H.C. 129/57

MICHEL BEN KOSTA v. MINISTER OF INTERIOR, MAYOR, COUNCILLORS AND TOWNSMEN OF TEL-AVIV-JAFFA AND OTHERS

In the Supreme Court sitting as the High Court of Justice

Olshan P., Goitein J. and *Berinson J.*

Administrative law—Licence for sale of pork under old bye-law—New bye-law enacted imposing absolute prohibition—Not unreasonable nor ultra vires enabling Law—Discretion of local authority in applying Law—Discrimination on grounds of religious affiliation—Interference with individual freedom—Validity of mode of confiscation of meat under under new bye-law—Interpretation of Law—Tel Aviv-Jaffa (Pigs and Pork) Bye-law, 1954—*Local Authorities (Special Enablement) Law.* 1956—*Tel Aviv (Pigs and Pork) Bye-law* 1957.

In 1955, the petitioner, a Christian, obtained a licence for the sale of pork under the then current bye-law. Consequent upon the enactment of a law enabling local authorities to prohibit or limit the sale of pork in the whole or part of their area as long as such prohibition or limitation were binding upon the whole population of such area or part, a new bye-law was passed in 1957, containing penal provisions for offences thereunder committed within 42 days from its date, unless immediately prior thereto the sale of the pork was lawful under the law then in force. Soon afterwards a quantity of meat belonging to the petitioner was confiscated and despite his protests and requests for its return, was destroyed. The petitioner claimed that the new bye-law was unreasonable and in excess of the Law, that the non-use of the discretion to exclude some part of the area from the prohibition was discriminatory and that the confiscation was in violation of the new bye-law.

Held: (1) The new bye-law was not unreasonable nor in excess of the authority given by the Law which required the prohibition to be applied on a territorial and not a personal basis. The fact that it might affect Christians equally with Jews and Moslems did not render it an invasion of Christian religious rites nor discriminatory on grounds of religious affiliation. Christianity does not impose a duty to eat pork. The Law and the bye-law do not prohibit the consumption but the sale of pork.

(2) The court will not interfere in the exercise of the discretion granted by the Law to a local authority whether to exclude or not to exclude any part of its area from the prohibition, since the exercise of the discretion involves an assessment of the existing circumstances, a matter which lies entirely with the local authority, provided it is done *bona fide* and within the scope of the Law.

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(3) The confiscation of the meat was unlawful, since prior to the new bye-law the petitioner must be deemed to have been at liberty to deal in pork, the old bye-law not being in accordance with the Law in that it imposed a personal 'discriminatory' licensing system, and the manner of confiscation therefore offended against the new bye-law which now applied.

Palestine cases referred to:

(1) *Misdemeanour Appeal* 18/28—*Attorney-General v. Abraham Altshuler* (1920-1933) 1 *P.L.R.* 283; (1919-1933) 4 *C.O.J.* 1314.
(2) *Cr. App.* 5/46, *Tel-Aviv—Hassia Trachtenberg v. Attorney-General* (1946) *S.C.D.C.*447.
(3) *Cr. Leave Application* 26/47, *Haifa—Sami Abdalla Bahaj v. Attorney-General* (1947) *S.C.D.C.*225.

Israel case referred to:

(4) *H.C.* 57/53—*Tabac House and others, v. Haifa Municipality and others* (1953) 7 *P.D.* 701.

English cases referred to:

(5) *Da Prato and others v. Provost and Magistrates of Partick* [1907] *A.C.* 153.
(6) *Kruse v. Johnson* [1898] 2 *Q.B.*91.
(7) *Jacobs v. London County Council* [1950] 1 *All E.R.* 737; [1950] *A.C.* 361.
(8) *Heap v. The Rural Sanitary Authority of The Burnley Union* (1883-84) 12 *Q.B.D.* 617.

Barak for the petitioner.

Zilbiger and *Rivka Dinai* for the fourth and fifth respondents (the Mayor of Tel-Aviv-Jaffa).
No appearance for the third respondent (Minister of Interior).

OLSHAN P. On July 31, 1957, an order nisi was issued requiring the fourth respondents to show cause why they should not be restrained from seizing and confiscating pork or pork products in the petitioner's butcher shop; why they should not return to the petitioner about 400 kilograms of pork which had been confiscated from him on July 8, 1957; and why they should not be restrained from interfering with the petitioner in conducting and maintaining the business of selling pork and pork products in his butcher shop. In the course of the proceedings the petitioner withdrew his petition in as far as it was directed against the first respondent (the President of the State of Israel) and the second respondent (the Prime Minister).

1. The petitioner is a Christian, the owner of a butcher shop in the Municipal market Neveh Shalom, situated at 7 Third Street, in Jaffa. He acquired the butcher shop in 1954 and in 1955 obtained the licence required under the Trades and Industries (Regulation) Ordinance, as well as a licence for the sale of pork in accordance with sec. 3(b) of the Tel-Aviv-Jaffa (Pigs and Pork) Bye-law 1954, published in the Kovetz HaTakanot (Official Regulations) 488 of December 9, 1954. In 1956 the petitioner again received such licences. In 1957 he did not obtain the licence under the municipal bye-law above-mentioned since that bye-law had been declared invalid by this court, but he continued to deal in pork at his butcher shop. In Reshumot, No. 211 of December 6, 1956, the Local Authorities (Special Enablement) Law, 1956, was published.

Sec. 1 of this Law states:-

> "Notwithstanding the provisions of any other Law, a local authority shall be competent to make a bye-law limiting or forbidding the raising and keeping of pigs and the sale of pork and pork products destined for food."

Sec. 2 of the same Law states:-

> "A local authority may impose a limitation or prohibition as provided in section 1 on the whole of its area of jurisdiction or on a particular part thereof, as long as they are made binding upon the whole population in such area or part thereof."

Sec. 6 of the Law states:-

> "A bye-law made by a local authority published in Reshumot before the coming into force of this Law and which would have been validly made had this Law been in force at the time, shall be deemed to have been validly made but a person shall not be prosecuted for an offence against a bye-law as aforesaid committed before the coming into force of this Law."

2. Sec. 3 of the bye-law of 1954 states:-

> "(a) No person shall sell, or cause or permit to be sold pig or pork outside a public market;
>
> (b) No person shall sell or cause or permit to be sold pig or pork in a public market, except under licence from the Mayor and in accordance with the terms of the licence."

It seems that here we have two kinds of restrictions, the first relating to the place of sale (a public market) and the second to the person, i.e., that only a person holding a licence is permitted to engage in the sale of pork (a personal licence).

Sec. 6 of the same bye-law states:-

> "An inspector may seize and confiscate any pork displayed for sale which does not bear the official seal of the municipal abbatoir of Tel Aviv-Jaffa."

Here arises the further limitation that even where the sale of pork is permissible, it is not to be sold unless it bears the seal of the municipal abbatoir of Tel Aviv-Jaffa.

3. On June 13, 1957, a bye-law of Tel Aviv-Jaffa was published in Kovetz HaTakanot which by sec. 8 repeals the 1954 bye-law and imposes an absolute prohibition upon the sale of pork in the area under the jurisdiction of the Tel Aviv-Jaffa Municipality. Sec. 4 of this bye-law confers upon an inspector the power to attach and confiscate pork subject to the prohibition. Sec. 9 of this bye-law provides:-

> "No person shall be prosecuted and no attachment or confiscation shall be executed against him for an offence under this bye-law committed within 42 days from its coming into force if immediately before it came into force, that person was engaged in raising pigs or in selling pork and its products in accordance with the law in force at that date."

4. Before the 1957 bye-law was approved by the Minister of the Interior, he drew the attention of the Mayor of Tel Aviv-Jaffa to the question of those sections of the Jewish, Moslem and Christian communities for whom "the eating of pork constitutes part of their ordinary way of life", and since "it is not feasible to distinguish the mode of operation (of the enabling Law) according to differences of ethnic or religious affiliation", he advised the use of sec. 2 of the enabling Law "so as not to affect the usual way of life of these citizens even if they be only a minority". This recommendation was not acceptable to the Mayor and, as indicated, the 1957 bye-law imposed a general prohibition.

5. Let us now return to the facts affecting the petitioner. On July 7, 1957, the petitioner paid to the abbatoir of the Municipality of Tel Aviv-Jaffa—as he had done the last two preceding years—the sum of IL. 6, the tax payable for a second veterinary examination of 400 kilograms of pork. The petitioner personally raises pigs outside the municipal area

of Tel Aviv. On the morning of the following day, July 8, 1957, a veterinary surgeon employed by the Tel Aviv municipality visited the petitioner's butcher shop, inspected the pork above mentioned and approved it as fit for human consumption with a seal "Second examination, Pork, Tel Aviv-Jaffa Municipality".

On the same day, about two hours after the visit of the veterinary surgeon, inspectors who were city employees arrived and confiscated 372 kilograms of the said pork without regard to the petitioner's protest.

On July 11, 1957, the petitioner demanded the return of the confiscated meat, contending that the confiscation was illegal, and gave notice that he would resort to the courts should the meat not be returned to him. The meat has never been returned, and we are told by the respondents' counsel that it has been destroyed.

6. In paragraph 18 of his petition the petitioner's counsel tried to deny the validity of the enabling Law, but in the course of the proceedings abandoned this argument and, as I have said, also withdrew the petition in as far as it was directed against the first and second respondents. Petitioner's counsel confined himself to an attack upon the bye-law on the ground that it is "illogical and does not meet the test of reasonableness and efficacy," because it "discriminates between various classes and groups of citizens of the State"; because "it shows lack of good faith", is "obviously unjust and unfair" and "interferes without justification with the rights of the citizens in a manner unacceptable to a reasonable person" and because it exceeds the bounds of or contravenes the purpose for which the enabling Law conferred upon the respondents the authority to pass the bye-law.

The petitioner's counsel contends likewise in paragraph 21 of the petition that the confiscation was in violation of the provisions of sec. 9 of the 1957 Municipal bye-law.

7. The fourth and fifth respondents argue that the question of the reasonableness of the bye-law under consideration does not arise since it was adopted by virtue of the provisions of the enabling Law. As for the confiscation of the meat, they argue that by virtue of sec. 6 of the enabling Law the 1954 bye-law was revived and that consequently even during the period preceeding the adoption of the 1957 bye-law, i.e., since January 1957, the petitioner was selling pork "not in accordance with law", and hence the provision concerning the 42 days in section 9 of the 1957 bye-law is not applicable to the petitioner. It should be noted that the Mayor of Tel Aviv, in examination upon his affidavit, said that

when the enabling Law was published the petitioner was notified that the 1954 bye-law was again in force, but there is no indication of this contention in his affidavit filed in court, and even in his letter to petitioner's counsel of August 7, 1957, sent in reply to the latter's communication there is no hint that such warning had been given to the petitioner.

8. The first question which arises upon the submissions of counsel for the parties is to what extent this court may entertain the plea of unreasonableness with regard to a bye-law made by a municipality. It is not disputed that such a bye-law has no force unless power to enact it was granted to the municipality by the legislature. Without an enabling Law, or when the bye-law is fashioned on a basis not within the scope of the enabling Law, the bye-law will be deemed to be without force or as exceeding the scope of the Act, according to the doctrine of *ultra vires*.

9. In the present case there is no room for the argument that the Municipality generally had no power to pass the bye-law involved since the enabling Law conferred this power upon the Municipality. The enabling Law has given the Municipality the power to prohibit the sale of pork in the area under its jurisdiction, and this is what the Municipality has done by the bye-law.

Accordingly the objection of petitioner's counsel only revolves on the exercise of the Municipality's discretion in declining to make use of the power granted to it by sec. 2 of the enabling Law to exclude the area in which the petitioner's shop is situated from the application of the bye-law.

10. On the question of the court interfering in the exercise of its discretion by a Municipality we have to distinguish between two types of cases.

a) Where indeed the bye-law has been enacted by virtue of the enabling Law, but it is contended that the discretion on which this power was exercised, or the manner of its exercise, was improper *from the viewpoint of the existing circumstances,* and, in reliance upon this argument, the court is asked to rule that the bye-law is unreasonable, that is to say, on the basis of the contention that the evaluation of the existing circumstances by the municipality was erroneous.

b) Where it is argued that the exercise of the discretion is invalid from the viewpoint of the enabling Law itself, namely, that upon an analysis of the enabling Law it can be shown that the Law did not intend at all to confer upon the municipality the power to exercise its discretion for the purpose behind the bye-law and that therefore the

bye-law is unreasonable. In this case the argument of unreasonableness is linked to the argument that the discretion is in excess of authority and is in substance a plea of *ultra vires*.

Generally the court will decline to interfere in cases of the first type. When a municipality is authorized to exercise a power to make bye-laws, then the power to assess the existing circumstances is committed to it alone and it is for the municipality alone to determine whether the circumstances do, or do not, justify the exercise of this power. The Municipality has merely to take care that the bye-law is within the four corners of the enabling Law and consistent with the legislative intent as it appears from the enabling Law.

This was discussed in *Tabac House* v. *Haifa Municipality* (4), where it was said:

> "There is therefore no doubt that the tendency of the courts on the question of the validity of bye-laws of this type will be to uphold rather than to invalidate them. Consequently it is also not important when we come to deal with the problem before us that one of us may think that had he been a member of the body making the bye-law he would have opposed it and proposed another in its place."

In the English case of *Da Prato and others* v. *Provost and Magistrates of Partick* (5), the legislature had authorized a municipal council to make bye-laws relating to the opening and closing of shops with one restriction, that the permissible hours of business should not be more than fifteen hours daily. A bye-law was made which permitted shops to stay open from 7 a.m. to 10 p.m. The appellant argued that the bye-law was unreasonable because the greater part of his business was done after 10 p.m. (his business was something in the nature of a restaurant for theatre goers and the like) and the operation of the bye-law completely destroyed his livelihood. The appellant argued further that the power had been granted to the local authority to enable it to regulate hours of business in a reasonable manner, namely, by *bearing in mind different kinds of business*. The House of Lords rejected these arguments, Loreburn L.C. saying in his judgment:

> "It is next said that it is unreasonable. All I can say is, here is a specific discretion with regard to a matter of power conferred upon this authority named in the section, and, when they have exercised their discretion in good faith in regard to it, it seems to me that the Court has no power to interfere."

If one fact were changed in that case, that is, had the said bye-law prescribed the time of opening during the hours of night when most people are asleep, it would have been possible, in my opinion, to classify the case under the second type, and to plead unreasonableness in the *ultra vires* sense, namely, that the exercise of the discretion was so perverse that it was inconceivable that the legislator intended to bestow such a power; for then it could be argued that the bye-law did not regulate the hours of business but destroyed business and the legislator did not intend to confer such a power upon the council.

In the well-known case of *Kruse* v. *Johnson,* (6), where examples are given (at p. 991) of the rare instances in which the court will interfere in the exercise of the discretion of a local authority, it is also said:

> "...the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'."

11. It follows from the foregoing that if the given bye-law is in point of reasonableness found to be within the four corners of the enabling Law, but the objection is aimed at invalidating the exercise of discretion by the Municipality because it refrained from using the power given it by sec. 2 of the enabling Law—to exclude certain areas from the application of the bye-law—this court cannot interfere so long as the respondents do not exceed their legal authority. I shall not express here any opinion whether the respondents have acted intelligently or not; that is a matter for the electorate or, perhaps, one calling for amendment of the Law by the Knesset. In as far as petitioner's counsel argues that the Municipality should have considered the existing circumstances in a different manner, namely, that it should have been persuaded that the existing circumstances justified making use of sec. 2 of the Law, that is an argument of unreasonableness which has nothing in common with the argument of excess of authority, and this court will not entertain it, nor interfere.

We must therefore only apply our minds to the argument that the given bye-law is unreasonable having regard to the provisions of the enabling Law, namely, that it is so unreasonable that it exceeds the authority which the Law has conferred upon the Municipality.

12. This brings me to the interpretation of the enabling Law.

(a) First of all it is clear from the Law that the authorization was granted upon condition that the bye-law should apply to the entire *population* of the "whole area or a certain part of the area" of the local

authority; that is to say, that the basis for the application of the bye-law must be territorial and not *personal*. It is thus forbidden to discriminate among sections of the population according to their national, racial, religious affiliation, etc. It is true that the municipality may exclude part of the area from the application of the bye-law for different reasons, such as the fact that this part is inhabited by residents for whom, for reasons of religion or conscience, the prohibition of the sale of pork is not required or is not desirable. But even in such a case, when the bye-law is made applicable to only part of the area, no prohibition upon the sale of pork by any one person may be imposed in the remaining parts where the sale of pork is permitted, and the fact that such persons may belong to a national group or religion which forbids the eating of pork is of no importance. The same rule is equally applicable in the reverse situation. When a bye-law forbidding the sale of pork is applied to part of the area, the bye-law must not make an exception and permit the sale of pork to some persons, or a group of persons, because they belong to a certain national group or religion.

This is clear from the proviso to sec. 2, that the *limitation or prohibition* must apply to the whole population.

(b) The mainstay of the argument of petitioner's counsel is that when the Knesset enacted the enabling Law it intended to authorize the imposition of a prohibition on the sale of pork upon Jews alone but not upon Christians. For that reason, petitioner's counsel argues, the Municipality of Tel Aviv acted unreasonably because it did not make use of sec. 2 of the Law and provide that the bye-law should not apply to petitioner who is a Christian and to others like him. How should the Municipality have acted in order to except the petitioner in view of the provision regarding the territorial basis? In the opinion of petitioner's counsel the Municipality should have treated the place where the petitioner carries on business in selling pork as a "special area" to which the bye-law was not to be made applicable. The petitioner's business is at no. 7 Third Street, in Neveh Shalom, inhabited by Jews, in a building comprising 25 booths occupied by Jews, with the exception of the petitioner's. What this means is that the Municipality should have treated the booth occupied by petitioner in such building as a distinct and special area. It seems to me that while dealing with the unreasonableness of the Municipality, petitioner's counsel has stumbled over the unreasonableness of his own argument.

At the outset, there is no question of what the petitioner's counsel represents as an invasion of Christian religious rites nor of discrimination

on grounds of religious affiliation. And I say this not merely because the Christian religion does not impose a duty to eat pork.

First, neither the enabling Law nor the bye-law imposes a *prohibition on the eating of pork*, whether upon Christians or Jews or anyone else. Secondly, the same problem arises in relation to all persons who have no aversion to eating pork, be they Christians, Moslems (whose religion also prohibits the eating of pork) or Jews. Accordingly, if the petitioner's counsel is right in demanding a privilege for his client, then any person—regardless of his particular religious affiliation—would be entitled to demand this privilege and the Municipality would have to regard every place where pork is sold by a person, not restrained by religious scruples, as a "special area" to which the bye-law is not to be applied. In the result the bye-law could only be applied in places inhabited exclusively by persons who, *for reasons of conscience, do not deal in the sale of pork*, that is to say, persons scrupulous in their religious observance. But for such persons there would be no need for the enabling Law or the bye-law.

Furthermore, if the petitioner were here to achieve his wish and after some time were to sell his shop to a Jew, the Municipality would immediately have to revoke the non-application of the bye-law to the "special area"—the above-mentioned booth in the building at no. 7 Third Street—(since petitioner's counsel argues that it was in truth the intention of the Knesset to empower the Municipality to prohibit the sale of pork by Jews alone). Were the Municipality to amend the bye-law in order to revoke, as above, its non-application to the "special area", because *it had passed to a Jew* it would in effect have been acting on a personal basis contrary to the provisions of the second section of the enabling Law.

(c) Petitioner's counsel spoke at length about interference with the freedom of the individual. Certainly there is here an invasion of the freedom of the individual but this is permitted by the enabling Law, and it is not for us to express an opinion whether or not the Knesset did the right thing in enacting this Law. Here, however, it is not a *matter of religious discrimination* nor, it should also be noted, of any prohibition, or authority to prohibit, the eating of pork. What we have here is interference with the freedom of the individual to engage in the *sale* of a certain product, interference with the convenience of the individual who eats pork, because he cannot obtain it in his neighbourhood in the city where he resides. From this point of view, there is no difference here whatever between a Jew or a Moslem or a Christian who usually eats pork.

(d) It was also argued that for this reason a Christian is compelled, as it were, to observe a prohibition imposed by the Jewish religion. (It is not clear to me why merely a Jewish and not a Moslem religious prohibition.) Therefore, according to this argument, if one is to conclude that in the enabling Law the legislator did not contemplate such compulsion, then the bye-law exceeds the scope of the enabling Law.

In the first place, this argument is not acceptable because in this regard the legislator has given freedom of action to municipalities and local councils, and we are not competent to introduce into the enabling Law something which is not there, i.e. to add a limitation on the exercise of the discretion which has been granted to a local authority.

Secondly, I have already pointed out that what is involved here is not a prohibition upon the eating of pork but a matter of prohibiting or limiting the right of the individual to engage in the pork business.

Thirdly, I have never heard an argument that if in a country where, for example, the majority of the population being Christian, the government closes its offices one day a week and for religious reasons selects Sunday for this purpose, so that Jewish or Moslem residents cannot on this account have resort to government offices on that day, that such practice constitutes compulsion upon such residents to observe a prohibition, precept or duty imposed by the Christian religion.

I have found no substance in the submissions of petitioner's counsel with regard to the unreasonableness of the bye-law on grounds of excess of authority.

13. Moreover, even if it be assumed—and we need not decide this in the present case—that unreasonableness can be pleaded in the case of some city which includes a large district inhabited only by Christian residents where the Municipality imposes a prohibition upon the sale of pig's meat in this district as well, without exercising its powers under sec. 2 of the Law to exclude that part of the city from the application of the bye-law—even then I think that the foregoing arguments of petitioner's counsel should be rejected because no such district is involved here, but one isolated shop situated in Neveh Shalom, an area almost wholly populated by Jews.

14. We must therefore pass to the second part of the submissions of petitioner's counsel regarding the attachment and confiscation carried out in the petitioner's shop.

The confiscation occurred before the lapse of the 42 days mentioned in sec. 9 of the 1957 bye-law. Respondent's counsel contends that sec. 9

is inapplicable here because prior to the effective date of the 1957 bye-law the petitioner engaged in the sale of pigs' meat "not according to law", and respondents' counsel argues that under sec. 6 of the enabling Law the earlier bye-law was revived immediately upon coming into effect of the enabling Law.

15. It is true that sec. 6 of the enabling Law revives a bye-law made by a local authority and published in Reshumot before the effective date of the enabling Law, but this is only in regard to a bye-law which *"would have been lawfully made had this Law been in force at the time."*

The bye-law must therefore be tested by this qualification. Respondents' counsel tries to find an indication for the view that the first bye-law passes the test in the body of sec. 6 of the enabling Law. He argues that before the enactment of the enabling Law there was published in Reshumot only one bye-law similar in terms to the earlier bye-law adopted by the Tel Aviv Municipality. Consequently, the very enactment of sec. 6 is some proof that the legislator did not regard the earlier Tel Aviv bye-law as not being consonant with the provisions of the enabling Law. This argument is not convincing since if the matter were as claimed by respondent's counsel, there would have been no need for the qualification in sec. 6, and the legislator would have simply prescribed that a bye-law published in Reshumot should be regarded as effective from the date of its publication. This indicates that the legislator in enacting sec. 6 was not concerned to scrutinize the bye-law or bye-laws already published in Reshumot, from the point of view of the qualification in the section.

16. We must therefore examine the earlier bye-law in the light of the provisions contained in secs. 1 and 2 of the enabling Law in order to establish whether the provisions of the bye-law are compatible with the provisions of the enabling Law.

It has already been stated above, that sec. 3 of the bye-law limits the sale of pork on a territorial basis (a public market) as well as on a personal basis (personal licence).

Counsel for the respondents relies upon sec. 1 of the enabling Law which confers on a local authority the power "to limit" the sale of meat and he contends that the meaning of the expression "to limit" is to regulate by imposing limitations, and the limitations can be by means of granting licences for the sale of pork. Sec. 3 (b) of the bye-law is therefore in accordance with sec. 1 of the enabling Law, and the conclusion is that immediately upon the enactment of the enabling Law, the bye-law resumed its validity.

Were it not for sec. 2 of the enabling Law, and if we had to deduce the nature of the power conferred upon the local authority from sec. 1 alone, this argument of counsel for the respondents would perhaps be acceptable.

But sec. 1 does not stand alone and it is to be construed with sec. 2. It is clear from the latter section that a local authority may impose a *prohibition or limitation* in a particular part of its area of jurisdiction but in such a case—and this is important—the limitation or the prohibition must apply *to the entire population* of that part of the area.

What then is to be made of sec. 3 of the bye-law under consideration?

Firstly, sec. 3 (a) imposes a prohibition upon the entire area of its jurisdiction with the exception of a public market.

Secondly, in relation to a public market sec. 3 (b) imposes a prohibition *not upon the entire population,* for it excludes from the application of the prohibition those persons in the public market who receive licences relieving them of the prohibition. So long as the prohibition to which a public market may be subject is not imposed by sec. 3 (b) of the bye-law upon the entire population but only upon part thereof (even if by far the largest part) sec. 3 (b) is repugnant to the provision in sec. 2 of the enabling Law concerning the imposition of the prohibition.

If we say that sec. 3 (b) of the bye-law refers only to the limitation and not to the prohibition, and limitation means also regulation by the requirement of licences—such an argument is available were it not for the words "binding upon the whole population"; but the word "binding" (in the plural) relates back to the prohibition as well as to the limitation.

Consequently, according to the terms of sec. 2 of the enabling Law, the condition for it being binding "upon the whole population" refers not only to the prohibition but also to the limitation; that is to say that the limitation also has to be such which it is possible to apply to the entire population. In other words, just as it is forbidden to discriminate *between one person and another* when imposing a prohibition, it is likewise forbidden to discriminate *between one person and another* when imposing a limitation.

When the enabling Law was being enacted every person was permitted to engage in business at his own pleasure without need to

obtain a special licence from the local authority as far as the matter appertained to it, apart from a licence under the Trades and Industries (Regulation) Ordinance, i.e. under a particular express Law.

It may be presumed that this position was known to the legislature and therefore when it qualified the authority to impose limitations by the condition that such imposition shall apply *to the whole population,* it could not have meant to enable a local authority to avoid the condition by the introduction of a system of special additional licences. The phraseology of the enabling Law makes it manifestly clear that the legislative intent was not to permit a bye-law to be based upon discrimination by means of religious, racial or ethnic affiliation, or upon any discrimination whatsoever and it therefore made the authority contingent upon the limitation being imposed "upon the whole population". It is thus not possible that the power "to limit" here embraces the power to discriminate by means of the allocation of licences. When a bye-law forbids the sale of pork and permits it only for one to whom a licence therefor is granted—then, as regards those to whom licences have not been granted, a prohibition and not only a limitation exists. For this reason the prohibition is not general. We are not concerned with the manner of enforcing sec. 3 (b) of the bye-law, but with what is implicit in its terms. It is certainly possible that by sec. 3 (b) the Municipality intended to grant a limited number of licences but the language of the section (if it is valid) enables the Municipality to grant licences even to one-half of its population and this certainly is contrary to the provisions of sec. 2 of the enabling Law.

According to sec. 2 of the enabling Law, a local authority may impose a limitation upon the whole population of a particular part of its area of jurisdiction, that is to say, that *all the inhabitants* of that part of the jurisdictional area *may sell* pigs' meat, subject to the limitations prescribed in the bye-law, such as the hours of sale, the non-sale of pork in stores in which other kinds of meat or products are sold, the sale of pork bearing the seal of the veterinary service and the like; that is to say, *any person* in that part of the area who does not violate the limitations prescribed in the bye-law may engage in the sale of pork.

The conclusion is that sec. 3 (b) of the earlier bye-law does not accord with sec. 2 of the enabling Law and was therefore not valid prior to the adoption of the 1957 bye-law. Sec. 9 of the 1957 bye-law therefore applies to the present case and the confiscation was illegal because it was carried out before the expiration of 42 days from the effective date of the new bye-law.

If the meat were still in existence I would order its return to the petitioner, but since we are told by respondents' counsel that it has been destroyed, I rule that the confiscation was illegal and in this respect the order nisi must in part be made absolute.

BERINSON J. I concur but I wish to emphasize that I do not see any room for distinguishing between two types of unreasonableness in the subordinate legislation of a local authority, one of which amounts to an excess of authority and is subject to judicial scrutiny, and the other which falls short of this and is not to be inquired into. The many decisions given by the courts in this country since the establishment of the State as well as during the period of the Mandate, which have dealt with this question, have almost always and consistently proceeded upon the assumption that the test of reasonableness of municipal bye-laws which prevails in this country is in accordance with the rules laid down in the leading English case of *Kruse* v. *Johnson* (6), which they followed in practice. Having regard to this, I doubt very much whether the view expressed before us that the question of the test of reasonableness is still open and that we are free to decide it as we choose, is correct. It is obvious that we may do so if we find it proper to exercise the power now vested in us by sec. 33 (b) of Courts Law 1957, and deliberately depart from the law hitherto acceptable to us. I found nothing in Mr. Zilbiger's arguments that could dispose me to do so.

It is to be emphasized that during the period of the Mandate this question was in fact decided in several judgments in which municipal bye-laws were held to be invalid on account of unreasonableness: see, *Attorney-General* v. *Altshuler* (1); *Trachtenberg* v. *Attorney-General* (2); and *Bahaj* v. *Attorney-General* (3). Although it was decided in these cases that the bye-laws had also exceeded the scope of the law-making powers, the two grounds given in each instance for invalidating the bye-laws—excess of authority and lack of reasonableness—were separate reasons, one additional to the other. As we know, each one of the grounds is in such cases treated as the *ratio decidendi: Jacobs v. London County Council* (7).

Since the establishment of the State no municipal bye-law has indeed been invalidated for unreasonableness (and, as we are told, neither for excess of authority), but the question has arisen more than once and the courts generally have regarded themselves competent to decide it and to deny validity to such a bye-law, even though, as we know, this will in practice be done only in rare and very extreme cases, especially when the bye-laws of an elected body are involved, bye-laws "which

should be supported, if possible. They ought to be, as has been said, 'benevolently' interpreted" (in the words of Lord Russel, C.J. in *Kruse* v. *Johnson* (6) at p. 99).

The existence of the test of reasonableness regarding subordinate legislation in various countries of the common law world cannot be doubted. It clearly appears from the decisions cited in the footnotes to the English and Empire Digest, volume 38, pp. 163-5. The same applies all over the United States (see, 62 *Corpus Juris Secundum,* Section 148, pp. 304-5). The learned writer, W.A.Wynes, in his Legislative, Executive and Judicial Powers in Australia, points out the inferior status of municipal bodies in comparison with true legislative organs with respect to their legislative power. He says (ibid. 2nd edition, p. 4):

> "Such bodies do not enjoy powers of legislation comparable in any sense with those of a legislative body. Among other things, municipal and other regulations are subject to disallowance by the authority from which the regulative powers are derived and, in addition, they are subject to a very real limitation of an entirely different character—they must be reasonable."

For myself I see no reason to depart from this path charted in the countries of the common law world to which in large measure we also belong.

In any event I do not see what contribution is made in the instant case by the distinction drawn by the President between one type of unreasonableness relating to the exercise or mode of exercise of the discretion vested in the local authority, and another type of unreasonableness relating to the exercise of discretion which really constitutes an excess of authority, for I am of the opinion that the bye-law involved is not affected by any unreasonableness and is valid by whatever test. As I listened to the extreme arguments of Mr. Barak, which he strained to the point of suggesting that it would have been proper for the Municipality to have declared the petitioner's shop a special district to which the prohibitions and the confiscatory powers of the bye-law would not apply, I thought that this line of argument invites the aphorism: before you discover a grain of unreasonableness in the bye-law, you had better remove the husk of unreasonableness from your own argument.

The decision in *Da Prato v. Provost etc. of Partick* (5) does not introduce any innovation and in any event does not go beyond the rules laid down in *Kruse v. Johnson* (6). The *Da Prato* case is only an

illustration of the application of the well known rule, especially in the case law of the United States, that if the authority granted to a local government body is express and specific and confers upon it a discretion within defined limits, and the body exercises its discretion within those limits, the court will not interfere except under the most extreme circumstances (see, McQuillin, The Law of Municipal Corporations, 3rd edition, vol. 5, pp. 383-5). The passage from the *Da Prato* case (5) cited by the President is from the judgment of Lord Chancellor Loreburn at p. 155, who, incidentally like the others Lords of Appeal, considered the problem from the double test of excess of authority as well as lack of reasonableness. The other Lords who sat in that case also delivered short judgments. Here is what some of them said:-

Lord Ashbourne:

> "The Legislature distinctly and deliberately intended to give some increased power, and to give increased power in regard to the selection of the period and the hours during which certain houses might be open. The town council exercised that power. Of course, they might have acted in such a way as to expose themselves to the charge of acting *ultra vires* and unreasonably, and it might be competent for that to be inquired into if they did so; but I am not satisfied that any case has been at all substantiated to that effect" (at p. 156).

Lord James of Hereford:

> "In concurring in this judgment I think there are some expressions used by the Lord Ordinary to which assent ought to be given in a modified form. He seems to shut out the power of review to an extent which I think would be dangerous if it were literally accepted" (at p. 156).

After bringing the example of the *Heap v. Burnley Union* (8) in which Lord Coleridge decided that a bye-law which prohibited the keeping of swine within 50 feet of a dwelling house was invalid as unreasonable, he adds: "In the same way here I think we should be careful to say that we do not shut out the power of review within certain limits" (at p. 157).

Lord Atkinson:

> "I think it is perfectly clear upon the construction of the section and the by-law, that the by-law is not *ultra vires,*

and I see nothing to show that it is unreasonable (at p. 157).

It would thus appear that they were all of the one opinion that a bye-law has to pass a double test: the test of authority and the test of reasonableness. It is quite clear that had the Town Council exercised its authority in a patently unreasonable manner they would have invalidated its action. If, for example, the Town Council had prescribed the hours of opening or a considerable part thereof during the night when most persons are asleep and not able to transact business, then, notwithstanding the express authority granted to it to prescribe in its discretion 15 hours daily for keeping business premises open, the court would not have shrunk from invalidating the exercise of discretion as unreasonable.

The same applies to the matter which is the subject of our inquiry. It is sufficiently clear from sec. 2 of the Local Authorities (Special Enablement) Law, 1957, that the Knesset intended to enable a local authority to exclude a territorial zone from the principle of the prohibition or limitation. It was not proved that within the boundaries of the Municipality of Tel-Aviv-Jaffa there exists a territorial concentration of persons interested in selling pigs or in eating pork and there is therefore no room for the argument of unreasonableness on account of the total prohibition which the Municipal Council has imposed within the limits of the entire city. It could be otherwise were there such an appreciable concentration within the city boundaries. The position would be even more manifest in the case of an entire settlement (whose inhabitants are not particularly sensitive on the subject of pigs) which falls within the limits of a regional council controlling a number of separate settlements. In such cases it could be said that the Knesset did not intend to grant authority needlessly to disturb the mode of life and the dietary habits of the inhabitants who have no objection to eating pork.

We must not forget the principal aim and purpose of the Law under consideration. The aim is not to prevent the raising of pigs or the sale of pork or its consumption for reasons of hygiene or public health. Neither is the aim to prevent all this for economic reasons. The Law is primarily intended to satisfy the religious and national feelings of the Jewish population which faithfully observes religious precepts, according to which the pig is the symbol of impurity. In spite of this the Knesset did not find it appropriate to decide itself about the raising and keeping of pigs and the sale of pork and pork products on a country-wide basis. It empowered the local authorities to impose such prohibitions or limita-

tions on a local territorial basis, but enabled each of them to exclude areas from the bounds of the prohibition and limitation. Having regard to the purpose of the Law and the method chosen by the legislature for its implementation, it appears to me that for a local authority not to use this opportunity with regard to an integral group of citizens in a territorial concentration of their own, and interested in having the power exercised on their behalf, would be contrary to the legislative intent. No sensible person would find justification for such an attitude without evidence of legitimate, practical reasons to prevent the exclusion of the prohibition or limitation, or which would be likely to render it futile. But, as I have said, that is not the case here, and we must therefore uphold the bye-law as it stands.

As for the second part of the President's judgment dealing with the matter of the confiscation of the petitioner's pork, I concur and have nothing further to add.

GOITEIN J. I agree with my colleagues that that part of the order nisi made by this court on July 31, 1957, which deals with the petitioner's application to continue the sale of pork and pork products in his butcher shop, should be discharged. I also agree that the order nisi should be made absolute with respect to the illegal confiscation of 400 kg. of pork confiscated from the petitioner on July 8, 1957.

Order Nisi discharged in part.
Judgment given on February 27, 1958.