbath and festivals commence and end. This sign would be connected to the traffic lights, and would facilitate the road's closure at the precise times of prayers.

25. In view of the matter's significance and at the request that the original panel of judges be broadened, I decided to add Deputy President S. Levin and Justices Or, Cheshin and Tal to the original panel. The hearing began on the August 15, 1996. At the start of the hearing, we ordered the joinder of a number of petitioners (HCJ 5341/96, 5354/96 and 5377/96) as respondents to the first three petitions. These respondents included the Committee of Tel-Arza and Bar-Ilan Street Neighborhoods. The Committee noted the numerous times it had approached the Minister of Transportation, Israel Kaiser, with requests that Bar-Ilan Street be closed. These requests were appended with the petitions of rabbis, of institutions for

President A. Barak

Jewish learning and of thousands of residents, including a petition signed by 1,000 children, all of whom requested that the Bar-Ilan Street be closed to traffic on the Sabbath. According to petitioner, those signing these petitions included “almost all of Bar-Ilan Street’s residents, house after house, religious, traditional and secular.” The Committee asserted that, on the Sabbath, “Bar-Ilan Street serves as a main artery for pedestrian traffic. Residents, together with their families, go to services three times a day, visit their rabbis and the homes of relatives and friends in the neighborhood, attend lessons in Torah, and go to the synagogue for the afternoon meal. Children, after a week of long days in school, also attend services, and go to lessons, Psalm reciting groups, games and meetings with their friends. The pedestrian traffic on the Sabbath and festivals on Bar-Ilan Street involves thousands of people and is of a far greater scope than the motor traffic, which poses a serious danger to the pedestrians, particularly the children. In addition, according to petitioner, the presence of motor vehicles “disturbs prayers and Torah classes in the synagogues and infringes upon the Sabbath rest enjoyed by the local residents.”

According to the Committee, the proper solution is the absolute closure of Bar-Ilan Street to traffic on the Sabbath. At minimum, the road should be closed in accordance with the Sturm Committee’s recommendations and the Traffic Controller’s decision. With respect to ambulances or other emergency vehicles, the Committee noted that these would be able to move freely. It asserted that “[w]ho is as well-known as the Ultra-Orthodox public and its volunteers for their commitment to saving lives and helping others?” The Committee further contended that Bar-Ilan Street was only a vital traffic artery on weekdays. On the Sabbath, traffic is minimal and the road becomes “a traffic artery for pedestrians.” The Committee also asserted that “almost 100% of the residents living in the vicinity of the Shmuel HaNavi and Jeremiah Streets, as far as Shamgar Street, are all religious or Ultra-Orthodox, and their religious sensibilities, convenience, and way of life should be taken into account.” In addition, it emphasized that the section of the road designated for closure contains over one hundred synagogues and religious institutions. As for the violence of Ultra-Orthodox groups on Bar-

Ilan Street, the Committee deemed these to be fringe groups, who do not reflect the views of the overwhelming majority of local residents. "It is well known that rabbis from all circles and communities have prohibited stone-throwing or any kind of violence at demonstrations, especially on the Sabbath, as such is prohibited by Jewish law."

With respect to petitioner number three (HCJ 5090/96), the Committee submits that an ambulance would be able to pick her up on the Sabbath. In addition, she would be able to obtain an ambulance sign for her car through the hospital. Regarding travel to members of her family, she would be able to do so during the hours when the street was open on the Sabbath. The same would apply to petitioner number four.

26. When the Minister of Transportation and the Traffic Controller began their oral arguments, the Court asked for further details from the National Traffic Controller, Mr. Langer. He answered our questions. He provided us with a detailed explanation of the traffic issues in Jerusalem on the Sabbath, noting the conflict between the desire of the religious and Ultra-Orthodox communities to maintain an observant way of life and between the secular public's freedom of movement. In the Controller's view, closing Bar-Ilan Street for a four-month period constituted an attempt to find the proper balance between these conflicting considerations, in order to facilitate finding a more permanent solution.

27. On the basis of his testimony before us, and in the view of the petitions and the responses to them, the Court thought it best to resolve the matter by way of an agreement. Such an agreement would quite naturally be premised on mutual patience and tolerance and on a long-term understanding regarding the future of Jerusalem. Rather than focusing solely on the issue of whether to close Bar-Ilan Street, it would relate to expected social dynamics and their effect on the secular-religious relations in the coming years. On the basis of such this agreement, it would be possible to find long-term solutions for the various problems that these petitions raised.



28. This led to our proposal that a public committee be established, whose members would provide a balanced reflection of the spectrum of views and perspectives on secular-religious relations. The committee's goal would be to strike a social covenant for secular-religious relations. The committee's recommendations would be considered by the government agencies, which would assist them in determining policy in traffic matters, including the potential closure of Bar-Ilan Street.

29. The Court's proposal was immediately submitted to the Minister of Transportation, who accepted it. We were informed that the Minister intended to have the Committee set-up immediately so it could begin deliberations without delay. The other sides also welcomed our proposal. Under the circumstances, we thought it appropriate to postpone the continuation of the hearing for two months, in order to allow the committee to function.

30. In view of this development, the state and the petitioners in HCJ 5434/96 petitioned the Court to strike down the interim order. Petitioners in HCJ 5016/96, 5025/96 and 5090/96 opposed this motion. We held, with Justice Tal dissenting, that there was no reason to revoke the interim order at that stage. It was our understanding, given the response of the National Traffic Controller and, on the basis of accepted guidelines regarding interim orders, that the interim order should remain valid. We further noted that the petitions were still pending and that, as long as we lacked exact and verified data regarding an appropriate solution, there were no grounds for changing the status quo that had existed on Bar-Ilan Street prior to the Controller's decision. This having been said, we noted that there was nothing to prevent the Controller or one of the other litigants, subsequent to the establishment of the committee, from approaching us at his or her own initiative with a request to strike down or alter the interim order, on the basis of developments in the committee.

31. The Court emphasized its hope that a public committee that would make recommendations, which would be submitted with appropriate haste

and which would reflect the social consensus of all walks of Israeli society, would facilitate an eventual solution to the critical problem of religious-secular relations both in Jerusalem and outside of it, based on mutual tolerance. We also expressed our concern that the committee be allowed to do its work in a quiet atmosphere, free from threats or violence. As noted above, the Controller or any of the litigants would be able to return to us in the future with a request to strike down or alter the interim order.

32. In his dissent, Justice Tal opined that the interim order should be cancelled. In his view, the National Traffic Controller's decision was temporary, and was intended to allow for assessment of the proposed arrangement. Upon termination of the trial period it would be possible to ascertain whether the proposed arrangement had been an appropriate and reasonable alternative. Justice Tal noted that he saw no reason for this Court to prevent the authority from conducting this experiment. The results of the experiment could also be weighed by the public committee.

*The Tzameret Committee*

In the wake of our proposal, on August 27, 1996 the Minister of Transportation appointed a public committee charged with making recommendations regarding motor traffic on the Sabbath. The committee was chaired by Dr. T. Tzameret. Its members were Prof. G. Golan, Rabbi T. Weinmann, Mr. U. Chason, Rabbi S. Yakobovitz, Rabbi She'ar Yashuv Cohen, Prof. E. Shweid, Prof. D. Shferber. In its letters of appointment, the Committee was requested to establish

recommendations regarding traffic on the Sabbath on Bar-Ilan Street in Jerusalem, in Jerusalem in general, and its environs. The recommendations are to reflect a social consensus between various segments of the population. This consensus is to be based on patience, tolerance and on a long-term understanding of the population structure of Jerusalem and its environs.

34. The Tzameret Committee deliberated for approximately nine weeks. It heard the testimony of dozens of witnesses, including public servants, experts in geography, economics, urban planning, sociology, political science and public administration, politicians, public figures and ordinary citizens. The Committee also studied the written requests of citizens not summoned to testify before it.

35. The Committee's recommendations address four matters: the creation of a "social covenant" between the religious and the secular, the economic, demographic, cultural and social development of Jerusalem, the regulation of the street closures nationwide on the Sabbath and holidays, and the closure of Bar-Ilan Street on the Sabbath and holidays.

Regarding the social covenant, seven of the eight Committee members recommended that a council, consisting of twenty-three public figures and spiritual leaders from all walks of life, be established to engage in an ongoing dialogue on religious-secular relations. "All of this with a view to the gradual improvement of religious-secular relations based on mutual respect, understanding and agreement."

With respect to Jerusalem's development, seven of the eight Committee members recommended intensifying research regarding Jerusalem, its development and its population, in order to collect data which could serve as a basis for formulating policy. Likewise, the seven members also suggested the restriction of subsidized building in Jerusalem, the building of additional public structures and the planning of new suburbs, with an eye to the lifestyles, character, and needs of the various sectors of the population. The Committee unanimously recommended extending the municipal boundaries of Jerusalem to the west and south, so that suburbs such as Mevasseret Tzion, Motza Elit, Ramat Rachel, Mt. Eitan and the Arazim valley would be included within Jerusalem. The Committee further recommended encouraging economic, public and spiritual activities within the Jerusalem area. In addition, six of the Committee members proposed "the promotion of cultural activity

geared towards various populations, provided that such activities do not involve the public desecration of the Sabbath.” One of the members opposed this recommendation and another abstained.

36. As for the matter of closing roads nationwide, the Committee recommended that Israeli roads be classified into six categories:

- (1) Local streets—streets used exclusively for access to adjacent land and not for thorough traffic;
- (2) Internal Thorough Streets—streets, mainly serving the needs of local residents, which concentrate and divert traffic from internal streets to collector or arterial thoroughfares;
- (3) Main Thorough Streets—streets which concentrate traffic from internal thorough streets to main traffic arteries;
- (4) Arterial Thoroughfare (with direct access to adjacent lands)—streets, used for transit between various neighborhoods, which concentrate traffic from the categories listed above;
- (5) Arterial Thoroughfare (without direct access to adjacent land users)—street, which are used for through traffic only, which concentrate traffic from the thoroughfares listed above;
- (6) Intercity Highway.

The Committee recommended that the Municipal Authority, in its capacity as the Traffic Authority, be exclusively authorized to deliberate and decide whether a Main Thorough Street or an Arterial Thoroughfare

(with direct access to adjacent land users), should be closed. Such requests would be considered if a large majority of the adult population (75% - 80%) in the area through which the street passes requested such a closure, and if reasonable alternate routes could be found. The Committee further suggested that any decision of the Municipal Authority to close a street should be submitted to the Central Authority, who would examine the decision based on professional considerations. The Committee recommended that only the Central Authority be authorized to close Arterial Thoroughfares (without direct access to adjacent land users) and Intercity Highways, and only then under exceptional circumstances. Moreover, the Committee proposed that an appeals board be established in order to adjudicate objections raised against the Central Authority's decisions.

37. With respect to Bar-Ilan Street's closure, five of the Committee members recommended that "in consideration of the needs of the Ultra-Orthodox population, we recommend adopting the Sturm Committee's decision to close Bar-Ilan Street on the Sabbath and festivals during prayer times, provided that arrangements are made for the secular public in accordance with its needs within the framework of the current *status quo*." In a personal letter, which forms part of the report, the Committee's Chairman noted that the recommendation that the road be closed during prayer times is a conditional one—the condition being that "there be an organized transportation alternative on the Sabbaths in Jerusalem, an arrangement that had existed in Jerusalem for many years." Two additional Committee members (Prof. Shweid and Prof. Golan) clarified that they agreed to closing the road with the understanding that transportation arrangements for the secular public would be based on the *status quo*, under which taxis had been permitted to operate. Prof. Shweber expressed reservations regarding these understandings, and emphasized that his intention was not to permit public transportation on the Sabbath, but rather to continue allowing private transportation. Rabbi Shear Yashuv Cohen, who refrained from voting, claimed that the reference to the *status quo* was intended to prevent deterioration in the

position of the secular population rather than permit the desecration of the Sabbath.

*The Decision of the Minister of Transportation*

38. The recommendations of the Tzameret Committee were submitted to the Minister of Transportation. In accordance with section 42 of the Basic Law: The Government, the Minister decided to assume the authority of the Traffic Controller in the matter of Bar-Ilan Street. On November 7, 1996, the Minister submitted an affidavit to this Court, detailing his stance.

39. The Minister of Transportation adopted the Tzameret Committee's recommendations regarding the establishment of a public council. This Council would be responsible for conflict resolution between different sectors of the Jewish population. The Minister of Transportation brought this proposal to the Prime Minister and requested that he recommend to the President that such a council be established.

With respect to Jerusalem's development, the Minister of Transportation stated that the committee's recommendations were not within his authority, but suggested to the Prime Minister that these recommendations be submitted to the Minister's Committee for Jerusalem.

40. In the matter of closing roads nationwide, the Minister of Transportation decided that professionals employed by his Ministry would assess recommendations of this nature. If the professionals suggested that the recommendations be implemented, and if the Minister decided to adopt them, appropriate legislative amendments would be necessary.

41. Regarding Bar-Ilan Street, the Minister of Transportation felt that implementing the Tzameret Committee's recommendations would

essentially entail closing the road. This position took into account its classification as an Arterial Thoroughfare (with direct access to adjacent lands), the existence of reasonable alternatives, and the fact that an overwhelming majority of the population had expressed its desire that the road be closed. The Minister also expressed his view regarding the condition on which the road closing was to be premised, namely "that arrangements are made for the secular public in accordance with its needs within the framework of the current *status quo*." The Minister regarded this condition as being "vague and lacking substantial factual basis." He noted the various interpretations given by different Committee members. Dr. Tzameret, Prof. Schweid and Prof. Golan felt that this paragraph referred to the implementation of public transportation on the Sabbath. Prof. Shwerber interpreted the paragraph as referring to the individual's right to violate the Sabbath within the framework of the existing *status quo*. Consequently, the Minister concluded that the majority of the Committee did not suggest making the street closure contingent on the establishment of alternate transportation routes.

Regarding the paragraph's factual basis, the Minister noted that the three Committee members in question could not point to any agreements that would confirm their respective interpretations. The Minister further noted that the Traffic Controller had informed him that, in the past, licenses had not been distributed for taxis to operate on Sabbaths and festivals. From this he deduced that, in permitting organized transportation, he would be changing the *status quo* rather than continuing it. The Minister of Transportation concluded that he had not been presented with a recommendation that reflected a "a social consensus between the various segments of the public regarding Sabbath traffic."

The Minister of Transportation also consulted with the Traffic Controller. The Traffic Controller recommended that the Minister adopt the Tzameret Committee's recommendation that Bar-Ilan Street be closed during prayer times, on the condition that Golda Meir Boulevard and the

other entrances to the city remain open during the Sabbath and festivals, as well as that Jaffa Street be open to private vehicles. It was on the basis of these conditions that the Minister of Transport decided that Bar-Ilan Street would be closed to traffic on Sabbaths and festivals during prayer times, as per the Sturm Committee's recommendations. Closing times would be for one hour and forty-five minutes after the beginning of the Sabbath, one hour and forty-five minutes prior to the end of the Sabbath and between 7.30 and 11.30 a.m. during the Sabbath day. In addition, the Minister of Transportation decided that, for as long as Bar-Ilan Street was closed, Golda Meir Boulevard and the entrances to Jerusalem would remain open. Similarly, the lanes on Jaffa Street normally reserved for public transportation would be opened to private vehicles.

*The Continuation of the Hearing*

42. Oral arguments resumed upon receipt of the Minister's response. The Minister of Transportation emphasized that his decision was not for a trial period, but reflected a final position. The Minister asserted that he had balanced the conflicting interests and decided that, in view of the serious harm to the interests of the Ultra-Orthodox sector on the one hand, and the existence of reasonable transportation alternatives on the other, it was reasonable to partially close Bar-Ilan Street to traffic on the Sabbath and on festivals. However, he noted, should there be any change in the circumstances, the Minister would obviously reconsider his decision. Moreover, the Minister asserted that his decision was influenced by the Sturm and Tzameret Committees' recommendations and by the opinions of various rabbis, committees and other interested parties. In this context, it was stressed that there were over one hundred synagogues within the ten surrounding neighborhoods immediately adjacent to Bar-Ilan Street. Indeed, local residents often crossed Bar-Ilan Street when going from one neighborhood to another, both for purposes of prayer and study. This having been said, the Minister was careful to stress that he had not been influenced by the violent demonstrations, though he contended that this violence was proof of the intensity of the feelings of



the Ultra-Orthodox community. According to the Minister, violence must be dealt with by the police, and it would not lead him to change his mind. Needless to say, if one of the responsible bodies, such as the municipality or the police, were to approach him, he would be prepared to consult with them in that regard.

The Minister highlighted that he had not been approached by any secular residents who would be harmed by his decision. He reiterated that “so long as Bar-Ilan Street is closed, the adjacent roads ... would remain open.” Furthermore, he clarified that, in deciding these matters, the more important and central the road, the stricter and more exacting would be the standards for its closing. In any event, the factors to be taken into account were the degree of harm to the feelings of the public, the balance between the various populations living adjacent to the road, and the nature of the alternatives available. In addition, the Minister notified the Court that the establishment of a public body that would function as an appeals board was presently under discussion. Practically speaking, he asserted, such a body had functioned in the Bar-Ilan case.

The Committee of Tel-Arza and Bar-Ilan Street Neighborhoods reiterated its position that Bar-Ilan Street ought to be completely closed on Sabbaths and festivals. It asserted that there were no more than fifty secular residents in the neighborhood, making Bar-Ilan Street a uniquely Ultra-Orthodox neighborhood. Similarly, the Association for the Rights of the Religious Community in Israel also asserted that Bar-Ilan Street ought to be absolutely closed to traffic on Sabbaths and festivals.

43. For their part, petitioners in 5090, 5025, and 5016/96 repeated their position that Bar-Ilan Street’s closure is unreasonable. They emphasized the absence of criteria for closing streets to traffic and argued that a precedent would be set for closing additional arterial roads if the Court was to approve the Minister’s decision to close the Bar-Ilan Street. They further emphasized that, in the past, the closure of Yehezkel Street had been justified by the fact that Bar-Ilan Street provided an alternative

route. Now, however, there are requests to close Bar-Ilan Street, claiming that other roads can serve as alternatives. In the future, these roads would also be closed. In this context, it was argued that if the feelings of the Ultra-Orthodox warranted the closing of Bar-Ilan Street, why did respecting these feelings not also warrant the closing of alternative roads as well? The petitioners emphasized that, while the secular petitioners were always ready to compromise, the Ultra-Orthodox were not prepared for any compromise, nor were they ready to renounce any of their past victories. It was further emphasized that there were many secular citizens who refrained from using Bar-Ilan Street on the Sabbath, due to the Ultra-Orthodox violence on the street.

44. In response to these comments, my colleague, Justice Tal, inquired as to whether the petitioners were prepared for a compromise in which Bar-Ilan Street would be closed to traffic on the Sabbath, as per the Minister of Transportation's decision and, in exchange, a street that is currently closed on Sabbath would be reopened. Justice Tal made particular reference to Yam Suf Street. The panel joined Justice Tal in this suggestion. The Minister informed us that he would conduct a hearing regarding the proposal with the representatives of the City of Jerusalem.

45. In his response, the Minister informed us that the compromise proposal had been seriously considered and that he had inquired with the Mayor of Jerusalem regarding the possibility of reopening Yam Suf Street to traffic on the Sabbath. After consulting with the representatives of the City Council and with the Director of the Traffic Section and Engineering Services, the Mayor of Jerusalem decided that it is appropriate to preserve the *status quo* on Yam Suf Street. He reasoned that there is no traffic-related connection between closing Bar-Ilan Street, as per the Sturm Committee's recommendation, and reopening that particular segment of Yam Suf Street, which had already been closed to traffic on Sabbaths and holidays for a year and three months. Professionals working in the Transportation Ministry agree that there is no significant traffic-related connection between closing

Bar-Ilan Street and reopening a segment of Yam Suf Street. The Minister of Transportation also agrees with this position. The Minister of Transportation noted that additional attempts had been made to find a solution acceptable to all sides, but that these efforts had been unsuccessful.

*The General Normative Framework*

46. Our point of departure is section 70(1) of the Traffic Ordinance [Revised Version], which confers upon the Minister of Transportation the authority to regulate traffic and establish rules regarding the use of the roads. With this authority, the Minister enacted Regulation 17 of the Traffic Regulations-1961:

17. (a) The Central Traffic Authority is permitted to direct the Local Traffic Authority regarding the determination of traffic arrangements, their alteration, termination, and maintenance.
- (b) Where instructions as stated in subsection (a) are given, and the Local Traffic Authority does not comply therewith, the Central Traffic Authority may set out such traffic arrangements, which shall be regarded as if though they had been established, indicated, activated or terminated by the Local Traffic Authority.

The “Central Traffic Authority” is the Traffic Controller or the body upon which the authority of the Controller is conferred. For our purposes, the Central Traffic Authority is the Minister of Transportation, in view of his use of section 42 of the Basic Law: The Government, by which he assumed the Traffic Controller’s authority with respect to Bar-Ilan Street.

47. Regulation 17 of the Traffic Regulations endows the Traffic Controller with the administrative authority to direct the manner in which traffic arrangements are to be set up. This authority, like any administrative

power, must be exercised in accordance with the rules of administrative discretion and procedure. The rules of administrative discretion, for their part, deal with the factors that the administrative authorities are permitted to take into account and any balancing between them. The rules of administrative procedure determine the methods through which administrative discretion is to be exercised. See 2 I. Zamir, *The Administrative Authority* [91], at 673. These two sets of rules were developed by the High Court of Justice and are based on the fundamental principles of our legal system. They have been entrenched in our Basic Laws. In accordance with the theory of administrative discretion, the administrative authority is only permitted to take relevant considerations into account. Furthermore, the administrative authority must find the appropriate balance between these relevant considerations. The balance must be reasonable, as must the decision. The exercise of administrative discretion must be based on a principled, fair and systematic examination of the factual foundation underlying the matter in question. Were the requirements of these two sets of rules satisfied in the case at bar?

*Laws of Administrative Discretion—Relevance*

48. According to our administrative law, an administrative authority is only permitted to consider relevant considerations. Irrelevant or foreign considerations are proscribed. See H CJ 953/87 *Poraz v. Mayor of Tel-Aviv/Jaffa Mayor* [4], at 324. In the case at bar, the Minister of Transportation considered the affront to the religious sensibilities and observant way of life of the Ultra-Orthodox population living around Bar-Ilan Street. Is this a relevant or a foreign consideration? The question of whether religious considerations and offense to religious sensibilities may be taken into account has been discussed at length in our case law. See 1 A. Rubinstein, *The Constitutional Law of the State of Israel* 214 (1997) [92]. Sometimes, the answer was in the affirmative and, at other times, it was in the negative. See H CJ 105/54 *Lazerovitz v. Food Products Comproller, Jerusalem* [5].

Clearly, the determining factor is the language of the law conferring the authority, and the purpose for which the authority is conferred. As a general interpretative guideline, subject to specific legislative provision, it may be said that considerations that take religious sensibilities into account are precluded if religious coercion is the final goal of such considerations. In contrast, religious sensibilities may be taken into account if they are intended to give expression to religious needs. *See* HCJ 3972/93 *Meatrael Ltd v. Prime Minister* [6], at 507. Indeed, religious coercion is said to run contrary to the right to freedom of religion and human dignity. Consideration of religious needs is, however, consistent with freedom of religion and human dignity. Thus, for example, when exercising discretionary powers to institute daylight savings time, it is permitted to take religious needs into account. I discussed this point in HCJ 217/8 *Segel v. Minister of the Interior* [7], at 439:

Changing the clock touches on and affects the lifestyle of the Israeli population. As such, even times of prayer and the observance of religious commandments are relevant matters. Just as the Minister of the Interior is permitted to take the industrial and agricultural needs of farmers, adults, and youth into account, he is also permitted to consider the interests of the religious and secular populations.

Similarly, in the exercise of discretion to prohibit the performance of a play, the fact that the performance offends the audience's religious sensibilities may be considered. This was indeed the ruling in HCJ 351/72 *Keinan v. Film and Play Review Board for Films* [8], at 814, as per Justice Landau:

According to the law of the State of Israel, even a playwright is not exempt from the duty not to grossly offend his fellow's religious sensibilities. This obligation is a direct product of the duty of mutual tolerance between free citizens with differing

views, without which a pluralistic society such as ours could not function. This principle is important to the extent that it can prevail over the basic right of freedom of expression.

In another case, dealing with the Review Board's authority to prohibit the screening of a film that offended the religious sensibilities of the public, H CJ 806/88 *Universal City Studio Inc. v. Film and Play Censorship Board* [9], at 37, I wrote:

In a long line of cases, this Court has recognized offense against another's feelings—such as feelings of religion or mourning—as justifying the exercise of the authority of the Review Board for the purpose of restricting the freedom of expression. The public's feelings are values which the Film and Play Review Board, acting in its capacity to censor films, must take into account. An infringement on such feelings may justify limiting the freedom of expression.

One case, H CJ 230/73 *S.T.M. v. Mayor of Jerusalem—Mr. Teddy Kollek* [10], at 121, discussed whether an administrative authority was entitled to refuse to issue a license that was required by the Licensing of Businesses Law-1968. The reason offered for the refusal was that opening the business in question would offend the local residents' sensibilities. The Court upheld the refusal to grant the license. Justice Y. Cohen considered injury to the public's religious feelings as a consideration relating to "public security," and, as such, to be legitimate:

Even in its narrow sense, this provision justifies the refusal to issue a license for a business, which, by its very nature, offends the feelings of the residents of the area in which the business is to be opened. As such, there is a real danger of a concrete violation of the public peace. If, for example, someone requested to open a night club in the heart of Mea Shearim, or a pub in the center of a

religious Muslim neighborhood, the Licensing Authority would be justified in refusing to issue a license.

In yet another case, the Court held that religious feelings may be taken into account when authority is exercised to limit the freedom of worship. *See* HCJ 7128/96 *The Temple Mount Faithful v. Government of Israel* [11]. That matter was succinctly summarized by Justice Berenson:

Consideration of religious feelings, close to the hearts of numerous segments of the population, is not an invalid consideration *per se*, provided that the use of the statutory authority is not a guise for attaining a purely religious objective. Where it is possible to pursue a course of action in one of two ways—either by ignoring religious considerations, or by taking them into account without imposing a large burden the public—the second route is preferable. In HCJ 98/54, a directive issued by the Food Controller was struck down by reason of it being an attempt—motivated by exclusively religious considerations—to prevent pig farming in Israel, under the guise of food control. This having been said, in the same ruling, it was explained that the directive would not have been defective had the Controller taken into account religious needs in a manner incidental to his authority to regulate food consumption. “Quite the opposite, there would have conceivably been a serious problem in his behavior had he ignored these considerations.” *Crim. A 217/58 Izramax Ltd. v. The State of Israel* [11], at 362.

Our conclusion is that the consideration of religious feelings, if this does not amount to religious coercion, is deemed to be a legitimate exercise of administrative authority. HCJ 612/81 *Shabbo v. Minister of Finance* [13], at 301. Taking into account religious considerations may form part of a statute’s general goal. Obviously, aside from this general goal, there may be a more specific goal, under which religious considerations are deemed illegitimate. *See* HCJ 953/87 *supra*. [4]. This approach was reinforced by

the adoption of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. Both of these Basic Laws stipulate that their purpose is “to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” See section 1 of the Basic Law: Human Dignity and Liberty and section 2 of the Basic Law: Freedom of Occupation. Consideration of religious feelings was recognized in the past as being commensurate with the values of the State of Israel as a democratic state. The validity of this consideration is now further reinforced by the values of the State of Israel as a Jewish state. Indeed, the Jewish and democratic values of the state are inseparable, as both are endowed with constitutional status. Both serve as tools for the legislative interpretation of laws. See Crim. FH 2316/95 *Ganimat v. The State of Israel* [14]. Thus, on the interpretative level, every effort must be made to ensure the synthesis and accommodation of these two aspects. See CA 506/88 *Yael Shefer v. The State of Israel* [15].

*The Law of Administrative Discretion: Balancing and Reasonableness*

49. As we have seen, provided no religious coercion is involved, offense against the religious feelings and lifestyle of an individual or group is a relevant factor in the exercise of administrative authority. Nonetheless, it cannot be forgotten that considering the religious feelings of a particular individuals is liable to violate the rights and feelings of another person. Thus, whether religious sensibilities are offended is a factor that cannot be considered in isolation. Rather, this must invariably be weighed against other factors, related to both the individual and the public at large. A reasonable balance must be struck between the conflicting considerations. If the balance is appropriate, it leads to the conclusion that the decision is reasonable. See HCJ *Ganor v. The Attorney-General*, at 513-14 [16]. Indeed, a decision’s reasonableness is assessed by balancing between competing values, according to their respective weight. This is the balancing doctrine as practiced in our public law. It is employed where an authority considers conflicting values and interests. It has been practiced by



this Court in most instances where the exercise of discretionary power infringes the rights of either the individual or society.

Even so, there are some interests against which there can be no balancing. For example, when the State of Israel's very existence was placed on the scales, this Court refused to weigh between that interest and competing interests. *IA 1/65 Yardor v. Chairman of Central Elections Committee* [17]. Indeed, the Court regarded preserving the State of Israel's existence as a "constitutional given" not to be weighed against the right to elect and be elected. Nonetheless, this case was clearly exceptional and was even the subject of criticism. *See IA 2/84 Neiman v. Chairman of the Central Elections Committee* [18], at 304. Thus, this Court refused to extend the scope of this exception to cases other than those involving preserving the democratic nature of the state. *Neiman* [18]. I am prepared to assume, without ruling on the matter, that there are other values or interests to which the balancing doctrine is not applicable. This having been said, the accepted approach in our public law is the following: where a conflict arises between an individual right and a public right, the Court balances between the two. *See Neiman* [18], at 308; *CA 294/91 Jerusalem Burial Society v. Kastenbaum* [19], at 521; *CA 105/92 Re'em Engineers v. Municipality of Nazareth-Illith* [20], at 207. This case involves balancing between conflicting interests and values. This is a process of "placing competing values on the scale and, having weighed them, deciding which value is to be preferred. *See HCJ 73/53 Kol Ha'Am Company v. Minister of the Interior* [21], at 879. This was the Court's approach regarding the conflict between freedom of expression and preserving public peace, *HCJ 153/83 Levy v. Southern District Police Commander* [22], in the clash between freedom of movement and public security, *HCJ 448/85 Dahar v. Minister of the Interior* [23], and in the clash between other conflicting values and interests that constitute fundamental values of our legal system. *See 2 A. Barak, Interpretation in Law* 679 (1993) [93]. Indeed, our constitutional jurisprudential theory is not based on an "all or nothing" approach but rather on a "give and take" approach, involving balancing between different

values. HCJ 148/79 *Saar v. Minister of the Interior* [24], at 178. As I stated in CA 105/92 *supra*. [20], at 205:

A social value, such as freedom of expression, does not have "absolute weight." The weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict.

50. This Court adopted a similar approach with regard to the balance between religious feelings and the freedom of expression, *see* HCJ 351/72 *supra*. [8]; HCJ 806/88 *supra*. [9]. It also adopted this approach with regard to the relationship between religious sensibilities related to the observance of the Sabbath and a specific public interest—for example, the regular supply of petrol. In that latter instance, the Court stated that a solution must be found which “on the one hand, would not ignore the religious sensibilities, sacred to the local residents and, at the same time, which would guarantee the supply of vital services to the public.” Crim. A 217/68 *supra*. [12], at 364. This Court adopted a similar approach regarding the relationship between religious feelings and the freedom of occupation. In this context, my colleague Justice Cheshin wrote in *Meatrael* [6], at 507:

The considerations of man, *qua* man, are most legitimate. Such is the nature of democracy, in which the individual's welfare and ability to flourish are of paramount importance. Where various segments of the population battle each other and the interests at stake are intertwined, the matter of setting priorities is self-evident. Weighing the interests inevitably leads to the need to decide between values, each pulling in its own direction. In balancing these interests we shall find it possible—and indeed our duty—to consider individual interests, or those of different sectors of the population, provided that we do not coerce the other into observing religious commandments. Religious

commandments, *qua* religious commandments, shall not be imposed upon those who are not observant of them.

It therefore follows that religious feelings are a public interest to be taken into account. Nonetheless, their weight is not “absolute.” Instead, they must be balanced “horizontally” against other values that also constitute a public interest and balanced “vertically” against other human rights. As Justice Zamir explained, in HCJ 7128/96 *supra*. [11], at 521:

Religious feelings are not extended absolute protection. There is no law that provides absolute protection to any right or value. All rights and values, be they what they may, are relative. Necessarily, the protection they are allotted is also relative. This equally applies to the protection extended to religious feelings.

Furthermore, just as consideration of religious sensibilities is not an “absolute,” but rather “relative,” value that must be balanced against other rights, values and interests, so too, the right to freedom of movement is not “absolute.” It too must be balanced against other rights, values and interests. It is common knowledge that there are roads and streets closed to traffic, either partially or totally. Roads are replete with road-signs and symbols that regulate the flow of traffic on the roads and streets. Thus, freedom of movement is a relative right and the law does not protect its full scope. *Compare* HCJ399/85 *Kahane v. The Broadcasting Authority* [25], at 283; HCJ 806/88 *supra* [9], at 33. In fact, the vast majority of human rights are relative, and may be infringed in order to realize interests which society considers worthy. *See* HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [26]; HCJ 2481/93 *Dayan v. Jerusalem District Commander* [27], at 473. The reason for this is that human rights in general, and the right to freedom of movement in particular, are not the rights of an isolated individual, living on a desert island. Instead, they are the rights of individuals living in society. They deal with the individual in his relationships with others, and presume the existence of a state that must realize social and national goals. Hence, every democratic society, sensitive to human rights, recognizes the

need to restrict them in order to preserve its capacity to protect human rights. For both human rights and the restrictions imposed on them stem from the same source, and reflect the same values. Even so, there are restrictions on the extent to which human rights may be limited. These limitations are based on the need to protect human rights. *See* CA 6821/93 *United Mizrahi Bank v. Migdal* [28], at 444.

51. The balancing of conflicting interests and values, including values related to religious feelings and religious lifestyle, ought to be principled, or definitional. The balancing ought to be based on a generalization that also allows for the resolution of future cases. In the balancing process a “rational principle” ought to be formulated. H CJ 73/53, *supra*. [21], at 881 (Agranat, P.). The balancing must reflect a “substantive criteria, which is neither paternalistic nor accidental, the nature or direction of which cannot be assessed.” *See* FH 9/77 *Israel Electric Company v. “Ha’Aretz” Newspaper Publications* [29], at 361. (Shamgar, J.)

52. As the balancing between conflicting values and interests is not conducted with scientific tools, the weight that must attach to the various interests and values is, by definition, not exact. Thus, there are certain situations where there are different ways of balancing between the conflicting interests and values, and there is more than one reasonable decision. A “zone of reasonableness” is created, within which a number of different decisions will be considered reasonable. *See* H CJ 389/80 *Dapei Zahav v. Broadcasting Authority* [30]; H CJ *Lugassy v. Minister of Communications* [31], at 454; H CJ 341/80 *Moshav Beit Oved v. Traffic Controller* [32], at 354; H CJ 910/86 *Ressler v. Minister of Defense* [33]. Any alternative within the “zone of reasonableness” is considered reasonable. In such situations, the choice between the various alternatives will be made by the relevant authority. It is endowed with the authority to select the alternative that appears appropriate, from among the different alternatives. As I mentioned in H CJ 953/89 *Indoor v. Mayor of Jerusalem* [34], at 694:

Applying the general normative criterion “near certainty of serious injury” to the circumstances of a concrete case may, quite naturally, give rise to difficult cases. One mayor may decide that there is near certainty of serious injury. Another mayor, using the same criterion, may decide the injury is not serious or that possibility of its occurrence does not reach “near certainty.” There may be a variety of possibilities, all included within the parameters of reasonableness, which reflect the legal exercise of the said criterion. The choice between these alternatives will be made by the competent authority—not the Court.

And so, when the authority in question is the legislature—the Knesset—the choice between alternatives found within the “parameter of reasonableness” is left to the legislature’s discretion. The choice is in the legislature’s hands and not the Court’s. Similarly, when the authority in question is the executive branch, the choice between the alternatives within the parameters of reasonableness rests with the executive, not the Court. This conclusion is derived from the principle of separation of powers. Indeed, while the Court is responsible for maintaining this separation, it is not charged with selecting the particular legal alternative within the “zone of reasonableness.” In consequence, it does not ask itself which of the legal alternatives it would have chosen had it been empowered to do so. To the extent that each of the alternatives is legal, it is irrelevant that the Court may have chosen a different alternative were it vested with the requisite authority. *Ressler* [33], at 506. A decision made by the executive branch may be declared illegal if it falls outside the zone of reasonableness. Every decision within the zone, however, is legal and the Court will not strike it down. The area of this zone is to be determined by the Court.

53. “Balance” is a metaphorical concept. When a judge balances between conflicting values, he operates on the normative level. The concept of “balancing” is premised on the notion that:

not all principles are of identical significance in society's eyes. Thus, in the absence of legislative direction, the Court must assess the relative social importance of the different values. Just as there is no person without a shadow, so too, there is no principle without weight. Balance on the basis of weight necessarily implies a social assessment of the relative importance of the different principles.

H CJ 14/86 *Laor v. The Film and Play Review Board* [35], at 434. Hence, "weight" attaches to social norms, reflecting their relative social importance. The "weighing" process is a normative act, intended to endow the various data with a place within the legal system and establish their social value, within the overall fabric of social values." H CJ 6163/92 *Eizenberg v. Minister of Construction and Housing* [36]. To this end, Justice Shamgar was correct, in FH 9/77 *supra*. [29], at 361, in pointing out that:

The process of placing competing values on the balancing scales describes the interpretative starting point, but does not establish criterion or value weights to assist in performing the interpretative task.

It follows that a standard for balancing between the need to preserve freedom of movement and the need to protect religious sensibilities must be found.

#### *The Balancing Standard*

54. In the wake of the adoption of the Basic Laws regarding human rights, the accepted criteria for balancing is the standard stipulated in the limitation clause of sec.8 of the Basic Law: Human Dignity and Liberty:

There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than that is required.

For our purposes, the relevant question is whether the order issued by the Traffic Controller, by virtue of which Bar-Ilan Street was partially closed to traffic on Sabbath eve and day, is commensurate with the values of the State of Israel, whether it was enacted for a proper purpose and whether the infringement of the freedom of movement does not exceed that which is required. We are permitted to employ this standard even though the order in question was issued under the authority of the Traffic Ordinance [Revised Version]-1961, which is protected by the rule upholding the validity of laws in effect prior to the adoption of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 10. Even so, all statutes must be interpreted in the spirit of the Basic Law, as I noted in FH Cr. 2316/95 *supra*. [14], at 653:

The Basic Law's constitutional status is projected on all areas of Israeli law. It does not overlook existing legislation, which is also a part of the law of the State of Israel. The constitutional aura projected by the Basic Law influences all areas of the Israeli Law, necessarily affecting the old law as well. Admittedly, the validity of existing law is retained, as the Basic Law's aura is projected less intensely on these, as compared to the new law. Thus, while the latter may be struck down if it contradicts a provision of the Basic Law, it cannot be invalidated. However, while the old law is constitutionally protected from being struck down, it is nonetheless not immune from being interpreted anew. There is no distinction between old and new law with respect to the interpretative influence of the Basic Law. Any administrative discretion conferred by existing law must be exercised in the spirit of the Basic Law.

Justice Dorner elucidated this point, in HCJ 4541/94 *Miller v. Minister of Defense* [37], at 138, regarding the interpretation of administrative authority:

The limitation clause applies exclusively to powers grounded in laws adopted subsequent to the Basic Law's enactment. However, by implication, it is appropriate to also apply its principles to the authorities' duties by virtue of section 11 of the Basic Law, which also applies to powers anchored in pre-existing laws.

Ever since the Knesset enacted the Basic Laws, the interpretation of legislation does not depend on whether the relevant legislation precedes or antecedes the Basic Laws. Likewise, whether the violation relates to rights "covered" by the two Basic Laws or not is equally irrelevant. A natural connection exists between the constitutional limitation clause and all public law, including human rights not literally "covered" by the Basic Laws. This is because it has always been our position that legislation includes both general and specific purposes. *See* H CJ 953/87 *supra*. [4]; H CJ 693/91 *Efrat v. Population Registrar* [38]. The general purposes are the values of the State of Israel as a Jewish and democratic state; the specific purposes refer to the specific "proper purpose" specified by the limitation clause. The principle of proportionality, as provided for in the Basic Law, is another expression of the reasonableness standard according to which we generally interpret any piece of legislation. Even previous law must—and has always been—interpreted by the standards of the limitation clause.

We shall now consider the general principles mentioned in the limitation clause. We will then proceed to examine their practical application to the order to partially close Bar-Ilan Street, issued by the Minister of Transportation in his capacity as Traffic Controller.

*The Values of the State of Israel*

55. The values of the State of Israel are its values as a "Jewish and democratic state." *See* the Basic Law: Human Dignity and Liberty, §1. It appears beyond dispute that consideration of religious sensibilities is



commensurate with the values of the State of Israel as a Jewish state. Indeed, a Jewish state is sensitive to the religious feelings of every one of its citizens. This is true, *a fortiori*, when these feelings are connected to the Sabbath itself. Sabbath observance is a central value in Judaism. The fourth of the Ten Commandments, the Sabbath constitutes an original and significant Jewish contribution to the culture of mankind. *See* 31 The Jewish Encyclopedia, [107], under The Sabbath, at 422. It is a cornerstone of the Jewish tradition and a symbol, an expression of the Jewish message and the character of the Jewish people. Deprive Judaism of the Sabbath, and you have deprived it of its soul, for the Sabbath comprises the very essence of the Judaism's nature. Over the generations, throughout its blood-soaked history, our nation has sacrificed many of its children in the name of the Sabbath.

56. Is it consistent with democratic values to restrict human rights for the purpose of protecting religious feelings?

The answer to this question is quite complex. Taking into account human feelings, including religious feelings, as grounds for restricting human rights is particularly problematic under the democratic conception. *See* R. Cohen-Almagor, *Limitations of Tolerance and Freedom—Liberal Theory and the Struggle Against Kahanism* (1994). In HCJ 230/73 *supra*. [10], at 119, Justice Etzioni correctly referred to this matter as “a minefield,” emphasizing that:

The concept of “public feelings” has broad connotations and the subject itself is particularly sensitive.

Thus, democracy finds itself in a dilemma when broaching the issue of whether the desire to protect human feelings can justify infringing on human rights. Indeed, democratic considerations seem to pull in opposite directions. On the one hand, protecting human feelings is natural to the democratic system, for society exists in order to give expression to these. This is the principle of tolerance, a basic tenet of democratic theory, vital

to a pluralistic democracy. It therefore “constitutes a social objective in its own right, its realization incumbent upon any democratic society.” CA 294/91 [19]. I dwelt on this point in CA 105/92 *supra*. [20], at 211, stating:

Tolerance is a central value in the public order. A democratic society seeking to fully maximize the wants of each individual will end up unable to satisfy even the minority of those aspirations. Ordered communal life is naturally premised on mutual forbearance and mutual tolerance.

In HCJ 257/89 *Hoffman v. Appointee over the Western Wall* [39], at 354, President Shamgar adopted a similar view, holding:

The sons and daughters of a free society, in which human dignity is a hallowed value, are all called upon to respect the individual’s personal religious feelings and his human dignity. This must be based on tolerance and the understanding that personal religious feelings and their expression vary from one individual to another.

An enlightened society also respects the beliefs and views of those who devotedly and passionately identify with what may not necessarily be the opinions shared by the average citizen. In that sense, understanding the other is more important than self-understanding. Thus, although the imperative “know thyself,” which is borrowed from a cultural tradition not our own, merits respect, it cannot replace tolerance, as expressed in Hillel’s famous maxim in the Talmud: “Do not unto the other that which is hateful unto you.” Tolerance is not a mere slogan for the appropriation of rights, but rather a criterion for recognizing the rights of others.

In HCJ 806/88 *supra*. [9], at 30, President Shamgar, addressing the tension between freedom of expression and offense against the listener's feelings, wrote:

Tolerance must not give license to offend the religious sensibilities of the other. It can even be said that a serious violation of religious feelings is the antithesis of tolerance, for the tolerance is intended to nurture and promote freedom of expression, rather than to violate and suppress religious feelings. Mutual tolerance between people with different values and beliefs is a basic cornerstone on which a free democratic society is premised.

Indeed, a democratic society is one which takes into account each and every individual's feelings. Democratic values give expression to "an individual's personal-emotional feelings and human dignity." CA 294/91 *supra*. [19], at 481 (Shamgar, P.). Furthermore, a democratic society is prepared to recognize that rights—such as freedom of expression or worship—must be restricted when allowing them to be fully realized would harm human life or physical integrity. Thus, for instance, we recognize the possibility of limiting the freedom to protest if it is nearly certain that allowing the demonstration to occur threatens physical harm, either to participants or to bystanders. *See* HCJ 153/83 *supra*. [22]. A democratic society, which is prepared to restrict rights in order to prevent physical injury, must be equally sensitive to the potential need for restricting rights in order to prevent emotional harm, which, at times, may be even more severe than physical injury. A democratic society seeking to protect life, physical integrity and property, must also strive to protect feelings.

57. On the other hand, a democratic system prioritizes human rights above all else. Democracy is not merely formal democracy—the "rule book conception," according to which decisions are left to majority will. Rather, democracy is substantive—the "rights conception," according to

which the majority is precluded from infringing on human rights. *See* R.M. Dworkin, *A Matter of Principle* 11 (1985) [104]. Thus, substantive democracy's need to protect and preserve human rights gives rise to a familiar dilemma, namely, whether it is at all possible to infringe on human rights in order to consider human feelings, themselves being harmed by the exercise of particular human rights. Indeed, the exercise of a right, by its very nature, risks offending another's feelings. However, recognizing offensiveness as grounds for restricting human rights may pave the way for undermining human rights entirely. Consequently, a democratic society must be most careful in recognizing the legitimacy of infringing on human rights for the purpose of protecting feelings. I noted this in, H CJ 953/89 *supra*, [34], at 690, a case dealing with the possibility of restricting freedom of expression in order to protect the feelings of a segment of the population:

If we were to restrict freedom of expression each time that feelings were hurt, freedom of expression would eventually disappear. Expression, by its very nature, risks offending. This being the case, if every offended feeling were to justify infringing on freedom of expression, in the end the latter would lose all meaning.

Clearly, communal life in a democratic society, by its very nature, requires some openness to offense in order to realize human rights. The principle of tolerance, by virtue of which consideration for feelings arises, itself gives rise to the requirement that one whose feelings are offended be tolerant. "This is the other side of mutual tolerance, necessary in a pluralistic society." H CJ 549/75 *Noah Films v. The Film and Play Review Board* at 764 [40] (Vitkon, J.). Indeed, "[t]olerance and patience are not one-way norms, but broad, multi-dimensional imperatives..." *Hoffman* [39], at 364 (Shamgar, P.). I insisted on this point, with regard to freedom of expression and offensiveness, in H CJ 806/88 *supra*. [9], at 38, noting:

A democratic society, by virtue of its very nature and substance, is premised on tolerance for differing opinions. A pluralistic, tolerant society is the singular force permitting communal life and co-existence. Hence, each and every member of society accepts the "risk" of their feelings being somewhat offended as a result of the free exchange of ideas. In effect, a society based on social pluralism must allow for the free exchange of ideas even if this risks offending those who may not agree with certain views. The regime's very foundation, as a democratic regime, requires a certain exposure to the risk that some members of the public may be offended.

As to the exercise of freedom of expression which infringes upon religious sensibilities, I stated, in HCJ 806/88 *supra*. [9], at 39:

It is only natural that religious conceptions are intrinsically related to individual consciousness. Indeed, feelings are liable to be hurt since a contradictory religious world-view is not merely an intellectual position with which one happens to disagree. Thus, the atheist is likely to offend the believer. Proponents of opposing religious views are likely to offend one another. This is a fact of life that a democratic society must accept. It is particularly differences of this nature that unite us around what we have in common. As this the only way that proponents of differing religious views can co-exist, suppressing the offensive is not the solution... Nor is suppressing all opposing views the solution. Doing so would only serve to stifle the human spirit.

And so, in a democratic and pluralistic society such as our own, there is no choice but to "absorb" offensiveness. In a democratic society, endeavoring to foster tolerance, there is no substitute for tolerance, even in the face of that which offends, as a means for preserving human rights. "The regime's very substance, as a democratic regime, requires a certain

exposure to the risk that some members of the public may be offended.” H CJ 806/88 *supra*. [9], at 38. This is the law regarding offensiveness in general, and regarding religious feelings in particular.

58. How can a democratic society escape this dilemma? How do we resolve the complications flowing from the fact that tolerance, which underlies the democratic conception, simultaneously justifies both protecting rights and infringing them? It appears to me that the answer lies in our duty to recognize a certain “threshold of tolerance” regarding hurt feelings, which every member of a democratic society accepts as part of the social contract upon which democracy is predicated. This being the case, only when an offense exceeds this “threshold of tolerance” will restricting human rights in a democratic society be justified. As I noted in H CJ 953/89 *supra*. [34], at 690:

A democratic society, striving to protect both freedom of expression and the public’s feelings, must establish a “threshold of tolerance.” Only offense that exceeds this threshold can justify infringing the freedom of expression.

This case dealt with the relationship between freedom of expression and offense to the public’s feelings. A similar approach should be adopted with respect to infringements of other human rights. Clearly, the “threshold of tolerance” is not uniform, but rather a function of the right and infringement in question, as Justice Zamir stated in H CJ 7128/96 *supra*. [11], at 521:

The threshold of tolerance for feelings, is neither set nor identical in every situation. The threshold depends, *inter alia*, on the identity of the conflicting right. For instance, the threshold may vary depending on whether the right in question is a basic right, such as freedom of expression, or a material, financial interest. Thus, while the threshold can be quite high if protecting feelings requires infringing the freedom of

expression, it may be lower regarding infringements on property. In effect, the threshold shall be set in accordance with the balance between clashing interests in the circumstances, reflecting the relative weight, that is to say the social importance, of the interests in question.

And so, it is possible to infringe human rights for the purpose of protecting feelings—particularly religious feelings and lifestyle—in a society with democratic values, provided that the harm exceeds the threshold of tolerance accepted in that society. Quite naturally, the “threshold of tolerance” varies from one democratic society to the next. This being the case, while it is possible to learn from the experiences of other democracies, the utility of such comparisons is rather limited. Thus, for instance, the stricter the separation between religion and state under a given system, and the more that the rights are set out in more “absolute” terms, the more likely that such a system will prefer human rights to human feelings. Conversely, the more permeable the boundaries between religion and state, and the more a legal culture is predicated on a “relative” conception of human rights, the greater significance it will attach to feelings as a proper ground for limiting human rights.

Our society is unique. Consequently, the solutions that we must seek are undoubtedly equally unique, or “Israeli-style,” to use Justice Cheshin’s turn of phrase in *Meatrael* [6], at 506, regarding the separation between religion and state in Israel. Similarly, addressing the relationship between store closures on the Sabbath, because of offense to religious sensibilities, and the harm to public order that such causes, Justice Berenson wrote in *Crim. A 217/68 supra*. [12], at 364:

I do not know how these matters are resolved in other countries. It is, however, reasonable to assume that each country seeks a solution suitable to its own needs that, on the one hand, is not estranged from the religious values to which

its citizens adhere yet, at the same time, promises to provide the necessary services that the public requires.

And so, in setting the “threshold of tolerance,” it is incumbent upon us to consider the substance of the right being infringed, the degree of offensiveness and the probability of the harm. Let us now turn to these principles.

*The Right’s Substance*

59. How does the substance of the right influence the possibility of infringing it in order to protect religious feelings? Would it not be accurate to assert that all rights are of equal status? The accepted approach—in Israel and abroad—regarding the protection of human rights is that not all rights are of equal status. Is the right to human dignity not different from the right to property? Even within the confines of a given right, various levels of protection may be allotted. Thus, for instance, the protection offered political expression is superior to that allotted commercial expression. *See* H CJ 606/93 *Kiddum Yezumot* (1981) *v. Broadcasting Authority* [41], at 24.

60. This being the case, our concern is with a complicated matter, best left to evolve according to our own legal system’s experience. For the purposes of this petition, it is sufficient that we establish that freedom of movement—the right being violated—is one of the most basic rights. This is true in Israel and in other legal systems as well. Discussing the “citizen and foreigner’s freedom of movement,” Justice Silberg stated, in H CJ 111/53 *Kaufman v. Minister of the Interior* [42], at 536, that this right is:

A natural right, recognized as self-evident in every country boasting a democratic regime.



These words ring especially true with regard to freedom of movement inside the country itself. Indeed, the freedom to travel within the country's borders is generally understood as being of greater constitutional import than the freedom to travel abroad. *See Dahar* [23], at 708. Freedom of movement within the country's borders is usually placed on a constitutional plane similar to that of freedom of expression. Hence, for example, in *Dahar* [23], Deputy President Ben-Porat perceived freedom of movement and freedom of expression as "rights of equal value and weight." *Id.*

*The Extent of the Harm to Feelings*

61. As we have seen, a democracy recognizes the possibility of restricting human rights to prevent harm to human feelings. This having been said, not every hurt feeling justifies violating rights; such harm must be tantamount to a severe offense to human feelings. What intensity of harm will justify an infringement on rights will vary from one right to another. Thus, only severe, serious, and grave offense to another's feelings can justify the infringement of a basic human right, such as freedom of expression. These cases shall be so exceptional that they shake the foundations of mutual tolerance. *See A. Barak, Freedom of Expression and its Limitations*, 40 *HaPraklit* 5, 18 (1991-1993) [100].

This was our approach to infringements on the freedom of artistic expression. *See HCJ supra*. [8], at 16; HCJ 243/81 *Yeki Yosha. v. The Film and Play Review Board* [44]; HCJ 14/86 *supra*. [35]; HCJ 806/88 *supra*. [9]; HCJ 953/89 *supra*. [34]. This is the law regarding the tension between the freedom of worship of one faith and between offending members of a different stream of belief. HCJ 7128/96 *supra*. [11]. I believe this approach should apply to the matter here—the balance between freedom of movement within the state and protecting religious sensibilities. As we have seen, substantively, freedom of movement resembles freedom of expression. These rights may be called "superior;" they are granted a "consecrated a place of honor in the temple of basic

human rights.” See H CJ 153/83 *supra*. [22], at 398). Freedom of expression may be infringed to prevent severe, grave and serious harm to human feelings, including religious sensibilities; similarly, it is possible to restrict freedom of movement under such conditions. “The nature of the harm” in question in both instances must be identical. Restricting freedom of movement is only possible when the harm to religious feelings and lifestyle is severe, grave and serious.

62. The severity of the affront to religious feelings is measured by its scope and its depth, as Justice Zamir said in H CJ 7128/96 *supra*. [11], at 524-25:

The severity of the offensiveness is measured on two levels: its scope and its depth. First, the harm must be broad. It is therefore insufficient that one person or a small group with minority extreme opinions is offended.

Likewise, negligible harm, even if it continues over many years, is insufficient. Both conditions need to be fulfilled: only harm to the religious feelings of a given group that is both broad and deep shall be said to exceed the threshold of tolerance in a manner that may justify restricting another group’s freedom of religious worship.

*The Probability of the Harm*

63. At times, the severe, grave and serious harm to feelings has already occurred; other times, it is a risk that has yet to materialize. When the latter is the case, does the risk always justify infringing a protected human right? The answer is no. The central status that democracy extends to human rights leads us to conclude that only a very high probability that feelings will be offended will justify infringing on a right. At times, it is held that there must be a “reasonable probability” of the risk materializing. See Crim. A 126/62 *Disentzik v. Attorney-General* [45];

*Neiman* [18], at 311. In other cases, the risk must be “real and serious.” See *Dahar* [23]. The requisite degree of probability varies from right to right, from case to case, as I noted in HCJ 153/83 *supra*. [22], at 401-02:

The variety of potential situations necessitates a multi-shaded balancing approach. We must refrain from adopting a single standard for all matters. The reason for this is that conflicting interests are not always of identical normative import and the problems that arise from the different clashes themselves, vary.

In *Neiman* [18], at 311, I further noted:

In determining which standard of probability should be adopted, an inclusive and universal measure is inappropriate. The matter depends on the magnitude of the various conflicting rights in a given context. The question is always whether the harm’s significance, together with the probability of it materializing, justifies infringing on a citizen’s right.

With respect to anything relating to freedom of expression, our approach is that a mere possibility, or even a reasonable possibility, for that matter, is insufficient for the purpose of violating the public interest. The probability of the harm materializing must be nearly certain or proximately certain. See see HCJ 73/53 *supra*. [21]; HCJ14/86 *supra*. [35]; HCJ 806/88 *supra*. [9]; HCJ 680/88 *Schnitzer v. Chief Military Censor* [46]. The probability test resembles the standard adopted by this Court regarding violations of freedom of worship and freedom of conscience. See HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Commander* [47], at 456; HCJ 2725/93 *Salomon v. Jerusalem District Commander* [48]; HCJ 7128/96 *supra*. [11]. In light of the close link between freedom of movement within the country and freedom of expression and worship, it seems to me that this probability requirement must also apply to infringements on freedom of movement within the state. It shall be noted that the “actual and serious suspicion”

standard was adopted with regards to violations of freedom of movement outside the country's borders. *Dahar* [23], at 708. This having been said, in that same case, Deputy President Ben-Porat emphasized the difference between freedom of movement inside and outside the state's borders, and narrowed the "actual and serious suspicion" test so that it applied exclusively to traffic crossing the state's borders. "Internal" traffic should be subject to the near certainty test.

*A "Proper Purpose"*

64. As we have seen, human rights are not to be infringed, save restrictions that are prescribed by statute and enacted for a proper purpose, as per article 8 of the Basic Law: Human Dignity and Liberty. The issue of whether a given purpose is deemed to be proper is ascertained on two levels: the first examines the purpose's content; the second examines its necessity. On the first level, a given purpose is deemed to be proper if it reflects a social objective, which is sensitive to human rights. Likewise, a purpose is said to be proper if it is intended to fulfill general social goals, such as a broad social policy or preserving the public interest. *See Bank Mizrahi* [28], at 434. On the second plane, a purpose is deemed reasonable if the need to fulfill it is important to society and to the state's values. The degree of importance is likely to vary according to the substance of the right that is violated. Thus, for instance, American law distinguishes between three levels of rights. To this effect, freedom of speech, voting rights, freedom of movement and the right to equality are found at the highest level. As these rights are deemed fundamental, only a purpose endeavoring to fulfill a compelling state interest, pressing public necessity, or substantial state interest shall properly infringe them. A lower standard is required with respect to other rights. *See* 3 A. Barak *Interpretation in Law: Constitutional Interpretation* [93], at 522. For its part, Canadian law requires that the highest standard be applied to all matters involving human rights. We need not take a stance regarding whether Israeli law should distinguish between different levels of scrutiny. Suffice it to say that, as in foreign

law, infringements on freedom of movement—a freedom at the pinnacle of human rights in Israel—requires the highest of standards.

*The “Least Restrictive Means”*

65. Human rights may be infringed only if the means used do not exceed the necessary. While the “proper purpose” test examines the objective, the “least restrictive means” standard examines the means employed for achieving the purpose. It is a proportionality test, employed in Israel for examining administrative and constitutional discretion. *See* HCJ 5510/92 *Turkeman v. Minister of Defense* [49]; HCJ 987/94 *Euronet Kavie Zahav (1992) Ltd. v. Minister of Communications* [50]; HCJ 3477/95 *Ben-Attiyah v. Minister of Education, Culture, and Sport* [51]; *See also* Z. Segal, *Grounds for Disproportionality in Administrative Law*, 39 *HaPraklit* 507 (1990-91) [101]; I. Zamir, *Israeli Administrative Law as Compared to Germany's*, 2 *Mishpat U'Memshal* 109 (1994-95) [102]. In HCJ 3477/95 *supra*. [51], at 11-12, I noted that the issue raised by the “proportionality” test is:

Whether the means employed correspond to the objective they seek to realize. Proportionality implies that the means need to benefit the goal that is pursued. The principle of proportionality comes to protect the individual from the regime and to prevent excessive infringements on individual freedom. As such, the means that the regime employs must be carefully selected in order to bring about the purpose's realization.

66. In Israel as in foreign law, the proportionality test is three-pronged. *See* HCJ 3477/95 *supra*. [51], at 12; *Bank Mizrahi supra*. [28], at 436. The first prong requires a rational connection between the means and objective. Thus, the means employed must be precisely “cut out” to fulfill the desired goal and rationally lead to its fulfillment—“the rational connection test.” The second prong prescribes that the means in question infringe on the individual as little as possible. This is to say that the

means are said to be proper only if it is not possible to achieve the objective in a different fashion, whereby the infringement would be minimized—"the least restrictive means test." The third prong provides that the means selected are inappropriate if the infringement on individual rights is not related to the benefits said to flow from the desired objective—the "restricted proportionality test." As Professor Zamir, *see Zamir supra*. [102], at 131, explained:

The third prong refers to the proportionality itself. According to this prong, it is insufficient that the authority select appropriate and moderate means. Instead, the authority must weigh the public benefits of achieving the goal against the harm caused the citizen by the means' application. The relationship between the benefit and the harm, and indeed between the means and objective, must be proportional.

67. Considering the feelings of one segment of the population may harm other segments. For our purposes, considering the religious sensibilities of Ultra-Orthodox Jews living in the neighborhood of Bar-Ilan Street infringes the freedom of movement of others. The proportionality test provides that infringements on the rights and interests of citizens seeking to travel on Bar-Ilan Street on the Sabbath must be proportional. In other words, the rights of these individuals are not to be infringed beyond what is necessary to safeguard the religious feelings of other individuals. The question of determining the appropriate means—and when infringing on human rights surpasses the necessary means—is examined according to the three-pronged test.

*Summarizing the Normative Framework*

68. To summarize: consideration of feelings, including religious sensibilities, as proper grounds for infringing on human rights is most problematic from the point of view of a democracy. Democracy finds itself trapped in an internal conflict, which it must naturally address with

great care. The Israeli solution is the following: considering feelings as grounds for restricting human rights is only permissible when the following three conditions are met. First, taking feelings into account conforms to the specific objective underlying the legislation. Second, it is permitted to take religious feelings into account only if doing so does not involve any religious coercion. Third, religious feelings may only be considered when the harm to these is so severe that it is said to exceed the proper threshold of tolerance. This threshold shall vary from right to right. Freedom of movement, specifically, can be restricted if such harm surpasses the threshold of tolerance. Several conditions must be met for this to be true. First, the harm to religious feelings and the observant lifestyle must be severe, grave and serious; second, the probability that the harm will materialize must be nearly certain; third, a substantial social interest must underlie the protection of religious feelings; fourth, the extent of the harm to freedom of movement must not exceed the necessary. This is to say that the least restrictive means are to be selected from amongst the available options.

Having set out this general normative framework, let us now examine the specific case at bar.

*From the General to the Particular*

69. Bar-Ilan Street's partial closure is based on three pieces of legislation. The basic authority to regulate traffic is set out in section 70(1) of the Traffic Ordinance [Revised Version], which empowers the Minister of Transportation to enact regulations for:

Traffic arrangements, and rules for the use of roads by  
vehicles, pedestrians and others

The Traffic Regulations were enacted by virtue of this authorization. Regulation 17(a) provides:

The Central Traffic Authority is permitted to direct the Local Traffic Authority regarding the determination of traffic arrangements, their alteration, termination, and maintenance.

As we have seen, the Minister of Transportation, under section 42 of the Basic Law: The Government, assumed the powers of the Traffic Controller. The Minister's powers cannot exceed those of the Traffic Controller. In his capacity as Traffic Controller, the Minister of Transportation instructed the Local Traffic Authority to close parts of Bar-Ilan Street to traffic on Sabbaths and Jewish holidays during prayer times in order to safeguard the religious sensibilities of the Ultra-Orthodox residents in the area. The order in question was handed down subsequent to the Minister of Transportation's determination that there is an alternate road to Bar-Ilan Street.

*The Issue of Authority*

70. Our starting point is that the Traffic Controller is, in principle, empowered to order that a street be closed to traffic on Sabbaths and Jewish holidays. With respect to local streets situated in Ultra-Orthodox neighborhoods this is undisputed. In principle, the Traffic Ordinance [Revised Version] does not distinguish between various sorts of streets, roads or drives, in all that concerns the Traffic Controller's authority to regulate traffic therein. As such, the type of road does not affect the authority to order its closure *per se*, it only influences the exercise of discretion regarding its potential closure.

*The Issue of Discretion*

71. Did the Minister of Transportation in his capacity as Traffic Controller properly exercise his authority? Our analysis begins with the fact that the Traffic Controller must take into account traffic considerations. It is incumbent on the Controller to ensure that residents be able to reach their homes and be able to travel from point A to point B



in a given neighborhood. Moreover, he must ensure that inter-city roads and city entrances remain open to traffic. Were it to become clear that no proper alternate route to Bar-Ilan Street is available, it would not be possible to close it off to traffic on Sabbaths and Jewish holidays, regardless of the harm caused to religious feelings and lifestyle.

72. However, rather than weighing traffic considerations, the Minister of Transportation, in his capacity as Traffic Controller, considered the residents' religious feelings. Was he permitted to do so? Clearly, religious matters cannot be the dominant consideration for, as we have seen, the dominant considerations must be traffic-related. However, in view of my assumption that the alternate route is reasonable from a traffic perspective, does it then become possible to take into account secondary considerations, such as those related to safeguarding religious feelings and lifestyle? The answer is in the affirmative. Although traffic related considerations are central, they are not absolute. To this effect, the Court has held that free competition, for instance, was a secondary consideration that could properly be taken into account. *See* HCJ 1064/94 *Computest Rishon Le Tzion (1986) v. Minister of Transportation* [52]. Thus, the issue boils down to the following questions: is the religious factor a relevant secondary consideration? If so, what is its weight? Can it exceed the inconvenience associated with rerouting traffic and the two extra minutes that doing so requires? Is this factor sufficiently weighty so as to outweigh the traffic difficulties caused the secular residents in the area, whose freedom to travel is restricted? The answer, needless to say, is far from simple. It is incumbent on us to examine the rights and interests struggling for primacy. Subsequently, we shall proceed to examine whether, under the circumstances, the Minister is authorized to weigh all these rights and interests. Finally, we shall examine whether the weight that the Minister attached to them was appropriate and whether his decision is within the zone of reasonableness.

*The Interests and Values Struggling for Primacy*

73. Which interests and values clash in the case at bar? On the one hand, we have society's interest in preventing offense to the sensibilities of the local religious population. The population in question, residing immediately around Bar-Ilan Street, is Ultra-Orthodox. Seven synagogues are found along Bar-Ilan Street. The area boasts over one hundred synagogues and institutions for Torah study. On the Sabbath, the neighborhood residents customarily attend synagogue, Torah lessons, visit rabbis, family and friends who live in the adjacent Ultra-Orthodox neighborhoods. To these residents, the desecration of the Sabbath on Bar-Ilan Street is offensive and infringes their observant lifestyle. Indeed, from their perspective, the offense is both bitter and severe. This is the interest in question on one side of the issue. This having been said, let it be emphasized that I am not convinced that Sabbath traffic on Bar-Ilan Street infringes the freedom of religion of the residents. These residents are free to observe the religious commandments. Sabbath traffic does not serve to deny them this freedom. *Compare* HCJ 287/69 *Miron v. Minister of Labour* [53], at 349. Even so, traffic on the Sabbath does harm the residents' religious feelings and their observant lifestyle.

74. On the other hand, we have freedom of movement, to which each citizen is entitled. Freedom of movement is a basic right, guaranteed to each and every Israeli. *See* *Dahar* [23], at 708; HCJ 72/87 *Atamalla v. Northern Command* [54]; Crim. Motion 6654/93 *Binkin v. The State of Israel* [55]. It is entrenched in the Basic Law: Human Dignity and Liberty. It is derived from the principle of human dignity, which is enshrined in our constitution. *Compare* *Elfassy* 6 BferGE (1957) [90]. The individual's freedom to travel "flows from man's intrinsic freedom as such, and from the state's democratic character." HCJ 3914/92 *Lev v. The Tel-Aviv/Jaffa District Rabbinical Court* [56], at 506. Each individual in Israel is granted the constitutional right to travel freely. "This constitutional right is self-sufficient, and can even be implied from human dignity and liberty." HCJ 2481/93 *supra*. [27], at 472. The significance of freedom of movement is the freedom to travel freely on streets and roads. HCJ 148/79 *supra*. [24]. It is the freedom to "come and

go”—“*la liberté d’aller et de venir*.” And so, closing Bar-Ilan Street to traffic on the Sabbath—either a full or partial closure—infringes the public’s constitutional right to freedom of movement. Moreover, preventing the free-flow of traffic on city streets injures the public interest in the free-flow of traffic. As Justice Berenson noted in *Crim. A 217/68 supra*. [12], at 363:

The use of private vehicles is increasingly indispensable to the economy and to satisfying collective and individual social and cultural needs. This is particularly true on the Sabbath and holidays, when public transportation is generally unavailable.

Beyond this, closing Bar-Ilan Street to traffic on the Sabbath both inconveniences and financially harms those members of the public wishing to travel along Bar-Ilan Street on the Sabbath. It harms secular Israelis seeking to use Bar-Ilan Street as a traffic artery connecting various Jerusalem neighborhoods. It particularly harms the secular residents residing in Ultra-Orthodox neighborhoods surrounding Bar-Ilan Street. For them, Bar-Ilan Street serves as a traffic artery permitting them to access their lands directly. Closing Bar-Ilan will compel these members of the public to walk from one end of Bar-Ilan Street to the other—a distance of one kilometer and two-hundred meters—in order to reach their homes. Their family and guests will be forced to do the same. Surely, in the end, part of the secular public will revolt against what they perceive as religious coercion. Truth be told, in the *League* [1] case, Deputy President Agranat pointed out that the order to close a segment of a street to traffic on the Sabbath “in no way...constitutes religious coercion whatsoever, as the order did not compel petitioner number two to act in a way that runs counter to his views regarding religion.” *Id.*, at 2668; *Baruch* [2], at 165. To my mind, however, this matter is far from simple. Be that as it may, *see* 1 Rubinstein *supra*. [92], at 177, note 14, the subjective sensation that one is being religiously coerced is clearly discernable among some members of the public who are prevented from circulating on Bar-Ilan Street during the hours that it is closed to traffic.

75. Employing legal concepts, how are we to characterize the clashing interests here? We have already seen that freedom of movement on the Sabbath is a constitutional right, which is infringed by street closures on that day. How is the interest infringing on this right to be characterized? It does not have the status of a human right. As noted, the offense to religious sensibilities and the observant lifestyle caused by motor traffic on the Sabbath does not infringe the freedom of religion of the observant public. We are not dealing with a horizontal clash between two conflicting human rights. However, the interests of the observant residents in safeguarding their sensibilities and way of life forms part of the public interest in preserving the public peace and public order. *See* HCJ 230/73 *supra*. [10], at 121.

In CA 105/92 *supra*. [20], at 205, I highlighted this public interest:

The public interest, with which the various human rights often clash, is varied. The expression "public interest" encompasses and includes a rainbow of public interests, with which organized society is concerned. As such, public security and welfare are both included, as is the public trust in public authorities. Similarly, the public interest in the recognition of individual rights and the preservation and promotion of tolerance, among citizens and the authorities and the citizens, is included. The rule of law, the independence of the judiciary and the separation of powers are all clearly public interests.

Likewise, in HCJ 14/86 *supra*. [35], at 430, regarding the need to balance between freedom of expression and public order, I noted:

Public order is a broad concept that is not easily defined, and whose meaning varies depending on the context. In this context, threats to the state's existence, its democratic regime, as well as public welfare, morality, religious sensibilities, a

person's right to reputation, and the need to guarantee fair legal proceedings are all included under the rubric of public order.

It appears, therefore, that taking into account religious sensibilities and the observant lifestyle forms part of both the public interest and public order. *See also* HCJ 806/88 *supra*. [9], at 29. At the same time, however, the need to preserve the free flow of traffic on Sabbaths and to allow members of the public—whether the public at large or local residents—to travel freely constitutes part of the public interest and of the public order. As such, both clashing interests can be described as falling under the rubric of the "public interest."

#### *The Relevance of the Clashing Interests*

76. Is the Minister of Transportation authorized to weigh all clashing interests and values? More specifically, is the religious factor—as part of the public interest—a relevant consideration in the context of the Traffic Controller's exercise of discretion? As we have seen, offending feelings in general, and religious sensibilities in particular, is a relevant consideration, provided that it does not constitute religious coercion. This is generally the case. Is this consideration relevant with regard to the Traffic Controller's authority? In my view, the answer is in the affirmative. The approach which perceives the religious factor as a "general consideration" which may be taken into account is equally applicable with regard to the Traffic Controller's authority to close Bar-Ilan Street. In exercising this authority, the Traffic Controller must consider the interests of all those who use the street, and who are affected by its closure. This includes the religious interests of those affected by regulations respecting Bar-Ilan Street.

In the *League* [1] case, which dealt with a street closure for the purpose of preventing disturbances to prayers in a nearby synagogue, Acting President Agranat wrote:

There can be no doubt that the respondent was taking into account a religious interest in considering the fact that motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably. There is no fault in that—just as there is no fault in considering cultural, commercial, or health interests, provided that they affect a significant part of the public.

*Id.* at 2668. In a similar vein, in *Baruch* [2], at 163-65, Acting President Landau noted:

The petitioners' submission that the respondent exceeded his authority, as per the Traffic Ordinance and Traffic Regulations, by taking into account the religious public's sensibilities is not convincing...

Ensuring the Sabbath rest, in accordance with the lifestyle of the interested public, is within the Traffic Controller's authority to regulate road-traffic

For our purposes, just as motor traffic along Jerusalem's King George Street disrupts prayers at the Yeshurun synagogue, vehicles on the segment of HaShomer street, in the heart of Bnei' Brak, also disturb the Sabbath rest of the local residents in that clearly Ultra-Orthodox area. Safeguarding this interest is not tantamount to religious coercion. Instead, it is merely extending protection to the observant lifestyle.

Hence, the Traffic Controller—for our purposes, the Minister of Transportation—was authorized to take into account the offense to religious sensibilities and the observant lifestyle of the local residents, living around Bar-Ilan Street, as a relevant consideration in exercising his discretion with respect to the partial closing of that street to traffic on

Sabbaths and holidays. The key question, however, is how to balance between the relevant religious consideration and the other conflicting considerations. It is to this issue that we now turn.

*The Balance Between the Relevant Considerations*

77. The key issue in the petition at bar relates to the balance between the freedom of movement and the religious consideration, as well as all other relevant considerations. It is incumbent on the Minister of Transportation to balance safeguarding the religious sensibilities of the local residents against the right of each member of the public to travel on Bar-Ilan Street every day of the week, as well as the public interest in keeping the street open year-round. Acting President Agranat emphasized this point in *League* [1] at 2668, noting:

The legislature's objective was to empower the Central Traffic Authority to regulate traffic on city streets...to this end, the vehicles' proprietors' and pedestrians' interest in using public roads for their various needs as well as the legitimate needs of other segments of the public, particularly those residing in the houses adjacent to public roads and those using them were considered. As the District Attorney has argued, the problem to which the Central Traffic Authority must consider in such circumstances is the need to strike a proper balance between these interests.

The Central Traffic Authority is under a duty to address every concrete case in light of the particular circumstances, taking into account all the interests that the street's closure may affect. In the end, the problem is one of measure and degree.

In a similar vein, Acting President Landau emphasized the need to balance between conflicting interests in *Baruch* [2], at 165:

It is necessary to strike a balance between the conflicting interests; this is a matter of measure and degree. It is but one manifestation of the endless problem of how to reconcile two "camps"—the secular and the Ultra-Orthodox—so that they live in peace in mutual respect, so that neither seeks to "conquer" the other or "triumph" at the other's expense.

Our case also presents the same balancing conundrum, which arises between conflicting values and interests. No one has so argued that the public interest in preventing traffic from circulating on Bar-Ilan Street on the Sabbath is "existential," and that other interests cannot be weighed against it. Similarly, the view that the public interest in the free-flow of traffic on Bar-Ilan Street on Sabbaths is "existential" and cannot be balanced must equally be rejected.

78. As noted, the proper balance is arrived at through examination of the limitation clause of the Basic Law: Human Dignity and Liberty. The State of Israel's values as a Jewish state require us to consider religious sensibilities, and indeed attach significant weight to this factor. The essence of the problem is in the State of Israel's values as a democratic state. We have seen that, in this context, it is proper to take into account the religious feelings of the religious public residing around Bar-Ilan Street, if the Sabbath traffic arrangements aimed at safeguarding these constitute a substantial social need, if allowing traffic to travel on the Sabbath and festivals offends religious feelings in a manner that is severe, grave and serious, and if the probability of this harm materializing is nearly certain. Then and only then does it become possible to say that the harm to religious sensibilities and the observant lifestyle of the Ultra-Orthodox residing around Bar-Ilan Street exceeds the threshold of tolerance which is acceptable in a democratic society. Is this the case here?

79. To my mind, the harm to the Ultra-Orthodox public's religious feelings ensuing from the free-flow of traffic on the Sabbath in the heart



of their neighborhood is severe, grave and serious. Indeed, to the religious Jew, the Sabbath is not merely a list of the permitted and the forbidden. Rather, the observant Jew perceives the Sabbath as a normative framework, intended to create a particular atmosphere. Our Rabbis, of blessed memory, described this special atmosphere as the additional soul which man is granted upon the entrance of the Sabbath, which leaves him as it exits. Babylonian Talmud, Tractate Beitza 16a, [110]. This rest is intended to bring the routine of daily life to a halt, and relieve man of daily worries. This rest seeks to permit a person to fully dedicate himself to his family and to his most cherished values. Moreover, rather than merely a private or family affair, the Sabbath is a community matter. Thus, an observant community's expectation is that the Sabbath rest is not restricted to the private domain of its members, but that it will envelop the public realm as well. With the coming of the Sabbath comes rest, not only to one's backyard but throughout the neighborhood. The hustle and bustle of daily life is replaced by prayer, family walks and the like. A crowded street that traverses the heart of the neighborhood, with the sounds of honking and engines, stands in stark contrast to the Sabbath atmosphere, as the majority of the local residents understand it. In effect, severe, grave and serious harm to a religious Jew observing the Sabbath ensues upon encountering traffic on one's way to synagogue or to a Torah institute. As usual, the burden of proving the severity of the harm is on the person claiming to have been injured. In the case at bar, this has not been the subject of dispute and was proven in the various affidavits submitted to the Court.

80. It should be emphasized that the excessive harm to religious feelings here is a result of the fact that Bar-Ilan Street is situated in the heart of the Ultra-Orthodox neighborhoods. Prior the Six Day War, Bar-Ilan Street was found at the periphery of the religious neighborhoods. Traffic on the Sabbath traveled along the neighborhood's periphery, so that even if religious feelings happened to be offended once in a while, the offense was negligible. The uniqueness of our case is a function of Bar-Ilan's location in the heart of the Ultra-Orthodox neighborhoods, so

that traffic on Sabbaths causes severe harm to religious feelings. This is also the difference between Bar-Ilan Street and other surrounding streets. While these other streets are also situated next to religious neighborhoods, their location is peripheral and they will therefore remain open to traffic on Sabbaths. The Ultra-Orthodox are offended on those streets also. However that harm cannot be said to surpass the threshold of tolerance expected in a democratic society.

81. The near certainty test is met in this case. Indeed, the severe, grave and serious harm to the religious feelings of the local residents caused by the Sabbath traffic is not a question of probability. It is proven fact. In dealing with the probability of religious feelings being offended as a result of a certain film being screened, in H CJ 806/88 *supra*. [9], at 41, Justice Goldberg wrote:

The clash between two basic values requires an estimation of the "relative social importance of the various principles" an examination of the probability, force, extent and scope of the harm that one principle causes the other.

The probability test, which ascertains the likelihood of harm, is outside the scope of examination in this instance. There is a need to consider to the probability of the harm as long as we are incapable of establishing the facts. In such cases, it is incumbent on us to estimate the risk of the harm. As such, we accept the "near certainty" test as the proper test respecting the Film and Play Review Board's authority. In such circumstances, we must estimate the risk that a particular film will endanger the public welfare and whether the level of risk is one of "near certainty."

However, when we can determine ourselves whether a given film offends religious sensibilities or denigrates a person's reputation, it is not necessary to estimate the likelihood of

harm. In such instances, our eyes are capable of seeing and our ears of hearing whether harm of this nature is in fact present.

This is the law in this matter. Beyond "near certainty," absolute certainty was unequivocally proven. It was proven that the religious feelings and lifestyle of the local Ultra-Orthodox residents are in fact severely, gravely, and seriously offended by reason of traffic going through their neighborhood on Sabbaths and festivals.

82. Freedom of movement is not to be restricted absent a "proper purpose." A purpose is said to be proper if its content and the need it addresses are proper. In my opinion, in terms of content, safeguarding religious feelings and the observant lifestyle constitutes a proper purpose. That conclusion is dictated by the State of Israel's values as a Jewish and democratic state. It is also prescribed by the special purpose underlying the Traffic Controller's authority—the religious factor—which although not the sole, or even dominant, objective, is a proper secondary purpose. The most difficult question is whether the need to realize this secondary objective is a "significant social matter." Mr. Langer, the Acting National Traffic Controller, was initially convinced that the social need to close Bar-Ilan Street on the Sabbath was not significant. It seems to me that, according to an objective standard, the case is borderline. Under these circumstances, there is no basis for interference with the assessment of the Traffic Controller. In effect, had Mr. Langer not changed his original position, there would be no reason to question his decision. Neither is his change of heart, in my view, to be deemed erroneous. Thus, both decisions—whether forbidding traffic along Bar-Ilan Street on Sabbaths or then allowing it—appear to me to be within the zone of reasonableness regarding the need to close the street.

83. Freedom of movement—the right infringed by Bar-Ilan's closure on Sabbaths—must not be restricted beyond what is strictly necessary. Is this condition met in this instance? This matter is difficult to resolve. This having been said, it appears to me that Bar-Ilan Street's absolute closure

throughout the Sabbath, from beginning to end, is excessive. As the harm to religious feelings and lifestyle is inflicted during prayer times, closing the street beyond those times would infringe the freedom of movement more than is necessary. Indeed, it is incumbent on the authorities to opt for the least restrictive means at their disposal. For our purposes, the least restrictive means would be a partial closure, during prayer times, at which time religious feelings are most offended, rather than imposing an absolute closure. This is undoubtedly the case from the perspective of the secular residents, who would be unable to reach their homes throughout the Sabbath, were an absolute closure to be imposed.

This having been said, is closing the street to traffic only during prayer hours excessive? To this end, we must distinguish between harm to the interests and values of those secular individuals residing outside the Ultra-Orthodox neighborhoods crossed by Bar-Ilan Street, and the harm caused the interests and values of their counterparts, residing within these neighborhoods. This distinction is vital in light of Bar-Ilan Street's role as a traffic artery connecting neighborhoods and its providing access to the property of the local residents.

84. The harm caused to the secular members of the public, residing outside the Ultra-Orthodox neighborhoods serviced by Bar-Ilan Street, who seek to exercise their freedom of movement and right to travel from one end of the city to the other, is not excessive. As pointed out, all that is required of them is a detour, taking no more than two extra minutes. While this is an infringement on their freedom of movement, it is not excessive due to the three following conditions. First, the alternative routes are open to traffic on Sabbaths. Second, Bar-Ilan Street itself is open to traffic on Sabbath, save prayer times. If, in practice, it will not be possible to travel on Bar-Ilan Street at times other than during prayers, the harm to the secular public shall be deemed excessive. Consequently, if the violence on Bar-Ilan Street on Sabbaths will continue during the times that traffic is permitted, this will excessively burden the secular residents' freedom of movement. Third, Bar-Ilan Street is open to

security and emergency vehicles even during the hours that it is closed to traffic. Bar-Ilan Street serves as a traffic artery leading to Hadassa Hospital, located on Mount Scopus. The two extra minutes it takes to arrive through the alternate route are crucial when it comes to saving human lives. The same applies to security vehicles, endeavoring to preserve the public peace. Such vehicles may freely travel along Bar-Ilan Street at all hours.

85. The matter is quite different with regard to the area's secular residents of Bar-Ilan Street, or those secular members of the public looking to visit family or religious friends living in Ultra-Orthodox neighborhoods. The partial closure of Bar-Ilan Street severely infringes their freedom of movement. The harm is grave as, prior to the closure, secular members of the public, as well as their family and guests, living in the Ultra-Orthodox neighborhoods were able to park their vehicles on Bar-Ilan Street and reach their residences on foot from there. This closure, however, will compel secular residents to park at the northern or southern end of Bar-Ilan Street, and to walk the length of Bar-Ilan. This walk, which is by no means short, does not constitute a reasonable alternative. The alternate routes of Route no. One and Route no. Four are intended to allow traffic to flow from one end of the city to the other. What, however, will become of the secular residing in the Ultra-Orthodox neighborhoods themselves?

86. This question is by no means simple. Closing Bar-Ilan Street to traffic on the Sabbath causes severe harm to the secular residents living in neighborhoods around Bar-Ilan Street. They were also harmed in the past, when the neighborhood's inner streets were closed off, and now, unable to reach their homes, they suffer additional harm. This having been said, the harm in question is narrow in scope as they are perfectly able to travel along Bar-Ilan Street at all hours, save prayer times when the street is closed, including Fridays the Sabbath and holidays.

Is this infringement lawful? Can it not be said that the infringement on the secular residents' freedom of movement is excessive? Every effort should be made in order to minimize injury to these secular residents. Consequently, it is only appropriate to consider the possibility of granting special permission to the secular residents to use Bar-Ilan Street even when it is closed. Just as security and emergency vehicles are permitted to use the street on the Sabbath, the same possibility should be extended to local secular residents. Undoubtedly, this is the case regarding the physically challenged, *see* HCJ 5090/96, or those residents whose occupation requires it, such as petitioner number three.

87. In practice, to what degree would the secular residents living in Ultra-Orthodox neighborhoods around Bar-Ilan Street be harmed were the street to be partially closed? How many secular residents live in these neighborhoods and how will the street's partial closure harm them? The evidence before us does not provide a satisfactory answer to any of these questions. Mr. Langer did not examine this matter in drafting his order to partially close the street to traffic. Instead, he relied on the data collected by the Sturm Committee. While the report is in the Court's possession, we do not have the protocols of the Committee's discussions, nor is there any information regarding the local secular residents—if such information was ever presented to the Sturm Committee. In his decision, the Minister of Transportation relied on the Tzameret Committee's report, which also does not contain data regarding the secular residents. Responding to our inquiries on the matter, the state informed us that no data respecting the secular residents was in possession of the Minister of Transportation. It emphasized that at no time was the Minister approached by secular residents opposing Bar-Ilan's closure. The assumption, therefore, was that most local residents were Ultra-Orthodox. Regarding this issue, the petitions before us contradict each other. One petitioner stated before the Court that "there are still numerous secular residents living in the area, such as non-observant elderly couples who are regularly visited by their children on Sabbaths and holidays." *See supra* para. 15. In contrast, the petition of the Committee of Tel-Arza and

Bar-Ilan Street Neighborhoods stated that “nearly one hundred percent” of the those living around Bar-Ilan Street keep the Sabbath, and that there are less than fifty secular residents in the area.

*The Law of Administrative Procedure: Gathering Data and Related Flaws*

88. Case law provides that a government decision must be based on and supported by relevant facts. To this end, the authority must gather the relevant data and verify the fruits of its search with extreme care, as noted in HCJ 297/82 *Brenner v. Minister of the Interior* [57], at 48-49, by Acting President Shamgar:

The decision must always be the product of serious, fair and systematic research...

The decision-making process by the authority must be composed of a number of crucial basic stages. These include the gathering and summarizing of data, verifying the data’s significance—which, in the event of alternative thesis, includes verifying the propositions and ramification of the conflicting thesis—and, finally, summarizing the reasoned decision. This process ensures that the relevant considerations are taken into account, that the arguments submitted are fairly examined, and that the resulting decision will withstand a legal and public critique.

89. What are the ramifications of the government authority’s failure to perform a proper verification? The consequences are a function of the circumstances. Thus, not every violation of proper administrative procedure will result in the administrative decision being struck down. In HCJ 2911/94 *Baki v. Director General of the Ministry of the Interior* [58], at 304, Justice Zamir wrote:

We must draw a clear distinction between the rule binding the administrative authority and the remedy granted by the Court when that rule is transgressed. The rule is found on one plane and the remedy in another. After the fact, the Court will weigh different considerations than the factors the authority should have weighed.

In a similar vein, in H CJ 2918/93 *Municipality of Kiryat-Gat v. The State of Israel* [59], at 848, Justice Dorner pointed out:

It is necessary to distinguish between primary rules, guiding the administration's actions, and secondary rules, regulating the legal results of violating these primary rules and the remedies for such violations.

Indeed, not every flaw causes an administrative decision to be struck down. Generally, only a substantive violation leads to such a result. See H CJ 161/80 *San Tropez Hotel Ltd. v. Israel Lands Authority* [60], at 711; H CJ 465/93 *Tridet v. Local Council for Planning and Building, Herzliah* [61], at 635. The effect of a procedural flaw depends on two factors. First, we must ascertain whether the violation of administrative procedure influenced the decision's content. Second, we must assess what effect striking down the decision will have on individuals and society. See H CJ 400/89 *Levitt v. President of the Military Tribunal, Southern District* [62], at 711. Thus, Professor Zamir was correct to point out that:

Only a substantive violation of administrative procedure, infringing a legal principle or a human right, is enough to justify the decision's reversal.

The issue of whether the violation is substantive, which would justify the decision's reversal, is in every case determined by two considerations. First, whether the violation is likely to have influenced the decision, or, in other words, whether the



decision would have been different in its absence. Second, what are the benefits to the parties and society if the decision is struck down.

II Zamir *supra*. [91], at 683-84.

90. As we have seen, the Minister of Transportation did not make an appropriate factual assessment of the impact of the closure on the secular residents living in the Bar-Ilan Street area. Instead, the Minister related to Bar-Ilan Street as a main traffic artery that did not provide direct access to adjacent land owners, whereas the street also provides direct access to adjacent lands. As a result, the concerns of secular residents living in Ultra-Orthodox neighborhoods who would be harmed by the street's closure on the Sabbath were not addressed. Let it be noted that the Sturm Committee encountered a similar problem regarding Sabbath and festival street closures in the Har-Nof neighborhood. From an administrative procedural perspective, the Committee acted properly. It called on the secular residents to provide information on their place of residence and mapped out their location. It also marked the roads and access-ways to remain open to the secular residents and their guests. The Minister of Transportation, for his part, did none of these things. Is this flaw substantive? From the perspective of the first consideration—namely, the flaw's influence on the decision's content—the flaw in question can surely be said to be substantive. As we have seen, the data regarding the secular residents living in the Ultra-Orthodox neighborhoods around Bar-Ilan Street is completely absent. The flaw is equally substantial from the perspective of the second consideration—the effect of striking down the decision, both generally and specifically. Indeed, striking down the Minister's decision will preclude the street's immediate closure. As a result, the severe, grave, and serious harm to the Ultra-Orthodox residents' religious sensibilities will persist. This however, is inevitable when the freedom of movement is at play, prior to determining an appropriate and factually grounded balance between this right and between harm to religious feelings and lifestyle.

*Additional Arguments*

91. Various arguments were raised in written and oral submissions made before the Court. To the extent I have not addressed these arguments in my decision, they are rejected. These arguments do not affect the legal structure of this decision, and they failed to sway my opinion on the matter.

*Conclusion*

92. In all that relates to the use of Bar-Ilan Street as a main artery, serving to connect various Jerusalem neighborhoods, the Minister's decision is within the zone of reasonableness. In contrast, the Minister's decision is flawed in its failure to address the plight of the secular residents living in Ultra-Orthodox neighborhoods and, as such, must be struck down. There is no alternative save to declare the Minister's decision ordering the street's partial closure null and void. It will be incumbent on the Minister to reconsider his policy respecting Bar-Ilan Street's partial closure, bearing in mind that it is a traffic artery, providing direct access to the adjacent lands.

*Additional Comments**The Tzameret Committee*

93. While I did not address the Tzameret Committee's recommendations in my judgment, this in itself no way reflects my opinion regarding their importance. Indeed, the Committee's recommendations are most important, and my hope is that they will be seriously considered. The Tzameret Committee was set up as per the Court's suggestion, based on our understanding that the Sabbath traffic issues in Ultra-Orthodox neighborhoods can only be resolved by way of agreement and compromise. The problem is both sensitive and grave. It relates to the larger problem of Sabbath traffic in Jerusalem and to

religious-secular relations in these matters. These problems, by their very nature, best lend themselves to a social rather than legal solution. Social consensus, based on compromise, is by far preferable to an imposed judicial decision, as President Shamgar noted in *Hoffman* [39], at 354-55, which dealt with prayer at the Western Wall:

All this leads us down the treacherous road of balancing between conflicting persuasions, convictions and opinions. In this context, it is far better to recall that the exclusive focus on the "miracle cures" that our generation expects to be handed down in Court, is not necessarily the appropriate solution or the desired cure for all our ills. These solutions are imposed and judicially ordered, rather than agreed upon in instances where experience seems to suggest that understanding and discussion between proponents of opposing viewpoints, although at first glance appearing more difficult, is far more fruitful.

While the Tzameret Committee operated precisely in this spirit, a compromise was not reached and a social covenant was not struck. Thus, we rule on the matter for lack of choice. This having been said, the Court cannot adopt the Tzameret Committee's views in our judicial decision. Our concern is with Bar-Ilan Street's closure to traffic on the Sabbath. Thus, while permitting public transportation on the Sabbath in a different place is likely to constitute a proper social balance, it is nonetheless irrelevant to reaching a judicial decision. Indeed, not all that is relevant in the social or political sphere is equally relevant in the legal sphere. For instance, the Court itself proposed that the problem of closing Bar-Ilan Street be resolved by opening Yam Suf Street, as a basis for agreement and compromise. While this suggestion may be an appropriate social compromise, it has no any bearing on a judicial ruling. As a social compromise was not successfully reached, our judicial ruling is inevitable. Such a ruling is anchored in relevant considerations

exclusively. To this end, the Tzameret Committee's recommendations are merely of secondary import.

*"The Slippery Slope"*

94. The following argument was made before the Court: if Bar-Ilan Street is closed to traffic on Sabbaths, even partially, the domino effect will be powerful. Additional traffic arteries will be closed, as will main roads. The entrance to Jerusalem will soon follow suit, as will streets across Israel.

As a judge, it is not for me to provide a political response to these concerns. My response can only be legal, and it is the following: any decision to close a street, road, or city entrance to traffic will have to be analyzed on a case by case basis. Thus, the legality of a particular closure does not imply that a different street's closure is legal. We judges are quite capable of distinguishing between different streets, between one closure and the next. In this vein, in H CJ 606/93 *supra*. [41], at 26, Justice Cheshin correctly noted:

One of our roles as judges—and a difficult one at that—is knowing how to distinguish between essence and periphery, between one case and another, between various nuances. The fact that a particular case is difficult does not justify that we refrain from attempting to distinguish it from other cases.

This is the law for our purposes. We are addressing the matter of Bar-Ilan Street, and that matter alone. I have concluded that there are reasonable alternatives to Bar-Ilan Street with regards to its use as a traffic route connecting various parts of the city—as opposed to its use as an access way to the homes of local secular residents.

What then will be the law when the issue of Sabbath traffic on a different traffic artery arises? Such a case shall be evaluated according to

the same measure employed in the case at bar, no more and no less. I am not prepared to change the legal measure for future fears that have yet to materialize. Such fears are based on speculation. The “slippery slope” argument is a difficult one, which we must always address with a certain degree of skepticism. *See* F. Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1986) [107]. Thus, while it may very well be that the slippery slope is indeed quite perilous, the slippery slope argument is by far more dangerous.

*The Lack of a Legal Standard*

95. It has been argued that, because the Minister of Transportation failed to set forth a framework of criteria for the exercise of his discretion, that his decision is flawed. Indeed, it is unfortunate that he did not set out such criteria. It is appropriate that the government authorities set out criteria for the exercise of their discretion. *See* 2 Zamir *supra*. [91], at 780. These would provide the administrative authority with the opportunity to set proper policy in a conscious and carefully planned manner. Such criteria help prevent discrimination, allow for long-term planning, and subject the exercise of discretion to review. This having been said, I am not convinced that the lack of independent guidelines here is sufficient to invalidate the Minister’s decision. The closure of main traffic arteries is by no means a routine matter. Each case is evaluated individually, on its own merits. Even so, it is appropriate that the Minister of Transportation to set guidelines in these matters.

96. The lack of independent guidelines was felt was in relation to the choice of alternatives to the closed route. Here, the Court was informed that there were alternate routes to Bar-Ilan Street, one of these being through Route no. Four, the other being Route no. One. Both these roads pass Ultra-Orthodox neighborhoods. We heard arguments asserting that that there is no basis for preferring Bar-Ilan’s Ultra-Orthodox residents’ religious feelings and the observant lifestyle over those of their counterparts residing around Route no. One and Route no. Four.

According to which criteria did the Minister exercise his discretion in this instance? Moreover, what will become of Bar-Ilan Street's closure in the event that demands to close these two alternate roads on the Sabbath will arise? According to which criteria will the Minister of Transportation act under such circumstances? These are important questions indeed. In my view, the answer to them is to be found in the material before the Court. As to the first question, we emphasized the difference between streets that go through the heart of an Ultra-Orthodox neighborhood—where thousands of Ultra-Orthodox individuals reside on both sides of such streets—and roads that are found at the neighborhood's periphery.

With respect to the second question, it is clear that, as soon as we consider the possibility of closing the alternate route, the issue of the original route's closure resurfaces. Our concern is with complementary solutions. It is possible to partially close Bar-Ilan Street provided that an alternate route remains open to traffic on the Sabbath. However, the moment that the alternate route is closed to traffic on Sabbath, Bar-Ilan Street must be opened. This position is shared by the Minister of Transportation who noted:

For as long as the road in closed...Golda Meir Boulevard (Ramot Road) shall remain open, as will the entrances to the city.

*See* para. 25 of the Minister's response brief. Let us add Route no. One to this statement. Clearly, it is best that the Minister prescribe a general formula for these purposes, which relates to all alternate routes. It is our hope that, in the future, this will be done.

97. Related to the issue of the proper legal standard is the question of how requests to close streets for religious reasons are to be dealt with. To this effect, the Tzameret Committee distinguished between various categories of roads. The Committee recommended that the authorized local and central bodies decide the matter. It also discussed when a

reasonable alternate route is required and when it is not. In addition, it proposed that an appeals board be set up, which would enable decisions about street closures to be appealed. In this regard, the Minister's decision was:

It is incumbent on the relevant actors to examine these recommendations in detail. If, subsequent to an examination of this nature, these professionals recommend that the recommendations be implemented, and in the event that I see fit to accept them, it will be necessary to change the law accordingly.

The matter, however, is left to the discretion of the Minister of Transportation. It is appropriate that these suggestions be positively weighed. Particularly important is the appeals board, which, if set up, will enable interested citizens to appeal decisions. Indeed, were such an appeals board in existence today, we would have perhaps learned the number of secular residents living in Ultra-Orthodox neighborhoods around Bar-Ilan. It is our hope that these issues will be decided speedily, allowing the Traffic Controller to decide afresh with respect to Sabbath street closures while also granting the right to appeal these decisions. Even so, it is clear that—from an administrative procedural perspective—the lack of this appeals mechanism will not influence the validity of the decisions.

98. It has been argued before the Court that the matter of Sabbath street closures must be regulated by statute. This approach is indeed proper. The subject matter is important and it is appropriate that it be enshrined in legislation. Moreover, it is also appropriate that the legislature prescribe primary arrangements and leave secondary determinations to administrative authorities.

While this is how a constitutional democracy operates, this is not the question placed before us. Our question is whether the existing legal

regime, which endows the Traffic Controller with the authority to determine primary arrangements respecting the flow of traffic—such as the matter of Sabbath street closures—is illegal because the primary arrangements are not enshrined in legislation. This question is to be answered in the negative. We are not to substitute the desired law for the existing law. Many are the matters in our lives, which in the past were regulated by secondary legislation but were in fact worthy of being anchored in primary legislation. Suffice it to cite the matter of recruiting Yeshiva students to the army. It has been argued that this last issue is an important one which would best be anchored in primary legislation. With this the Court agreed. Nevertheless, we held that the lack of primary arrangements prescribed by statute does not invalidate the secondary legislation in this respect. *See Ressler* [33], at 501. This too is the law in the case at bar. While this is not desirable, it is nonetheless legal.

#### *Violence*

99. For a considerable amount of time now, Ultra-Orthodox factions have engaged in violent activities on Bar-Ilan Street. Stones were thrown at passing cars, and police intervention was required, Sabbath after Sabbath. There are those who believe that this violence has succeeded in bringing about a new perspective regarding freedom of movement on Bar-Ilan Street. This is to say that the street's partial closure will, to a certain extent, be tantamount to rewarding this violence, as Justice Landau so accurately described in *Baruch*, at 165 [2]:

In a law-abiding country such as ours, the physical pressure of illegal demonstrations and violent protests must never be allowed to impose solutions. Violence breeds violence and a country that allows such violence to succeed will destroy itself from within. I am fearful that this issue can serve as an obvious example of such destruction, for it gives the impression that the riots and demonstrations which took place pressured the government into searching for a new solution to the problem.



This having been said, the fact that it was the violence that pushed the matter to the fore, and that precipitated the matter's review, does not, in and of itself, provide sufficient reason to strike down the decision—provided that its content was not influenced by the violence. Justice Landau insisted on this point in *Baruch*, at 165 [2], holding:

How shall the Court, in hindsight, deal with the unfortunate fact that the administrative arrangement in question was reached only after violence? Certainly, no court would validate an invalid arrangement for fear that voiding it will result in renewed violence. Nor will it, on the other hand, strike down an arrangement, which appears both valid and appropriate, only because it was motivated by an attempt to find a deal with violence. The proper response to illegal activities is an appropriate police reaction, and the enforcement of the penal law.

Indeed, we must distinguish between this violence and the administrative authority exercised in its wake. All legal means must be employed to fight the violence, *see* HCJ 153/83 *supra*. [22], at 406, and every person's freedom of movement must be protected. "Maintaining an arrangement does not imply surrender to those threatening to violate it. Rather, it is extending shelter and protection to the victims of such violence-mongers." HCJ 166/71 *Halon v. Head of the Local Council of Ousfiah* [63], at 594. (Berenson, J.) Freedom of movement in Israel must not be allowed to fall prey to violence.

100. As for the exercise of administrative discretion, such discretion is deemed flawed when it is influenced by the violence on the street. *Compare* HCJ 549/75 *supra*. [40], at 764. The balances between the various relevant considerations must be struck on the basis of their respective weight. The violence on the street must not influence this weight. A government authority whose path is influenced by violence on

the street is destined to falter. In this respect, Justice Silberg, in HCJ 155/60 *Elazar v. Mayor of Bat-Yam* [64], at 1512, correctly pointed out:

Today, there may be demonstrations and protests by various religious factions; tomorrow, the anti-religious sectors may be the ones accused of running amok and disturbing the peace... this phenomenon is a Sword of Damocles dangerously dangling over us, leading to the surrender of public institutions to the terror on the streets.

Justice Landau, in HCJ 512/81 *The Archeological Institute of Hebrew University, Jerusalem v. Minister of Education and Culture* [65], at 543, spoke in a similar spirit:

Tolerance and patience are indeed necessary, as is considering the feelings of the other side. This by no means implies that one should surrender to the pressure from illegal demonstrations and the violent behavior of extremist groups, seeking to impose their views and will on government authorities, whose authority they do not recognize.

This having been said, the proper exercise of discretion is not to be invalidated merely because violence raised an awareness of the problem. Such is the case here. I am convinced that the decision of the Minister of Transportation was taken with a proper understanding of freedom of movement and its influence on the Ultra-Orthodox public's religious sensibilities. As such, his decision was not influenced by the violence, except for the fact that it was the violence which brought the matter to the Minister's attention.

101. The Minister's decision was to partially close Bar-Ilan Street on Sabbaths. We have seen that this decision strikes a proper balance between the conflicting considerations regarding the flow of traffic within the city. As noted, the full closure of the street would excessively infringe

the freedom of movement. This being the case, the decision to close the street to traffic during certain hours is premised on the fact that it will be open for the remainder of the day. If the violence will continue, however, and if it will affect the free-flow of traffic during the hours when vehicles are permitted to travel, then secular residents will likely refrain from driving on Bar-Ilan for fear of being attacked. If this scenario materializes, the delicate balance struck shall be undermined. Under such circumstances, there will be no choice but to fully reopen Bar-Ilan to traffic on the Sabbath, with the police strictly enforcing the law.

### *Tolerance*

102. Tolerance is among Israel's values as a democratic state. It is by virtue of tolerance that rights may at times be infringed on in order to protect feelings, including religious sensibilities. Tolerance is also one of the State of Israel's values as a Jewish state, as noted by Justice Elon, in *Neiman* [18], at 296:

This is the doctrine of government in our Jewish heritage—tolerance for all, of each and every group, to each opinion and each world-view. Tolerance and mutual understanding ensure that each individual and every group has a right to express its views.

Hence, tolerance serves as a measure for striking the proper balance between various clashing values, as I noted in CA 294/91 *supra*. [19], at 521:

Tolerance constitutes both an end and a means. It is in itself a social end, which every democratic society must aspire to fulfill. It equally serves as means, as a tool for balancing between social goals, and allowing for their reconciliation when they clash with each other.

How is one to be tolerant towards those who are not? In the petitions before us, we repeatedly heard the argument that the Ultra-Orthodox residents are not tolerant of their secular counterparts. They are not prepared for any compromise whatsoever, as tolerance would dictate. An example of their unwillingness to compromise is the fact that they rejected the Court's proposal regarding the closure of Yam-Suf Street. It was argued that they view tolerance as a one-way street—to serve their interests, absent any compromise on their part.

103. It cannot be denied that these contentions do have a certain basis in the facts presented. The Ultra-Orthodox's refusal to compromise regarding Yam-Suf Street was a difficult blow. In truth, tolerance should be mutual, as President Shamgar wrote in *Hoffman* [39], at 354:

Tolerance and patience are not one-way norms, but broad, multi-dimensional imperatives...tolerance is not to be invoked only to collect rights, but rather, as a measure for recognizing one's fellow's entitlements...tolerance must be mutual. Shows of strength that surface from violent groups are not worthy of such tolerance.

What then is the law when certain groups in society are intolerant? Are they then unworthy of tolerance? To my mind, it is incumbent upon us to be consistent in our understanding of democracy. According to the democratic perspective, the tolerance that guides society's members is tolerance of everyone—even towards intolerance, as I wrote in H CJ 399/85 *supra*. [25], at pp. 276-277:

The democratic regime is based on tolerance...tolerance of our fellows' deeds and views. This includes tolerance of those who are themselves intolerant. Tolerance is the force that unites us and permits co-existence in a pluralistic society such as ours.

It is incumbent upon us to be tolerant even of those who are intolerant of us, due to the fact that we cannot afford to be otherwise. Because if we are not tolerant of the intolerant we shall undermine the very basis of our collective existence, premised on a variety of opinions and views, including those that we disagree with, and including the view that tolerance is not mutual.

#### *Judicial Review*

104. The Minister of Transportation was faced with a difficult situation, which can legally be dealt with several ways. Thus, he would have been authorized to decide to continue with the status quo. In other words, Bar-Ilan Street would have remained open to traffic. This would have been a proper decision, striking an appropriate balance between the various considerations to be taken into account. This, however, was not the Minister's decision. Instead, he opted for a partial closure of the street on Sabbaths. He was authorized to do so in all that regards the use of Bar-Ilan as a traffic artery without direct access to adjacent land users. His decision to this effect is within the zone of reasonableness. Under these circumstances, there isn't any place for the High Court's intervention. In fact, the question is not how the Court would act, if it were in the Traffic Controller's place, but rather if the latter acted as a reasonable Traffic Controller would have. My answer to this question is in the affirmative. This, however, is not the case with respect to the use of Bar-Ilan Street as a traffic artery which also provides access to adjacent land users. In this respect, the administrative process was flawed and the decision adopted deviated from the realm of reasonableness. In this regard, the Court has no choice but to intervene.

#### *A Final Word*

105. Long have I traveled down the treacherous road that is Bar-Ilan. The case before us is by no means simple. From a legal perspective, it is most difficult. A constitutional democracy will hesitate before it infringes human rights in order to safeguard feelings. A delicate balance between conflicting considerations is required, and this balance is not in the least bit simple. The case before us is difficult from a social perspective. Attempts to reach an agreement and to strike a compromise have all failed. This being the case, the solution must be found in a judicial ruling, which is quite unfortunate. Nevertheless, in President Landau's words in *Dawikat* [3], at 4 "as judges, this is our role and our duty."

#### *The Result*

106. The final result is as follows: a reasonable alternative to Bar-Ilan Street was found in all that concerns travel arrangements from one end of the city to the other. Under these circumstances, the partial closure of the street during prayer times on the Sabbath, as per the Minister's decision, strikes an appropriate balance between freedom of movement and the Ultra-Orthodox local residents' religious sensibilities and observant lifestyle.

Consequently, I would have rejected the petition and revoked the *order nisi* had the matter of the local secular residents and their families not arisen. Clearly, this presumes that three conditions are met. First, the alternative routes must be open on the Sabbath. Second, Bar-Ilan Street must remain open to traffic on the Sabbath during the hours when traffic is permitted, and the free-flow of traffic must not be hampered by violence. Third, Bar-Ilan Street should remain open to emergency and security vehicles even during prayer times.

The factual situation, however, is quite different. There is a problem with the traffic arrangements regarding the local secular residents, living around Bar-Ilan Street—they, their family and loved-ones, and all secular residents who visit their religious friends on the Sabbath. The interests of

these individuals were not taken into account. Nor was a proper factual basis prepared. In this respect, the Minister of Transportation's decision was made in violation of proper administrative procedure, as it failed to distinguish between the different sectors of the population residing in the areas in question. Thus, Bar-Ilan Street was partially closed to all traffic on the Sabbath. Under these circumstances, I suggest that the Court reject the petition in HCJ 5434/96 and make the *orders nisi* in HCJ 5016/96, 5025/96 and 5090/96 absolute, so as to strike down the Minister's decision to partially close Bar-Ilan Street and return the matter to him. In his new decision, the Minister will take into account the interests of the local secular residents and their guests, as this judgment instructs. These

interests will be considered in accordance with an appropriate factual basis, according to the conditions set out in this judgment.

Under the circumstances, no order for costs shall be made.

#### **Justice T. Or**

The Minister of Transportation decided to close a section of Jerusalem's Bar-Ilan Street, measuring 1.2 km., to motor traffic during prayer times on Sabbaths and Jewish holidays. Was this decision lawful? This is the issue in the petitions before us.

#### *Opening Comments*

1. My judgment was written prior to having had the opportunity to examine the judgment of my colleague, the President. As the President elaborated on the relevant facts and procedures, I will not revisit them. Initially, I only addressed those facts that were relevant to my position. However, after reading the President's judgment, I felt it necessary to add three additional brief comments for the purpose of clarifying my position.

2. To be quite frank, I would have preferred it had the various parties in the case at bar come to an arrangement, one that could have spared the

involvement of this Court. This was the reason for our recommendation that a committee be set up in order to help the parties strike a compromise. To my dismay, these efforts were fruitless. As such, we must deal with a matter which is the subject of fierce public controversy. Whichever way we decide, there will be those who will not be satisfied, and who will regard our decision as harmful. No verdict is capable of satisfying everyone. To the extent that we discharge our judicial duty to review the Minister of Transportation's decision in accordance with the legal criteria used for assessing the legality of administrative decisions, criticism is to be expected from one side or the other. As has become the norm, the criticism will be of the result reached by the Court, or by any one of the presiding judges. With the exception of a precious few, not many will be particularly interested in the legal reasoning underlying any of the opinions. We have grown accustomed to the fact that the rulings of this Court have sensitive political or social ramifications.

Even so, despite our awareness of these implications, we are not at liberty to refrain from deciding matters that demand the attention of this Court. As difficult as the task before us may be, and despite the criticism of those whose claims will be rejected, we have no alternative but to discharge our duty and rule according to the law applicable to the facts of the case, each judge according to his ability, understanding and conscience.

This having been said, let us proceed to the matter at bar.

*Bar-Ilan Street*

3. Bar-Ilan Street's importance as a traffic artery is at the heart of our deliberations and is the key to resolving the matter. The road passing through Bar-Ilan Street connects the northeastern section of Jerusalem to the city's western section and with the entrance to the city. As is indicated in the brief submitted by the Traffic Controller, Bar-Ilan Street "begins at the entrance to the city, passes through the Ultra-Orthodox neighborhoods and ends in the neighborhoods located in the northern part of the city." The road



in question is wide, with two lanes in each direction. In certain sections, the road boasts three lanes.

The fact that the road in question is one of Jerusalem's most central is undisputed. It serves both those entering Jerusalem and those living in the city's western neighborhoods, such as Bet HaKerem, Kiryat Hayovel and Kiryat Menachem, allowing them to reach the northeastern part of the city. The road also serves those in the northeast who wish to reach the western part of the city, or who wish to exit the city.

We do not have exact statistics regarding the percentage of the population served by this road. Even so, all agree that the neighborhoods served by it are large. These neighborhoods house tens of thousands of residents, if not more.

4. Due to both its size and the significant population that it serves, the volume of traffic on the road is substantial. Mr. Michael Nackman, the manager of the City of Jerusalem's traffic departments and engineering service, submitted specific numerical data relating to the flow of traffic. From his report, dated October 6, 1996, submitted to the Tzameret Committee, it emerges that on Sabbaths—from sunset on Friday to a little after sundown on Saturday—a significant number of vehicles use the road. The engineer's data indicate that, between January 1, 1996 and March 30, 1996, the road was used by 13,216 vehicles on the Sabbath. This constitutes 27.1% of the average traffic during weekdays of the same period. The statistics for the next three months are similar. During that period, the average number of vehicles driving on the road on the Sabbath was 13,714, which constituted 28% of the average number of cars driving on the road during that week.

I must further mention that surveys conducted over another period, between July 1, 1996 and July 27, 1996, showed an increase in the volume of traffic on weekdays, while the volume of traffic on the Sabbaths decreased. I do not think that this decrease in the volume of Sabbath traffic

should be taken into account. As indicated by the Traffic Controller, Mr Langer, in his testimony before the Court on the August 15, 1996, "today, after a period of extended violence, there are many people who are afraid to use the road and in fact avoid using it...thus, the data of the last few Sabbaths is not relevant, since it is the product of pressures that do not reflect the regular traffic volume." To this I add that, for a number of years, serious controversy has surrounded Bar-Ilan Street and there are many people who avoid traveling on it on Sabbaths. As a result, even the surveys conducted during the first half of 1996 do not accurately reflect the real potential volume of travel on the Sabbath.

5. Thus, Bar-Ilan Street is a central traffic artery—a fact which equally holds true on the Sabbath. The road's centrality as a traffic artery is also evidenced the letter the Central Traffic Controller, Mr. Langer, to the Mayor of Jerusalem. This letter will be cited below. Moreover, in his testimony before this Court, Mr. Langer also referred to Bar-Ilan Street as a central traffic artery, which connects important parts of Jerusalem and serves significant portions of the population, a large part of which uses the road on the Sabbath as well.

6. We emphasized that Bar-Ilan Street is a central traffic artery. The road segment under discussion is surrounded by residential buildings on both sides. For quite a few years now, these buildings house primarily religious and Ultra-Orthodox residents. This being the case, inner streets in the areas along Bar-Ilan Street are closed to traffic on the Sabbath and Jewish festivals. Even so, and despite the local population, no restriction was ever imposed on Sabbath and holiday traffic on Bar-Ilan Street itself. The Minister of Transportation, however, recently decided to close the road to traffic on Sabbaths and festivals, during "prayer times." The three petitions here attack this decision.

7. Having described Bar-Ilan Street, we can now proceed to dealing with the petitions themselves. First, we will outline the normative framework within which the Minister adopted his decision. Then we shall

decide whether the Minister's decision was reasonable in accordance with the proper balance to be struck between the relevant considerations.

*The Normative Framework—The Competent Authority*

8. The legally competent authority in our case is the Traffic Controller. The Traffic Regulations-1961 identify the authority who has the jurisdiction to prescribe arrangements of the nature before us. Regulation 16 authorizes the Traffic Controller to determine the placement of traffic signs and road arrangements. Under the Regulation, the Traffic Controller is authorized:

- (1) To determine the design of traffic signs, their types, sizes, colors, forms, meanings, manner of placement and signals;
- (2) To determine traffic arrangements or to exempt from their use generally or in a particular case.

Moreover, under the Traffic Regulations, the Traffic Controller also serves as the Central Traffic Authority. In this regard, Regulation 1 provides:

Central Traffic Authority—The Traffic Controller appointed for any area in the State, or a person vested with the authority of the Central Traffic Authority, for the whole area of the state or a part thereof.

Regulation 17 enumerates the Central Traffic Authority's powers. Under this regulation, the Central Traffic Authority is permitted to allocate powers to the Local Traffic Authority to determine traffic arrangements. If these regulations are not complied with, the Central Traffic Authority is empowered to implement them itself. The following is language of the Regulation:

17. (a) The Central Traffic Authority is permitted to direct the Local Traffic Authority regarding the determination of traffic arrangements, their alteration, termination, and maintenance.
- (b) Where instructions as stated in subsection (a) are given, and the Local Traffic Authority does not comply therewith, the Central Traffic Authority may set out such traffic arrangements, which shall be regarded as if though they had been established, indicated, activated or terminated by the Local Traffic Authority.

Who is the said Local Traffic Authority? The notice regarding the appointment of traffic authorities (Y.P. 5730-2281) provides that the head of the Municipal Authority will function as the Local Traffic Authority. The bounds of the Local Traffic Authority's powers are set out in Regulation 18 of the Traffic Regulations, and includes posting traffic signs and indicators. As indicated in section 18(b), there are certain arrangements that the Local Traffic Authority is only empowered to determine "when set out, in writing, by the Central Traffic Authority."

In accordance with the Traffic Controller's order, the Central Traffic Authority determined that its local counterpart would be permitted to determine traffic arrangements under section 18(b) in the Jerusalem area, with the exception of "main thoroughfares and the city center." As it is undisputed that Bar-Ilan Street corresponds to the definition of a "main thoroughfare," the authority to determine the traffic arrangements in the location is vested in the Traffic Controller.

*The Normative Framework—The Minister of Transportation in his Capacity as Traffic Controller*

9. As we have seen, the Traffic Controller is the statutory authority charged with making decisions regarding Bar-Ilan Street. These petitions

here were directed against the Controller's decision to close Bar-Ilan Street during certain hours on Sabbaths and Jewish festivals, for a four month trial period.

After the hearings of the petitions began and the *orders nisi* and interim orders against the Traffic Controller were issued, the Minister of Transportation decided to exercise the powers vested in him under section 42 of the Basic Law: The Government, and to assume the Traffic Controller's powers regarding the issues under discussion here. The Minister explained his decision in section 10 of his additional affidavit. In the Minister's own words:

In light of the Court's decision, which linked the closure of Bar-Ilan Street to the setting of comprehensive policy regarding Sabbath traffic in Jerusalem and across the country—policy predicated on a social covenant between the various sectors of the population—and bearing in mind that in accordance with that decision I established a public committee, that made recommendations to me regarding the broad issues involved, I have seen it fit to make a linkage between the various aspects relating to road closures. It is for this reason only, and until the entire issue is resolved, that I have decided to arrogate the Traffic Controller's authority in all matters relating to the decision to close Bar-Ilan Street, under Regulations 16 and 17 of the Traffic Regulations.

In exercising this authority, the Minister decided that:

Bar-Ilan Street will be closed to traffic on the Sabbath and Jewish festivals during prayer times, in accordance with the Sturm Committee's recommendation. For as long as the road is closed, Golda Meir Boulevard (The Ramot Road) shall remain open, as will the entrances to the city. A lane for private vehicles shall also remain open on Jaffa St, on Sabbaths and Jewish festivals.

The closing times shall be from one and three quarter hours before the entry of the Sabbath, from one and three quarter hours prior to the termination of the Sabbath and between the hours 07.30 - 11.30 during the Sabbath day”.

The terms “Bar-Ilan Street” refer to both Bar-Ilan and Yeremiyahu roads, including the section stretching from the Shamgar intersection to the Shmuel HaNavi intersection.

10. While the personal identity of the empowered individual changed when the Minister assumed the powers of the Traffic Controller, the nature of the authority and its scope remained the same. Clearly, there is a difference between the Minister and the Traffic Controller. His experience is different and his perspectives are also liable to be different. This, however, does not change the powers that the Minister assumed from the Controller. Indeed, the normative context relevant to the exercise of these powers remains unaffected, as does the purpose for which the authority was initially bestowed. Similarly, the framework of considerations relating to the exercise of the authority remain unchanged. *See* H CJ 5277/96 *Hod Matechet Ltd. v. Minister of Finance* [66], at 867. The only thing that changes is the personal identity of the entity in whom the authority is vested.

So notes Professor Zamir in his book, 2 *The Administrative Authority* 586-87 [91], when discussing an example of the Minister of Transportation appropriating the Traffic Controller’s authority. On this subject, Professor Zamir writes:

In my opinion, it is preferable, both academically and practically, to say that the assumption of authority, as well as its delegation, does not transfer authority from one organ to another. Instead, it merely adds another organ to the administrative authority. The Traffic Controller is the natural locus where these powers vest. It is there that the authority in question is surrounded by all of the

pertinent considerations, related to the essence of the Traffic Controller's function and to special provisions relating to the Controller's relationships with other authorities. Consequently, there is no justification for uprooting the authority from its natural locus and transferring it to the "foreign environment" of a different authority...

Likewise, difficult problems are liable to arise between the two authorities involved were the assumption of authority to have the effect of transferring powers from one authority to the other. For instance, is the assuming authority...entitled to strike down or alter a decision made by the original authority? This question arises because, generally, a decision may only be struck down or altered by the same authority that adopted it.

Prof. Zamir further notes that this difficulty may be resolved by presuming that a Minister who assumes the powers of an administrative authority embodies that statutory authority. Thus, "when the Minister of Transportation assumes and exercises the Traffic Controller's authority, he is regarded as the Traffic Controller. The Minister is permitted to do anything that the Controller is empowered to do, and he is under the same duties as the Controller." *Id.* I fully concur with these words which, in my opinion, are appropriate for the issue before us. They suggest that, in order to ascertain the legality of the Minister's decision's here, we must examine the framework of considerations that the Traffic Controller, as a statutory authority, was permitted to consider.

11. Another point must be made. Our concern is with the Minister of Transportation's decision, in his capacity as Traffic Controller. The Minister is a religious person. He was elected to serve as a Member of Knesset on behalf of a party whose goals are religious. Naturally, this fact is liable to influence the policy that the Minister adopts.

Nevertheless, this fact must not be allowed to alter our assessment of his decision's legal validity. The issue before the Court is whether the Minister made reasonable use of the authority which he appropriated from the Traffic Controller. Issues regarding the exercise of statutory authority are not decided by reference to the person who holds the position. Rather, any assessment of reasonableness is normative, and focuses on whether an act is an act that a reasonable authority, responsible for that particular matter, would be permitted to take. The issue here is whether the decision reasonably balances between the values at stake. The substance of these values and their relative weight are not affected by the personal identity of the individual exercising the authority. As Justice Barak stated in H CJ 389/80 *supra*. [30], at 439-40:

Unreasonableness is measured in accordance with the standard of the reasonable person. This is an objective test. The question is not what the authority actually did, but rather that which it ought to have done. In this context, the reasonable person is the reasonable civil servant, in the place and position of the civil servant who actually made the decision at issue. The question is, therefore, whether a reasonable civil servant, in the situation of the civil servant who adopted a particular decision, would have likely adopted the decision in question, under the circumstances....

The administrative authority is obviously not identical to the actual clerk whose decision is being reviewed, despite the significant degree of "subjectification" of the "objective" authority, which does not operate in a vacuum, but rather under concrete circumstances.

Justice Barak revisited this point in *Ganor* [16]:

Reasonableness is not a personal matter, but a substantive one. It is not the reasonableness of he who actually adopted the decision



that renders the decision reasonable, but rather the reasonableness of the decision itself that allows the person adopting it to be deemed reasonable.

This being the case, the Minister's own worldview should not influence our judicial review. The judicial review is, first and foremost, forged from the considerations that the Traffic Controller ought to have taken into account in exercising his authority in the matter before us. With these preliminary remarks, I shall now proceed to the examination of these considerations.

*The Normative Framework—The Traffic Controller's Discretion*

12. In this case, we are dealing with the Traffic Controller's authority in his capacity as the Central Traffic Authority. This authority relates to the proper regulation of road traffic, indicated by the specific definition of the term "signpost," as it appears in the Traffic Regulations. The term is defined as "any indication, sign or signs, including a traffic light, as determined by the Central Traffic Authority, which was positioned or posted with the Traffic Authority's authorization or consent in order to regulate road traffic or in order to warn or guide pedestrians."

The basic purpose that these signs are intended to serve is the regulation of road traffic. The regulation of traffic requires extensive technical expertise. See HCJ 398/79 *Abdalla v. Mayor of Nazareth* [67], at 526. First and foremost, it involves the ability to make professional decisions which will create a well organized, balanced transportation system, one that guarantees the optimal levels of efficient, speedy and safe traffic movement. The central consideration here must be ensuring safe and efficient transportation. This is the central consideration that the Traffic Authority must take into account when exercising its powers.

This Court pointed this out in *Abdalla, supra*. [67]. There, in deliberating the legality of a decision of the Traffic Authority, the Court

held, *Id.* at 525, that “in positioning signs, the Authority must be guided exclusively by transportation considerations.” The Court clarified the matter of transportation considerations:

The matter of signs, including their posting and their removal, are not static issues. Rather, their change is a function of what is required in order to fulfill the objectives which the Traffic Ordinance is designed to regulate. Thus, what may have been suitable yesterday in terms of the requirements of traffic arrangements in a particular area may no longer be appropriate in light of the prevailing circumstances, and may be even less suited to tomorrow’s needs, given the changes in the numbers of cars, the character of the area, population density and other such changes, occurring on a daily basis.

*See also* HCJ 379/71 *Levy v. The Municipality of Petach-Tikva* [68], at 788; HCJ 112/88 *The Local Committee for Planning and Building, Ramat-Gan v. The District Committee for Planning and Building, Tel-Aviv District* [69]

Indeed, the Minister of Transportation himself spoke similarly in a Knesset debate (session number ten, of 10.7.1996, at 433), stating:

The considerations guiding the Traffic Controller in deciding to close a given street must, first and foremost, be professional, traffic-related considerations.

13. This Court has emphasized that the central considerations of the Traffic Authority’s powers must be professional and traffic-related. This does not, however, imply that the Authority is precluded from taking more general considerations, which touch on the influence of road-traffic on other interests, into account. Indeed, the broad administrative legal rule remains that “the fact that the executive branch takes general public considerations into account, even when these stray from the specific area it is charged with,

does not invalidate the decision.” See HCJ 612/81 *supra*. [13], at 301. This broad principle is equally applicable to the Traffic Controller. Thus, the Court held that, in approving bus lines, the Controller need not limit his considerations to transportation factors—he may also take into account the public interest in the efficient use of public funds. In another case, HCJ 1869/95 *Gasoline Import Company v. Minister of Transportation* [70], the Court held that in prescribing regulations for the transport of petrol, the Controller may also consider factors related to free competition. *Id.* at 569-70.

This general principle also relates to the feelings of the religious public, which are legitimate considerations for the Traffic Controller to take into account. Thus, for instance, the *League* [1] case dealt with the Traffic Authority’s decision to close part of the road adjacent to the “Yeshurun” Synagogue on Sabbaths and Jewish holiday, since the worshippers were disturbed by traffic. In its decision, the Court ruled, *Id.* at 2668, that it was permitted to take religious feelings into account:

There can be no doubt that the respondent was taking into account a religious interest in considering the fact that motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably. There is no fault in that—just as there is no fault in considering cultural, commercial, or health interests, provided that they affect a significant part of the public.

A similar approach was taken in *Baruch* [2], a case dealing with the Traffic Authority’s decision to close part of Hashomer street in Bnei Brak to motor traffic on Sabbaths and holidays. In that instance, Acting President Landau ruled that the Traffic Controller was permitted to take the feelings of the local population into account and further held that “ensuring the Sabbath rest, in accordance with the lifestyle of the interested public, is within the Traffic Controller’s authority to regulate road-traffic.” *Id.*

I will revisit these two judgments and discuss them at length below.

14. In this context, we should mention that, although religious considerations and the matter of religious sensitivities are legitimate factors, they cannot become the central element in the Traffic Controller's decision. The Controller should, above all, consider transportation-related and professional factors. Other, more general factors, including consideration of the observant public's religious sensibilities, are peripheral and cannot prevail over transportation considerations. The "religious" consideration, being peripheral, cannot become the central factor in the Controller's decisions regarding the regulation of traffic. Thus, as more importance is accorded to transportation-related considerations pulling in one direction, proportionately less weight will be accorded to religious sensitivities pulling in the opposite direction.

This Court adopted this line of thought as far back as *Lazerovitz* [5]. In *Lazerovitz* [5], the Court held that it was within the Food Controller's authority to "weigh many factors, including economic, financial, sanitary, psychological and, in certain cases, even religious factors." *Id.* at p.55. The Court, however, qualified these comments, stating that these factors must be limited to cases where the actions of the Food Controller were "seriously and faithfully geared towards fulfilling his legitimate functions as a Food Controller regulating food consumption, in which case there was no fault in incidentally taking religious considerations into account." *Id.* at 55-56.

From this it is clear that professional considerations must be the primary considerations guiding the Traffic Controller. General considerations of religious needs are peripheral and cannot overshadow the specific considerations central to the powers of an administrative authority. We rendered a similar ruling in H CJ 1064/94 *supra*, [52]. The issue there concerned Regulation 273 of the Traffic Regulations. That regulation dealt with the certification of licensing centers, that were to check vehicles for their mandatory annual license test. In that context, the Court said, *Id.* at 817:

We may identify two central factors which the respondents should have considered. The first is road safety—the maintenance of vehicles in proper working order. The second involves encouraging free enterprise.

In weighing these factors, the Court granted greater weight to the purpose underlying the regulation. There, this purpose was guaranteeing the safety of motor vehicles. This was the central consideration, forming the very kernel of the grant of authority. Considerations relating to free enterprise were permitted, but only as incidental to the central consideration. In the event of a conflict between the two considerations, the specific consideration would prevail over the general desire to encourage free enterprise.

This is also the rule here. In other words, while the Traffic Controller was permitted to take the religious sensitivities of the observant community into account, this consideration cannot form the basis of his decision. Instead, the Controller's considerations must be primarily based on transportation considerations.

15. We have examined the framework in which the Controller must exercise his discretion. We have seen that the Controller is not limited to transportation considerations, and may consider general values which are affected by his decisions. For our purposes, three central values demand our attention—the freedom of movement, the freedom from religion of those who wish to freely travel on the Sabbath, and the right of the religious public not to have their religious sensibilities offended. I will briefly relate to each of these values.

*Freedom from Religion*

16. “Every person in Israel enjoys freedom of conscience, belief, religion and worship. This freedom is guaranteed to every individual in an enlightened democratic society, and is therefore guaranteed to every person

in Israel. This constitutes one of the basic principles upon which the State of Israel was founded.” H CJ 292/83 [47], at 454. The public’s right to freedom from religion is also included within the ambit of the freedom of religion and conscience. “It is a supreme principle in Israel, based on both the rule of law and this Court’s rulings, that Israel’s citizens and its residents are guaranteed freedom of religion and freedom from religion.” H CJ 3872/93 *Meatrael* [6], at 506 (Cheshin, J.) I noted, in same case, that “the notion of freedom of religion, on the one hand, and freedom of conscience, including freedom from religion, on the other, is expressed by the phrase “each man shall live by his faith.” *Cf.* Habbakuk 2:4 [111] *See Meatrael* [6], at 197. Justice Berenson made reference to this same principle in H CJ 287/69 *supra.* [53], at 364:

It is true that people must respect each other’s feelings, including religious sensibilities and beliefs and, wherever possible, refrain from infringing them. This is a supreme moral imperative, in the absence of which organized community life would not be possible. But this imperative applies to all. Just as Reuben must respect Simon’s religious feelings, so too must Simon respect Reuben’s free way of life, and refrain from attempting to force his ideas and beliefs on his neighbor.

In a similar vein, I wrote in *Meatrael* [6], at 501:

It seems to me that in striking the delicate balance between freedom of religion and freedom from religion, it must be properly remembered that the mere fact that a certain segment of the population holds particular beliefs and opinions and has different behavioral patterns does not warrant preventing them from continuing to think, believe and behave in accordance with those different beliefs, patterns and customs, even if they offend another section of the public.

Closing a road to traffic on the Sabbath is, to a certain extent, religious coercion of the secular population, who is not observant of the Sabbath. A road closure prevents motorists from using the road of their choice. It may prevent them from reaching the home of a local resident or bar them access to the road's speed and convenience. Justice Vitkon emphasized this point in *Baruch* [2], at 166:

I am distressed by the trouble caused to the public that does not observe religious commandments or does not see the use of vehicles as transgressing the sanctity of the Sabbath. I am convinced that closing the road constitutes religious coercion with respect to that population.

Obviously, I agree that freedom from religion is neither the single nor the exclusive interest at stake. Indeed, freedom from religion is not absolute and must be balanced against other values, with which it may conflict. To this effect, my colleague, Justice Barak, stated in *Ressler* [33], at 501, that "the need to guarantee freedom of religion and prevent religious coercion does not preclude us from considering the needs of the religious population." In a similar vein, in HCJ 6111/94 *Guardians of the Tradition v. Committee of Chief Rabbis* [71], at 105-06, I noted that:

A person's right to freedom of conscience, including freedom from religion, is not absolute and, at times, may be overridden by other considerations...

Quite often, a conflict may arise between those wishing to live a secular lifestyle and others desirous of maintaining a religious way of life.

As such, we must examine other interests which bear on the dispute here.

*Freedom of Movement*

17. In Israel, freedom of movement is guaranteed as a basic right. *See* H CJ 672/87 *supra*. [54], at 709 (Barak, J.) It includes each and every person's right to exit the State. *See* Cr. Motion 6654/93 *supra*. [55], at 293. It also encompasses a person's freedom to move freely throughout and across the State of Israel. *See* H CJ 153/83 *supra*. [22], at 401. As such, this freedom also includes every individual's freedom to travel "freely in areas intended primarily or exclusively for traffic and transit." PL. Cr. A 6795/93 *Aggadi v. The State of Israel* [72], at 701. This right is essential to individual self actualization. It has not lost any of its significance in modern times. Of late, we have been witness to the development of electronic modes of communication that "shorten" the distance between places and allow people to perform tasks from their homes, for which, in the past, they had to leave their place of residence. This includes both work and academic studies. As the Chief Justice of the American Supreme Court noted, freedom of movement "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *See Kent v. Dulles*, 357 U.S. 116, 126 (1958) [85].

Justice Berenson, addressing the matter of motor traffic on Sabbaths and festivals in CA 217/68 *supra*. [12], at 363, also insisted on the fundamental nature of freedom of movement:

The use of private vehicles is becoming increasingly indispensable for maintaining the economy and meeting the social and cultural needs of both individuals and society, particularly in light of the lack of public transportation on Sabbaths and holidays.

Bar-Ilan Street's closure to traffic constitutes an infringement of this basic freedom, as Acting President Landau pointed out in *Baruch* [2] *supra*., at 163:



Halting traffic because of the wishes of the Ultra-Orthodox infringes the freedom of movement of those interested in using their vehicle as they wish on Sabbaths and holidays.

This having been said, this right, like freedom from religion, is not absolute. For example, it may retreat in the face of the freedom to demonstrate, as Justice Barak clarified in H CJ 148/79 *supra*. [24], at 177-78.

*Harm to the Sensibilities of the Religious Public*

18. The harm caused to the feelings of the religious public residing on and around to Bar-Ilan Street, must also be taken into account. Of course, "only the Knesset can impose the observance of religious commandments. Not only must this authority to coerce be prescribed by primary legislation, it must also be specific and explicit." *Meatrael, supra* [6] at 507 (Cheshin, J.). This having been said, "The observant are entitled to and worthy of protection, as is any other group in Israel, and freedom of religion gives rise to the need for such protection." *Id.* As a result, religious feelings are also entitled to protection. Our jurisprudence recognizes the need to safeguard these feelings as part of the public order, in its broad sense, as held by President Barak in H CJ 14/86 *supra*. [35], at 430:

"Public order" is a broad concept, which is difficult to define, and whose definition varies depending on the context in which it is defined. In the context at bar, public order includes threatening the state's existence, harming the democratic regime, public peace, morals, religious sensibilities, a person's reputation, and fair judicial proceedings, as well as other matters that touch on the issue of public order.

This consideration also served as a basis for the Court's decision in *Baruch, supra*. [2], dealing with the decision to close Hashomer street on Sabbaths and Jewish holidays. It therefore follows that religious feelings are

a factor that an administrative authority may take into account. Nevertheless, our case law remains apprehensive of this element. *See* HCJ 230/73 *supra*. [10], at 119 (Eztioni, J.).

The Ultra-Orthodox residents living in close proximity to Bar-Ilan Street argue that motor traffic on that street on the Sabbath and festivals offends their religious sensibilities. I do not dispute that these individuals are in fact offended as a result of the stark contrast between their Ultra-Orthodox lifestyle and traffic on the Sabbath. It reflects the local residents' profound belief in the sanctity of the Sabbath and their commitment to this idea. We must not forget that "religious perspectives are deeply intertwined with each individual's conscience." HCJ 806/88 *supra*. [9], at 39. Similarly, the harm caused to the Ultra-Orthodox public reflects the fact that members of that population residing on Bar-Ilan Street are a "captive audience" of sorts, compelled to witness the desecration of the Sabbath against their will. As a result, in principle, the right of the Ultra-Orthodox public not to be offended is worthy of consideration.

Understandably, the protection extended to religious feelings is not a value that developed in a vacuum. Nor is it an absolute value. The protection accorded this value must take into account the existence of other circumstances. In the final analysis, it is a question of balance, the subject to which we now turn.

#### *Balance*

19. Balancing between different values is often difficult, given the difficulty involved in identifying the proper weight that must attach to each individual value. At this juncture, we shall recall that, in striking the appropriate balance, it is incumbent upon us to consider the fact that "to a certain extent, a democratic society recognizes harm to religious feelings as an injury. Only in this manner will it be possible for different religious viewpoints to coexist." *See* HCJ 806/88 *supra*. [9] (Barak, J.)

The question is therefore whether the Minister's decision reflects a reasonable balance between the relevant considerations. We shall recall that "reasonableness refers to weighing all the relevant considerations and attaching the proper weight." *Ganor supra*. [16], at 513. This and more: "the very fact that the administrative authority took all the relevant considerations, and only those, into account is not sufficient to ensure the decision's reasonableness. Even a decision that took all the relevant considerations into account shall be deemed unreasonable if it failed to attach the proper weight to the various factors." HCJ 4267/93 *A.M.I.T.I.-Citizens for Efficient Government v. The Prime Minister* [73], at 464.

From these statements, as well as from our analysis above, we see that, in reviewing the Minister's decision, the Court must examine whether the solution chosen confers the appropriate weight on the central factor of transportation, which constitutes the fundamental normative consideration relevant to the arrangement before us.

In addition, it is incumbent upon us to evaluate whether the chosen solution is the product of a proper balance between the interests at stake. In so doing, we must examine whether the solution is a balanced one, capable of preventing infringements on certain interests, while ensuring that this does not come at the expense of interests lying on the other side of the debate. Thus, it is necessary to examine whether the solution adopted both prevents such inequality as would result from preferring one interest over the other, as "considering the feelings of A, at B's expense, is tantamount to inequality: A will continue living the lifestyle of his choice, while B will be compelled to live in a manner that goes against his beliefs, in other words, he will be forced to endure religious coercion." *Meatrael supra*. [6], at 501. In the final analysis, we must recall that "the matter is one that involves balancing legitimate interests related to closing or opening the street in question." *Baruch supra*. [2], at 166-67 (Vitkon, J.).

The issue to which I will now turn is whether the Minister's decision strikes the requisite balance.

20. In evaluating the solution for which the Minister opted, I feel that three fundamental matters regarding the reasonableness of the Minister's decision must be emphasized. The first is the character and importance of Bar-Ilan Street as a main traffic route. Second, we must examine the harm to the local secular residents and to the rest of the public served by Bar-Ilan Street on the Sabbath. Third, we must examine the lack of any change in the objective data that would justify a change in a long-standing arrangement.

To my mind, these factors were not given the weight that they deserve. I shall now address them.

21. *The road's character and importance.* Above, we dwelt at great length on the nature of Bar-Ilan Street. We saw that the street is public property, which remains at the public's disposal. It is a road accommodating a significant amount of vehicles, including on Sabbaths, despite recent violent incidents disrupting the free-flow of traffic in the area. We have also seen that this road serves the population inhabiting Jerusalem's largest neighborhoods. In effect, the street is the principal link between these neighborhoods. As such, the road is the main road for all those entering the city from outside, whose destination is one of Jerusalem's northeastern neighborhoods. For some of these people, the Sabbath is the only day of the week when it is possible to visit Israel's capital. It is a main road, constituting a chief traffic artery, not a local inner street. As the Traffic Controller suggested in his letter to the Minister of Transportation, "the Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem's northern neighborhoods to the city's center and south, every day of the week."

22. This fact is of utmost importance. In balancing, significant weight attaches to the issue of whether we are dealing with the private or public domain:

The interests of the observant population's are quite weighty, perhaps even determinative, within the privacy of their own

homes. However, the further one travels from his home, and the closer one is to touching the public domain—or on another's private domain—or when one's request involves his fellow's rights, so too will the strength of one's interests be weakened, as it will be balanced against the rights of his neighbor, in the latter's public or private realm.

*Meatrael supra.* [6] at 508 (Cheshin, J.). Justice Cheshin clarified that “protection may be extended to the observant individual's ‘extended’ household.” *Id.* However, as far as we broaden the scope of the “private domain,” it would still not include a public road like Bar-Ilan. For our purposes, we are not dealing with an inner street, connecting other local neighborhood streets. Instead, we are dealing with a main street, serving a very large population and a significant number of vehicles daily, including on the Sabbath. A road such as this cannot be considered the “private” domain of the community residing in its vicinity, nor can this community dictate its use. It belongs to the public at large. As such, it cannot be expropriated from the public, either in whole or in part.

23. This was the policy adopted by the Ministry of Transportation. We have already seen that the Ministry has decided that traffic arrangements on Bar-Ilan Street and similar streets shall be determined by the Traffic Controller, not the Local Council. This teaches us that roads such as these are not considered to be part of the private domain, even broadly defined. Rather, they are deemed to be public property. Consequently, a national traffic authority, rather than a local one, was appointed to preside over it.

Moreover, from the outset, the Ministry's policy regarding traffic arrangements reflected this distinction between the private and public realm, as implied from the Traffic Controller's statements at the meeting held on August 15, 1996. On that occasion, the Controller addressed the policy of Sabbath street closures, asserting: “to the best of my knowledge, no other traffic arteries are closed...as a rule, traffic arteries must remain open. The

act of closing a traffic artery is most drastic.” See page 12 of the meeting’s protocol.

I am convinced that this policy is appropriate. In my opinion, it reflects the proper balance between the needs of all communities. The neighborhood’s inner or side streets, situated alongside Bar-Ilan, are closed to traffic on Sabbaths and holidays throughout the day. This is appropriate. The population residing in the vicinity of these streets is essentially Ultra-Orthodox. Under these circumstances, the value of preventing offensive to religious feelings prevails. In this manner, the religious community’s needs, its sensibilities and lifestyle are to be taken into account. Closing these side streets, while allowing the main street—on which many wish to travel on Sabbaths—to remain open, is a compromise between the needs of Jerusalem’s secular community, including the needs of those coming to visit the capital from every corner of the country, and the needs of Bar-Ilan’s Ultra-Orthodox public. We must not forget that “in a society that includes those of different faiths, as well as those with no faith at all, it is only appropriate that mutual understanding reign. A pluralistic society such as ours requires mutual tolerance. A compromise is necessary.” H CJ 6111/94 *supra*. [71], at 105. The emphasis is on the mutuality of the tolerance. With all the consideration that the religious feelings of the local residents warrant, this factor is not the only one to be taken into account; a compromise is necessary. It is also necessary that there be understanding and tolerance on the part of the Ultra-Orthodox for the needs of those who does not observe the Sabbath and for whom the use of Bar-Ilan Street is essential.

Such a compromise reflects the fact that consideration of the needs of the Ultra-Orthodox community has its limits. These limits are premised on the imperative to also consider the needs of another community, one which shares Jerusalem with the Ultra-Orthodox. Consideration of these needs demands that main streets, like Bar-Ilan, remain open. In this manner, the wishes of the observant community are properly recognized, while the nature of the road in question—an important traffic artery—is also taken into account.

To my mind, and in this I disagree with my colleague, the President, this balance in no way deviates from the “threshold of tolerance” required of the Ultra-Orthodox population in a pluralistic and democratic society such as ours. With no disrespect intended towards the genuineness of the latter’s feelings, the proper balance between the interests does not allow the harm to these feelings to outweigh traffic considerations and the interest in keeping Bar-Ilan Street open to the public at large. This and more: harm to religious feelings cannot prevail over every individual’s basic freedom to travel freely in the public realm, in accordance with his wishes, where the place in question was intended for public use.

24. In order to highlight the street’s importance, it is appropriate to revisit the Traffic Controller’s statements in his letter to the Mayor of Jerusalem, Mr. Olmert, dated November 29, 1994. The letter in question, as noted, was written on the heels of “media publications and incidents on the street,” with the intention that discussions regarding the proposed closure of Bar-Ilan Street to traffic on Sabbaths take place. The Controller was aware of the Ultra-Orthodox demands to close the street to traffic on Sabbaths. In this context, the Controller suspected that Jerusalem’s City Council would decide to close the street, which would require his approval. The Controller decided to pre-empt such an attempt and apprise Mr. Olmert of his position. The following are the contents of the Controller’s letter:

The Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem’s northern neighborhoods to the city’s center and south, every day of the week. It would be unthinkable to close this route to traffic on the Sabbath or on any other day. Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

This is a clear position, premised on the importance of Bar-Ilan Street.

After the Traffic Controller wrote to the Mayor and received a response, he revisited the matter in a second letter to the Mayor dated January, 3 1995. In this second letter, he highlighted the need to secure the Central Traffic Authority's consent to Bar-Ilan Street's closure:

The following is a response to your letter attached herein.

In July of 1992, in accordance with regulation 18(b) of the Traffic Regulations-1961, the Central Traffic Authority determined the areas that fell within the jurisdiction of the City of Jerusalem, including the authority of the Local Traffic Authority to prescribe traffic arrangements.

A map marking the roads that were removed from the Local Traffic Authority's jurisdiction, by virtue of the same Regulation, is attached to this notice. Bar-Ilan Street is among those roads removed from the Local Authority's jurisdiction.

As such, Bar-Ilan Street is subject to the provisions of Regulation 18(c) of the Traffic Regulations-1961. Any traffic arrangement touching on Bar-Ilan, particularly one envisioning its closure, must be approved by the Central Traffic Authority.

As I have already stated in my letter dated November 29, 1994, I will not agree to Bar-Ilan Street's closure on Sabbaths and holidays, or on any other day.

These two letters set forth a clear and unequivocal position, according to which the Traffic Controller would not consent to the closure, as required by Regulation 18(c) of the Traffic Regulations.

During oral arguments August 15, 1996, the Traffic Controller was questioned regarding the change in his position, after having decided to close Bar-Ilan Street at certain hours on Sabbaths and Jewish holidays. He



did not reiterate Bar-Ilan's importance. Rather, he stated that, following a conversation with the Minister of Transportation, it became clear to him that his original position failed to give proper weight to the harm that Sabbath traffic on Bar-Ilan Street caused the local residents. I will not expand on the impression that the Controller's words made on this Court. Suffice it to say that his statements were not convincing. Indeed, his views regarding Bar-Ilan's importance on Sabbaths and festivals—in terms of transportation—did not change. As noted in his letter dated November 29, 1994, the Controller was already well aware of the harm caused to the religious sensibilities of the local Ultra-Orthodox residents. It seems that the only factor that precipitated the Controller's sudden decision to consent to Bar-Ilan's partial closure on Sabbaths was his willingness to conform to the opinion of his supervisor, the Minister of Transportation. There was no change in the relevant considerations that would justify such a change in position.

25. *The Local Secular Population.* No one disagrees that the majority of residents living on and around Bar-Ilan Street are religious. Likewise, all agree that a local secular population does exist, whereas detailed data as to its precise size has not been set forth. Nevertheless, it is clear that its size is not negligible.

Petition HCJ 5090/96, brought in part by local secular residents, argues that "numerous secular residents still live in the area, including many non-observant elderly couples who, on Sabbaths and festivals, are visited by their children," *see* para. 15 of the brief. Furthermore, this petition submitted, *see* para. 26, that "many of the local residents, being elderly, are not able to walk long distances and will therefore prefer to stay home [if Bar-Ilan is closed-off]. This would be tantamount to *de facto* house arrest for all those who do not believe that using one's vehicle on the Sabbath constitutes a desecration of the Sabbath."

For our purposes, it is sufficient to presume that closing Bar-Ilan Street on Sabbaths and Jewish holidays will not only cut off traffic from one end

of the city to the other, but will also block passage to those who, residing on and around Bar-Ilan Street, use the road to reach their homes and those of their loved ones.

26. Petition 5090/96 describes the distress experienced by two of the secular residents living in the area. Petitioner number three, Mrs. Avinezer, resides on Tzefania Street, a street adjacent to Bar-Ilan, and works at Hadassa-Ein Karem Hospital. Her work requires her to be on standby in case of a terrorist attack. As most of Tzefania Street's residents are Ultra-Orthodox, the street is closed on Sabbath, and petitioner number three, on weekends, is compelled to park her vehicle approximately three hundred meters from her home. Closing Bar-Ilan Street as well would force petitioner to park her vehicle over a kilometer away from her house.

Petitioner contends that her work sometimes requires her to reach the hospital as soon as possible. Thus, the petitioner fears that compelling her to park at a significant distance from her home "will prevent her from continuing in her position as terrorist attack standby personnel, while reducing the hospital's willingness to employ her for this important position."

Moreover, the petitioner fears that, in addition to interfering with her work, Bar-Ilan's closure will disrupt her personal life as well. The petitioner is a single woman who eats her Friday night dinner and Sabbath lunch at her brother's family's home in Jerusalem. Were she compelled to park her car about a kilometer away from her residence, as per the Minister's proposed plan, she argues that she would have to "march over five kilometers on Sabbaths in order to continue with her regular routine...this would be particularly difficult in seasons where the weather would render this even more difficult."

27. Let us proceed to the case of petitioner number four in HCJ 5090/96, Mr. Gabay. Mr. Gabay is a disabled IDF veteran, who has difficulty walking. His parents live on David Street, which crosses Bar-Ilan

Street, in the heart of the area closed to traffic. He and his family customarily visit them, at times on Fridays and other time on the Sabbath, during the hours that the Minister decided to close the street to traffic. Petitioner argues that enforcing this arrangement will prevent him “from seeing his parents on Sabbaths and holidays, or, in the alternative, will make it quite difficult for them to meet, causing severe physical and emotional suffering.” *See* para. 24 of the petition.

28. As noted, the Court was not presented with any detailed information regarding the number of additional secular residents living in the area, and the manner in which the Minister’s decision is liable to affect them and their families. It was argued that a significant number of the secular residents were afraid to voice their opinions. These examples here, in and of themselves, point to the concrete possibility that harm will come to these residents. They point to a serious threat to their quality of life, to their ability to properly lead their lives and perhaps even to their occupations. It would not be inaccurate to say that the above harm is made particularly severe by the fact that these petitioners have not been given the option to be heard. According to the material before the Court, the Minister failed to turn his attention to their plight.

29. It seems to me that this failure to address the issues pertaining to the secular residents constitutes a defect in the Minister’s decision. Indeed, the positions of petitioners three and four, both as individuals and as members of the relevant group to which they belong, were not given any weight.

I am therefore convinced that proper weight, and indeed, to my mind, significant weight, should have been given to the issues raised by the secular residents living on and around Bar-Ilan Street. This, however, was not done. There is no mention of the magnitude of this problem in either of the respondents’ briefs.

The only response found in these briefs is that the relevant balance is to be struck between two communities. I do not find this response

convincing. It implies that Bar-Ilan's secular residents form part of a more or less homogenous group, whose needs were taken into account by the Minister. This however is not the case. In his decision, the Minister considered the situation of the secular members of the public who use Bar-Ilan Street in order to get from one end of Jerusalem to the other and the alternatives available to them. He did not, however, distinguish between the secular public generally and the local secular residents, living on and around Bar-Ilan Street. The latter have additional, specific needs. Moreover, the harm to these residents is intensified in light of the fact that, due to the closure of most of the streets adjacent to it, Bar-Ilan is the only road open to traffic on Sabbaths and holidays, in the area in question.

Nevertheless, the fact that the street will be closed only partially, and only during particular hours that are specified in advance, can be seen as a mitigating factor. This is to say that local residents, and those wishing to reach them, have but to plan in advance. This however does not solve the problems associated with unanticipated trips, which are at times necessary. Nor does it solve the problem of the complications to the Sabbath routines of the local secular residents, and it fails to mitigate the fact that their freedom of movement is severely infringed as a result of the Minister's decision.

30. *The Absence of Any Change in the Original Conditions.* Acting President, Justice Landau pointed out in *Baruch supra.*, [2] at 166, that "we are dealing with interests of various segments of the population, whose characteristics may change. We will not do justice by weighing interests that no longer reflect the current situation." A change in circumstances is likely to justify altering the existing arrangements, even with respect to matters touching on freedom of religion and worship.

This having been said, we must bear in mind that "extending protection to the feelings of one part of the population is liable to infringe on the feelings of another part." *Meatrael supra.* [6], at 500. Indeed, the

fact that we are dealing with the subject of a sharp public controversy cannot be ignored. Moreover, we must remember that deciding such cases involves determining the character of the area and the city and, at times, even the character of the country. The case here has potential ramifications on the character of Israel's capital, Jerusalem, whose character is important to each and every Israeli citizen.

Furthermore, we must also recall that the decision to be rendered does not deal with a minor change. Instead, at issue is a sharp and drastic change to Sabbath traffic arrangements. Let us remember that, according to the Traffic Controller's statements, the policy of the Ministry of Transportation is that roads of this nature should remain open on Sabbaths. *See* p. 12 of the meeting protocol dated August 15, 1996. The Minister's decision, however, seems to indicate that this policy has been abandoned. To a certain extent, his decision has the effect of creating a new norm to balance the interests of the various communities involved.

Absent social consensus on these issues, any deviation from the existing arrangement involves harming one of the sides to this public debate. At times, harm of this sort may be justified under the circumstances. However, a decision to depart from the existing arrangements must be anchored in particularly well-grounded considerations. It must express a basic and substantive transformation in the facts on the ground.

31. Did a substantive change occur in the area in the last few years? The material before us suggests that the answer is in the negative. Indeed, the composition of the local population has not changed of late. For years, the great majority of the street's residents have been Ultra-Orthodox. For years, the street's character was what it is today. For years, alternative routes to Bar-Ilan have existed.

Even the Traffic Controller, who serves as the supreme professional authority for these purposes, cannot identify any change in the facts

which could have sparked a change in his position. He attributes his drastic change to the fact that “when I asserted that the street was not to be closed I failed to give the proper weight to the depth of harm that motor traffic on Sabbath on Bar-Ilan Street causes the local Ultra-Orthodox residents.” *See* para. 12 of the Controller’s affidavit dated 12.7.1996. I have already addressed the change in the Controller’s position. I merely wish to emphasize that, even according to the Controller himself, there has been no change in the facts on the ground.

It is not the existence of alternate routes that sparked the authority’s change in position. We have seen that in November of 1994 the Traffic Controller was convinced that it would be improper, from a professional, traffic-related perspective, to close Bar-Ilan on Sabbaths and holidays, despite the existence of alternate roads. It would not be excessive to repeat his statements to this effect, according to which:

The Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem’s northern neighborhoods to the city’s center and south, every day of the week. It would be unthinkable to close this route to traffic on the Sabbath or on any other day. Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

This position, as the Traffic Controller noted in his affidavit of July 29, 1996, is anchored in “clear traffic-related considerations.” Nothing has changed from this point of view. If so, what occurred that would justify a change in the authorities’ position? What caused the Traffic Controller, who staunchly opposed the idea of closing Bar-Ilan in November of 1994, to support the closure less than two years later? What caused the Minister of Transportation, Mr. Levy, to adopt a decision so different from that of his predecessor, Minister Yisrael Keisar, who only in July of 1996 determined that “the Traffic Controller’s professional

opinion is that the road is a main traffic artery not to be closed on the Sabbath” and that “the decision will be made on a professional basis?” See appendix 8 of the response brief of respondents 3-6 in HCJ 5016/96, summarizing the meeting between the Minister and the residents of Bar-Ilan Street on January 10, 1996.

32. The Tzameret Committee, which addressed the developments in the area, noted in page 33 of its report:

After the Six-Day War, Bar-Ilan Street evolved from a peripheral street at the northwestern part of the city, to a road connecting Jerusalem’s newly built Jewish neighborhoods.... The area has become the heart of the Ultra-Orthodox concentration on both sides of Bar-Ilan Street. Although demonstrations by Ultra-Orthodox groups on Bar-Ilan Street, all the way back to 1988, can be considered a turning point in the debate, the street's one-time closure in honor of the Satmar Rebbe’s visit in 1994 is what led to increased efforts among Ultra-Orthodox factions to close the street to traffic.

The municipal elections of 1993, which granted the Ultra-Orthodox community decisive influence, gave rise to expectations in that community that the street would in fact be closed to traffic on the Sabbath. Moreover, the existence of alternate routes further strengthened the feeling that the secular public should give in to the demands of the local Ultra-Orthodox residents and refrain from traveling in their midst.

The Traffic Controller explained his change of heart in terms of the magnitude of the harm caused the Ultra-Orthodox residents. However, there is no reasonable basis for presuming that any change has occurred in the intensity of this harm over the years. The desecration of the Sabbath involved in travel has always existed. The Ultra-Orthodox residents' position regarding the desecration of the Sabbath is well-

known, and has not changed over the years. Nor was there a change in the size of the local Ultra-Orthodox community. As such, it is difficult to suppose that the Traffic Controller was not aware that the Sabbath traffic gravely offends the local residents' sensibilities and lifestyle. Indeed, it is no secret that streets in different parts of the country, particularly those adjacent to Bar-Ilan, are closed for precisely this reason.

33. Hence, the change must be found somewhere else. It is indeed quite difficult to ignore the impression that the true change lies in the Ultra-Orthodox community's unwillingness to accept genuine mutual compromise. In addition, a clear escalation is apparent in the tactics used by quite a few members of the Ultra-Orthodox community in order to force a change in the situation, including the use of threats and violence. Moreover, there has also been a change in the extent of this community's political power, both locally in Jerusalem and nationally.

Violence does not constitute a proper consideration worthy of being attached any weight, and this has been repeatedly confirmed by our jurisprudence. See, for instance, President Landau's statements in H CJ 512/81 *supra*, [65], at 543, insisting that it is "absolutely forbidden" to take violence into account. From this perspective, the case at bar is not dissimilar to H CJ 549/75 *supra*. [40], which involved the Film and Play Review Board's decision to sanction the screening of the film "Night Watcher" in theatres. The Board revoked this permission after a second deliberation, and the film was barred. In his opinion, Justice Vitkon addressed the decision to abandon the original decision, stating, at 764:

In my opinion, it is improper to deviate from the original conclusions simply because of the inability of certain factions to reconcile themselves with the Board's decision. Is the Board not aware that with every sensitive issue—whether sexuality, nudity, violence or offense to religious sensibilities—there will always be a minority, or perhaps even a majority, who will prefer that such a film not be publicly screened? However, he



who believes that such a film should nonetheless be presented, is by the same token convinced that these objections, although sincere, should not be taken into account. This is the "other side" of mutual tolerance required in pluralist societies. If these objections give rise to the possibility of violent outbursts, this is a matter for the police to deal with in order to protect the public and preserve law and order. It is not, however, a consideration that should in any way influence a Board member to censor a film which, in his original opinion, was worthy of being screened.

To this, I will also add that developments regarding the Ultra-Orthodox community's standing in Jerusalem and its political clout cannot be allowed to influence the proper balance here. The proper balance must consider the facts on the ground and the local population's composition. It must take into account the road's size and importance. It cannot be influenced by the political clout of those who do not live adjacent to Bar-Ilan Street.

34. I summarize: none of the data presented before us can possibly justify deviating from the arrangement customary on Bar-Ilan Street for years now. No relevant change in the situation on the ground was pointed out. No consideration liable to prevail over considerations of transportation was shown. Moreover, I reiterate: the fact that the Minister is a religious, observant man is not a factor or reason that can justify closing Bar-Ilan Street on the Sabbath.

35(a). We have described the essence of the debate. We have examined the Minister's decision and the applicable standards. We have surveyed the defects in the Minister's exercise of discretion. We conclude that, according to the proper standards, the Minister's decision does not reflect a reasonable exercise of the authority vested in him. Indeed, the Minister failed to take into account all the relevant considerations and did not give the proper weight to all factors.

(b) It seems to me that the Minister did not give proper weight to Bar-Ilan Street's nature and character. His decision suggests that it is not clear whether he considered all the relevant data regarding the scope of traffic on that street. In any event, this data is not set out in the Minister's brief. One way or the other, the Minister did not consider the fact that he is dealing with a main traffic artery, which cannot be viewed as a "private domain," belonging to the Ultra-Orthodox community living alongside it. As such, the Minister did not give proper weight to positions of professionals charged with the matter—professionals who originally claimed that, from a traffic perspective, Bar-Ilan must necessarily remain open on Sabbaths and Jewish holidays.

(c) The Minister took into account data indicating that those seeking to reach Jerusalem's northern neighborhoods from the entrance to the city will be able to reach the northeastern neighborhoods even subsequent to Bar-Ilan's closure. According to this data, closing the street will lengthen the travel time between the city's entrance to the Sanhedria Intersection by 1.5 km, or two minutes, via Route no. Four. The residents of western neighborhoods, such as Beit HaKarem and Yiryat Yovel would also have access to Route no. 4. The Traffic Controller further notes that the northern neighborhoods' residents have the option of directly exiting the city via Route no. Four to Tel-Aviv or via the Modi'in Road (Route no. 443). As for the additional time such a detour would take, the Tzameret Report suggests that it is similar to the extra time it would take to reach the city's northwest. *See* the Tzameret Committee Report, at 166.

I believe it is difficult to see these facts as changing the balance in the matter before us.

First, this description is no solution for those seeking to reach the Bar-Ilan Street area on Sabbaths, neither for those who live there nor for those who wish to visit the local residents.

Second, I am not convinced that the extra travel-time is negligible. Thus, in *Baruch* [2], a detour of two and a half additional kilometers was understood by Acting President, Justice Landau as a factor acting against allowing the Traffic Controller's decision in that matter to stand. This was also Justice Vitkon's view. Nevertheless, both these judges upheld the decision, essentially because the resulting harm was limited to no more than fifty vehicles. *Id.* at 166. Needless to say, the matter before us is dramatically different. As noted, the road in question is central to Israel's capital, serving not only Jerusalem's residents but all those visiting the city. In light of the above, I do not believe that the availability of Route no. Four renders the Minister's solution of choice palatable from a traffic perspective. We recall that, despite the existence of Route no. Four, the Controller's professional opinion, from the end of 1994 to March of 1996, was that Bar-Ilan should not be closed.

Third, in HCJ 5090/96, the petitioners contend that the detour, Route no. Four, "passes through Shuafat Ridge, a recently built Ultra-Orthodox neighborhood, and adjacent to the Ramot neighborhood, itself containing a significant number of Ultra-Orthodox residents. It is no secret that the Ultra-Orthodox residents of Shuafat Ridge and Ramot also desire this street's closure." *See* para. 19 of the petition. To this we should add that the area where Route no. Four connects with the Shmuel HaNavi Intersection is also populated by Ultra-Orthodox residents. With this in mind, it is difficult to see the detour via Route no. Four as offering a reasonable alternative to Bar-Ilan's users.

Indeed, it would appear that rerouting traffic to Route no. Four merely redirects the harm from one street's (Bar-Ilan) Ultra-Orthodox community to that of another, the alternate route, which is equally Ultra-Orthodox. Moreover, rerouting Sabbath traffic to the alternate route intensifies the desecration of the Sabbath, by increasing the requisite travel time.

(d) The Minister decided that Bar-Ilan Street would be closed during certain hours on Sabbaths and Jewish holidays. He imposed an intermittent closure of the street to traffic on those days or, in the colorful words of Justice Cheshin, a “zebra” like closure. Thus, for part of the Sabbath, the street would remain open, while it would be closed for the other. Part white, part black, with every person deciding what they feel is which. At first glance, this approach seems to consider the needs of those who wish to use the road on the Sabbath. Upon closer examination, however, it becomes apparent that this arrangement is riddled with difficulties. Knowing that the road will be closed during certain hours, motorists will fear not being able to reach it in time, which will undoubtedly deter many of them from arriving in the first place. Furthermore, the Minister decided that the road will be closed for a period following the entrance of the Sabbath and for a period prior to its end. These times, however, vary with the calendar, and not all are familiar with them. As such, a partial closure is liable to become quasi-absolute.

Beyond this, there is an additional practical difficulty. The material submitted to us suggests that the road will turn into a pedestrian walkway of sorts for the Ultra-Orthodox during the hours that it is closed to traffic. In light of the members of the local Ultra-Orthodox community’s sworn testimony, detailing their staunch belief that the street should remain closed throughout the Sabbath, it is quite difficult to see how the road can be safely cleared of pedestrian traffic so as to allow motorists to use it during the times reserved for such use. This fact too is liable to effectively turn the Minister’s decision to one that brings Sabbath motor traffic on Bar-Ilan Street to an absolute halt.

(e) And so, I believe that as things stand, the Minister’s decision to close the street, even partially, in order to spare the religious sensibilities of the Ultra-Orthodox public, fails to reflect a reasonable balance between the relevant considerations. In truth, the harm to the religious public’s sensibilities is beyond question. However it seems to me that,

under the circumstances, and in light of other factors, this harm does not justify the Minister's decision to close the street. To my mind, the Minister's decision fails to strike a reasonable compromise between the various interests. This being the case, I am convinced that the decision is unreasonable and must be struck down.

36. My conclusion is not altered by the recommendations of the committees that addressed the matter of Sabbath traffic on Bar-Ilan Street, nor by our case law on similar issues. I will now turn to briefly examine both these issues.

#### *The Committees*

37. The first committee to broach the matter was headed by Mr. Elazar Sturm. This committee was set up by the Mayor of Jerusalem in December of 1994 to examine traffic arrangements in Jerusalem. The Committee's recommendations were published in 1995, and touched on a number of Jerusalem streets, including Bar-Ilan. The Committee recommended that Bar-Ilan be closed to traffic on days of rest during prayer times only—105 minutes on the Sabbath eve, four hours on Sabbath morning, and 105 minutes before the end of the Sabbath.

In retrospect, it became clear that this Committee was misled by inaccurate data regarding the volume of traffic on the road. Thus, appendix 9 to the respondents' response in HCJ 5016/96, which summarizes the meeting that took place on February 13, 1996 at the Minister's office, with the participation of the Mayor of Jerusalem and Mr. Sturm, indicates that the latter believed that there is a decrease in the volume of traffic on the Sabbath—from 15,000 vehicles to only 3,500. Moreover, he was under the impression that only 700 vehicles would be affected by the street's closure during prayer times. In addition, the Traffic Controller's affidavit of July 29, 1996 indicates that the Sturm Committee felt that traffic on Bar-Ilan Street on Sabbaths amounted to only 12% of weekday traffic.

38. Comparing this data with the data that surfaced following a subsequent professional examination reveals that the original data was erroneous. It appears that the volume of traffic weekdays stands at about 50,000 vehicles—over three times the data presented before the Sturm Committee. On Sabbaths, traffic on Bar-Ilan stands at over 13,000 vehicles, once again three times the figure presented to the Committee. That figure constitutes 28% of weekday traffic, not 12% as the Sturm Committee believed. Over 5,000 vehicles pass through Bar-Ilan Street during prayer times on the Sabbath—*over seven times more* than the Sturm Committee had estimated! As such, the Sturm Committee's conclusions cannot be seen as carrying any weight for our purposes. These conclusions are based on faulty and unreliable data.

39. The second committee to deal with the issues at bar was the committee chaired by Dr. Tzvi Tzameret ("the Tzameret Committee"). This committee was set up on August 27, 1996, on the heels of the hearings of these petitions. The committee report stated that:

Taking into account the needs of the Ultra-Orthodox community, we hereby recommend adopting the Sturm Committee's decision to close Bar-Ilan Street to traffic on Sabbath and holidays during prayer times, provided arrangements are made to ensure the mobility of the secular public in accordance with its needs, within the framework of the existing *status quo*.

This decision was adopted by a majority of five Committee members, with one abstaining and two opposing. A short time thereafter, however, it became clear that the parties were substantially divided as to the proper interpretation of the recommendation. Three of the members who supported the decision, Professor Eliezer Schweid, Professor Galia Golan and Dr. Tzvi Tzameret, stated that they had supported the proposal based on the understanding that it was intended to make way for the institution of public transportation in Jerusalem on Sabbaths. In contrast, one of the

proposal's other supporters, Professor Daniel Shperber, rejected this interpretation, saying that the expression "status quo" was meant to recognize every secular person's right to desecrate the Sabbath, but to not recommend instituting public transportation on that day.

40. As such, the committee's recommendations cannot be perceived as truly reflecting the views of the actual majority of Committee members. In effect, no consensus had crystallized among the members as to the possibility of closing Bar-Ilan on Sabbaths. As such, the Minister cannot rely on this Committee report, and it would appear that of this he is aware. In his brief, the Minister stated that, in light of the statements of three of the Committee members, the recommendation does not reflect "a social consensus between the various segments of the public regarding Sabbath traffic." *See* paragraph 22. In a similar vein, the Minister made the following statements in the Knesset (on November 6, 1996, sitting 35) (appendix 2 to the additional affidavit from November 13, 1996 in HCJ 5025/96) "I do not wish to rely on the Tzameret Committee's report at this juncture as its members each have their own interpretation."

To this I will add that the committee's recommendations are not based on a normative solution to the problem of Bar-Ilan Street. Rather, it is a social compromise, the fruit of negotiations conducted among the committee members. Moreover, the other matter discussed by the committee—the issue of public transportation on the Sabbath—is unrelated to the question of Bar-Ilan Street's closure, except according to three of the Committee members. It gives rise to problems of a completely different character. Thus, the committee's recommendations cannot be seen as a normative source to support the reasonableness of the Minister's decision.

*Case Law*

41. My conclusions remain unaltered even in view of this Court's previous rulings in which it refrained from interfering with the authority's decision to close other roads.

(1) The *League* [1] case dealt with the Traffic Controller's decision to close segments of Jerusalem's King George Street and Shmuel Hanagid Street, adjacent to the Yeshurun Synagogue, to traffic on Sabbaths and Jewish holidays. The road segments were closed during the morning hours because "motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably." *Id.* at 2667. To this end, it was taken into account that "the Yeshurun Synagogue is a large, central synagogue in Jerusalem, serving a significant community of worshippers. Moreover, the alternative to motorists would only require them to travel an additional 300 meters." *Id.*

The Court held that the Traffic Controller was authorized to take these considerations into account, despite the fact that the factor in question was of a religious character. In its judgment, the Court considered the significant disturbance caused to the large community of worshippers and the fact that motorists would only have to travel an additional 300 meters. In that situation, the Court held that an appropriate balance between the conflicting interests had been struck.

I do not feel that that decision has any influence on the result to be reached here. The street in that instance was not a central traffic artery like Bar-Ilan. Nor did that matter deal with the harm to the residents living in the segments to be closed. We will recall that the balance in the case before us must be struck in accordance with the concrete circumstances of the matter, as this Court has held, *Id.* at 2668:

The Central Traffic Authority is under a duty to examine each concrete case according to its special circumstances, taking into account each interest likely to be affected by the street



closure, for better or worse. In the end, the problem is one of degree and extent.

Having found that the circumstances here are substantively different from the *League* [1] case, it is clear that the conclusion reached by the Court there is not binding here. To this I will add that, in contrast to the *League* [1] case, the matter of synagogues was not a central consideration in this instance. Advocate Mandel, learned counsel for the Minister and Traffic Controller, submitted that her client, the Minister, did not attach any significant weight to those synagogues along Bar-Ilan Street:

While there may also be a few synagogues along Bar-Ilan Street, priority was given to allowing the religious population to live an observant lifestyle. (protocol of the hearing of January 12, 1996, at 5).

(B) The *Baruch* [2] case involved the Traffic Controller's decision to close a 300 meter segment of HaShomer street in Bnei Brak to traffic on Sabbaths and Jewish holidays. The road in question was "within an Ultra-Orthodox community, on both sides." *Id.*, at 161. One of the two Ultra-Orthodox neighborhoods adjacent to the road had been only recently built. The road forming the subject of controversy connected two main roads—Geha Road and Jabotinsky Drive. Getting around the closed segment involved traveling 2.5 additional kilometers.

The Court upheld that decision, with the majority of justices emphasizing that very few members of the secular public were likely to be harmed. Acting President Landau pointed out that, while the decision restricted motor traffic on Sabbath around the clock, and required motorists to travel an additional 2.5 kilometers, the closure involved "discomfort to only a very limited segment of the public, the owners of only about fifty private vehicles...this as measured against disturbing the Sabbath rest of a large population in what is the heart of the of the Ultra-Orthodox community." *Id.* at 165. In a similar vein, Justice Vitkon

pointed out that “the number of local residents wishing to see the street closed on Sabbaths and festivals far outweighs the few interested in protecting their freedom of movement, and even these will not be denied that freedom but only have it minimally restricted.” *Id.* at 167. Justice Etzioni there limited himself to a general comment, and stated that the Court is not to interfere with the Traffic Controller’s decision, as the latter “issued the order only after seriously weighing several factors, taking into account all the interests and data respecting the locals, particularly in light of the recommendations of the public committee” *Id.*

This description clearly reveals that the central factor in the Court’s decision was the negligible size of the secular public whose freedom of movement was affected. Under the circumstances, the Court upheld the decision to close the street to traffic on the Sabbath. As described above, the situation before us is not at all similar to the situation there. We are dealing with a main road, which connects entire parts of Jerusalem to each other. How can a main road such as Bar-Ilan be seriously compared to a road serving a mere fifty people? As we have seen, the number of motorists affected is a crucial issue in the case here.

42. In light of the two decisions cited above, the position of the Minister of Transportation here represents a dramatic change. Upholding the Minister’s decision in this case would be tantamount to setting a new norm, according to which it will be possible to close main traffic arteries, of significant importance, whenever the feelings of the local religious community are offended. As a result, the secular public will have no choice but to become accustomed to routine travel along detour routes on the Sabbath.

Truth be told, this matter requires us to weigh the circumstances pertaining to it, and it alone, as I have done in my judgment. Nonetheless, balancing the interests and considerations relevant to the dispute also sets a precedent for the future. This precedent will be relied on in other cases. The word of the Court is heard from afar. Thus, in proceeding to rule in

this case, it is incumbent on us to take a holistic, contextual approach, aware of the road our that decisions pave. If in the past, we were asked to rely on the *League* [1] and *Baruch* [2] cases—cases where special circumstances justified Sabbath street closures—our decision in this instance will undoubtedly be cited in the future. If we uphold the position of the Minister in this instance, we will be adopting a new approach, according to which offense to religious feelings is primary and takes precedence over other factors. Thus, the tolerance and compromise required of Sabbath observers shall disappear and traveling along detours shall, by the same token, become routine. So it will be, even when the street to be closed on the Sabbath is a central traffic artery. For obvious reasons, I shall bring no specific examples, but I do foresee the imminent closure of additional main roads in Jerusalem on the Sabbath, simply because the particulars relating to those roads are no different from the circumstances at bar.

Certainly, these statements are not meant as a warning against a “slippery slope,” not that that argument should be minimized. Rather, my fear is that the application of this new norm will have practical ramifications, today and certainly in the future, on Sabbath street closures in Jerusalem.

43. I feel it necessary to make an additional comment with regard to this matter. Among the conditions cited in the Minister’s decision was the condition that the entrance to Jerusalem remain open. The need for setting out a condition such as this, intended to calm those wishing to reach Jerusalem by car on Sabbaths and holidays, is in itself worrisome. Did anyone even fathom that the entrance to the city would actually be closed to traffic on Sabbaths? It is unthinkable that the entrance to Israel’s capital would be closed to the nation’s citizens, wishing to visit it on Sabbaths and holidays. The Minister’s decision seems to suggest that the entrance remaining open is somehow contingent on Bar-Ilan Street’s partial closure. I will not deny that I fear the dynamic likely to ensue in the wake of this decision.

44. I will now summarize my opinion. I have concluded that the Minister's solution is unreasonable, and that this Court's intervention is required. This conclusion is based on data specifically pertaining to Bar-Ilan Street, which shows that the road in question is central, and serves a large number of secular motorists on the Sabbath. As such, the harm to the sensibilities of the local Ultra-Orthodox residents must give way to the motorists' freedom of movement.

The Ministry of Transportation's professional experts also based their opinions on the road's centrality. I have deemed the Minister's decision unreasonable by virtue of his failure to raise any concrete reason that could serve as a basis for his decision to deviate from his own professionals' unequivocal opinion. Nor did he offer any basis supporting the substantial change in the previous long-standing arrangement. As such, I believe that no significant weight should attach to the argument that alternate routes are available, particularly since these professionals were well aware of this and, nonetheless, unequivocally opposed the closure.

My conclusion is also based on the fact that the harm caused to those members of the public wishing to reach the Bar-Ilan Street area on Sabbaths and holidays was not considered. Nor was proper weight attached to the harm caused the local secular residents, living on and around Bar-Ilan Street.

Based on these grounds, I have concluded that the Minister's decision deviates from the parameters of reasonableness, and that this Court's intervention is required.

#### *Epilogue*

45. It is no secret, and indeed self-evident from the material before us—especially from the report of the Tzameret Committee—that, prior to the adoption of the arrangement prescribed by the Traffic Controller on

July 10, 1996, serious disturbances occurred on Bar-Ilan Street. This problem was raised in an earlier petition. See HCJ/ 4712/96 *Meretz-Democratic Israel Faction v. Commander of the Jerusalem District, Israel Police* [74], which discussed the police decision not to permit a secular march in the area. There, *Id.* at 82, we cited the opinion of the Jerusalem District Police Commander:

In this last year, the police have been faced with attempts by Ultra-Orthodox elements to disturb the peace on the Sabbath on a weekly basis. Every Sabbath, hundreds of Ultra-Orthodox individuals gather to block the road. They call out, screaming at passing vehicles. At times, there are attempts to throw stones at passing vehicles, or to place roadblocks.

I revisit these statements, bearing in mind the respondents' claims in support of the street's closure. The response affidavit submitted by respondents numbers 7-16 in HCJ 5016/96, who are also respondents 8-17 in HCJ 5025/96 and respondents 6-15 in HCJ 5090/96, cites our decision in *Baruch* [2]. There, we stated that the Court will not strike down an otherwise proper arrangement merely because violence was used prior to its adoption. In the same breath, however, the respondents proceed to argue that the violence in the area must be "a determinative consideration regarding Bar-Ilan's closure on Sabbaths and holidays."

Likewise, respondents numbers 11-20 in HCJ 5016/96, who are also respondents in HCJ 12-21 HCJ 5025/96 and respondents 10-19 in HCJ 5090/96, argue that there is a serious fear that a failure to close Bar-Ilan "is liable to result in serious violent confrontations between extremists on both sides, thereby fanning the flames and dragging all of Jerusalem into an unending cycle of violence." These respondents then turn to the "stormy demonstrations which occurred on Bar-Ilan Street in July-August of 1996, during which many police officers and protesters were injured." Respondents submit that these events demand a rule in which freedom of

movement takes a backseat in order to prevent near certain harm to the public order.

It appears that these respondents are unfamiliar with the entirety of our statements in *Baruch* [2]. There, *Id.* at 165, we stated that, even though an otherwise proper arrangement will not be struck down because attempts to achieve this arrangement employed violence, a country of law and order simply cannot allow itself to be subject to violent pressure tactics:

In a law-abiding country such as ours, the physical pressure of illegal demonstrations and violent protests must never be allowed to impose solutions. Violence breeds violence and a country that allows such violence to succeed will destroy itself from within...

How should the Court, in retrospect, relate to the unfortunate fact that the administrative arrangement in question was reached following violent outbursts? Clearly, no court would uphold an illegal arrangement for fear that striking it down will lead to renewed violence. On the other hand, nor would it strike down an otherwise proper and suitable arrangement merely because of the violent incidents that preceded it.

We are not dealing with a near certain probability of harm to the public order. Instead, our concern is with an overt threat to use violent tactics to disturb the public peace, the likes of which have already been employed, if the respondents' demands regarding Bar-Ilan Street are not met. Contrary to some of the respondents' submissions, not only is this factor not a decisive factor in whether we should uphold the Minister's decision, it is not even a proper one. It is no coincidence that the Minister failed to advance this particular argument in his briefs. As we noted in *Baruch* [2], this line of reasoning is an invitation to street violence to overwhelm the decision-making process. It is tantamount to placing a gun

against the authorities' forehead. It encourages anarchy to replace the rule of law. As such, this consideration may not be taken into account by a democratic regime.

46. This line of reasoning, advanced by respondents, brings me back to the statements cited by my colleague, Justice Turkel, in *Meretz supra*. [74], at 835. The statements were written by Professor David Hed, in *The Limitations to Tolerance and Freedom: The Liberal Theory and the Struggle Against Kahanism*, regarding tolerance:

Tolerance contains a paradox, as it requires that violence not be used against views and behavior that are considered unjustified. Why must we tolerate views and speech that seem completely erroneous and indeed loathsome?

In general, the answer to this question is that this is the only way to maintain a pluralistic society, in the absence of consensus regarding political, religious or moral values.

These statements are equally applicable here. In effect, mutual tolerance and compromise are the recipe for maintaining communal life in a society of many shades such as Israeli society, particularly in a place as complex as Jerusalem. The duty to be tolerant, however, is not a one-way street, to which only the secular community is subject. This duty also binds the Ultra-Orthodox community, who demand that their religious sensibilities and lifestyle be respected. Tolerance is equally required of this public, in the face of activities which may not be to their liking. Only by way of mutual tolerance will it be possible to attain true coexistence, which reflects an authentic compromise. To this effect, President Shamgar wrote in *Hoffman supra*. [39], at 354:

Tolerance and patience are not one-way norms, but broad, multi-dimensional imperatives...tolerance is not to be invoked only to collect rights, but rather, as a measure for recognizing

one's fellow's entitlements...tolerance must be mutual. Shows of strength that surface from violent groups are not worthy of such tolerance.

In a similar vein, in CA 105/92 *supra*. [20], at 211, Justice Barak stated:

Tolerance is a central value in the public order. A democratic society seeking to fully maximize the wants of each individual will end up unable to satisfy even the minority of those aspirations. Ordered communal life is naturally premised on mutual forbearance and mutual tolerance.

An arrangement attained by force is no compromise. Nor does it reflect tolerance. Instead, it demonstrates power, and converts the decision-making process into a pattern of surrender to the use of violence. Justice Silberg highlighted the dangers of such a pattern in H CJ 155/60 *supra*. [64], at 1512:

Today, it is argued before us that the religious sector is likely to engage in demonstrations and protests; tomorrow, it will be argued that anti-religious sectors will run wild, disrupting the peace if the city gives in to their religious counterpart's demands. This line of argument is a sharp and very dangerous sword, liable to result in the surrender of public institutions to the terror on the street.

To my dismay, it seems that the Minister's decision here constitutes a very dangerous development. Prior to the decision, the objective facts in the Bar-Ilan Street area remained unchanged. The professional opinion of the authority charged with the matter was clearly and unequivocally against the closure. The only change was an increase in violent activity by the Ultra-Orthodox in the area; they have employed violent tactics, which have become routine and systematic. It is against this backdrop that the Traffic Controller made his new decision.



Therein lies the danger. Numerous points of contention exist in the area of secular-religious relations, including the problem of traffic on Sabbaths and Jewish holidays. Thus, the fact that the decision here was the product of the violent pressure may signal that disturbing the peace is likely to pay off. As I noted in *Meretz supra*. [74], at 830 “surrendering to those threatening violence shows weakness and encourages additional threats and violence, until it becomes difficult to foresee when and under what circumstances such violence will cease.” It is incumbent on the authorities to break this vicious cycle, before it is too late. It must send a clear message that violence does not pay off.

47. My colleague, the President, believes that the violence on Bar-Ilan Street did not influence the Minister’s decision. My colleague distinguishes between cases in which violence actually caused the change in policy, and between cases where the violence served “only” to raise the matter, and bring it to the authority’s attention.

For me, this distinction is a difficult one. It is problematic in terms of the lesson that must be sent to those who believe that violence can help them achieve that which they could not obtain under ordinary circumstances.

To this end, it is important to emphasize exactly what occurred in the case before us. The Traffic Controller’s original position was that Bar-Ilan Street should not be closed, even partially. This was a reasonable position, which would not have required the Court’s intervention. This is also the view of my colleague, the President, *see* para. 104 of his opinion, who, in discussing the various options which the Minister was authorized to select, noted:

[h]e would have been authorized to decide to continue with the status quo. In other words, Bar-Ilan Street would have remained open to traffic. This would have been a proper

decision, striking an appropriate balance between the various considerations to be taken into account.

What happened in the case before us? Although the state of affairs on Bar-Ilan Street prior to the Minister's decision was both reasonable and appropriate, and though all the relevant data remained unchanged, the surge of violence caused the issue to be "reconsidered." Even if it could be said that the violence did no more than lead to the matter being reconsidered, this is sufficient for those who employed it. I fear that this violence will have far-reaching implications.

This being the case, if my opinion were to be accepted, the petitions in HCJ 5016/96, HCJ 5025/96 and HCJ 5090/96 would be upheld, and the *orders nisi* made absolute, and the Minister's decision to partially close Bar-Ilan Street to traffic on Sabbaths and holidays would be declared null and void. I would reject the petition in 5434/96 which requested that Bar-Ilan Street be closed at all hours of the Sabbath and Jewish holidays.

I would not make any order for costs under the circumstances.

#### **Justice M. Cheshin**

Before me are the opinions of my colleagues, President Barak and Justice Or. Both are well-reasoned. Both are beautiful legal tapestries. In my heart I always knew which opinion I would prefer. Now, in my own words, I shall attempt to explain the reasons for my choice.

#### *The Minister's Decision and the Sturm Committee Report*

2. On one of the first days of November 1996, the Minister of Transportation, Rabbi Yitzhak Levy, decided to close Jerusalem's Bar-Ilan Street to motor traffic on Sabbaths and Jewish holidays during specific hours, essentially prayer times. In the Minister's own words:

Bar-Ilan Street will be closed to traffic on the Sabbath and Jewish festivals during prayer times, in accordance with the Sturm Committee's recommendation. For as long as the road is closed, Golda Meir Boulevard (The Ramot Road) shall remain open, as will the entrances to the city. A lane for private vehicles shall also remain open on Jaffa St, on Sabbaths and Jewish festivals.

The closing times shall be from one and three quarter hours before the entry of the Sabbath, from one and three quarter hours prior to the termination of the Sabbath and between the hours 07.30 - 11.30 during the Sabbath day.

The Minister made this decision in his capacity as Traffic Controller, after assuming the Controller's powers as per section 42 of the Basic Law: The Government. This decision is before the Court for review. The result turns on the effect of this decision, which we know was the Minister's. In other words, while we know that the hand signing at the bottom of the decision was the Minister's, the voice and authority behind it are the Traffic Controller's. Indeed, the Traffic Controller remains Traffic Controller even if the Minister temporarily fills his shoes. Needless to say, we are reviewing the Traffic Controller's decision, the issue being whether the Traffic Controller was authorized to close a street to traffic for a significant period of time, every Sabbath, for what are essentially religious reasons.

3. The decision in question speaks for itself. The Minister of Transportation informed us that he decided to close Bar-Ilan Street to traffic "in accordance with the Sturm Committee's recommendations." The Minister decided to adopt the Sturm Committee's recommendations as is, including the committee's reasoning. Otherwise, why would he even raise the Sturm Committee's name to begin with? The question we should be asking is what prompted the Minister to adopt the committee's recommendations and why did he see fit to do so?

4. First and foremost, the Sturm Committee was not established by the Minister of Transportation, nor did it report to him. Rather, the committee was established by and reported to Mr. Ehud Olmert, the Mayor of Jerusalem. Its report was also presented before Jerusalem's City Council, which served as a basis for the Council's decision of October 30, 1995. What then prompted the Minister to pull out the Sturm Committee's recommendations from the archives, dust them off and revive them? I have searched long and hard but failed to find a clear reason for this course of action.

Second, anyone reading the Sturm Committee's report will learn that it can speak in vague generalities. For instance: "the Committee believes that the problem of Sabbath Traffic deeply divides Jerusalem's population and that appropriate solutions must be found." The Committee also stated that:

Testimony before the Committee reflected broad agreement and understanding among individuals of all social and political colors, religious and secular. There was agreement and understanding regarding requests to foster an atmosphere which conforms to the sensibilities of religious neighborhoods, while bearing in mind the needs of others

These statements are accurate and well known. However, to conclude from this that it is proper to close Bar-Ilan Street—as per the Sturm Committee's recommendation and the Minister's decision—is quite far-fetched. In effect, the Committee's report bears no trace of any in-depth analysis dealing with Bar-Ilan Street's closure, and the Committee's majority failed to supply a proper response to Ya'acov Rubin's minority opinion, which staunchly opposed Bar-Ilan Street's closure. Rubin, himself a religious man, carefully reasoned his reservations regarding the majority's recommendation, and I have yet to see or hear a worthy response to his dissent.

Justice M. Cheshin

Third, the Tzameret Committee's report, unlike the Sturm Committee's report, presents us with an in-depth and detailed analysis of Bar-Ilan Street's closure. How is it that the Minister failed to consider the Tzameret Committee's observations regarding Bar-Ilan Street? While the Minister was authorized not to agree with the Tzameret Report, he was not permitted to ignore the findings of a committee that he himself appointed. How could he possibly have ignored these thought-out statements and go directly to the Sturm Committee's report? Let us also recall that the Sturm Committee's report was submitted two years prior to the Minister's decision.

Fourth, as my colleague, Justice Or, noted in paragraphs 37 and 38 of his opinion, the Sturm Committee relied on erroneous data as to the volume of traffic on Bar-Ilan Street. While it would not be accurate to say that faulty data necessarily leads to erroneous conclusions, it is clearly improper to adopt the committee's findings without verifying the impact of the faulty data. To the best of our knowledge, no such verification was conducted.

Fifth, when the Sturm Committee's report was submitted, the Traffic Controller opined that "it would be unthinkable to close Bar-Ilan to traffic on Sabbaths or on any other day." It would stand to reason that the Minister, acting as Traffic Controller, would attempt to explain the statements made by the Traffic Controller two years prior. Unfortunately, no such explanation was offered.

5. Finally, while the Sturm Committee did recommend that particular streets be closed to traffic on the Sabbath and holidays, it further recommended that other streets not be closed. Indeed, the Committee proposed that Yam Suf Street remain open for "it serves a significant number of motorists from the Ramot Eshkol and Givat HaMivtar neighborhoods."

These recommendations were presented to Jerusalem's City Council on October 30, 1995. In its decision regarding Bar-Ilan Street, the Council held that it lacked the authority to order Bar-Ilan's closure—"The Jerusalem City Council cannot close Bar-Ilan Street to traffic on Sabbaths and Jewish holidays." As for Yam Suf Street, the City Council decided to close it partially, without explaining why it saw fit to stray from the Sturm Committee's recommendations. From that very day, Yam Suf Street has remained partially closed to traffic on Sabbaths and holidays, in accordance with the decision of the Mayor and the City Council and contrary to the Sturm Committee's recommendation. Both the Mayor of Jerusalem and the City Council sharply deviated from the Sturm Committee's recommendations, a deviation for which we have found no explanation.

The Minister of Transportation has decided to adopt the Sturm Committee's recommendation regarding Bar-Ilan Street's closure. If so, than why did he not further add and instruct that Yam Suf Street be opened, in accordance with the Sturm Committee's recommendation? For the recommendation to close Bar-Ilan Street was made simultaneously with the recommendation not to close Yam Suf Street. These recommendations are connected. If the Minister saw fit to adopt the one, why did he fail to adopt the other? The reasons for this are unclear and have not been presented to this Court.

6. During the hearings, it was proposed that Bar-Ilan Street be closed, in accordance with the Sturm Committee's recommendations, provided that Yam Suf Street be opened. In other words, the Court suggested that the Sturm Committee's recommendations be fully implemented—with regard to both Bar-Ilan Street and Yam Suf Street. Petitioners accepted this proposal, while the Minister requested additional time to examine it. Later, the Minister informed us of his refusal to accept the proposal, stating that "there is no significant traffic connection between closing Bar-Ilan Street and reopening a segment of Yam Suf Street. Yam Suf is not an alternate route to Bar-Ilan."

Justice M. Cheshin

I admit that I do not understand this answer. First of all, no one suggested that reopening Yam Suf Street was intended to ease Bar-Ilan Street's closure. Not even the Sturm Committee argued this point. Rather, all that the Committee said was that this street "serves a significant number of motorists from the Ramot Eshkol and Givat HaMivtar neighborhoods." These words remain uncontradicted. Second, it was clear to all that this *quid pro quo*—closing one street and reopening another—was intended to form the basis for mutual concessions and mutual tolerance. Did the petitioners not share the Mayor of Jerusalem's awareness of the fact that Yam Suf Street was not meant to serve as an alternate route to Bar-Ilan Street? Anyone who reads the Mayor's letter to the Minister of Transportation will learn and understand—a street that has been closed will not be reopened.

A final word: putting aside the Mayor of Jerusalem's position, we have yet to hear a proper answer from the Minister as to why he decided to adopt only the restrictive parts of the Sturm Committee's recommendations, while rejecting other parts. For my part, it is my belief that the burden of explaining and clarifying this lies with the Minister. No explanation, however, was either seen or heard.

*The Tzameret Committee*

7. In his brief of November 6, 1996, the Minister of Transportation discussed the Tzameret report and its recommendations at length. To the best of my understanding, the Minister decided not to make use of the Committee's recommendations due to the differences of opinion which arose among its members regarding Sabbath traffic arrangements. Later on, he decided to rely on the same part of the Committee's recommendations directing Bar-Ilan Street's closure on Sabbaths and holidays during prayer times. This left me confused: did the Minister make use of the Tzameret Commission's report or did he not?

8. The following was the Tzameret Committee's recommendation, submitted by a majority of five members, with two members dissenting and one abstaining:

Taking into account the needs of the Ultra-Orthodox community, we hereby recommend adopting the Sturm Committee's decision to close Bar-Ilan Street to traffic on Sabbath and holidays during prayer times, provided arrangements are made to ensure the mobility of the secular public in accordance with its needs, within the framework of the existing *status quo*.

Anyone reading this recommendation will see that it is divided into two parts. The first part orders that Bar-Ilan Street be closed on Sabbaths and holidays during prayer times. The second part is contingent on the first—Bar-Ilan may be closed “provided arrangements are made to ensure the mobility of the secular public in accordance with its needs, within the framework of the existing *status quo*.”

This second part served as a sharp point of contention among the Committee members, shattering the consensus respecting Bar-Ilan Street's closure expressed in the first part. As soon as the ink on the report was dry, everyone began to offer their own view as to what was included in the report. After the dust settled, we were left with two opposing camps, each denying the other's point of view. Some Committee members believed that Bar-Ilan Street should not be closed unless public transportation was instituted on Sabbaths. Other Committee members interpreted the report as precluding public transportation from being introduced. I presume that each and every Committee member argued in perfectly good faith—how could I presume otherwise? Even so, we do not have an unequivocal recommendation made by the Committee.

9. Had the Minister informed us that he did not see any need to consider the Tzameret Committee's recommendations, as they were not



unequivocal, I would have been silent. However, in his brief, the Minister found it appropriate to contest the second part of the recommendation, a course of action which prompts me to speak out. Regarding this second part, the Minister had the following to say:

The Committee's recommendation regarding Bar-Ilan Street's closure is two-fold: the first part is clear; the second is ambiguous and subject to multiple interpretations.

And further on:

The said condition... is more opaque than transparent.

In conclusion, the Minister stated:

In light of the data presented, no one among the committee believed that the closure of Bar-Ilan Street on Sabbaths and holidays was completely inappropriate.

Five remaining members recommended that, taking into account the needs of the Ultra-Orthodox population, Bar-Ilan Street should be closed on Sabbaths and Jewish holidays during prayer times. Two Committee members believed that Bar-Ilan Street should be closed to traffic throughout the Sabbath and holidays. One member abstained.

Moreover, the Minister stated:

And so it is that, to my understanding, the majority of the Tzameret Committee members believed that an appropriate balance between the freedom of movement and the lifestyle of the Ultra-Orthodox community residing around Bar-Ilan Street justifies adopting the Sturm Committee's recommendation,

according to which Bar-Ilan Street shall be closed during prayer times on the Sabbaths and Jewish holidays.

And more:

From the above it appears that, were I to adopt the Committee's recommendations regarding street closures throughout the country, and effect the proper statutory changes, nothing would prevent a decision to close Bar-Ilan Street to traffic on Sabbaths and Jewish holidays.

Furthermore:

The above suggests that the majority's recommendations are not contingent on instituting public transportation.

Under these circumstances, the recommendation before me cannot be said to reflect a social consensus between the various segments of the public regarding Sabbath traffic.

The following is my own interpretation of the Minister's statements: the recommendation to close Bar-Ilan Street is unequivocal and clear, whereas the subsequent condition is ambiguous and opaque. Therefore, says the Minister, I have decided to adopt the clear and ignore the ambiguous. Furthermore, seeing as how the majority of the Committee members supported Bar-Ilan's closure, I shall adopt their statements to this effect and order that the street be closed.

10. This interpretation of the Committee's recommendations is erroneous. Suffice it to say that a reading of the Tzameret Committee's report and its appendices—which stretch out over dozens of pages—clearly reveals the strong bond between the first and second part of its recommendations. There is no need to delve any further in order to see that the first part of the recommendation cannot survive without the

second. The two are as one. Both are like limbs of the same body; amputating any part is tantamount to killing the whole. The Tzameret Committee's recommendations constitute one whole, as Professor Galia Golan explained in her letter to the Minister dated November 3, 1996, which I cite below:

While I was prepared to sign the Committee's report, this step was quite difficult for me, due to the decision to close Bar-Ilan Street during prayer times which, in practice, means the street's complete closure on Sabbath. Nevertheless, as stated, I was prepared to sign by virtue of the "package deal"—the secular public would approach the Ultra-Orthodox in the spirit of compromise provided the latter would approach the secular in the same spirit. The street would be closed provided that arrangements would be made for public transportation in Jerusalem on Sabbaths in accordance with the public need and the status quo. It was also understood that certain cultural activities that do not involve the public desecration of the Sabbath, such as the supervised opening of the Jerusalem Theatre, be allowed.

Since the publication of the Committee's report, it became clear to me that there was no—nor will there be—any "package deal." No changes to public transportation or cultural activities on the Sabbath will be made. The Committee's findings only lead to Bar-Ilan Street's closure and will not bring about any additional changes.

I cannot shut my eyes and ears and convince both myself and others that the Committee's conclusions are to my liking when I know that, in practice, they will not be implemented in their entirety. The secular public is once again making concessions, for the umpteenth time, without obtaining anything in return, despite the conditions spelled out by the Committee, which

forms the basis of its conclusions. If this condition is not brought to fruition, the entire structure that the Committee attempted to construct, based on mutual consideration and tolerance, crumbles.

As such, so long as I am not in any position to enforce this condition and implement the Committee's recommendations in their entirety and simultaneously, I will refrain from signing the report. I will be prepared to sign if and when it will become unequivocally clear to me that the decision to close Bar-Ilan Street during prayer times will only be implemented together with the rest of the Committee's conclusions.

The Minister was entitled to say that the Tzameret Committee's recommendations were not to his liking, due to Professor Golan's statements and those of other Committee members, such as Dr. Tzvi Tzameret and Professor Eliezer Schweid, and that he therefore decided to ignore the committee report. However, I would think that the Minister was not permitted to assert that the conditions set out by the Committee are opaque and can be ignored, while also concluding that the majority of Committee members recommended Bar-Ilan's closure. It is clear to all that some Committee members believe that the recommendation to close Bar-Ilan was contingent on the existence of public transportation on the Sabbath. Without the support of the condition the whole edifice collapses. How then can the Minister claim that his decision to close Bar-Ilan is based on the Committee's recommendation?

11. Furthermore, the Minister of Transportation discusses the Tzameret Committee's "majority" and "minority" opinions, in an attempt to prove that most Committee members supported the closure. In addition to the Minister's statements cited above, he also asserted:

The majority's recommendation regarding the closure of Bar-Ilan Street during prayer times on Sabbaths and Jewish

Justice M. Cheshin

holidays is conditional, the condition being that the closure is contingent on "arrangements being made to ensure the mobility of the secular public in accordance with its needs in the framework of the *status quo*."

The said condition...is more opaque than transparent.

Three of the majority Committee members set out the condition in a manner lacking any factual basis whatsoever.

I for my part fail to understand the Minister's preoccupation with the issue of majority and minority views. Indeed, while the matter of majority and minority may well arise with respect to bodies composed on a democratic or representative basis it has no place in a body assembled according to neither of these methods. The Tzameret Committee was not composed on a democratic or representative basis. The Minister of Transportation informed us that the Committee's composition reflects a balance of opinions and views in the matter of religious-secular relations. Thus, the Minister writes that half of the Committee is "composed of religious individuals: two representatives of the Ultra-Orthodox community, two other religious representatives and four others defined as "not religious." Needless to say, this composition is not "democratic." If the committee is supposed to represent the interests of Bar-Ilan Street's residents, the committee should have included a greater number of Ultra-Orthodox members. Conversely, if the starting premise was that the Committee should reflect the composition of Israel's population, then it should have included a greater number of non-observant individuals.

In recommending that the Committee be set-up, we meant a committee capable of reaching a "social consensus between various communities." We further added:

Such an agreement would quite naturally be premised on mutual patience and tolerance and on a long-term understanding

regarding the future of Jerusalem. Rather than focusing solely on the issue of whether to close Bar-Ilan Street, it would relate to expected social dynamics and their effect on the secular-religious relations in the coming years. On the basis of this agreement, it would be possible to find long-term solutions for the various problems that these petitions raised.

*See supra*, para. 27 of Justice Barak's opinion. And further on:

This led to our proposal that a public committee be established, whose members would provide a balanced reflection of the spectrum of views and perspectives on secular-religious relations. The committee's goal would be to strike a social covenant for secular-religious relations. The committee's recommendations would be considered by government agencies, which would assist them in determining policy in traffic matters, including the potential closure of Bar-Ilan Street.

*Id.*, at para. 28. While it may only take one side to torpedo an understanding or covenant, it takes two to create such a covenant. Here, one of the sides involved—the non-observant side—will only agree to such a covenant on the condition that public transportation on the Sabbath be made available. The other side does not agree to this. What then is the point of discussing majorities and minorities? Indeed, only a unanimous agreement or, in the alternative, an agreement reached by a clear and overwhelming majority, can lead to a social covenant. Clearly, unanimous agreement was not to be found, nor was there a clear and overwhelming majority. In the absence of agreement, calculating majorities and minorities is rather pointless.

12. It would appear, however, that for the Minister to base his decision on the Tzameret Committee's report was tantamount to relying on a broken reed. *Cf.* Isaiah 36:6 [112] The Minister's efforts to rely on the committee's recommendations trapped him in a web of errors.

*Interim Summary*

13. Essentially, neither the Sturm Committee's report nor the Tzameret Committee's report and their respective recommendations can legitimize the Minister's decision to close the street. In light of the Minister's choice to base his decision on such a faulty foundation, the decision must be struck down.

14. With these remarks in mind, let us further examine the Minister's decision on its merits, this time ignoring both committees' recommendations and limiting ourselves to the substantive considerations raised by the Minister in his capacity as Traffic Controller. We shall present the factors weighed by the Minister in reaching his decision and subsequently proceed to interpret, explain, and analyze.

*The Decision on its Merits*

15. I have read the Minister's brief dated November 6, 1996 very carefully. I have further read the brief of the Traffic Controller, Mr. Alex Langer, dated July 29, 1996. For all intents and purposes, the Minister's brief is a continuation of Mr. Langer's submissions, and both may be read as one. A reading of both these briefs teaches, without a shadow of a doubt, that the main consideration guiding the Minister in his decision was the threat that the local observant population's feelings would be offended. In the Minister's own words, as stated in his brief:

I have examined the Tzameret Committee's report and the briefs submitted to this Court, as well as the Traffic Controller's recommendations. The problem related to offending the religious population living on and around Bar-Ilan Street is both complex and most familiar—a matter which I have discussed repeatedly with the Traffic Controller, in the wake of his decision of July 10, 1996.

The additional material presented to the committee does not reveal any traffic-related reason that changes the balance between the harm to the religious lifestyle and between the infringement of the secular public's freedom of movement.

The Minister refers to the Traffic Controller's decision of July 10, 1996—in other words, Mr. Langer's brief of July 29, 1996—and clearly and unequivocally expresses the need to prevent any harm from coming to the feelings of the observant residents. Let us now read a few lines from Mr. Langer's brief:

I have balanced between the freedom of movement of those asking to use this street on Sabbaths and holidays and the interest in safeguarding the feelings of the religious residents living on Bar-Ilan/Yirmiyahu Street and in its vicinity. In exercising my powers as Central Traffic Authority, I am authorized to take interests of a religious character into account when they affect a significant segment of the population.

The dilemma before me raises a conflict between legitimate interests. On the one side is the respect owed the Sabbath, as understood by a significant proportion of the local residents, living in the neighborhoods along the road. On the other side are the rights of all the city's residents, in general, and the residents of the northern neighborhoods in particular, to use the existing and convenient road for their purposes.

The former demand that the road be completely closed to traffic on Sabbaths while the latter request that it remain open on Sabbath, as on any other day of the week.

On the one hand, there is harm to the religious sensibilities of a large population, for whom Sabbath traffic on its streets is extremely offensive. On the other hand, a significant number



of people are inconvenienced by having to refrain from traveling along this road on Sabbaths and holidays. As noted, the additional travel time resulting from the street closure is a mere few extra minutes. It should be emphasized that we are not dealing with interference with the freedom to reach one's destination. Rather, the restriction concerns the right to get from point A to point B a particular way. To employ a metaphor, a one-way street, or a dead end restricts the right to travel along it freely but does not constitute an infringement on freedom of movement since alternate routes permit motorists to reach their destination of choice.

In light of this, I believe that, at this stage, Bar-Ilan Street should be closed to traffic when the majority of the religious public is on its way to and from synagogue, times when the offensiveness of passing traffic is amplified.

To my mind, there is no need to elaborate: the Sabbath is what prompted the Minister of Transportation to decide as he did.

16. We have quoted the Minister and the Traffic Controller at length, and for good reason. We do so because the briefs of other respondents—this is the case regarding the petitioners in HCJ 5434/96—repeatedly raise arguments as to the pressing need to close Bar-Ilan Street on Sabbaths and holidays. The Court's concern, however, is with the reasoning underlying the Minister's decision. Thus, before jumping into the legal deep, we insisted on clarifying in which direction we were headed and what we were searching to find.

17. The question before us is two-pronged. First, was the Minister (in his capacity as Traffic Controller) authorized to take into account the Sabbath observance factor and the local residents' religious feelings in making his decision to close Bar-Ilan Street? Second, if the Minister was in fact authorized to take these factors into account as he did, was he

permitted to attach determinative weight to this consideration as he did? Is the Sabbath factor capable of outweighing all the other considerations that point to the need to leave Bar-Ilan Street open to traffic all week long, including on Sabbaths and holidays (with the exception of Yom Kippur, of course)?

Prior to turning our minds to this question, let us make the following general comment regarding the Minister's decision, on its merits.

18. It would appear that the Minister's decision is one that attempts to reconcile the irreconcilable. In deciding to close Bar-Ilan Street to vehicular traffic during specific hours and not others, the Minister carved the Sabbath to pieces or strips. An analogy may be drawn to one driving down a tree-laden road with the sun peering between the trees and leaves, intermittently lighting his way, alternating with the shade from the trees. A moment of sunshine, followed by a moment of shade, and again. In no time, the driver will become dizzy and in the future will want to drive down a different road in order to avoid this dizzying experience.

The manner in which the Minister has chosen to close Bar-Ilan Street—in pieces and strips—will prompt motorists to prefer alternate routes throughout the Sabbath. This is all the more true as the opening and closing hours of the street are a function of the entrance and exit of the Sabbath—times that, as we all know, change on a weekly basis. In fact, those asking that the street be closed throughout the Sabbath may be justified in arguing the Sabbath cannot be divided. Whatever the case may be with regard to that argument, it appears that the Minister's decision will effectively result in the street's closure throughout the Sabbath, at all hours. In effect, the street closure is a clear and certain prescription, leading to a single conclusion—Bar-Ilan Street will be closed to motorists and will appear closed throughout the Sabbath, from a little before sundown on Friday to the appearance of the first stars on Saturday night. This is how the Minister's decision must be understood and as such it shall be examined.

19. At this juncture, we may turn our attention to the merits of the Minister's decision, bearing in mind that, from his perspective, the Sabbath factor was the determining consideration. In our opinion, the Minister exceeded the proper boundaries of reasonableness or, if you will, he exceeded his authority in deciding to close Bar-Ilan Street on Sabbaths and holidays. First, he attached excessive weight to the religious consideration. Second, he subjected the public domain to an improper arrangement. Third, he expropriated property that belongs to the public and turned it into private property. Let us now analyze these points, one by one, in order.

*The Religious Consideration in an Authority's Exercise of its Discretion*

20. In *Meatrael* [6], both Justice Or and I dwelled on the role of discretion in the decision of a government authority. I have but to repeat that which was said in that instance: Israel is a democracy under the rule of law. The fact that religious commandments are not the law in Israel, unless passed into law, is a supra-principle enshrined in our law. Even when a religious commandment is passed into law it is only binding by virtue of its statutory status. Our law also provides for freedom of religion and freedom from religion. An individual's right to observe religious commandments is fully protected provided, of course, that he does not, in so doing, disrupt public order or violate the country's laws. At the same time, an individual is entitled not to have religious commandments coerced on him against his will. Only a Knesset statute can order otherwise. After the enactment of the Basic Law: Human Dignity and Liberty even a Knesset statute is subject to the permanent restrictions prescribed by the Basic Law.

Our law is separate from religion and religious commandments are not binding unless enshrined in statute: "the principle of the separation between religion and state will guide and direct our laws. Only in accordance with a statute passed by the Knesset can a religious

commandment be enforced. It may only be enforced in a manner that is both explicit and specific, in addition to being set out in primary legislation.” *Meatrael* [6], at 507. In other words: “considerations that have their source in religious commandments are not to be taken into account by government authorities unless the Knesset provides otherwise.” *Id.* For this reason, a city is precluded from forbidding the sale of non-Kosher meat or pork by virtue of the powers conferred on it by the Municipal Ordinance [Revised Version]. See H CJ 122/54 *Axel v. Mayor of Netanya* [75]; H CJ 72/55 *Mendelson v. Municipality of Tel-Aviv/Jaffa* [76]. Similarly, the Food Controller’s authority to forbid pig-farming was not recognized in *Lazerovitch* [5]. See also 1 A. Rubenstein, *The Constitutional Law of the State of Israel* (1997) [92]

This basic principle is found in the separation between religion and state. Of course, this is “an ‘Israeli-style’ separation: a separation involving a unification of sorts.” See *Meatrael* [6], at 506. The significance of the principle of separation of religion and state is that religion will not be imposed on the citizen and resident unless enshrined in statute. The religious system does not form the country’s law—its commandments are not the binding law of the state unless infused with the power of statute by the Knesset.

21. The aforementioned suggests that religious considerations cannot properly take center-stage or prevail over other legitimate considerations. In other words, taking into account religious considerations is deemed improper when these attempt to take center-stage among the considerations being weighed by a government authority. This was the case in *Axel* [75], *Mendelson* [76] and *Lazerovitch* [5]. See also *Crim. A 217/68 supra*. [12]. This is not the case when religious considerations merely play a secondary role, with all that that implies regarding the authority’s exercise of its discretion. While at times it may be difficult to distinguish between primary and secondary considerations, in general, we are capable of distinguishing between what is central and what is peripheral. Thus, for example, we will not hesitate to rule that the main

objective of the Import-Export Ordinance [Revised Version]-1979 is economic, *see Meatrael* [6]; that the central goals of the Municipalities Ordinance [Revised Version] are general municipal objectives, rather than religious ones, *see Mendelson* [76] and *Axel* [75]; and that the Traffic Ordinance's [Revised Version] primary objectives are traffic and transportation oriented goals.

Following this approach, it is possible to explain and interpret the rules set out in the Yeshurun Synagogue case, HCJ 174/62 [1] and the *Baruch* [2] case. In *Yeshurun* [1], the Court held that "motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably." *Yeshurun* [1], at 2677; that the "Yeshurun Synagogue is Jerusalem's largest and most central synagogue, housing a large community of worshippers on Jewish holidays and Sabbaths," *Id.*, and that the inconvenience caused motorists due to the prohibition to drive near the synagogue is minimal. For these reasons, the Court agreed to close the streets near the synagogue on Sabbaths and Jewish holidays during the morning hours. The differences between the case at bar and that particular case are many. I will stress the following three differences. First of all, regarding motor traffic, King George Street and Shmuel HaNagid Street (the streets closed to traffic in the *Yeshurun Synagogue* [1] case) pale in comparison to Bar-Ilan Street. We were unaware of the exact number of vehicles passing through King George Street during prayer hours when the *Yeshurun Synagogue* [1] case was decided; we do know, however, that thousands of vehicles pass through Bar-Ilan Street.

Second, in the *Yeshurun Synagogue* [1] case, the city requested that the streets neighboring the synagogue be closed to traffic during the morning hours alone—not on Friday evening, on Sabbath morning, or at the end of the Sabbath, which, in practice, is tantamount to closing the street to traffic throughout the Sabbath. Thus, our case involves a full closure, rather than one during the morning hours. Third, the plight of the local residents was not at issue in *Yeshurun* [1]; here we know that

closing Bar-Ilan would burden these residents. Above all, let us recall the following: the *Yeshurun* [1] case was decided in 1962 and, if we will try to look back, we will certainly remember what Jerusalem was like in those days, prior to the Six-Day War, and the number of vehicles to be found on Israel's streets back then. Thus, in comparing the year 1962 to the year 1997, the differences between these two cases become clear.

Let us now turn to the rule in *Baruch* [2], the Bnei Brak case. While the case involved the closure of a road throughout the Sabbath, a careful examination of the reasoning underlying the decision reveals that the Court failed to comment on the closure's effect on through traffic. The Court turned its attention exclusively to the plight of the local residents—both the Ultra-Orthodox and the non-observant. The Court addressed the harm caused the first group if the road would remain open to motor traffic and the harm caused the second group if it were in fact closed. In the words of Acting President Landau, *Id.* at 165:

In this case, we are dealing with the discomfort caused a limited number of residents, possessing about a mere fifty private vehicles...against the harm to the Sabbath rest of a significant population concentrated in the heart of the Ultra-Orthodox community.

Justice Vitkon's statements, *Id.* at 167, were similar:

From the perspective of the number of local residents, those interested in the street's closure on Sabbaths and holidays by far exceeds the number of those interested in freedom of movement, bearing in mind that the latter's freedom of movement is not negated but merely restricted in a manner which does not pose any significant burden. This being the case, I am in favor of granting the petitioner's request.

The case at bar, however, is quite different, if only for the fact that there are thousands of vehicles passing through Bar-Ilan Street. *Baruch* [2] by no means dealt with the same volume of through traffic. In truth, while the road closed in that instance was referred to as a “traffic artery,” the Court did not go any further to address the nature of the road in question or the effect that closing it would have on passing traffic. To this let us add and recall that the authorities made no effort to inquire into the number of those non-observant residents living on and around Bar-Ilan Street whom the closure would potentially harm. How can we then learn from the *Baruch* [2] case in this instance?

22. In *Meatrael* [6], the Court distinguished between the exercise of discretion regarding religious considerations and those involving human welfare, stating, at 507:

Considerations regarding the observance of religious commandments *per se* are not appropriate administrative matters unless prescribed by law. The considerations of man, *qua* man, however, are most legitimate. Such is the nature of democracy, in which the individual’s welfare and ability to flourish are of paramount importance. Where various segments of the population battle each other and the interests at stake are intertwined, the matter of setting priorities is self-evident. Weighing the interests inevitably leads to the need to decide between values, each pulling in its own direction. In balancing these interests we shall find it possible—and indeed our duty—to consider individual interests, or those of different sectors of the population, provided that we do not coerce the other into observing religious commandments. Religious commandments, *qua* religious commandments, shall not be imposed upon those who are not observant of them.

The *Yeshurun* [1] and the *Baruch* cases illustrate human welfare considerations being taken into account, following the Court’s finding

that "the authority's actions aimed at preventing harm to the religious sector will not cause significant harm to the secular segment of the public." *Meatrael* [6], at 500. The same cannot be said in our case, where we are dealing with thousands of motorists served by Bar-Ilan Street.

23. On the subject of freedom of religion and freedom from religion: the history of mankind presents countless instances of religious coercion, which directly infringe the freedom of religion. This was the case with orders to bow down to various images, to forcefully convert from Judaism to Christianity or Islam, to eat a certain proscribed food item. Freedom *from* religion, however, is quite different. An example of infringing one's freedom *from* religion is imposing a duty to pray against one's will. Generally, however, infringements on freedom from religion are indirect and therefore often difficult to identify. It is therefore included in the general rights vested in the individual. Indeed, because of the difficulty in pinpointing an infringement of this sort, religious considerations may at times prevail over other conflicting considerations. A case in point: *Baruch* [2], where a street closure forced motorists to take a longer road, and raised the question of whether the motorist's freedom from religion had been infringed. In Justice Vitkon's opinion, *Id.* at 166:

The street closure constitutes religious coercion against this secular public, seeing as how the closure is not limited to prayer times at the local synagogue...the closure is imposed throughout the day.

By contrast, Justice Etzioni opined, *Id.* at 167:

I would not go so far as to say that the fact that some of the residents are precluded from using a segment of the road amounts to a certain degree of religious coercion, as my honorable colleague, Justice Vitkon, suggests. This is not a case of religious coercion as there is no absolute prohibition on



travel on the Sabbath. Rather, we are dealing with a limited restriction, which does not harm the secular public's sensibilities or its conscience, but merely inconveniences it.

In *Yeshurun* [1] the Court agreed with Justice Etzioni's opinion, *Id.* at 2668, stating that the ban on traffic in the synagogue's vicinity does not in any way constitute "religious coercion whatsoever, as the order in no way compels the petitioner to act against his conscience or views regarding religion."

I, for my part, tend to agree with this last statement. To say that compelling a motorist to lengthen his road-time infringes his freedom from religion is, to my mind, stretching both language and substance. An observant Jew can be said to be devout, but it is difficult to say of one who is not observant that he is "devout" in his non-observance. In other words: the fact that individuals are barred from traveling in the synagogue's vicinity during prayer times, which indirectly lengthens travel-time, constitutes coercion and infringes on the individual's freedom to drive next to the synagogue whenever his heart desires. Even so, it would be difficult to deem this arrangement as infringing freedom *from* religion. An infringement of freedom—yes; an infringement of the freedom from religion—rather doubtful.

In light of these difficulties, freedom *from* religion is often "swallowed up," so to speak, by an individual's general right to freedom. It is for this reason that we prefer to speak of the authority's power and the boundaries of the considerations that it is entitled to take into account. In other words, freedom from religion lays hidden under the doctrines of the authorities' discretion and under an individual's general right to freedom, as guaranteed by our country's laws. This is the source of the aforementioned rules, according to which an administrative authority is precluded from taking into account religious factors as a principal consideration unless explicitly permitted or instructed by the legislature.

24. In Israel, every individual is entitled to the constitutional rights of both freedom of religion and freedom *from* religion. Subject to the Basic Law: Human Dignity and Liberty, or the Basic Law: Freedom of Occupation, an authority can only take religious considerations into account—as a primary consideration—by virtue of a statute. An administrative authority must be empowered by a statute—not by a regulation—if it wishes to take religious considerations into account. Neither may religious considerations be made primary considerations with regard to the enforcement of laws. *See* HCJ 1520/91 *Vilensky v. National Labor Court* [77], at 513. The Traffic Ordinance [Revised Version] was intended to regulate traffic and transportation arrangements. It was not meant to advance religious issues or matters of faith. Thus, if the Traffic Controller believes that traffic on Bar-Ilan Street on the Sabbath offends the religious sensibilities of the local observant residents, and decides to close the road to traffic throughout the Sabbath in order to avoid causing this offense, it is incumbent upon him to ask the Knesset to enact a statute authorizing him to do what he feels is necessary. The arrangement must take statutory form and only an explicit Knesset statute is empowered to authorize the Traffic Controller to act as he wishes. The individual's right to freedom of religion and freedom from religion are protected in both the private and public realm. If society seeks to limit this freedom, it can only do so by Knesset legislation.

*The Private Realm Belongs to the Individual and the Public Realm to the Public*

25. As a general rule, the private realm belongs to the individual and the public realm to the public. A person's home is his and his family's; city streets belong to the entire community. This is also the case in relations between religion and state. Every person has the right to freedom of religion and freedom from religion in the private domain. The state and its emissaries must safeguard and protect this freedom using all means available to them. This is the case respecting the private

domain and it is equally the case regarding the public domain. In both these realms the state will protect the individual's right to freedom of religion and freedom from religion. By definition, this right signifies that no one will be religiously coerced.

26. Our concern is with these two sets of pairs: individuals and the community, in the private realm and in the public domain. Both these pairs relate to each other in certain ways. We can be sure of the following, subject to statute and constitution: neither an individual nor the community can impose on another in the latter's private domain. Similarly, in the public domain, an individual will not be allowed to impose his will on another or on the community. Our case raises a question with regard to the connection between the individual and the community in the public domain. Is the public entitled to force its religious customs on the individual who finds himself in the public realm, in their midst, and thus negate that individual's right to freedom in the public domain? The Court touched on this issue in *Meatrael* [6], at 508, stating:

The interests of the observant population's are quite weighty, perhaps even determinative, within the privacy of their own homes. However, the further one travels from his home, and the closer one is to touching the public domain—or on another's private domain—or when one's request involves his fellows' rights, so too will the strength of one's interests be weakened, as it will be balanced against the rights of his neighbor, in the latter's public or private realm.

All this is to say that a heavy burden lies on the community whenever it seeks to deny the freedom of an individual situated in the public realm.

27. What is the private domain and what is the public domain in regard to freedom of religion and freedom from religion? All agree that a person's home forms part of the private domain. Nevertheless, I believe

that it is possible—and indeed proper—to expand that which is considered the private domain even beyond the four walls of one's house and yard—though with great care. Take, for example, an observant neighborhood of alleys and narrow side streets upon which no stranger ever treads. It will not be an exaggeration to say that, with regard to the public desecration of the Sabbath, even those alleys between houses should be deemed to be the observant residents' private domain.

Let us emphasize: at present, we are dealing with the expansion of the private domain only with regard to the public desecration of the Sabbath. We shall not, however, consider expanding the private realm in respect to any other matter involving the imposition of religious customs in the public domain. Thus, in regard to any other matter, the public domain remains public and the observant residents living in the area have the same rights as anyone else—no more. The same would apply to opening a pub in the center of a Muslim village or a movie theatre on the Sabbath in the heart of an observant neighborhood. *See Meatrael* [6], at 508.

All these matters may be examined from the perspective of the relevant administrative authority. We ask ourselves whether the authority acted within the confines of its jurisdiction and within the boundaries of reasonableness when it chose to expand the private domain with regard to the public desecration of the Sabbath, or when it forbade opening a pub or a movie theatre in a certain neighborhood. We, however, prefer to peer underneath the exercise of discretion and examine the relevant conflicting interests. The central issue is whether there is authority to coerce an individual to do—or refrain from doing—a certain act in the public domain, when the reason for coercion is rooted in religion.

28. The matter at bar does not involve the ordinary exercise of administrative discretion. Had we been dealing with placing a no-entry signpost for purely traffic-related considerations or with closing a certain roadway for construction purposes, we would be examining the Traffic Controller's exercise of his discretion through the prism of administrative

Justice M. Cheshin

law. This, however, is not the case when the Traffic Controller turns to “extra-traffic” considerations, such as religious matters. In this instance, a constitutional consideration of the first rank comes into play. A constitutional consideration requires constitutional analysis and the ordinary rules of administrative law are not fit for the challenge. Whether we like it or not, we are within the realm of constitutional law and the Traffic Controller’s discretion is not the same as it would be understood by administrative law. Of course, constitutional considerations constitute the foundation of our entire legal system—they permeate it through and through. *See* 1 I. Zamir *supra*. [91], at 103. But, in our case, the constitutional aspects of the case at bar are prominent. As an aside: seeing as how we are dealing with a constitutional struggle, the fact that the Traffic Controller changed his mind becomes peripheral.

29. The individual’s “extended” home may be said to include his home’s surroundings. Do these surroundings include a street the likes of Bar-Ilan? To this end, the statements of the Traffic Controller, Mr. Alex Langer, in his letter of November 29, 1994, addressed to the Mayor of Jerusalem, are most pertinent:

In light of publications in the media and the situation on the street itself, I found it appropriate to apprise you of our position on the matter. The Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem’s northern neighborhoods to the city’s center and south, every day of the week. It would be unthinkable to close this route to traffic on the Sabbath or on any other day. Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

Let us be well aware of the fact that Bar-Ilan Street is a “main traffic artery” and therefore “[i]t would be unthinkable to close this route to traffic on the Sabbath or on any other day.” So it was when the Traffic

Controller spoke according to his conscience, employing sharp language such as “unthinkable” to illustrate his view. Let us offer our own view on this matter: the Traffic Controller spoke as he did without even being asked his opinion. His statements revealed that he had heard or read of the Sturm Committee’s intention to recommend that Bar-Ilan Street be closed on Sabbaths and holidays, which outraged him, prompting him to write to the Mayor as he did. When a person speaks frankly he exposes the contents of his heart.

The Traffic Controller felt the need to reiterate his position, and followed up his first letter with another, just a few months later, expressing his point of view unequivocally. He wrote the following to the Mayor of Jerusalem on November 3, 1995:

As I have already stated in my letter dated November 29, 1994, I will not agree to Bar-Ilan Street’s closure on Sabbaths and holidays, or on any other day.

The Traffic Controller took a similar stance on March 27, 1996, in a meeting between the Minister and Bar-Ilan’s residents. In summarizing the meeting, it was announced—in the Traffic Controller’s professional opinion, that Bar-Ilan Street is a central traffic artery which must not be closed on the Sabbath.

Later on, the Traffic Controller announced that he had changed his mind, a matter on which we have yet to comment. Nevertheless, the clear words spoken by him cannot be retracted, namely, that Bar-Ilan Street is a “main traffic artery” and that it would be “unthinkable” to have it closed on Sabbaths and holidays. These words are not mine—they are the Traffic Controller’s own. Moreover, these statements are quite significant seeing as how our case involves a constitutional matter of first rank. We are not dealing with the ordinary exercise of discretion as a routine administrative issue—such as a decision to reroute traffic to the right or left—but with a matter involving relations between religion and state. As

we have seen, a matter such as this demands both constitutional and statutory attention. The instant that matters of religion—of either religious freedom or coercion—are involved, we follow and live by statute and the constitution, not by the Traffic Controller's instructions. For this very reason, as noted, the fact that the latter changed his mind will only be given minimal weight.

30. From the Traffic Controller's statements we learn that Bar-Ilan Street is a "main traffic artery" that should not be closed—neither on the Sabbath nor on any other day. Applying these words to our own case, Bar-Ilan Street is the public domain, and not in the formal sense alone. For even those alleys between the houses are part of the public realm. But Bar-Ilan Street is the core of the public domain—in both name and substance. Bar-Ilan Street is by no means the private domain; it is public domain, in the truest sense of the concept. Each and every individual has an equal right in it: those living in its vicinity and those who do not. Bar-Ilan Street is the main road, the King's Highway along which the King and his people shall travel. The Traffic Controller is not permitted to compel the individual not to use a road such as this.

31. In describing Bar-Ilan, the Traffic Controller did not use the phrase "main traffic artery" in vain. An artery is a blood vessel infusing man with life. Bar-Ilan Street is a *main* traffic artery. Thus, in deciding to close the street to traffic, the Minister infringed a constitutional principle. This principle provides that a government and administrative authority is precluded from restricting an individual's freedom in the public realm for religious reasons. And so, government authorities renounce the freedom to take religious considerations into account unless specifically authorized, at which time these factors are to remain peripheral. For our purposes, the Minister of Transportation deviated from that which is permissible by attaching determinative weight to religious considerations and by imposing religious commandments on the public domain—on a central traffic artery belonging to the public.

Perhaps there will be those who will inquire what became of the rule in *Yeshurun* [1] or in *Baruch* [2]. To them I provide the following answer: at a certain point quantity becomes quality. At times, a little difference can mean a lot; a straw may break the camel's back. The two precedents above dealt with a "small quantity." By contrast, the case at bar, stated in these terms, involves a very large quantity. The Court in *Baruch* [2] stated that a mere fifty private vehicle owners were liable to be negatively affected by the closure—those fifty as compared to hundreds of thousands here.

*On Expropriation and Individual Rights*

32. The private realm is the individual's. Neither an individual nor the public can infringe the individual's right to his private domain unless explicitly empowered to do so by statute or by the Constitution. And what of the rights of the public and the individual in the public realm? They have the right to walk through the public domain, to drive through places intended for that purpose, to travel on roads and through fields—a right generally known as the liberty or freedom of movement. Nevertheless, the public domain is the public's home, and each member of the public can use it provided that he or she behaves as one does in public—respecting their fellow's right to do the same, while refraining from causing the public realm any harm. The liberty of movement in the public realm is subject to these rules.

How then does a person travel in the public domain? There was a time when people traveled on foot or rode on animals:

And Bilam arose in the morning and saddled his ass and rode with the princes of Moab. And God's anger was kindled because he went: And the angel of the Lord stood in the way for an adversary against him. Now he was riding upon his ass, and his two servants were with him.



Numbers, 22:21-22 [113]. So it was in the days of old. Today, the car has replaced the donkey. Freedom of movement, however, remains the freedom to walk in the public realm, to ride donkeys or to drive cars. *See* Crim. A 217/68 *supra*. [12].

The value attaching to freedom of expression is of the highest order. Deputy President Ben-Porat stated that freedom of movement was equal in weight to freedom of speech, *Dahar* [23], at 708, and of course it is unnecessary to elaborate on the value attaching to the latter freedom. Moreover, freedom of movement is a descendant of freedom—freedom, as we all know, being of primal importance:

The right to life and to all things upon which life depends—the right to breathe, to drink, to eat—is the source of all rights. Second in rank is freedom.

HCJ 606/93 *supra*. [41], at 25. Such is freedom of movement and this is its place in the hierarchy of individual rights in the public realm.

My colleague, Justice Or, elaborates on the subject of freedom of movement, concluding that in our case, in the internal struggle between clashing interests, freedom of movement prevails. While I do agree with him, my agreement is accompanied by a certain feeling of discomfort. Why? Freedom of movement, like other recognized individual freedoms, is not crafted of one clay. Instead, under the umbrella of each and every freedom, we find a plethora of freedoms. Take, for example, freedom of expression; an accepted position is that commercial expression is not afforded the same degree of protection as political expression, which is more closely guarded. *See* HCJ 606/93 *supra*. [41]. This is also the case for freedom of movement. In other words, not every matter that may claim to fall under that heading is worthy of the same degree of reverence and protection. Freedom of movement, first and foremost, implies the individual's primary personal freedom. As per section 5 of the Basic Law: Human Dignity and Liberty, "[t]here shall be no deprivation or

restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise” except in accordance with the limitations set out under section 8 of this Basic Law.

Alongside personal freedom we find freedom of movement, as it is commonly understood—the individual’s liberty to roam throughout the land, from top to bottom, from left to right, from one end to the other of the public realm. This is freedom of movement in all its wonder, in all its glory. In this context, let us, for instance, recall the provisions found in Regulations 109,110 and 125 of the Defense [Emergency] Regulations-1945, authorizing the Military Commander to restrict the individual’s rights in the public sphere.

Is this the freedom of movement at issue here? I would find it difficult to agree. First of all, the intended prohibition only applies to motoring on Bar-Ilan Street. It is permitted to enter Bar-Ilan Street provided one is traveling on foot. Secondly, the time it takes to travel down the alternate routes is not much longer than the time it would take to go down Bar-Ilan Street. In conjunction, these two factors render make the following conclusion practically inescapable: the issues raised in this case are at best peripheral to freedom of movement: far from its core, possessing no greater strength than any other peripheral right.

The matter, however, does not end here. The reason being that, in our opinion, there is no need to project the case as fitting exclusively within the doctrine of freedom of movement in the public realm. The matter should be understood more broadly, namely in the context of the individual’s rights in the public sphere, with freedom of movement being only one of its manifestations. Each and every individual in society has a vested interest in the “public domain”—a public property interest of sorts—which implies that society is prohibited from expropriating this interest unless expressly authorized by statute or by the Constitution.

A parable: a man owns a large ranch. In order to facilitate getting

around his extensive piece of property, he paves roads and paths inside the ranch. The ranch is private property, as are the roads and paths. Suddenly, strangers, without having acquired any right in the property, disturb this man and prevent him from continuing to use the paths or roads on his farm. The man will take these strangers to court and win his case against them, seeing as how they trespassed on his property. The case will not raise the issue of freedom of movement—the freedom to move about the farm. Instead, the man will argue his right to his private property. That is the parable and here is its lesson: the individual has a public property interest of sorts in the public domain and no one has the right to infringe on this interest—this right, among other freedoms, implies freedom of movement.

33. And so, for instance, “designated property”, which the Property Law-1969, § 107 defines as “public property designated to be used for the public’s benefit,” including rivers, riverbeds, roads, railways and sewers. The law designates how such property is to be dealt with, “to ensure that the public is not driven from property intended for its benefit.” *See* Y. Weissman, Property Law 276 (1993) [95]. Furthermore, “the purpose of these rules is to ensure that this property will continue to serve the public interest for which they are intended.” *Id.* at 285. Needless to say, roads, by their very nature, are intended for the public’s benefit, *Id.* at 280—and for the public in its entirety, not just a certain part thereof. Thus, whoever deprives the public of its rightful property and grants it to an individual or to a certain segment of the public only—as did the Minister in this case— infringes on the public’s rights. Through his actions, the Minister expropriated from the public that which he was not permitted to expropriate. *See also* H. Klinghoffer, Administrative Law 141 (1957) [96].

This was also the case in ancient Roman Law. Indeed, ancient Roman Law classified goods that were not considered private into various categories, including *Res Ominum Communes*, which included air, running water, the sea and its beaches, and *Res Publicae*, which referred

to property belonging to the nation as a whole, namely those goods owned by the state and designated exclusively for public use. *See* R.W. Leage, *Roman Private Law* 154 (3<sup>rd</sup> ed. 1961) [106]; Dr. S. Eizenstat, *Roman Law, its History and Doctrine* 143 (1954) [98], explaining that these goods “were at every Roman’s disposal and were extended special legal protection.”

This is also the law under the Anglo-American system. Since time immemorial, the law in England has been as follows:

In a highway the King hath but the passage for himself and his people.

1 Roll. Abr. [Rolle’s Abridgment, 1688] 392, cited in 21 Halsbury *The Laws of England* [108], at 78, n. 2. Justice Wills, in *Ex parte Lewis* (1888) [88], at 197, commented on the nature of the public’s interest in public roads:

[A] right for all Her Majesty’s subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.

The public’s right to passage on public roads has priority over the rights of adjacent property-owners; it has priority over it and overtakes it:

Speaking generally, the public have the right of free and unobstructed passage over the whole of a public highway...But the right of the public is a higher right than that of the occupier, and if the user by that occupier, though reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights, and the Court will interfere by restraining the continuance of the obstruction.

---

Justice M. Cheshin

*Vanderpant v. Mayfair Hotel Co.*, 1 Ch. 138, 152-53 (1930) [89]. Hence, a public road belongs to the public not the individual and not to those residing in its vicinity. The public has the right to use the road as it wishes, at any time.

This is also the law in the United States. In cases where a public road passes through a residential neighborhood, the local residents are not given any priority over outsiders, as the New York Court of Appeals held in a widely cited case:

Bearing in mind the principle above mentioned that political subdivisions and municipal corporations hold the fee of streets for the benefit of the whole people, it follows that residents of a particular area in a town or village do not possess and cannot be granted proprietary rights to the use of the highways therein, in priority to or exclusive of use by the general public.

*People v. Grant*, 17 N.E.2d 542, 544 (1954) [86]. In *NYS Public Emp. Fed. V. City of Albany*, 527 N.E.2d 253, 255 (1988) [87], the Court further stated:

Historically, English highways were said to be the King's and impeding their use was proscribed for his right was one of passage for himself and his subjects....Tailoring the English rule to democratic concepts, the common law in New York has restricted local regulation by impressing a public trust upon the streets. The right to use of the highways is said to rest with the whole people of the State, not with the adjacent proprietors or the inhabitants of the surrounding municipality.

And further on, at 256:

The general rule is clear: residents of a community have no greater right to use the highways abutting their land—whether it be for travel or parking—than other members of the public.

I believe there is no need to elaborate on the subject. Bar-Ilan Street is part of the public domain. As such, it belongs to the collective, the public—not to its residents or those living in its vicinity.

Finally, and closest to us, Jewish Law states as follows in the Mishna *Baba Bathra* 6:7 [114]:

He whose field is traversed by a public path and he closed it, substituting [another path] at the side, forfeits that which he has given, and [that which he has appropriated as] his does not pass into his possession.

In more modern words, as translated and interpreted by Shimon Ben-Shemen in his modern commentary to Tractate *Baba Bathra* 92b (1981) [115]:

He whose field is traversed by a public path [a road which the public had always used] and he closed it [the field owner appropriated segments of this public road] substituting another path [by carving out a different route for the public to use, at the edge of his field] forfeits that which he has given [to the public users], and his [the road that was originally public, and which the field owner wished to take from the public and make it his own] does not pass into his possession [both roads are deemed public].

From this we learn that the public roads belong to the public. The public, and each one of its members, is authorized to use these roads even if they happen to cut through an individual's private property. An individual is prohibited from taking a public road and appropriating it

---

Justice M. Cheshin

even if he grants a part of his land to be used as an alternate road. One who attempts to appropriate a public road by carving out an alternate route in his field actually renders both roads public property.

A debate arose among the Rabbis of the Talmud regarding the interpretation of the Mishna. Why and for what reason is an individual not entitled to offer an alternate route in exchange? The public is in no way negatively affected by the exchange. In response, three rabbis offered three different approach. *See* Babylonian Talmud, Tractate Baba Bathra 99b-100a [116].

The first approach: “Rabbi Zevid said in the name of Raba: It is a decree [that he is not allowed to substitute another path for the one already used by the public] lest he assign to them a crooked path.” In other words, there is a fear that the field owner may provide an alternate route of lesser quality than the original road.

The second approach: "Rabbi Mesharsheya said in the name of Raba: [Our mishna deals only with the case where] he gives them a crooked path." According to this approach, the Mishna is only discussing a case in which the alternate road is actually of lesser quality. If, however, the alternate route is of equal quality, it may properly serve to replace the original road.

The third solution: “Rabbi Ashi said: Any path [that runs] along the side [of a field] is crooked.” In other words, in practice, any alternate route that the field owner proposes to grant will actually be inferior. As such, he is not authorized to replace the original route.

In summary: the public domain may not be expropriated even if the public is offered an alternative in exchange.

For our purposes, the analogy is clear: the Minister of Transportation was prohibited from expropriating the right of the public to use Bar-Ilan

Street. This rule applies *a fortiori* to our case—if an individual is precluded from expropriating a public road even if he grants a piece of his own property in exchange, all the more so in our case, where both roads—Bar-Ilan Street as well as the alternate route—are actually public property.

34. The principle that “[t]here shall be no violation of the property of a person,” as per section 3 of the Basic Law: Human Dignity and Liberty may also apply to the individual’s right to public property. It is most appropriate that this principle—if not in language than in spirit—apply to the individual’s right to public property. An individual is not to be deprived of his property “except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required.” Basic Law: Human Dignity and Liberty, § 8. An individual’s right to the public domain is similar to his right to his private domain.

35. In his affidavit, the Minister explains that the alternate road to Bar-Ilan Street will lengthen motorists’ journey by merely a few additional minutes. Therefore, the Minister contends, on one hand we have the Ultra-Orthodox residents who claim that allowing traffic on Bar-Ilan Street on the Sabbath gravely offends their religious sensibilities. On the other hand, according to the Minister, motorists will only be inconvenienced by a few additional minutes. Anyone, insists the Minister, would understand that there is no contest between these “competing” rights. I do not agree.

I would agree that the competing interests, as the Minister asserts, are not of equal weight, as less weight attaches to the matter of convenience than to the observant community’s offended feelings. This, however, is not the issue. Instead, the issue is whether the Traffic Controller was authorized to expropriate the public interest in public property. The answer is no—the Traffic Controller was not so authorized. Each and every member of the public has the right to pass through Bar-Ilan Street,



unhindered, in accordance with his wishes. Bar-Ilan Street is public property and as such may not be expropriated, unless by statute.

Take, for example, a given central traffic artery. The Traffic Controller allots the local residents parking spots on land forming part of the road itself. This road is so wide that no one senses this expropriation. Would the Traffic Controller be permitted to act so? No one will defend his actions—public property is public property and no one is allowed to expropriate it, except under authorization of statute. How then is Bar-Ilan Street any different from this traffic artery? If traffic on Bar-Ilan Street, or any other street, would be prohibited for the purpose of installing pipes for public use, no one will deem this an expropriation—street-closures for such purposes are provided for in traffic laws. The consideration underlying the closure is traffic-related, pure and simple. This is not the case when religious factors come into play, and demand that a road be expropriated from the public for the benefit of a few.

36. For our purposes, the Ultra-Orthodox residents living on and around Bar-Ilan Street passionately object to the petitioners' claims. They advance the following argument: why do the petitioners object to the closure of Bar-Ilan Street during prayer times when they agree to street-closures in their areas? Take Jerusalem's Ben-Yehuda Street, which was turned in to a pedestrian promenade, Tel-Aviv's Dizengoff Street, which is closed to traffic on Sabbaths, and Netanya's Herzl Street, which becomes a pedestrian walkway on the Sabbath. As per their brief of July 26, 1996, submitted on behalf of the residents of Tel-Azra and Bar-Ilan/Yermiyahu Street:

It was possible to close Ben-Yehuda Street, a central traffic artery, and to turn it into a pedestrian promenade. It was also permitted to close Tel Aviv's Dizengoff Street on Sabbaths, despite its being a central traffic artery, in order to allow for coffee house clients to quietly enjoy themselves. Nevertheless it would be "unthinkable" to close Bar-Ilan Street on Sabbaths

even though the absolute majority of its residents demand this closure, as Sabbath traffic offends their sensibilities, disrupts prayers in the local synagogues and threatens the welfare and security of the neighborhood children, crossing the street throughout the day.

Are the local residents asking for that much? All in all, they ask that their street become a pedestrian walkway on the Sabbath, or at least, as per the Sturm Committee's recommendation, during prayer times.

Further on in their affidavit, these same residents point out that:

About one-hundred per cent of the residents in the area of Shmuel HaNavi Street and Yirmiyahu Street, up to Shamgar Street, are either religious or Ultra-Orthodox. Their sensibilities are to be heeded and their lifestyle respected, above that of those invading their neighborhood.

Do these respondents honestly believe that Bar-Ilan Street may be analogized to these streets, which they offer as examples? The difference between these stands out for all to see: while traffic was absolutely prohibited on Ben-Yehuda Street, and at certain times on Dizengoff and Herzl Street, these streets remained the public's in their entirety, open for all members of the public to use and enjoy. The public domain remained public and the individual's interest in public property remained unchanged. While the public will be precluded from driving through these streets, they will nevertheless be able to enjoy sitting on a terrace in a coffee shop on it. The matter of Bar-Ilan Street however, is as different as it can be. Once closed, that street is effectively expropriated in favor of the local residents, thereby turning the public domain into the domain of *some* of the public. Surely, the respondents do not seriously believe that that the inhabitants of the rest of Jerusalem's neighborhoods will come take a stroll down Bar-Ilan Street.

37. A basic principle of law is that there is no expropriation without compensation, unless the legislature explicitly stated otherwise:

When dealing with legislation empowering the authorities to infringe on the citizen's property rights, the legislation is not to be interpreted in a manner allowing for such harm without compensation, unless it is clear and obvious that the legislature intended to deny the right to compensation.

HCJ 150/69 *Reich v. Head of the Antiquities and Museums Administration* [78], at 209 (Cohen, J.). This was the law even prior to the enactment of the Basic Law: Human Dignity and Liberty and certainly remains so after the right to property has been enshrined in article 3 of this Basic Law, and the enactment of the limitation clause, in section 8 of the Basic Law. There is no expropriation without compensation. He who takes must give something in return—*quid pro quo*.

38. I felt it necessary to state this well-known rule in order to discuss the recommendations of the Tzameret Committee. The majority there recommended closing Bar-Ilan Street on Sabbaths and Jewish holidays during prayer times “provided arrangements are made to ensure the mobility of the secular public in accordance with its needs, within the framework of the existing *status quo*.” Each Committee member and party to the petition interpreted this last condition differently. Had the Committee been composed of seventy members rather than seven, we would have heard seventy interpretations of the decision. In his affidavit of November 6, 1996, the Minister disagreed with a number of Committee members—with Dr. Tzameret and Professors Schweid and Golan—regarding the meaning of the condition set out, opining that it is “more opaque than it is transparent” and that these three members’ interpretation of it “is totally unfounded.” Forgive me if I cannot agree with the Minister’s opinion.

39. I assume that there is no internal link between closing Bar-Ilan Street and instituting public transportation in Jerusalem on the Sabbath. Instituting public transportation on the Sabbath will not solve the difficulties created by Bar-Ilan Street's closure, just as not closing Bar-Ilan will not compensate for the lack of public transportation for Jerusalem's non-observant residents who do not have access to a private vehicles. This in itself is a problem, yet unrelated to the matter of Bar-Ilan Street. This problem was examined in Professor Galia Golan's writings prior to the Tzameret Committee's publication of its report. *See* para. 10 *supra*.

The fact is that instituting public transportation on the Sabbath was intended to serve as an outstretched hand for peace within the context of the social covenant to be struck between the observant and the non-observant sector—give and take, a mutual exchange, a *quid pro quo*. This is how one shows good will to his fellow in order to foster trust. For this reason, I am not convinced that the Minister's conclusion that instituting public transportation on the Sabbath "would have the effect of...disrupting the existing *status quo*" is correct. The matter of preserving the *status quo* is not relevant here. I for my part assert that we should focus on *quid pro quo* rather than on the *status quo*. Let us for a moment assume that instituting public transportation on the Sabbath would in fact "disrupt" the *status quo ante*. Does closing Bar-Ilan Street not also disrupt it? Indeed, as I stated in *Meatrael supra* [6], at 506, the "*status quo*" that everybody keeps referring to "is unlike any other *status quo*." It is an "Israeli-style *status quo*." And how is an "Israeli-style *status quo*" defined?

An Israeli-style *status quo* is an imprecise, nebulous and flexible concept: all those who invoke it will mold it in their image, to suit their purposes. It is like clay in its creator's hands—it may be molded, stretched out, or constricted.

*Id.* at 506-07. What reason is there for us to discuss the *status quo ante*? Let us instead speak of a social covenant, a covenant struck in honesty and good faith, whereby each side both gives and receives. One party agrees to Bar-Ilan Street's closure while the other consents to making public transportation available. Expropriation on the one hand, compensation on the other. Give and take, *quid pro quo*.

40. This was the reasoning underlying the proposal made by this Court, according to which Yam Suf Street would opened to traffic as a result of Bar-Ilan Street's closure. The City of Jerusalem and the Minister of Transportation rejected the proposal, invoking the lack of any connection between prohibiting traffic on Bar-Ilan Street and permitting it on Yam Suf Street. In the Minister's own words:

Professionals in the field and the Ministry of Transportation agree with the City of Jerusalem that there is no significant traffic connection between closing Bar-Ilan Street and reopening a segment of Yam Suf Street. Yam Suf is not an alternate route to Bar-Ilan.

Nevertheless, this response fails to address the Court's proposal. Never did the Court contend that there was any link between the license and the prohibition. Speaking for myself, I can say that my own intention was to promote a showing of good will, to foster rapprochement between the parties, to extend an outstretched hand for peace. Thus, when examining the response submitted by the Mayor of Jerusalem and the Minister of Transportation, which claimed that "to the best of my understanding, as a Local Traffic Authority, it is appropriate that things be left as they are now with respect to the segment of Yam Suf Street in question," we were at a loss as to why. And so, even the flicker of good will that the Court hoped to nurture was extinguished.

*On the Independence of the Empowered Authority's Exercise of Discretion*

41. A short time following Israel's independence, the Supreme Court set out a rule regarding the independence of an authority's decision making powers. See H CJ 70/50 *Michlin v. Minister of Health* [79], at 323-24. While this ruling is widely cited in various contexts, our concern at present is limited to one aspect—an administrative authority's decision that it took in accordance with instructions that it received from the Minister appointed over it. In order not to stray unnecessarily, let us, for the moment, assume that the appointed Minister was permitted to assume the authority's powers. See section 1 of the Government Authorities and Judiciary Ordinance (additional provisions)-1948, and section 42 of the Basic Law: The Government. The established law is that the authority may not base its decision on the Minister's instructions. The authority is independent. Consequently, if it is shown that the authority decided as it did because the Minister instructed it to do so, the decision will be struck down, by reason of the fact that the discretion was not independently exercised. We all recall the Court's decision in H CJ 74/51 *The National Center of Contractors Associations v. Minister of Commerce and Industry* [80]. In that instance, the appellants' counselors argued that Mr. Noy, the empowered authority, based his decision on government policy rather than his own discretion, which would invalidate his decision. The Court rejected this argument, stating at 1550:

Having seen and heard Mr. Noy on the witness stand, we are left with the impression that he is a competent individual and we reject the argument that he merely carried out the will of others, without exercising his own discretion.

While it appeared that the government made an important policy decision, a decision of this nature does not bind the administrative authorities. It was purely its good fortune that Mr. Noy happened to agree with its position.

Justice M. Cheshin

42. This rule regarding the independence of the administrative authority— particularly from the responsible Minister—was the subject of extensive criticism. First among the critics is our distinguished teacher, Professor H. Klinghoffer, in his article *An Empowered Authority's Internal Guidelines—Their Validity*, 3 Hod HaMishpat 38 (1948) [104]. This view was shared by many distinguished scholars, such as Professor B. Bracha in his book, 2 Administrative Law 604 (1996) [99] and Dr. Y. Dotan in his book Administrative Guidelines [99]. The Court found different ways to narrow this rule, to avoid it, even to ignore it. Even so, to the best of my knowledge, the rule has remained intact and Professor Bracha believes that “changing the rule requires legislative intervention.” *supra*. [98], at 102-03. I do note, however, that while I may agree with Professor Bracha’s words regarding the rule itself, I am not certain that I share his views on this last point.

43. In the case at bar, the Traffic Controller, in November 1994, at the time speaking freely, felt that it would be “unthinkable” to close Bar-Ilan Street on Sabbaths and holidays. Approximately a year and a half later, following conversations with the Minister of Transportation, the Traffic Controller changed his mind most drastically. So he declared before this Court, in response to our inquiries.

It is with great interest that I read the Traffic Controller’s brief. I listen to his oral explanation carefully. I further read the protocols from arguments before this Court. Subsequent to all these efforts, I was convinced that it is proper to reverse the so-called “independence” rule. I will not lay out the whole issue, but only part, in saying the following: when the Minister is permitted and authorized to assume an authority’s powers, he is equally allowed to direct that authority and instruct it as to how it is to decide. Judicial review will then examine the decision on its merits—not in view of the decision-maker’s identity.

*A Final Word*

45. I have said my piece, as have my colleagues, each in his own way. The majority opinion will be the decisive one. Such is the way of the law since time immemorial. Life, however, is stronger than a judicial ruling, particularly when it involves long-standing, dynamic human relationships. No society may exist absent tolerance and patience between men. Hatred and jealousy is a recipe for disaster. The Court sought to pave the way for a social covenant—however unsuccessfully. We can now only hope that in the end wisdom will prevail and end in a handshake. Our hope is not yet lost.

*After These Words...*

45. Having said that which I just did, I will add a few words that are for their part unnecessary to deciding this case. I would have refrained from making the following comments had some of my colleagues not first broached them. I refer to the matter of the Tzameret Committee's recommendations regarding street-closures—both present and future.

46. The third chapter of the Tzameret Committee's recommendations was entitled: "Recommendations Regarding Sabbath and Holiday Street-Closures Nation-Wide." The text itself featured rules instructing us how to go about closing Israeli roads: a "local street" shall be closed in such and such a way; "an internal thoroughfare" this way; "an intercity road" that way, and so on. Each of the roads were given their own label; authorities responsible for ordering street closures were set out as were procedures for dealing with street closures; appeals boards were set up, as were times and dates. My colleague, the President, presents a few of these recommendations in paragraph 36 of his judgment and the rest are, of course, found in the Tzameret Committee's report.

Until now, streets were closed one by one, individually—a few here a few there. Henceforth, the Committee proposes to write the book on



street closures, as though roads were paved, surfaced, and opened only to be closed. Under this line of thinking, street closures will no longer be an exceptional matter in isolated instances, as they were until now. Instead, street closures shall become the norm. And so it will be every Sabbath and every holiday.

47. For my part, I find it difficult to accept that such norms be set out in this country. Since the issue was not raised for the Court to rule on in this case, I will not elaborate on the matter, nor will I examine it on its merits. Suffice it to say that there is cause to believe that if we were to follow this path, both administrative guidelines and regulations would prove insufficient for this purpose. Only a statute can regulate the matter. There are those who would even deem that insufficient.

#### *The Ruling*

48. Were my opinion to be adopted, petitions HCJ 5016/96 and HCJ 5025/96 and HCJ 5090/96 would be granted and the Minister's decision to close Bar-Ilan Street to traffic during prayer times on Sabbaths and holidays would be struck down. This would also include the revocation of the *order nisi* granted in HCJ 5434/96.

#### **Deputy President S. Levin**

1. I had hoped that setting up the Tzameret Committee would allow us to foster a general social consensus between the various sectors of the population regarding Sabbath traffic, a consensus on the basis of which we could also resolve the matter of Sabbath traffic on Bar-Ilan Street in particular. Our hopes, however, were shattered, leaving no other alternative than for this Court to rule on a divisive political issue.

While the Court was dragged into making decisions of this nature against its will, it cannot dodge its responsibility or the need to decide.

Our decision is not a political one. It is a judicial ruling for the purpose of which we set aside our personal views regarding which measures should properly be taken in the political and social realm. Nor are we at liberty to opt for compromise, according to which practical solutions, such as agreeing to the closure of a particular street on the Sabbath in exchange for the institution of public transportation on that day in other parts of the city. While these are solutions that could have been reached through negotiations, they are not possible solutions on the legal plain. The Court's ruling is judicial as it is premised on judicial review of the decision of the Minister of Transportation, having assumed the Traffic Controller's powers, as expressed in his brief dated November 6, 1996. The decision should be read bearing in mind the Traffic Controller's decision of July 10, 1996 regarding Bar-Ilan Street's temporary closure on Sabbath during prayer times. The Minister's decision is an administrative one, and it is in this capacity that it is attacked before us today. The tools at our disposal for the purpose of examining the Minister's decision are derived from administrative law and our examination shall be conducted on the following five levels:

- (1) The Minister's decision and its components;
- (2) The various interests that the Minister was under a duty to take into account in making his decision;
- (3) The factual basis required for the purpose of determining the existence of each of the relevant interests and their respective scope;
- (4) Weighing the Minister's decision both from the perspective of the relevant factual basis and from that of the balance between the various relevant interests and their scope;
- (5) Our operative decision.

*The Minister's Decision*

2. The Minister of Transportation thought it proper to accept the part of the Tzameret Committee's recommendations adopting the Sturm Committee's decision to close Bar-Ilan Street to traffic during prayer times on Sabbath and holidays. The Minister offered his opinion regarding the "protocol for dealing with requests for street-closures", according to which type B3 roads such as Bar-Ilan would only be closed when a reasonable alternative was available. The Committee recommended that, in matters concerning roads the likes of Bar-Ilan, the burden of making decisions of this sort be shifted to the local authority. In consequence, the local authority would decide whether to close roads to traffic in areas where the overwhelming majority of the population has expressed its wish to this effect, subject to the availability of a reasonable alternate route. Furthermore, the Committee set out guidelines regarding how to deal with requests to close roads, including the right to appeal before a public committee. On the basis of these recommendations, the Minister decided to close Bar-Ilan Street on Sabbaths and holidays.

The fact that the said recommendations were contingent on what was defined as an "arrangement to ensure the mobility of the secular public in accordance with its needs in the framework of the *status quo*" did not escape the Minister. Even so, he opined that these recommendations were opaque and that differences of opinion arose between some of the Tzameret Committee members as to their significance. Accordingly, the Minister decided to only adopt the first part of the Committee's decision, unconditionally. To this end, the Minister consulted with the Traffic Controller, who supported the decision, provided that Bar-Ilan Street's closure during prayer hours be contingent on Golda Meir Boulevard and the entrance to the city remaining open to traffic on Sabbaths and holidays, and that the lane reserved for public transportation on Jaffa Street be opened to all private vehicles on those days.

The Minister reviewed the Committee's report and its appendices and

discussed them with the Traffic Controller prior to making his decision of July 10, 1996, as per the brief he submitted to this Court and in accordance with the Traffic Controller's suggestion. The Minister's summarized his decision:

The additional material presented before the Committee and its recommendations reveal that there is no traffic-related justification for changing the weight attaching to the harm caused to the religious lifestyle of the residents as compared to that attaching to the infringement on the secular public's freedom of movement on the road.

Even so, the Minister decided that Bar-Ilan Street would be closed to traffic on Sabbaths and Jewish holidays during prayer times, in accordance with the Sturm Committee's recommendations.

3. We elaborate on the Minister's decision in greater detail, dwelling on the following three points: first, the Sturm Committee recommended, with Committee member Ya'acov Rubin dissenting, that Bar-Ilan Street be closed during prayer times. It also recommended that Yam Suf Street remain open as "that street serves a significant population from the neighborhoods of Ramat Eshkol and Givat Ha'Mivtar and serves as a central traffic artery for the residents of these neighborhoods." The previous Minister of Transportation accepted the Traffic Controller's professional opinion that Bar-Ilan Street was not to be closed by reason of it being a central traffic artery. At the same time, the Jerusalem City Council decided to close Yam Suf Street and other streets that the Sturm Committee recommended should remain open.

Second, within the context of the negotiations conducted between the parties, the Court suggested that the parties examine the possibility of reopening a segment of Yam Suf Street to traffic. The closure or reopening of Yam Suf Street was under the jurisdiction of the Local Traffic Authority, which was not so inclined, stating that professionals in

the Ministry of Transportation accept that “there is no significant traffic connection” between closing Bar-Ilan Street and reopening a segment of Yam-Suf Street, as the latter is not an alternate route to Bar-Ilan.

Third, during her pleadings before this Court, Ms. Mandel was asked why her client, the Minister, decided to only close Bar-Ilan Street during prayer times. She replied that the purpose of the closure was to permit the Ultra-Orthodox public the opportunity to pray undisturbed. In response to our queries, Ms. Mandel further informed us that the Minister decided as he did following “an additional evaluation of all the relevant interests as well as the harm caused religious sensibilities of those residing in the street’s vicinity. Both this evaluation and the decision’s reasonableness need to be examined in light of the existing alternatives.” Moreover, Mrs. Mandel asserted that the Minister did not consider the issue of violence. However, if circumstances were to change and the violence were to continue, she assured the Court, the Minister would revisit his stance.

Finally, when the respondents were asked whether the Minister had access to data regarding the number of non-Ultra-Orthodox residents living on and around Bar-Ilan Street, they replied that exact data was not available to him. Instead, he “dealt with percentages” and in any event, the majority of the population residing in Bar-Ilan Street’s vicinity is Ultra-Orthodox. The fact that the Minister lacked any factual basis for determining the number of secular families liable to be harmed by his decision was also raised in the Court’s meeting of August 13, 1996.

#### *4. The Relevant Interests*

The authorities are permitted to weigh and take into account three central factors when deciding on the complete or partial closure of a given road. The first is a transportation-related factor, which includes the public’s interest in entering and exiting a particular road for passage and each individual’s freedom of movement. The second involves the feelings and sensibilities of the majority of local residents living alongside the

road, if they request that it be closed to traffic, in order to ensure that their neighborhood's particular character is preserved, whether their reasons are religious or not. The third factor is the interest of the "minorities" residing alongside the road (and their visitors) who claim the unqualified right to reach their homes at all times and to travel from them in their vehicles undisturbed. Additional interests to be taken into account include access to security vehicles during emergencies.

The relative weight of these factors is not to be determined in advance in any given case. The more central the road, as in the case of a main traffic artery, the greater the weight attaching to the traffic factor. Nevertheless, these factors may be balanced in the event that reasonable alternate roads are available to the public. Case law also recognizes that the second factor as one that may be taken into account. Thus, for instance, in *Baruch* [2], at 163, the Court held that:

Ensuring the Sabbath rest, in accordance with the lifestyle of the interested public, is within the Traffic Controller's authority to regulate road-traffic.

Hence, even the proper weight attaching to the second factor is likely to vary depending on the circumstances, as a function of the size of the population whom road traffic is liable to offend, and their interest in preserving their lifestyle of choice in their immediate surroundings.

Just as the balance between the first two factors varies, so too does the weight of the third factor depend on the circumstances. The centrality of the citizen's freedom of movement, following the enactment of the Basic Law: Human Dignity and Liberty, and even prior to it, requires the guarantee that this right not be denied, even if other significant considerations justify restricting traffic on Sabbaths and holidays.

When do these remarks apply? When the residents of Bar-Ilan Street are involved (the third factor). In such a case, it is possible that the rights

Deputy President S. Levin

of those individuals for whom Bar-Ilan Street serves as a throughway may be limited in light of the rights of the majority of residents living along the road (the second factor), provided proper and reasonable alternate roads are available. However, I cannot accept the argument that if the neighborhood's character changes after a given individual moves in, and, because of this, restrictions were imposed on the road on which he resides, he must necessarily adjust to these restrictions even if they touch on his right to access his home or travel from it.

Bearing in mind these preliminary remarks, the issue in this case is whether the balance struck by the Minister between the conflicting interests cited above is appropriate.

5. At this juncture, let us elaborate on another matter in further detail. The conflict forming the subject of this petition lead to violent clashes between religious and secular, raising the question of whether allotting significant weight to the second interest is not tantamount to rewarding violence. It has already been held that although violence should certainly not be rewarded, the fact that there were violent outbursts does not negate our ability to consider the legitimate interests of those relevant elements irrespective of the violence. *See Baruch supra*, [2].

As the Court was informed, the Minister's decision was not influenced by the violence. This having been said, since any judicial arrangement involving the balancing of interests depends on the presumption that the arrangement will be respected, the Minister will be compelled to revisit his position absent proper implementation.

Once again, it has been argued that the partial closure of a given road to safeguard the local residents' feelings and sensibilities is likely to serve as a precedent for further closures, in places where the balance of interests resembles Bar-Ilan Street, in the end allowing determinative weight to be given to the second factor while ignoring the first or the third. Hence, we are prompted to inquire why Bar-Ilan Street's residents

should be given priority over the religious residents of other alternate routes, which perhaps were less vocal in invoking their rights. My answer to this is that the proper balance between the various elements must be preserved in every case and every limitation on the right of passage, if at all relevant, must be made contingent on the availability of appropriate, reasonable alternate routes.

#### *6. The Factual Basis*

The factual basis underlying the Minister's stance is composed of the Tzameret Committee's report and its conclusions, the Sturm Committee's recommendations, and the Traffic Controller's opinion submitted before the Tzameret Committee. In addition, the Minister consulted with his team of professionals. He also had access to petitions submitted by numerous citizens, religious schools, and the religious residents of Bar-Ilan Street.

The previous Minister of Transportation met with the residents of Bar-Ilan Street. The Minister had at his disposal the professional opinion of the Traffic Controller, Mr. Langer, according to which the Ministry was to treat Bar-Ilan as a main traffic artery, which connected Jerusalem's northern neighborhoods to its center and south every day of the week. Mr. Langer further added the following pointed statements:

It would be unthinkable to close this route to traffic on the Sabbath or on any other day.

Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

Following the elections of May 1996, the present Minister of Transportation assumed his position and convinced Mr. Langer to alter his original decision by considering the full depth of the harm caused to



Deputy President S. Levin

the local Ultra-Orthodox resident's sensibilities. While the traffic-related data remained essentially unchanged, the decision itself was altered due to the fact that a new element, unrelated to traffic matters, was added. While the Traffic Controller apprised us of his reasons for the change, his explanation left us disappointed. The Traffic Controller should be a traffic expert—not an authority on the degree of consideration to be given to religious factors. There is no doubt that the current Minister's decision is "ideological" in nature, and that his ideological stance differs from his predecessor's. This having been said, to my mind, there is no flaw in a decision being "ideologically motivated," provided that it respects the requirements set forth by law. Accordingly, the Minister was careful to respect the law when assuming the Traffic Controller's powers. An examination of his decision reveals that he tried to balance the relevant elements. This is the mark of an appropriate course of action. Even so, it is incumbent upon us to decide whether the final result reflected an appropriate balance.

The Minister also based his conclusions on the Sturm Committee's recommendations—a Committee set up by the City of Jerusalem. The Committee's purpose was to reach a compromise solution, not necessarily identical to a judicial solution. Thus, the Committee's recommendations are to be accorded weight even though the protocols of its sessions were not preserved. In retrospect, it became clear that following the previous Minister's refusal to close Bar-Ilan Street in accordance with its recommendations, a few other streets, which the Sturm Committee had decided would remain open to traffic, were closed. As such, Bar-Ilan Street's closure will not fully correspond to the Sturm Committee's recommendations.

The solutions proposed by the Tzameret Committee members are oriented towards compromise and do not reflect a legal solution. From all the proposals made to him, the Minister chose to conclude that the Committee does not, under all circumstances, rule out the closure of Bar-Ilan Street. He was, however, not prepared to accept the conditions set

out by a number of Committee members in this regard. The issue of whether the Minister was authorized to act as such shall be addressed below. It does appear that a certain amount of weight does attach to this conclusion as well.

Prior to making his decision, the Minister also commented on the Traffic Controller's position, as set out in his last letter of June 11, 1996. The letter reveals that the traffic related data remained unchanged, save the fact that the number of motorists using Bar-Ilan Street on Sabbaths, as compared to weekdays, dropped slightly. In his letter, the Traffic Controller also instructed that Golda Meir Boulevard "is an essential link in the network of streets, available during the hours that Bar-Ilan Street is scheduled for closure," and that, on Sabbaths, traffic in both directions will be permitted on Jaffa Street, as an additional lane will be opened to traffic, providing convenient access to Road no. One, and to Jerusalem's northern neighborhoods.

Among all the material before the Minister, data regarding the secular residents of Bar-Ilan Street was nowhere to be found; nor were any recommendations made as to how their rights were to be safeguarded. While data of this sort is found in the petition of HCJ 5434/96, it naturally requires the Traffic Controller's independent verification. Data regarding concrete harm to the secular residents resulting from Bar-Ilan Street's closure is available with respect to two of the petitioners in HCJ 5090/96.

Additionally, the material in the Minister's possession failed to address how the recommendations before him would be implemented in light of the threats and attacks made. The matter of how the threats and attacks influenced the decision itself and are liable to affect its implementation was not given any attention.

*Was the Minister's Decision Appropriate?*

Deputy President S. Levin

7. I feel it necessary to make the following two comments prior to proceeding under this heading: the first comment is that the issue here is not what decision the Court would have made but rather if there is cause to intervene with the Minister's exercise of his discretion. In this vein, the Minister is given substantial leeway. Thus, it is only proper for the Court to consider intervening with this discretion if the Minister ignored central factors which he was under a duty to consider, or if he drastically deviated from the proper relative weight attached to factors taken into account. The second comment deals with the fact that this present case does not give rise to the issue of the State of Israel's duality as both a Jewish and democratic state, as the Minister saw fit to premise his decision solely on the need to safeguard the street's residents' right to pray undisturbed. Thus, the Minister may have also considered this factor if the offense involved members of different faiths, Muslim or Christian, for instance.

8. We have yet to define the term "traffic artery." The "Guidelines for Planning City Streets," published by the Ministry of Building and Housing and the Traffic Controller, and submitted to the Tzameret Committee, distinguished between a "intercity road," an "arterial road," a "collector road," and a "local street." The "traffic artery" was defined as a "road found at a neighborhood's periphery, which connects various neighborhoods, directs traffic and reroutes it from the intercity highways to the network of collector roads." Although the Tzameret Committee debated whether Bar-Ilan Street was in fact a "traffic artery," I am prepared to presume that it is such. The current Traffic Controller referred to it as such and it corresponds to the definition cited above.

Under these circumstances, the issue of whether there is a proper balance between the traffic element and the local residents' sensibilities arises. Whoever opines that the first element always prevails over the second will believe that the *order nisi* should be made absolute. To my mind, while significant weight attaches to the fact that a given street meets the definition of "traffic artery," this weight is not determinative. A

“traffic artery” is by no means untouchable and it is possible that the authorities will give importance to safeguarding the right to pray and worship unhindered even if the street involved is a “traffic artery,” provided that the weight attached to the latter factor is not excessive. In the case at bar, two public committees recommended that, under certain conditions, it would be possible to close Bar-Ilan Street during prayer times. Although their recommendations were submitted in the public realm, from a legal standpoint the Minister was nonetheless authorized to determine that circumstances justifying limiting traffic on Bar-Ilan Street could in fact arise. I do not believe that this determination exceeds the legitimate bounds of the Minister’s discretion.

The next step is to analyze the proper relationship between the first and second factor. In light of Bar-Ilan Street’s centrality from a traffic perspective, the Minister is only authorized to limit traffic on the Sabbath in a limited fashion, not exceeding what is necessary and taking into account the alternate routes available to the public. The Minister consulted with the relevant traffic professionals, who also considered the “religious” factor. He concluded that imposing traffic restrictions is possible from a traffic standpoint and justifiable only during specific hours, rather than throughout the Sabbath. I agree that, in so doing, the Minister “stretched” the permissible to its limits. As a result, any change in circumstance is likely to necessarily alter his decision. This having been said, generally speaking, I have concluded that, from an administrative point of view, this exercise of discretion is not to be struck down, as it was exercised bearing in mind both the first and second factors. In any event, the petition in HCJ 5434/96 should be denied.

Even so, it appears that the Minister failed to consider the interests of the local secular residents, for whom Bar-Ilan Street is more than a throughway, as it is the road to their homes. Accordingly, in my opinion, their interest must prevail over the right of the majority of the locals to pray undisturbed. Not only was data regarding the number of secular residents, some of whom may be deemed the “silent minority,” not at the

Minister's disposal, but these residents were not even guaranteed access to their homes during the hours that the traffic limitations were scheduled to be in place. As has already been explained above, I cannot accept the argument that it is incumbent on the secular residents to change their

lifestyle and way of reaching their places of residence following a change in the character of the street.

Needless to say, the Minister's decision contained two presumptions. First, the Minister assumed that violent elements would not sabotage the decision's practical application and, second, he assumed that alternative routes would remain available to the public. It is sufficient for one of these presumptions to falter for the entire decision to collapse.

#### *9. The Operative Result*

For the reasons detailed above, I join in the President's opinion.

#### **Justice E. Mazza**

Like my colleagues, the President and Deputy President, I too believe that our review of the Minister's decision to order the partial closure of Bar-Ilan Street should not give rise to a question of *ultra vires* but, rather, should be exclusively limited to the matter of the decision's reasonableness.

Our premise is that the Traffic Controller has the authority to order the closure of a street to traffic on the Sabbath and Jewish holidays, in order to safeguard the religious lifestyle of the local residents, when the street scheduled for closure cuts through the heart of their neighborhood. This authority is not limited to "internal" streets. It equally applies to traffic arteries. Accordingly, despite the fact that Bar-Ilan Street is, first

and foremost, a “traffic artery,” the Traffic Controller has the authority to order its closure.

This having been said, I concur with the conclusions of my colleagues, the President and Deputy President, that the Minister’s decision in the case is blatantly unreasonable and must therefore be struck down. The President’s reasoning, with which the Deputy President concurs, is also acceptable to me.

However, in order to ensure that my position is perfectly understood and in order to further emphasize that which appears to be worthy of particular emphasis, I wish to comment on the three following subjects: the Minister’s erroneous reliance on the Tzameret Committee’s recommendations, the fact that the Minister ignored the needs of the secular minority constitutes sufficient reason to strike down his decision, and the significance of his assumption of the existence of alternate routes to Bar-Ilan Street.

*The Tzameret Committee’s Recommendations*

2. The Minister’s decision was rendered on the heels of the Tzameret Committee’s recommendations and anchored in the adoption of part of the Committee’s recommendations. As understood by the Minister, this recommendation corresponded with those made by the Sturm Committee. In so supposing, the Minister followed a path, which, to my mind, lies beyond the legitimate array of options proposed by the Tzameret Committee.

In its recommendations, the Tzameret Committee distinguished between setting out a general arrangement to deal with requests to close streets and formulating a concrete position regarding the conditions for closing Bar-Ilan Street. Between these two options, there was no middle ground. The institution of a general arrangement, as per the Committee’s first recommendation, is of a legal character. However, the Committee’s

stance with respect to the conditions to be met for closing Bar-Ilan Street merely reflected an attempt to present a compromise proposal of a public-political nature, probably meant to provide a rapid, out-of-court solution to a difficult and painful social problem.

In light of this distinction, it was incumbent on the Minister to relate to the Tzameret Committee's recommendations in only one of two ways. On one hand, the Minister could have informed the Court of his intention to set up a general arrangement to deal with requests to close roads and to prescribe an arrangement identical or similar to the one that the Tzameret Committee proposed. The Minister then could have declared that he would revisit the matter of Bar-Ilan Street's closure in the context of this general arrangement. On the other hand, the Minister could have agreed to base his decision regarding the closure of Bar-Ilan Street on the Tzameret Committee's recommendations. In my opinion, it would have been best for the Minister to opt for the first alternative. Nevertheless, he was entitled to select the second.

The Minister, however, chose a third way. On the one hand, he took it upon himself, with the assistance of his Ministry's professionals, to examine the Committee's recommendation regarding a general arrangement for street closures. On the other hand, he decided to close Bar-Ilan Street immediately. The Minister based this last decision on the assumption that "in light of the data presented to it, none of the Committee members excluded the possibility of closing Bar-Ilan Street on Sabbaths and holidays;" and that only a minority of the Committee members understood the decision to close of the street as predicated on "provided arrangements are made to ensure the mobility of the secular public in accordance with its needs."

In so deciding, the Minister erred, as the condition in question was in fact part of the majority's recommendation, reached with the support of five of the Committee members. The report that the majority submitted reveals this to be so. As such, the recommendation should have been

accepted or rejected as is, without addressing the differences of opinion that later emerged among the Committee members. I, for my part, am convinced that the adoption of only part of the Committee's recommendations—a Committee which, let us recall, was only established for the purpose of proposing a potential solution to a pressing social problem—cannot be deemed a proper administrative decision. This being the case, I join in my colleague's, Justice Cheshin, criticism of the decision, set out in paragraphs 10-11 of his judgment. To my mind, the significance of this is that the Minister's decision must be examined on its merits, without any reference to the Tzameret Committee's recommendations and, even more so, to the recommendations of the Sturm Committee. Indeed, an examination of this nature was conducted in the opinions of the President and the Deputy President.

*Ignoring the Needs of the Secular Minority*

3. In deciding whether to exercise his power to close a street, the Traffic Controller is confronted with two conflicting considerations—the “traffic” considerations, on the one hand, and the “religious” factor on the other.

Accordingly, exercising this power to close streets is contingent upon finding a suitable balance between the public's traffic-related interest in using Bar-Ilan Street and the local residents' religious interest in the street's closure. In this balance, the most significant weight will always attach to the traffic interest. As such, in the absence of a reasonable alternative, capable of meeting the motorists' traffic needs, the Traffic Controller must refrain from closing the road. The religious factor alone cannot be determinative.

This rule applies to all decisions of this nature, whether regarding a local neighborhood street or a road serving as a traffic artery. Even a local street is a public road, and should not be treated like the local residents' private property, not even as the property of the “majority” of



its residents. The difference between an internal street and one constituting a traffic artery lies exclusively in the size of the public likely to be harmed by its closure. Thus, closing an internal neighborhood street, which goes through a religious neighborhood, will interfere with the transportation needs of the secular minority residing there, including the needs of the friends and relatives of those residents. Clearly, however, closing a traffic artery negatively affects the entire public by interfering with their transportation needs. As such, particularly significant weight will attach to traffic-related considerations.

This having been said, a quantitative comparison is liable to mislead. We must recall that the needs of the general public do not necessarily correspond to the transportation requirements of the local residents. This is particularly true when dealing with a road that is both a central traffic artery and a local access-way. The closure of such a road is contingent on the availability of a reasonable alternate route that will both serve the public as a whole as a traffic artery, and also provide the residents with local access.

Bar-Ilan Street, as defined in the Minister's decision, constitutes a central traffic artery which also provides direct access to adjacent land users. It therefore follows that we are in fact dealing with a road that is both a traffic artery and a local access-way. Closing such a road is contingent on meeting the transportation needs of all those served by it. In his decision, the Minister pointed to roads that, in his opinion, constitute a reasonable alternative to the arterial traffic on Bar-Ilan. However, as his decision's content indicates, the Minister failed to ascertain the needs of the local secular population, nor did he propose any alternatives capable of meeting their needs. While no data was submitted regarding the size of the local secular population in question, this, in my opinion, is unimportant. For the purposes of this decision, I am prepared to assume that an overwhelming majority of these neighborhoods are in fact Ultra-Orthodox and do wish for the street's complete closure on Sabbaths, and that the number of secular residents is negligible. Even so,

the balance of considerations requires that a suitable alternative for the needs of this small minority be found prior to closing Bar-Ilan Street. As my colleague, the President, has rightly held, this flaw in the Minister's decision is sufficient to require that it be struck down.

The issue of whether the needs of the local residents lend themselves to alternative solutions is for the Minister to decide. Consequently, in the absence of concrete alternatives, it is incumbent on the Minister to consider normative alternatives, such as instituting an arrangement that would permit allowing traffic to pass through during the times that the road is closed, if a request to this effect is submitted by a permanent local resident of one of the surrounding neighborhoods. So long as a concrete alternative, capable of meeting the needs of the local residents, is not found, or a normative alternative is not established, there is no basis to support a decision to close Bar-Ilan.

*The Existence of an Alternative to a Traffic Artery*

4. The Minister's decision to order the closure of Bar-Ilan Street during prayer times included the following condition:

For as long as the road is closed, Golda Meir Boulevard (The Ramot Road) shall remain open, as will the entrances to the city. A lane for private vehicles shall also remain open on Jaffa St. on Sabbaths and Jewish festivals.

This condition is based on the presumption that the roads named provide a suitable alternative to Bar-Ilan Street as a traffic artery. The Minister's presumption relies on findings produced by the examinations conducted: each of the above roads constitutes a detour around Bar-Ilan Street. Driving through those streets lengthens the trip in each direction by approximately two minutes at most. From a purely traffic-related perspective, I judge these alternatives acceptable in that they are capable of providing a proper detour for Bar-Ilan traffic.

The matter, however, does not end here. Alternate routes must be selected according to a standard set out for this particular purpose. Judging from the evidence submitted to the Court, it does not appear that the Minister set out such a standard for choosing these roads. In other words, the roads selected to serve as alternate routes were not examined from any other aspect save their length in comparison to Bar-Ilan's. An important issue, which was not examined, is whether the population residing along these roads is also composed of individuals whose religious sensibilities are liable to be offended in a manner identical to the harm that prompted the Minister to justify his decision to close Bar-Ilan Street. Quite simply, had this examination been conducted, and revealed that those residing along some or all of the roads selected as alternate routes are overwhelmingly Ultra-Orthodox, the Minister would have been compelled to revisit his choice and reevaluate whether these alternatives are in fact suitable in light of these circumstances. It would be unthinkable for the Minister to reroute a massive amount of traffic to these alternate routes while risking that the local residents, like their counterparts on Bar-Ilan Street, will in turn demand that their Sabbath observance be granted the same respect as their neighbors along Bar-Ilan.

My colleague, the President, distinguishes

between streets that go through the heart of an Ultra-Orthodox neighborhood—where thousands of Ultra-Orthodox individuals reside on both sides of such streets—and roads that are found at the neighborhood's periphery.

*See supra* para. 96 of his decision. Indeed, this difference may be cause for distinguishing between Bar-Ilan Street and other roads that merely border on or are adjacent to Ultra-Orthodox neighborhoods. This possible distinction, however, was only set out in the President's judgment, while the Minister's own briefs do not even mention it.

At first, I believed that even a defect of this sort is cause for striking

down the Minister's decision. Eventually, I became convinced that I could join in the President's conclusion holding that, if and when one of the roads cited as alternate routes in the present decision will be itself scheduled for closure, that specific decision shall be examined on its own merits. Of course, a decision of this nature will necessarily reopen the issue of Bar-Ilan's closure itself. The President's conclusion is based on the assumption that:

it is clear that, as soon as we consider the possibility of closing the alternate route, the issue of the original route's closure resurfaces. Our concern is with complementary solutions. It is possible to partially close Bar-Ilan Street provided that an alternate route remains open to traffic on the Sabbath. However, the moment that the alternate route is closed to traffic on Sabbath, Bar-Ilan Street must be opened.

*Id.* Let me offer two additional points in support of this position.

First, I emphasize that the Tzameret Committee's holding was that "a road deemed to serve as a reasonable alternative to a closed street shall

Justice E. Mazza, Justice D. Dorner not be closed unless a reasonable alternative, capable of replacing both the first road and the second, is found.” The second is the following clarification: the Minister may one day find himself in a position where he cannot refuse to close one of the alternate routes to Bar-Ilan without violating the balance struck between the interests of the local populations and, for reasons of equality—equality between different Ultra-Orthodox communities—will be equally unable to reopen Bar-Ilan Street. In such a situation, the Minister would not be authorized to order the closure of the alternate routes. Rather, he would be obliged to reopen Bar-Ilan Street, while also leaving the alternate route open to traffic. And so, the failure to set a standard for selecting alternate routes as part of the administrative procedure for dealing with a request to close a road engenders numerous difficulties. The Minister would be well-advised to take advantage of the delay granted him by our decision in order to fill this missing link.

5. Accordingly, and given my agreement with the President’s other conclusions, I hereby join in his opinion.

**Justice D. Dorner**

1. I agree that the petition should be granted, as per the opinion of my colleague, Justice Or.

I believe that that the Minister of Transportation's decision is unreasonable, as stated in my colleague's opinion. In addition, however, the decision should be deemed invalid simply because it fails to conform to his statutory authority.

2. As noted, the Minister of Transportation, using the discretion granted to him by the Traffic Controller, ordered Bar-Ilan Street to be closed to traffic during prayer times on Sabbaths and Jewish holidays. The Minister made the closure contingent on the fact that Golda Meir Boulevard and the entrances to Jerusalem remain open. Likewise, the Minister premised Bar-Ilan’s closure on the fact that the lane normally reserved for public transportation on Jaffa Street would be opened to private vehicles.

Truth be told, Bar-Ilan Street is not really a “street.” Rather, it forms part of a central traffic artery, segments of which are referred to by different names—starting from Yirmiyahu Street, going through Bar-Ilan and Harel Brigade Streets all the way to Eshkol Boulevard. A mere glance at a Jerusalem city map reveals that this route forms the sole connecting route directly linking the entrance to the city, Jerusalem’s northwest, and its northeast.

The primary alternative selected by the Minister is not an intersection comparable to the one that was closed. Rather, these two connected roads allow motorists to bypass the closed road. This alternative route begins at the city’s northwestern entrance in the “Mei Niftoah” area connecting to Eshkol Boulevard via Golda Meir Boulevard, and cuts through the heart of the Ultra-Orthodox neighborhoods of Kiryat Shva, Kiryat Balaz, Kiryat Tzanz, Ezrat Torah, Tel-Azra and Sanhedria. Violent demonstrations have occurred in this area in the past against Sabbath traffic. Let us also emphasize that along the Jaffa Street alternate route, particularly in the area around HaTurim Street, an Ultra-Orthodox population also resides.

3. The Traffic Controller, in his capacity as the Central Traffic Authority, is the authority empowered to establish traffic arrangements, particularly street closures. His authority derives from Regulation 17 to the Traffic Regulations. The Traffic Regulations were regulated by virtue of section 70(1) to the Traffic Ordinance [Revised Version], providing:

The Minister of Transportation is permitted to enact regulations regarding:

- (1) Traffic arrangements, and rules for the use of roads by vehicles, pedestrians and others;

Does this provision allow Bar-Ilan Street’s closure for the purpose of preventing harm to religious sensibilities?

It is no secret that an administrative authority is held to exercise its

Justice D. Dorner

discretion exclusively for the purpose behind the empowering statute. To this end, Justice Barak's comments in HCJ 953/87, 1/88 *supra*. [4], at 324, are most appropriate:

A government authority is not free to set goals for itself in whose name it is permitted to exercise its discretion. Statutory discretion must be exclusively exercised within the framework of the statute's objective. Indeed, even if the statute explicitly provides that the discretion is absolute, this still implies the authority's duty to pursue the objectives of the law.

*See also* 2 I. Zamir, *supra*, [91], at 744-45.

Thus, various administrative orders and decisions were struck down on the basis of this principle, including, for example, the Food Products Supervision Order (Pig Farming)-1954, adopted for religious reasons under a statute whose purpose was to ensure distribution of food products in times of emergency. *See Lazerovitch* [5], at 55. Similarly, we struck down a decision making the grant of permits for importing food products to Israel contingent on obtaining kosher certification, a decision which was made under legislation with an economic purpose. *See* HCJ 231/63 *Retef, Food Supplies v. The Minister of Commerce and Industry* [81]. We also struck down a municipality's decision to change a zoning plan with the intention of preventing a Christian Center from being established, *see* HCJ 392/72 *Berger v. The District Committee for Planning and Building, Haifa* [82], at 772, and invalidated a decision to proscribe the import of non-kosher meat, adopted under a statute having economic purposes. *Meatrael* [6], at 503-04, 509.

This Court has equally held that a municipality, empowered by statute to regulate municipal matters via by-laws, cannot enact such provisions in order to further religion. As such, the Court has held that a municipality may not advance religious goals unless it was authorized explicitly by statute. Thus, for instance, a by-law prohibiting pig farming and the sale of pork for religious reasons was struck down. *Mendelson, supra* [76], at 752. Similarly, a municipality's refusal to grant a butcher shop a permit due to the fact that it sold non-Kosher meat was struck

down, *Axel, supra* [75], at 1532. A gas-station owners' conviction for opening their business on the Sabbath, in violation of a municipal by-law was overturned. Crim. A 217/68, *supra* [12]. This approach is clearly reflected in President Olshan's comments, in *Axel, supra* [75], at 1531-32:

The conflict is between those who perceive the prohibition regarding the eating of pork as holy or as inextricably linked to our national identity and those who believe otherwise. On the heels of this conflict, we find another difference of opinion—the argument between those who think it right to coerce this prohibition upon the whole of society and those who believe that there is no place for coercion of this nature in a democratic state and that the matter of observance should be left to each and every individual's own conscience.

This problem is a general and national one, not particular or limited to a specific location. Its resolution is left to the national legislature's exclusive authority, unless the legislature finds it appropriate to delegate its decision-making authority in this matter to the local authorities.

A democratic regime is characterized by the fact that the power to limit individual freedom is derived from the People's will. Accordingly, this power rests with the central institution authorized to speak and decide in its name; namely, the legislature.

The power to limit individual freedom, vested in the legislature, also includes the authority to empower others, such as municipalities, ministers, administrative authorities and so on and grant them the power to limit individual freedom within specific jurisdictions. In such cases, the empowered authority indirectly draws its power from the People's will. This being the case, it is incumbent on the legislature to bestow such powers explicitly and unequivocally, particularly when the



Justice D. Dorner

matter involves a problem of national proportions rather than a local one. In cases of this sort, the granting of such powers is not to be presumed unless the intention to bestow such powers is obvious and clearly reflected in the statute's formulation or in its clearly set out objectives.

4. On the heels of this ruling, which held that imposing restrictions on human rights for religious reasons is within the exclusive purview of the legislature—the Knesset—certain statutes seeking to balance between various considerations in this area were passed.

Thus, for instance, the Local Authorities Law (Special Empowerment)-1956, authorized the local authorities to restrict or prohibit the sale of pork and pork products for consumption within their jurisdiction through bylaws. However, the consumption of pork, its import and export or its sale in restaurants was not prohibited. And so, the Law for Amending Municipal Ordinances (number 40)-1990, empowered a municipality to prohibit places of entertainment from opening on Sabbaths and Jewish holidays within its jurisdiction due to religious tradition. Most recently, subsequent to the Court's striking down the government's decision to prohibit the import of non-kosher meat in *Meatrael I* [6], an "override clause" was incorporated into the Basic Law: Freedom of Occupation. This clause allowed for the Meat and Meat Products Law-1994, to be enacted. While this statute proscribes the import of non-kosher meat to Israel, the sale of such meat in the country is not prohibited. A petition attacking this statute's validity was rejected and its constitutionality was upheld. *See* HCJ 4676/94 *Meatrael Ltd. v. The Knesset* [83].

5. The above case law distinguishes between establishing arrangements regarding religious matters—which is within the Knesset's jurisdiction—and between taking individuals' interests into account, including their religious sensibilities, a matter that can fall within the province of an administrative authority. Parallel to this distinction is the line drawn between the private and public domain, a point made by Justice Cheshin in *Meatrael I* [6], at 508:

The interests of the observant population's are quite weighty, perhaps even determinative, within the privacy of their own homes. However, the further one travels from his home, and the closer one is to touching the public domain—or on another's private domain—or when one's request involves his fellows' rights, so too will the strength of one's interests be weakened, as it will be balanced against the rights of his neighbor, in the latter's public or private realm.

Indeed, within the private domain, individuals and families are free to determine how to live their lives, within the bounds of the law and provided, of course, that their neighbor remains unharmed. They are free to protect their way of life and sensibilities from being offended. Moreover, our case law recognized the existence of similar rights on the community level. Thus, for instance, the Court permitted administrative authorities to consider factors relating to the protection of the community's lifestyle and the religious sensibilities of its members in its decision-making process, even absent statutory authorization to this effect.

Case law of this sort sanctioned the closure of a street segment bordering Jerusalem's central synagogue during the morning hours of the Sabbaths and Jewish holidays in *League* [1], subsequent to the city's Transportation Committee's Chairman's conclusion that "motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably." *Id.* at 2667. Similarly, the Court sanctioned the closure of a road in Bnei-Brak, a city whose population is overwhelmingly Ultra-Orthodox, in *Baruch* [2]. On the basis of these precedents, one hundred and twenty Jerusalem streets, situated in essentially Ultra-Orthodox areas, were closed-off.

In contrast, in the broad, social-public area, our case law made a point of insisting on the principle that religious considerations may only be taken into account in the context of an arrangement set forth by the legislative branch, or by virtue of a specific empowering statute.

Justice D. Dorner

6. For our purposes, even if we were to apply the above stated case law regarding the community level to the Traffic Ordinance [Revised Version], it would not be sufficient to authorize the closure of a central traffic artery for religious reasons, an artery whose closure was deemed, by the Traffic Controller in his letter to the Mayor of Jerusalem, to be “unthinkable, whether on the Sabbath or any other day” from a traffic perspective. A central traffic artery by no means belongs to those residing alongside it. Rather, it serves all the city’s residents, including those taking advantage of their day of rest to visit Jerusalem. Those residing alongside a traffic artery such as Bar-Ilan are to expect that a major public road will not be expropriated for their own private needs, in order to safeguard their sensibilities. Nor can they expect it to be limited in order to preserve their particular lifestyle, absent a statutory provision explicitly instructing otherwise.

7. For the Ultra-Orthodox, seeing Jews traveling anywhere in their cars on the Sabbath, let alone the Holy City of Jerusalem, is most offensive. Indeed, even the very thought of it offends their religious sensibilities as “all of Israel are each other’s guarantors” Babylonian Talmud, Tractate Nedarim 39a [117]—all Jews are responsible for one another. Needless to say, the offense is further exacerbated when the Sabbath desecration occurs before their very eyes. On the other hand, closing off the main road is liable to offend the secular public’s sensibilities, interfering with their wish to travel freely on Sabbaths and holidays. As noted by Justice Or in *Meatrael* I [6], at 500:

Extending protection to the feelings of one part of the population is liable to infringe the feelings of another part.

A complex balancing exercise such as this, between the feelings and needs of two segments of the population, must be left to the legislature.

By its very nature, a statute sets out general norms and includes a standard, the product of a balance struck between various and continuing conflicting interests. In the absence of a statutory arrangement regulating the matter at bar, the Minister’s decision in our case may only be characterized as accidental and arbitrary, sparked by violent

Justice D. Dorner, Justice Ts. Tal demonstrations. Nor is it premised on any clear standard. It does not promote equality as it is likely to increase the already significant volume of Sabbath traffic on alternate routes, which for their part house an equally Ultra-Orthodox population. In which way are Bar-Ilan's residents' religious sensibilities more worthy of protection than those of their counterparts, living along the alternate routes, which the decision also harms? How shall the authorities that ordered Bar-Ilan's closure and rerouted Sabbath traffic to the alternate routes react if those living in the latter's vicinity shall protest against the increase in traffic? The Minister's decision fails to provide answers to any of these questions.

8. We should not here expand the Traffic Controller's powers and permit him to resolve this difficult public debate, when doing so entails bypassing the legislative branch and lacks any clear, equality-promoting standard. Such an extension of our existing case law would indeed be a leap I am unwilling to take.

Accordingly, in my opinion, the petitions in HCJ 5016/96, 5025/96 and 5090/96 should be granted and the Court should strike down the decision to close Bar-Ilan Street on Sabbaths and Jewish holidays during prayer times. The petition in HCJ 5435/96 requesting that the closure be broadened should be denied.

### **Justice Ts. Tal**

As President Barak mentioned, the dispute is essentially a social, value-laden struggle; its outer cover alone is that of the law. As such, it does not lend itself to judicial resolution particularly well. Hence, this Court proposed to establish a public committee, in the hope that it would be capable of finding an appropriate out-of-court solution. This hope, however, was dashed, forcing the Court to rule.

The fact that the petitioners are almost entirely public figures, who have come to fight the battle of those who drive on Sabbaths and holidays, only serves to further emphasize the value-laden nature of this dispute. Thus, on the one hand, there are the residents of the neighborhoods adjacent to and surrounding Bar-Ilan Street, for whom the phenomenon of motor traffic on

Justice Ts. Tal

the Sabbath is like a dagger thrust into their heart. On the other hand are the petitioners, who are concerned about their freedom of movement and freedom from religious coercion.

In all innocence, I assumed that public persons of the highest rank, like the petitioners, would be most sensitive and tolerant to the plight of the local residents and would not insist on their right to violate the Sabbath in the heart of these neighborhoods, before the local residents' very eyes, and those of their children.

After all, the Minister's decision, both in its original form according to the Sturm Committee and in its final form in accordance with the Tzameret Committee, was not to close the road for the entire day. Instead, the road would only be closed for a few hours, when the intensity of the affront to the residents' sensibilities was at its peak. On the face of it, it would seem that the petitioners themselves ought to have regarded this decision as striking a proper balance between their right to use the road on the Sabbath, and the right of the local population to a respite from the terrible defilement of all that is holy to them, for at least a few hours of the day. Furthermore, even during the hours during which the road was to be closed, motorists would have at their disposal alternate roads, which do not lengthen their travel time by more than a minute or so. It would seem to me that the most elementary of manners, together with a level of tolerance befitting public figures, would have dictated this solution.

Unfortunately, the voices of discord have prevailed, sounding furiously in our midst.

At this juncture I will also allow myself to criticize the violence that occurred during the demonstrations on Bar-Ilan Street. Indeed, I believe that it was precisely the violent actions of some—perhaps a very small minority—of the Sabbath-observing public, that hardened the hearts of the petitioners and sealed their ears from hearing the honest cry of the true Sabbath. This is not the way of the Torah—"Her ways are ways of pleasantness, and all her paths are peace." Proverbs 3:17 [118]. Stoning motorists is in itself a desecration of the Sabbath, and can very well endanger the motorists' lives.

Conceivably, the petitioners too might have seen the justice of the balance reflected in the Minister's decision, were it not for the violence and the riots.

Even so, given the gravity of the damage caused to the local residents' lifestyle and sensibilities, I would have expected people of such merit to display understanding and tolerance.

2. An additional comment regarding the Jewish Law aspects of the issue is appropriate. Just as the dispute is essentially not a legal one, it is by no means clear to me that the Minister's position is grounded in Jewish Law. For if the closing of the road on the Sabbath, albeit partially, involves lengthening motorists' driving time, thereby increasing the amount of time during which the Sabbath is desecrated, I have my doubts as to whether Jewish Law would endorse such a proposal. This was also the reason for the proposed compromise offering to close Bar-Ilan Street in exchange for the reopening of Yam Suf Street. If closing Bar-Ilan involves desecrating the Sabbath in any case, it makes no difference which alternate road is selected. In such a case, the detour which leads to greater social consensus is preferable to merely closing Bar-Ilan Street. It is a pity that this proposal, which the petitioners accepted, was rejected, of all people, by the Minister and the religious sector.

3. Unfortunately we did not succeed in achieving a tolerance-based resolution of the dispute. The petitioners claimed that they were prepared to display tolerance, had "the other side" done the same. My colleague, President Barak, has already responded to this claim, in para. 103 of his judgment:

To my mind, it is incumbent upon us to be consistent in our understanding of democracy. According to the democratic perspective, the tolerance that guides society's members is tolerance of everyone—even towards intolerance, as I wrote in H CJ 399/85 *supra*. [25], at pp. 276-277:

Justice Ts. Tal

The democratic regime is based on tolerance...tolerance of our fellows' deeds and views. This includes tolerance of those who are themselves intolerant. Tolerance is the force that unites us and permits co-existence in a pluralistic society such as ours.

It is incumbent upon us to be tolerant even of those who are intolerant of us, due to the fact that we cannot afford to be otherwise. Because if we are not tolerant of the intolerant we shall undermine the very basis of our collective existence, premised on a variety of opinions and views, including those that we disagree with, and including the view that tolerance is not mutual.

Moreover, the "tolerances" here are not equivalent. The "tolerance" involved in the slight inconvenience caused by a detour cannot be compared to the "tolerance" required to withstand the fatal blow dealt the Holy Sabbath and the local population's way of life. To better illustrate this point, I will risk using an extreme example, but as is the way of any caricature, it is purposely exaggerated in order to emphasize its point. I recall the poem of Heinrich Heine in which Jacob says to Esau (freely translated):

For thousands of years we have tolerated one another in brotherhood; you tolerate the fact that I breathe, and when you rage, I tolerate your fury.

4. We were not so fortunate as to see the matter resolved the way of tolerance. We must therefore assess the issues from a judicial perspective. My colleague, the Honourable President, praises the Sabbath, to the extent of saying that the Sabbath:

It is a cornerstone of the Jewish tradition and a symbol, an expression of the Jewish message and the character of the Jewish people. Deprive Judaism of the Sabbath, and you have deprived it of its soul

These comments are well said and worthy of their author. But, in the President's eyes, the Sabbath conflicts with freedom of movement, which in his view is a derivative of human dignity. I beg to differ. While freedom of movement is indeed a basic right, it is, in my opinion, not included in the Basic Law: Human Dignity and Liberty. There are important rights which were not enshrined in the Basic Law, and not by inadvertence. In my opinion, great caution ought to be exercised when attempting to read rights, which are not expressly mentioned, into the Basic Law. The Supreme Court of the State of Israel protected basic rights long before there was a Basic Law, and will presumably continue to do so in the future.

Freedom of movement is indeed one of the most crucial freedoms, even if not derived from Human Dignity. Even so, like almost all other freedoms, freedom of movement is relative rather than absolute. A mere glance shall reveal how this right is circumscribed in all places, at all times, in accordance with the needs of the place and the time. The Sabbath, on the other hand, in the view of "the Nation that Sanctifies the Seventh Day,"<sup>1</sup> is almost an absolute value, superceded only by considerations relating to the saving of a life, or the fear of endangering lives. I will limit myself to only a few examples:

The Sabbath is an "Eternal Covenant" and an "Eternal Sign" between God and the Jewish People. *See* Exodus 31:16-17 [119]:

And it shall come to pass, if ye diligently hearken unto Me...[to] hallow the sabbath day, to do no work therein; Then shall there enter into the gates of this city kings and princes sitting upon the throne of David, riding in chariots and on horses, they, and their princes, the men of Judah, and the inhabitants of Jerusalem: and this city shall remain for ever...But if ye will not hearken unto me to hallow the sabbath day, and not to bear a burden, even entering in at the gates of Jerusalem on the sabbath day; then will I kindle a fire in the

---

<sup>1</sup> From the Sabbath prayers.



Justice Ts. Tal

gates thereof, and it shall devour the palaces of Jerusalem, and it shall not be quenched.

Jeremiah 17: 24-27 [120]. The other prophets also rebuked the nation in respect of the Sabbath. *See* Ezekiel 20 [121]; Amos 8 [122]; Nehemiah 9,10,13 [123]. In the words of the Talmuds: "Great is the Sabbath, for it is equal to all of the commandments." Jerusalem Talmud, Tractate Brachot 1:8 [124] and "Jerusalem was destroyed only because of the Sabbath was desecrated therein." *See* Babylonian Talmud, Tractate Shabbat 119b [125].

The Sabbath's supreme value is not limited to the religious sphere. It also also extends to the national and universal planes. In the words of Ahad Ha'Am, in *Al Parashat Derachim*, part 3, at 30:

Whoever feels an authentic connection with the life of the Jewish people throughout the generations, cannot conceive of the Jewish people without the Sabbath. One could say without any exaggeration that, more than the Jewish people have kept the Sabbath, it was the Sabbath that kept the Jewish People.

*See also The Book of the Sabbath* 10-11 (1934) [126]:

The Sabbath is the greatest creation of genius of the Jewish spirit and anyone who violates it, has harmed the nation's very heart.

The very division of the week into seven days, universally accepted, though it has no basis in astronomy, is evidence of the Sabbath's antiquity and its universality, as remarked by Rabbi Yehuda Halevi. I would also refer to the important book of Prof. Abraham Joshua Heschel *The Sabbath: Its Meaning for Modern Man* (1951) [127].

Consequently, "freedom of movement," which is an important basic right, is confronted by the "Holy Sabbath," which is an almost absolute obligation upon the Jewish people.

5. Actually, there is no conflict here between “freedom of movement” and the Sabbath. Nobody, and certainly not the Minister of Transport, is attempting to negate or deny the petitioners, or any other person, this freedom. The confrontation is between a slight impingement upon the freedom of movement and that of a mortal wounding of the feelings and way of life of the local population.

And it is in this context that I must take issue with my colleague, the President, who places “individual rights” on a higher plane than injury to a person’s feelings. In my opinion, there is no place for this *a priori* determination. In each and every case, the right must be weighed against the depth of the feeling. The scale is both social and value-laden. Each person, every population, possesses a system of rights and sensitivities. There are cases in which individuals, or even the public at large, will impute greater weight to feelings than to rights. What is patriotism if not a feeling? What are love, hate, brotherhood, neighborliness, aesthetics, art, and poetry if not feelings? During its entire history, our nation has proved that it is prepared to sacrifice its most basic right, the right to life, on the altar of the feeling of sanctity of the Sabbath and the commandments. “Why are you going out to be stoned? ....for I kept the Sabbath.” *See* Midrash Leviticus Rabbah 32:1 [128].

Furthermore, as stated, the holiness of the Sabbath and the intensity of the affront to the feelings of the local population are confronted only by a measure of inconvenience in exercising the right of the freedom of movement.

6. My colleague, Justice Or, reminded us that freedom of religion also entails freedom from religion. The question, however, does not even arise. The Minister is not, Heaven forbid, attempting to force the petitioners to observe the Sabbath. They are free to travel on the Sabbath as they please, subject to a minor limitation during certain hours.

7. In light of the above, to the extent that our concern is with those using Bar-Ilan Street for transportation alone, I would not only dismiss the petition, but grant the petition of the Association for the Rights of the

Justice Ts. Tal

Religious Community in Israel and instruct that the Bar-Ilan Street be closed throughout the Sabbath. To this effect, let me mention that within the compromise proposal, where I suggested that Yam Suf Street be reopened in return for Bar-Ilan Street's closure, the petitioners were prepared to have Bar-Ilan Street closed throughout the entire Sabbath.

8. We are therefore left with the problem of the local residents who do not observe the Sabbath.

To my mind, the petition of Ms. Avinezer does not pose any problem. As noted, the commandment of the Sabbath always gives way to considerations of saving lives or to counter the threat of such situations arising. Thus, as a nurse who works in a hospital and therefore inevitably deals with saving lives, Ms. Avinezer's vehicle, bearing the appropriate markers, will be able to come and go unhindered, like any other security and emergency vehicle. Indeed, according to the Minister's decision the "closure" will be effected by way of signposts—not roadblocks.

As for the petitioner Mr. Gabay, who is physically handicapped and requests to visit his parents who live on David Street on the Sabbath, he will be able to do so during the hours in which the street is open as per the Minister's decision. Although this may pose a slight inconvenience, as he may have to change his schedule slightly, such an inconvenience is trivial with respect to the matter at hand.

It seems to me that this also serves to answer the plight of the other secular residents. In other words, even if such people will have to limit themselves during the hours that the closure is imposed, the restriction is a relatively minor one, which in the circumstances is not unreasonable. After all, if we accept to take alternate routes and bear temporary restrictions for various other reasons, why should we be unwilling to subject ourselves to similar limitations for the sake of the Sabbath?

It should be recalled, in this context, the brief that was submitted by Advocate Simcha Meron. There, it was claimed that petitioners searched, but could find no secular residents in the area along Bar-Ilan St. This affidavit was never contradicted. And it is quite plausible. Thus, for

instance, a claim that no secular people reside in the neighborhood of Mea Shearim would be believed. It would seem that the areas under discussion too have also gone through this process of “natural selection” of sorts, whereby the neighborhood remains overwhelmingly Ultra-Orthodox. My colleagues fear that perhaps there are secular residents who do not dare show themselves for fear of repercussions. We, however, are a Court that can only rule on the basis of the evidence before it. A decision cannot be based upon fears and conjectures. The fact is that the two private petitioners, Avinezer and Gabay, were not intimidated and did come forward.

Rather than dwelling on the possibility of there being silent secular residents, it is incumbent upon the Court to rule according to the certainty of the existence of thousands of offended and wounded Ultra-Orthodox residents.

The very volume of traffic on the street even on the Sabbath, estimated at about 13000 vehicles, puts to rest the fears of my colleague, Justice Or, that numerous drivers refrain from using the road on the Sabbath, for fear of violence. While I am prepared to assume that there are such people, I also believe that there are well-mannered, sensitive drivers who refrain from driving on the road out of good manners, not out of fear. The Court, however, can only base its decision on the facts as they are presented to it, not on speculation—and the fact is that thirteen thousand drivers are not afraid to drive down Bar-Ilan.

If we examine the Minister’s decision in terms of his exercise of discretion, then the words of this Court, in H CJ 4769/90 *Zidan v. Minister of Labor and Welfare* [84], with regard to secondary legislation, are appropriate:

In all that regards the exercise of judicial review respecting the reasonableness of secondary legislation, the case law has developed rules which serve as a brake and guarantee against excessive judicial intervention regarding the validity of legislation. These rules are based on principles of judicial policy

Justice Ts. Tal

aimed at defending legislative norms that were prescribed by the administrative authority by virtue of their *prima facie* powers.

A well-known rule is that the Court will not interfere with the discretion given an administrative authority, nor will it put itself in the shoes of that authority, unless the unreasonableness goes to the very heart of the matter and where it is almost certain that according to a correct measure of reasonableness the authority could not have decided as it did. In such instances, it is incumbent on the Court to show restraint and not put itself in a situation wherein it effectively replaces the administrative discretion with its own. It has therefore been held that only extreme unreasonableness will warrant judicial interference with the validity of secondary legislation.

9. While my six colleagues are all of the opinion that the *orders nisi* should be made final, three of them—Justices Or, Cheshin and Dorner—feel that they must be made unconditionally final. In other words, in their view, the orders ought to be made absolute even if the local secular residents in question suffer no damage as a result of the closure. The other three judges—President Barak, Deputy President Levin and Justice Mazza—are also of the opinion that the orders must be made final, but they have left the Minister the option of first verifying the matter of the local secular residents. For their part, they are prepared to uphold the Ministers decision only with respect to the “traveling motorists.”

10. If my opinion were to be accepted, the Court would grant the Association’s petition in HCJ 5434/96 and, *a fortiori*, dismiss all of the other petitions.

However, since mine remains a lone voice, and in order not to render the Minister’s decision unsalvageable in the event that a solution to the plight of the local secular residents is found, if such a plight does in fact exist, I will add my consent to the President’s judgment, for pragmatic reasons only.

\*\*\*\*\*

In consequence, by majority opinion, with Justice Tal dissenting, the Court has decided to dismiss the petition in HCJ 5434/96 and to make the *orders nisi* in HCJ 5016/96, 5025/96 and 5090/96 absolute, in the sense that the Minister's decision to close Bar-Ilan Street, albeit partially, is null and void.

Bearing in mind the contents of section 10 of Justice Tal's judgment, we hereby decide, by a majority opinion, with Justices Or, Cheshin and Dorner dissenting, that the operative part of our decision is contained in paragraph 106 of the President's judgment.

Under the circumstances, no order is made for costs.

13 April 1997.