HCJ 2481/93

Yosef Dayan

v.

1. Yehuda Wilk – Jerusalem District Commissioner

2. Rabbi Ovadya Yosef

3. Dr Meira Sarel and Professor Shalom

4. Shoshana Eitan

5. Ricka Barsela

6. Oren Sheindel

The Supreme Court sitting as the High Court of Justice

[9 February 1994]

Before Vice-President A. Barak and Justices S. Levin, E. Goldberg

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

Facts: The petitioner applied for a permit to hold an assembly directly outside the home of Rabbi Ovadya Yosef, spiritual leader of the Shas political party. The District Commissioner of Police refused the permit, because it would violate the rights of privacy of the rabbi, his family and his neighbours.

Held: It is necessary to balance the petitioner's right to freedom of assembly against the right of privacy of the public figure, his family and his neighbours. According to Vice-President Barak, these rights are of equal importance: in principle there is a right to hold an assembly outside the private home of a public figure, but this right must not materially intrude on the right of privacy of the public figure and his neighbours. When the home is used to some extent also for public activity, then slightly less protection will be given to the right of privacy of the public figure in his home than in a case where the home is not used for public activity. According to Justice S. Levin, the right of privacy of the public figure in his home is of greater importance than the right to hold an assembly outside that home. According to Justice Goldberg, an assembly outside the private home of a public figure should only be allowed when he conducts all or most of his public activity from home.

In the present case, Vice-President Barak and Justice Goldberg would have granted the petition and allowed the petitioner to hold an assembly outside the home of Rabbi Ovadya Yosef, if the petitioner had agreed to restrictions of time, place and manner. The petitioner, however, refused to agree to any restrictions.

Petition denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, 5752-1992, ss. 3, 7, 7(a), 8.

Penal Law, 5737-1977, s. 226.

Police Ordinance [New Version], 5731-1971, ss. 83, 84, 84(a), 85.

Protection of Privacy Law, 5741-1981, ss. 2(1), 4, 5, 18, 19.

Israeli Supreme Court cases cited:

[1] HCJ 3080/92 – unreported.

[2] HCJ 148/79 *Saar v. Minister of Interior* [1980] IsrSC 34(2) 169.

[3] FH 16/61 *Companies Registrar v. Kardosh* [1962] IsrSC 16(2) 1209; IsrSJ 4 7.

[4] HCJ 953/87 *Poraz v. Mayor of Tel Aviv–Jaffa* [1988] IsrSC 42(2) 309.

[5] FH 9/77 *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [1978] IsrSC 32(3) 337.

[6] CA 524/88 *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [1991] IsrSC 45(4) 529.

[7] HCJ 693/91 *Efrat v. Director of Population Registrar* [1993] IsrSC 47(1) 749.

[8] HCJ 153/83 *Levy v. Southern District Commander* [1984] IsrSC 38(3) 393; IsrSJ 7 109.

[9] HCJ 243/62 *Israel Filming Studios Ltd v. Geri* [1962] IsrSC 16 2407; IsrSJ 4 208.

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

[11] MApp 82/83 *State of Israel v. Alia* [1983] IsrSC 37(2) 738.

[12] HCJ 3815/90 *Gilat v. Minister of Police* [1991] IsrSC 45(3) 414.

[13] FH 13/60 *Attorney-General v. Matana* [1962] IsrSC 16 430; IsrSJ 4 112.

[14] EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; IsrSJ 8 83.

[15] HCJ 428/86 *Barzilai v. Government of Israel* [1986] IsrSC 40(3) 505; IsrSJ 6 1.

[16] FH 9/83 *Appeals Court Martial v. Vaknin* [1988] IsrSC 42(3) 837.

[17] HCJ 109/70 *Coptic Orthodox Mutran of Jerusalem v. Minister of Police* [1971] IsrSC 25(1) 225.
[18] HCJ 14/86 *Laor v. Film and Play Review Board* [1987] IsrSC 41(1) 421.
[19] HCJ 73/53 *Kol HaAm Ltd v. Minister of Interior* [1953] IsrSC 7 871; IsrSJ 1 90.
[20] CA 214/89 *Avneri v. Shapira* [1989] IsrSC 43(3) 840.
[23] HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
[22] HCJ 448/85 *Dahar v. Minister of Interior* [1986] IsrSC 40(2) 701.
[23] CrimA 126/62 *Disenchik v. Attorney-General* [1963] IsrSC 17 169; IsrSJ 5 152.
[24] HCJ 869/92 *Zvilli v. Chairman of Central Elections Committee for Thirteenth Knesset* [1992] IsrSC 46(2) 692.
[25] HCJ 456/73 – unreported.
[26] HCJ 991/91 *David Pasternak Ltd v. Minister of Building and Housing* [1991] IsrSC 45(5) 50.
[27] HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [1993] IsrSC 47(2) 229, [1992-4] IsrLR **Error! Bookmark not defined.**.
[28] CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [1963] IsrSC 17 1319; IsrSJ 5 120.
[29] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[30] CA 670/79 *HaAretz Newspaper Publishing Ltd v. Mizrahi* [1987] IsrSC 40(2) 169.

Israel Magistrates Court cases cited:

[31] CrimC (Jer.) 4300/81 – (unreported).

Australian cases cited:

[32] *Australian National Airways Pty Ltd v. The Commonwealth* (1945) 71 C.L.R. 29.

American cases cited:

[33] *Rowan v. Post Office Dept.* 397 U.S. 728 (1970).
[34] *City of Wauwatosa v. King* 182 N.W.2d 530 (1971).
[35] *Public Utilities Comm'n v. Pollack* 343 U.S. 451 (1952).
[36] *Martin v. Struthers* 319 U.S. 141 (1943).
[37] *Gregory v. Chicago* 394 U.S. 111 (1969).
[38] *Carey v. Brown* 447 U.S. 455 (1980).

[39] *Cox v. Louisiana* 379 U.S. 536 (1965).
[40] *Pruneyard Shopping Centre v. Robins* 447 U.S. 74 (1980).
[41] *United Electrical, R. & M. Workers v. Baldwin* 67 F. Supp. 235 (1946).
[42] *Cohen v. California* 403 U.S. 15 (1971).
[43] *Frisby v. Schultz* 487 U.S. 77 (1988).
[44] *Kovacs v. Cooper* 336 U.S. 77 (1949).

English cases cited:
[45] *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21 (PC).
[46] *Francis v. Chief of Police* [1973] 2 All ER 251 (PC).

German cases cited:
[47] *Ovg. Koblenz, Beschl v.* 24.5.86 7B 36/86.

Indian cases cited:
[48] *Indulal v. State* (1963) 50 A.I.R. Gujarat 259.

Canadian cases cited:
[49] *R. v. Big M. Drug Mart Ltd* [1985] 1 S.C.R. 295.
[50] *Committee for the Commonwealth of Canada v. Canada* [1991] 1 S.C.R. 139.
[51] *Cheema v. Ross* (1991) 82 D.L.R. (4^{th}) 213.

For the first respondent — N. Arad, Director of High Court of Justice Department at State Attorney's Office.
For respondents 2-6 — Y. Bar Sela.

JUDGMENT

Vice-President A. Barak

A asks the competent authority in the police force for a permit to hold an assembly. He wants to hold it, together with others, on the pavement outside the apartment of *B* (in a cooperative house). *B* is a public figure. His apartment is also used for public purposes. *B* opposes the granting of the permit. The neighbours also oppose it. What is the scope of discretion of the competent authority in the police force in such circumstances? This is the question before us.

The facts

1. Rabbi Ovadya Yosef is a spiritual leader. He is the president of the Council of Torah Scholars. This council is the supreme body of the Shas movement. This movement is a political party represented in the Knesset. It is a member of the coalition. Rabbi Yosef lives, together with his wife, in a cooperative house in a residential neighbourhood in Jerusalem (36 Jabotinsky Street). Rabbi Yosef has an office elsewhere (Hizkiyahu HaMelech Street). Persons interested in meeting Rabbi Yosef must arrange such meetings in advance with the rabbi's office. Rabbi Yosef's family lives in his private apartment. The rabbi does not regularly hold meetings in his home about matters relating to his public activities. Nonetheless, he receives visits from persons in government at his apartment, such as the Prime Minister, cabinet-ministers, deputy-ministers and members of the Knesset. The frequency of the visits of deputy-ministers and members of the Knesset from the Shas party is four to five visits a month. The Minister of the Interior (a Shas representative) usually visits Rabbi Yosef once a week. The Council of Torah Scholars does not meet in the rabbi's house.

2. The petitioner applied to hold an assembly (on 6 May 1993) outside Rabbi Ovadya Yosef's apartment. He wants to 'protest the continued participation of Shas in the Government'. He expects two hundred and fifty participants. He wants to use a stage and two loudspeakers. The assembly is to last two hours (19.00-21.00). The demonstrators are to meet at Wingate Square (near the rabbi's house) and disperse there. On 2 May 1993, the petitioner applied to the Jerusalem District Commissioner of the Israel Police Force to receive a licence for the assembly. Clarifications requested from the petitioner indicated that the demonstrators intend 'to approach Rabbi Ovadya Yosef's house with signs and loudspeakers, to erect a stage and protest against the rabbi and the Shas party'. In communications with the petitioner,

it was suggested that he hold the assembly in the plaza of the Van Leer Institute (an aerial distance of two hundred meters). This is situated nearby. The petitioner rejected the suggestion.

3. The Jerusalem District Commissioner (on 4 May 1993) denied the petitioner's request. The reason was the 'ruling held by the Supreme Court with regard to a demonstration involving an intrusion into the private domain of a public figure and a harassment in his private life'. The petition before us was filed against this decision. We issued on that day a show cause order as requested. We ordered that Rabbi Ovadya Yosef should be joined as an additional respondent in the petition. We fixed the hearing for 12 May 1993, in view of the statement of the petitioner that he wanted to hold the meeting on a new date. At the beginning of the hearing (on 12 May 1993), we discovered that the service of the court papers on Rabbi Ovadya Yosef was not done properly. We postponed the continued hearing of the petition to a new date, after proper performance of service. We granted an application of residents (the applicants in HCJApp 2593/93) to be joined as additional respondents in the petition. Several days later (on 18 May 1993), we held a hearing on the petition itself. We heard the arguments of the parties. The attorney of Rabbi Ovadya Yosef was asked to submit, within a week, a list of the frequency of the visits of persons in Government to the rabbi's house during the last month. The parties were given leave to submit further arguments in writing.

The petitioner's position

4. According to the petitioner, the police's position deprives him of his basic right to freedom of speech. The purpose of the assembly is to draw public attention —

> 'to the protest of Sefardim (Jews of oriental origin) against the direction in which the rabbi was going. We approach the head of the pyramid in order to influence him, for his opinions influence others.'

The petitioner further claims that the police are discriminating against him. In the past, a permit was given to hold an assembly opposite the private residence of the Prime Minister (in Ramat-Aviv), and opposite the apartments of Supreme Court justices. According to the petitioner, Rabbi Ovadya Yosef carries out his political activity mainly from his apartment. The rabbi is 'a figure standing at the head of a political movement, and his movement is involved in an acute political controversy among the Israeli public, and it is therefore inconceivable that he is immune to public

criticism.'

The position of the police

5. The position of the Jerusalem District Commissioner is mainly based on the consideration about the intrusion into the private life of a public figure and harassing him in his private life. The first respondent (hereafter — 'the respondent') relies on a guideline of the Attorney-General that 'a permit to hold a demonstration directed against a public figure may be refused if it is to be near his private residence, as distinct from his place of work…' (Attorney-General's guideline no. 21.566, ('freedom of assembly'), s. 12(e)). In the respondent's opinion, the significance of holding the assembly and its immediate effect is a disturbance, harassment and intrusion into the private life of the rabbi, his family members and his neighbours. In these circumstances, the right of the petitioner and his friends to demonstrate must yield to the right of the rabbi, the members of his family and his neighbours not to be harassed in their private lives. In her arguments before us, Mrs Arad, arguing for the respondent, pointed out that the freedom of speech does not include the freedom to force another person to listen to that speech. A demonstration whose purpose is to put pressure on a specific person should not be permitted in the name of freedom of speech. Within the framework of the considerations for granting a permit, the District Commissioner must take into account the right of privacy of the rabbi and his family. He must also take into account the fact that the demonstration will cause a nuisance. Mrs Arad further argued that the petitioner wants to hold an assembly on public land, but at the entrance to a person's house, literally adjacent to his private premises. This is likely to constitute a real nuisance to him and intrude upon his privacy. The consideration of preventing an intrusion on privacy is a relevant factor that must be considered. The rabbi and members of his household may become involuntary 'prisoners', in that they will be a captive audience; among the District Commissioner's considerations, he must take into account the reasonable balance required in realizing the right of free speech against the right to privacy. In this respect, the fact that the rabbi has public standing is insufficient to justify an intrusion on his privacy. This right is currently protected both in the Protection of Privacy Law, 5741-1981, and the Basic Law: Human Dignity and Liberty, and with regard to the petitioner's freedom of speech, this can be exercised at some distance from the door of the rabbi's house, without undermining the purpose of the assembly and the message that it carries to the public.

6. In his reply, the District Commissioner pointed out that when he refused to grant the permit, he assumed that it referred to the home of Rabbi

Ovadya Yosef. He did not imagine that a claim might be made that the rabbi's apartment is also used as an office. A claim to this effect was never made by the petitioner during the contacts with him. Nonetheless, when the claim was raised, it was also investigated. The attorney of Rabbi Ovadya Yosef explained the actual situation, and in view of this explanation there is no justification for intruding on the privacy of the rabbi and the members of his household. Neither is there any discrimination, for in similar circumstances applications to hold demonstrations outside the private homes of public officials were refused.

7. In his affidavit of reply, the District Commissioner mentioned another consideration. It is impossible to hold an assembly on the plaza at the intersection of Jabotinsky Street and Marcus Street. The crossroad is a 'traffic island', approximately twenty metres in diameter, at an intersection of four main roads. The plaza is covered with decorative plants and grass and there is no access to pedestrians. It was not designed for holding assemblies, erecting platforms, for meetings or for gatherings. An assembly as requested should not be held at the intersection of Jabotinsky Street and Marcus Street since there is no suitable physical location for this. The assembly can be held nearby. Nonetheless, the District Commissioner points out that 'the most important reason given for refusing the request was in essence the applicants' demand that the assembly had to take place outside the home of Rabbi Ovadya Yosef.'

8. The respondent rejects the claims of discrimination. He points out that in the past a petition was filed against his decision not to allow a demonstration or a disturbance to be held outside the homes of judges. The petition was dismissed *in limine* (HCJ 3080/92 [1]). Similarly approval was not given in the past to hold demonstrations outside the private home of the Prime Minister, where he lives in Ramat-Aviv.

The position of Rabbi Ovadya Yosef

9. Rabbi Ovadya Yosef supported the District Commissioner's position. His attorney pointed out that 'the rabbi's apartment is not used as his office, even though, in the course of his daily affairs, important visitors and guests whom the rabbi cannot receive in his office come to the rabbi's apartment, and the apartment essentially serves as his home where the rabbi spends most of the day and night in study.' In a statement on behalf of the rabbi, it was also pointed out that —

> 'More than the rabbi suffers from the ongoing harm to his ability to enjoy his private apartment, the rabbi's wife, who is unwell,

> suffers greatly from the disturbances which include, *inter alia*, people shouting at her when she goes out and comes in, and banging on the door of the apartment late at night. In addition to this there is the suffering of the neighbours.'

It should also be noted that 'the congregating of many dozens of people and speeches made with loudspeakers, would constitute a serious and real disturbance to the rabbi's household and to all the neighbours.' 'Both the rabbi and his neighbours who live in the building are entitled to lead their private lives without disturbance and without any disruption of their lifestyle. The rabbi and the members of his household are entitled to leave and enter their home freely, to pass along the pavements adjoining their home, and not to be exposed to fears and injuries.'

The neighbours' position

10. Respondents 3-6 are neighbours of Rabbi Ovadya Yosef. They are residents in the building where his apartment is situated. They wish to support the decision of the District Commissioner. They point out that 'for some time a kind of mini-demonstration has been held next to the building in the form of a protest vigil. This phenomenon has recurred from time to time over a period of years.' They add:

> 'The most recent protest vigil began several weeks ago. At first it was right in front of the building next to the entrance to the house. The participants in the vigil brought chairs and tables and signs, and they sat around the tables, eating, drinking and talking. In addition, one car or more always accompanied the group, and this contained equipment and supplies. The police surrounded the demonstrators with protective barriers, and on the police barriers the participants hung up protest signs against the Prime Minister, Rabbi Ovadya Yosef, Minister Deri and other similar signs. After a while, and apparently as a result of complaints made by neighbours, the police moved the protest vigil from the front of the building to the side of the building, on the pavement next to the plaza adjacent to the building.'

The neighbours emphasize that the protest vigil has caused an intolerable disturbance to the residents of the building and it has disrupted the lives of the residents of the building. This was the background for the fundamental position of the neighbours. They recognize the importance of freedom of speech. It has the same status as a person's right to enjoy his privacy and his freedom to enjoy his own home and property without interference. The

petitioner can realize his freedom of speech at some distance from the respondents' house. Among its considerations, the police must take into account the neighbours' right to privacy, enjoyment of their apartments and quiet living. Just as a property right warrants protection, the right to privacy and enjoyment of property also warrants protection. The neighbours have no other remedy. Applying to the civil court will not help them. An injunction against the organizers is ineffective, for others will come to demonstrate. A civil court can examine the question of nuisance, but not the legality of the permit. The neighbours have the standing to turn to the police and oppose the granting of a permit to the petitioner. From this standing derives their right also to apply to the court against a decision to grant a permit. 'Just as a person can apply to this honourable court for the right to demonstrate, the door of the honourable court must also be open to anyone in Israel whose privacy is being invaded.'

The normative framework

11. The normative premise is enshrined in s. 84 of the Police Ordinance [New Version], 5731-1971 (hereafter — 'the Police Ordinance'). This provision provides that the district commissioner of police may determine — whether in general or in a specific instance — that holding an assembly or a procession requires a licence. This decision depends upon whether the district commissioner of police thinks this is necessary in order 'to maintain public security or public order'. On the basis of this provision, district commissioners of police have issued general notices whereby anyone who wishes to organize or conduct a procession or an assembly out of doors must obtain a permit (see HCJ 148/79 *Saar v. Minister of Interior* [2], at p. 173). Under this provision, anyone wishing to organize or hold an assembly (which under s. 83 of the Police Ordinance means a gathering of fifty or more persons for the purpose of hearing a speech or lecture) or a procession (which means, under the definition in s. 83 of the Police Ordinance is a march or assembly in which 50 or more persons are to walk together) must apply to the district commissioner of police for a licence. The Police Ordinance provides that the officer in charge may grant the licence, refuse it, or grant it subject to conditions (s. 85 of the Police Ordinance). The Police Ordinance does not establish the scope of the discretion given to the officer in charge (see D. Libai, 'The Right to Assemble and Demonstrate in Israel', 2 *Iyunei Mishpat*, 1973, 54, at p. 58). This means that the officer in charge must exercise his discretion within the framework of the purpose for which he was given the authority (see FH 16/61 *Companies Registrar v. Kardosh* [3]). This purpose includes a specific purpose and a general purpose (see HCJ

953/87 *Poraz v. Mayor of Tel-Aviv–Jaffa* [4] at p. 326). The specific purpose is enshrined in the Police Ordinance, and it concerns maintaining security and public order. The general purpose concerns protecting and promoting fundamental values, such as the freedom of speech, freedom of movement, property rights and the right of privacy. Justice Shamgar discussed this, saying:

> '… the recognition of basic freedoms as a substantial part of the Israeli legal system leads also to the conclusion that the *basic* freedoms are, both in name and in purpose, a part of the law, i.e., as basic rules that guide and formulate ways of thinking and legal interpretation, and influence these by their character and their purpose' (FH 9/77 *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [5], at p. 359).

I too discussed this in one case, where I said:

> '… the constitutional premise is the existence and protection of basic rights in a democratic regime. The assumption is that the legislature (parliament or a delegated authority), when passing legislation, wishes to maintain and protect basic rights. It follows that the purpose of all legislation is to maintain and protect basic rights and not to harm them' (CA 524/88, *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [6], at p. 56).

And in another case I said:

> 'The basic principles of the system and basic human rights determine the purpose of legislation. The presumption is that the purpose of legislation is to realize the principles of the system, and to promote human rights in it. These principles constitute a kind of "normative umbrella" that extends over all legislation… they permeate into all legislation and constitute its purpose' (HCJ 693/91 *Efrat v. Director of the Population Registrar at the Ministry of Interior* [7], at p. 763.

We will consider these purposes and the relationship between them.

The right to hold an assembly or a procession

12. Holding an assembly, procession or picket is one of the basic human rights in Israel (*Saar v. Minister of Interior* [2]; HCJ 153/83 *Levy v. Southern District Commissioner of Police* [8]). This right 'is recognized, alongside the freedom of speech or as deriving therefrom, as belonging to those freedoms

which shape the character of the Government in Israel as a democratic government' (*ibid.,* at p. 398). 'Through this freedom, means of expression are granted to those who do not have access to political or commercial avenues of expression. For this reason our legal system, like the legal systems of other enlightened democracies, accepts that the right of demonstration and assembly has a recognized place in the hall of basic human rights' (D. Kretzmer, 'Allocating Resources to Protect Demonstrations: The Israeli Approach', *Freedom of Expression and the Charter,* ed. D. Scheiderman, 1991, 424). In the past, this right was recognized in case-law, and it was one of those 'basic rights that are "unwritten", but which derive directly from the character of the State as a freedom-loving democracy.' (Justice Landau in HCJ 243/62 *Israel Filming Studios Ltd v. Geri* [9], at p. 2415 {216}). It appears that now this right can be derived from the Basic Law: Human Dignity and Liberty, which provides a statutory constitutional basis for the human right to dignity and liberty. The freedom to express oneself — in words alone or by expressive actions — is a major expression of human dignity and liberty. Indeed, 'the freedom of demonstration and assembly has a broad ideological basis, at the centre of which is the recognition of the worth of the human being, his dignity, the freedom given to him to develop his personality, and the desire to maintain a democratic form of Government' (*Levy v. Southern District Commissioner of Police* [8], at p. 398 {114}).

13. In analyzing the constitutional right we did not distinguish between an assembly, a procession or a picket. All three are characterized by the fact that the speaker has a physical presence at the place of the expression. Nonetheless, Israeli law distinguishes between these forms of expression. Thus, for example, a permit is required for holding an 'assembly' or a 'procession', but a permit is not required for a picket (see CrimC (Jer.) 4300/81 [31] and Kretzmer, 'Demonstrations and the Law', 19 *Isr. L. Rev.* 1984, 47). This derives from the special arrangements in the Police Ordinance. As we have seen, the Ordinance requires a licence for holding an assembly or a procession. Assembly is defined in s. 83 as follows:

> ' "assembly" – fifty or more persons who have congregated in order to hear a speech or lecture on a political issue or in order to discuss that issue.'

It follows that fifty or more persons holding a picket, without having 'congregated in order to hear a speech' does not constitute an assembly. The same is true of forty-nine or less persons who have congregated to hear a speech or lecture. 'Procession' is defined in s. 83 as follows:

> ‘ “procession” – fifty or more persons walking together, or who have congregated in order to walk together, from one place to another, whether they are actually moving or not, and whether they are organized in any specific form or not.’

It follows that fifty or more persons who have not congregated in order to walk together do not constitute a procession. The same applies to forty-nine or less persons who have congregated together to walk together. Other arrangements can be found in the Penal Law, 5737-1977, and in the Protection of Privacy Law. I will first analyse the constitutional rights in accordance with their inherent nature, without reference to these special definitions. Thereafter I will examine the influence of the said provisions, in so far as they are relevant to this case, on the realization of the constitutional rights.

14. An assembly, procession or picket are characterized *inter alia* by the fact that the participant in an assembly, procession or picket has a physical presence at the place of the expression (see Kretzmer, *supra*, *Isr. L. Rev.*, at p. 51). This presence may naturally impair the interests and values of others. A procession through city roads is liable to impair the right of movement of those using the roads. An assembly or picket next to a house may impair the use and enjoyment derived by the residents of the building from the land in their possession. An assembly, procession or picket may harm public order. This ‘friction’ between the right of assembly, procession or picketing and other values and interests necessitates a balance between the conflicting rights, involving reciprocal concessions. We will address the nature of this balance below. It expresses the ‘relativity’ of the constitutional right. In this case, it should be emphasized that the restriction of the right of assembly, procession or holding a picket does not derive from the ‘inherent’ nature of the right, or its own innate insufficiency. The restriction of the right of assembly or procession or holding a picket is derived from considerations that are ‘external’ to the right itself, which derive from the existence of competing rights and conflicting interests. Indeed, we must distinguish between matters that are included within the inherent nature of a basic right (‘the extent of the right’) and the degree of recognition given to its inherent nature in a given context (‘the extent of the protection’): see HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [10], at p. 33 {244}, and also F. Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge, 1982.).

Property rights and the right of privacy

15. An assembly, procession or picket are all liable to interfere with a person's ability to use and enjoy his property. When the assembly or picket take place on a person's property without his consent, they interfere with his property rights. The same applies to an assembly or picket that are supposed to take place in the streets of the city that are intended for assemblies, when they are held outside a person's house or apartment. In such a case, the assembly or picket may interfere with the person's ability to enjoy his property, namely the ability to escape into one's own private property from the pressures of society and the inquisitive public eye. Property rights have been recognized by Israeli case-law as a constitutional right (see *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [6]; J. Weissman, *Property Rights: General Part*, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 1993, 37). In particular, the assembly, procession and picket interfere with a person's right of privacy. This right is also a constitutional basic right (see MApp 82/83 *State of Israel v. Alia* [11], at p. 741, and cf. HCJ 3815/90 *Gilat v. Minister of Police* [12], at p. 424). These two basic rights — property rights and the right of privacy — were recognized as basic rights by the Basic Law: Human Dignity and Liberty. The Basic Law states: 'One may not harm a person's property' (s. 3) and 'Every person is entitled to privacy and confidentiality' (s. 7(a)). For the purposes of petition before us, we do not need to set down the boundary between property rights and the right of privacy, or between them and other rights. Since the focus of the petition lies in the violation of the right of privacy, we will consider this issue, and reserve judgment on the question whether, in addition to the violation of the right of privacy, there is also a violation of the resident's property rights.

16. Every person in Israel is 'entitled to privacy' (s. 7(a) of the Basic Law: Human Dignity and Liberty). The scope of this right is not entirely free of doubt. Much has been written about it (see, *inter alia*, R. Gavison, 'Privacy and the Limits of the Law', 89 *Yale L.J.*, 1979-1980, 421). Now that it has a statutory constitutional basis, it must be interpreted from a 'broad perspective' (Justice Agranat in FH 13/60 *Attorney-General v. Matana* [13], at p. 442 {124}) 'with the understanding that we are dealing with a provision that shapes our way of life… the issue is one of human experience, which must adapt itself to changing realities' (EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [14], at p. 306 {157}). For this reason a constitutional provision must be construed 'with a broad outlook, and not in a technical manner' (HCJ 428/86 *Barzilai v. Government of Israel* [15], at p. 618 {100}). This is the source of the approach — accepted in enlightened democratic countries — that a constitutional

provision should be interpreted 'liberally' (Justice Wilberforce in *Minister of Home Affairs v. Fisher* [45], at p. 25), with a substantive approach and not a 'legalistic' one (in the language of Judge Dickerson in *R. v. Big M. Drug Mart Ltd* [49]), with an objective approach and not a 'technical' or 'pedantic' one (in the language of Judge Dixon in *Australian National Airways Pty. Ltd v. The Commonwealth* (1945) [32], at p. 81). Against a background of such an approach, it can be held that the constitutional right of privacy includes, *inter alia* — but without any attempt to encompass all aspects of the right —a person's right to lead the lifestyle he wishes inside the privacy of his home, without outside disturbance. A man's home is his castle, and inside it he is entitled to be left to himself, to develop the autonomy of his own private will (see *Rowan v. Post Office Dept.* (1970) [33], at p. 736). In this respect, the right to privacy is, *inter alia* — in the language of Prof. Gavison — a restriction on the accessibility of others to the individual (see Gavison, in her article, *supra*, at p. 428). Indeed, in the tumult of life in modern society, a person's right of privacy allows him to be on his own and with the cherished members of his family, and enables him to gather strength at home for the following day (see *City of Wauwatosa v. King* (1971) [34], at p. 537). The right of privacy is therefore intended to ensure that a person does not become a prisoner in his home, and is not compelled to expose himself at home to disturbances that he does not want. In this way, the right of privacy constitutes — in the language of Justice Douglas — the beginning of freedom (see *Public Utilities Comm'n v. Pollack* (1952) [35], at p. 467). Indeed, Warren and Brandeis referred — in their preliminary list on this matter — to a person's right to be let alone as a right that is the 'most comprehensive of rights and the right most valued by civilized man' (S.D. Warren and L.D. Brandeis, 'The Right to Privacy', 4 *Harv. L. Rev*. 1890-1891, 193). Justice Frankfurter rightly said in the case of *Martin v. Struthers* (1943) [36], at p. 153, that:

> '….homes are sanctuaries from intrusions upon privacy and of opportunities for leading lives in health and safety.'

In a similar vein, Justice Black said that allowing every person to do as he wishes would ultimately lead to a situation where:

> '…homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of

> an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a Government with such monumental weaknesses' (*Gregory v. Chicago* (1969) [37], at p. 125).

Justice Brennan made similar remarks in *Carey v. Brown* (1980) [38], at p. 471, where he stated:

> 'Preserving the sanctity of the home, the one retreat to which men and woman can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick".'

Justice Shamgar gave an excellent description of this, when emphasizing that a picket outside or at the door of a person's home, intrudes on his privacy, for it is liable to —

> '…deprive a person of his tranquillity, his feeling of personal security and the feeling that he can run his own life, without having his private affairs becoming a display for all, and hence the harassment and the resulting infringement of privacy' (FH 9/83 *Appeals Court Martial v. Vaknin* [16], at p. 851).

So we see that the right of privacy draws the line between the individual and society. It defines the boundaries within which the individual is left to himself, for the development of his own individuality, without the interference of others (see T.I. Emerson, *The System of Freedom of Expression*, New York, 1970, 544). Indeed, just as the recognition of human dignity and liberty leads to the recognition of freedom of speech, assembly and demonstration, so the recognition of human dignity and liberty leads to the recognition of a person's right to be free from unwanted speech. This was discussed by Prof. Black, who said:

> 'The claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar if not identical with those classically brought forward in support of freedom of speech in the usual sense. Forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms' (C.L. Black, 'He cannot Choose but Hear: The Plight of the Captive Auditor,' 53 *Colum L. Rev.* 1953, 961, 967).

Indeed, just as everything in human rights necessitates freedom of speech, there is nothing in human rights that necessitates the hearing of unwanted speech.

Freedom of movement

17. The right to hold an assembly, procession or picket may conflict with the right of the individual to move freely in the roads and streets. 'Roads and streets were intended for walking and travelling' (*Saar v. Minister of Interior* [2], at p. 177). Just as one person has a constitutional right to hold a procession through a city street, so another has a constitutional right to walk along a city street. This constitutional right exists independently, and it can also be derived from human dignity and liberty.

The public interest

18. Hitherto I have discussed human rights with regard to an assembly, procession or picket. Alongside these rights of the individual, there also exists the public interest (R. Pound, 'A Survey of Social Interests,' 57 *Harv. L. Rev.* 1943-44, 1). These are the interests of the public as such, which it demands as an organized entity. One cannot maintain an organized democratic society without maintaining the public interest in security, order and public peace. Admittedly, one cannot have democratic government merely on the basis of public order alone, but one cannot have democratic Government without public order. Public order is one of the basic values of the legal system (see HCJ 109/70 *Coptic Orthodox Mutran of Jerusalem v. Minister of Police* [17], at p. 246). The public interest includes public peace, the quiet and tranquillity of daily life, the personal security of a person in his home and in public places, and the proper relationships between individuals and between the individual and government. Indeed, the public interest also includes protection of the human rights of the individual. Without public order it is impossible to ensure human rights. Without order there is no freedom (see HCJ 14/86 *Laor v. Film and Play Review Board* [18], at p. 433). When a group of people want to hold an assembly, picket or procession in a city street, there is a public interest in maintaining order and security in the city streets, in ensuring the flow of traffic in the streets and in protecting property and privacy. Justice Brennan discussed this in *Carey* [38] at 471, saying:

> 'The state's interest in protecting the welfare, tranquility and privacy of the home is certainly of the highest order in a free and civilized society.'

It follows that there is a public interest in protecting the interest of the individual and it is the interest of the individual to protect the public interest. In a democratic society there is an inseverable link between order and freedom. How can we ensure the proper operation of this link? The answer that our legal system gives to this question lies in the need to balance interests and values when they conflict. The key lies in an attitude of 'give and take' and a balance of conflicting values. Human rights are not 'absolute'. They are 'relative'. The public interest wishes to ensure proper 'subsistence areas' for the relative nature of the right. We will now turn to this matter.

Balancing between conflicting interests

19. As we have seen, the District Commissioner of Police has discretion in granting a licence for an assembly or a procession. This discretion is exercised within the framework of the purpose of the Police Ordinance. This purpose includes the realization of the specific and general aims underlying the Ordinance. As we have seen, these purposes include safeguarding the constitutional right to hold an assembly and a procession, safeguarding the constitutional right to property, privacy and freedom of movement and safeguarding the public interest. No difficulty arises when all the values and interests that must be taken into account point in the same direction. This is certainly the case when there is a request to hold an assembly in the desert, far from any town. The individual exercises his right without harming anyone. The public interest is realized in its entirety. But in the vast majority of cases the individual does not want to hold an assembly in the desert. The individual wants to hold an assembly in the busy streets of the city, or on the quiet promenades of a residential neighbourhood. He wants to convey a message to others by means of a physical presence, and thereby he is likely to injure the rights of others and the public interest. Indeed, giving the protection of the law to the right of assembly and procession to the fullest extent will harm the right of property, the right of privacy and the freedom of movement, which also demand protection to the fullest extent. It necessarily harms the public interest. Therefore a constitutional process is required to restrict the protection given to constitutional rights, so that they are only protected to a partial extent. This restriction is based on the recognition that it is impossible to protect all of the rights to the fullest extent. The fullest protection of the right of *A* to hold an assembly cannot be reconciled with the fullest protection of the right of *B* who does not consent to the presence of *A* on his property (the property right), or who wishes not to be exposed to *A*'s speech (the right of privacy), or who desires to walk in precisely the same

area where *A* wishes to hold the assembly (the freedom of movement). Indeed, complete protection of human rights contains an inherent contradiction, for human rights are not only directed against the Government, but they are also directed one against another. There exists between them a structure of connected vessels. Therefore an act of constitutional balancing is required (see HCJ 3080/92 [1]). By means of the constitutional balance, proper protection will be given to the various constitutional rights and the public interest in a manner that achieves constitutional harmony. Justice Agranat discussed this, when addressing the relationship between the freedom of speech and public peace:

> '… the right to freedom of speech is not an absolute and unlimited right, but a relative right, which can be restricted and supervised in view of the aim of upholding important socio-political interests that in certain conditions may be preferable to those protected by the realization of the principle of free speech. Delineating the limits of the use of the right of freedom of speech and of the press depends therefore on a process of placing the different values on the scales and, after weighing them, choosing those which, in the circumstances, must prevail (HCJ 73/53 *Kol HaAm Ltd v. Minister of Interior* [19], at p. 879 {99}).

Israeli law adopts a similar position with regard to the conflict between other constitutional human rights (such as the conflict between the freedom of speech and the right to reputation; see *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [5]; CA 214/89 *Avneri v. Shapira* [20]; the conflict between freedom of speech and freedom of movement; *Saar v. Minister of Interior* [2]). Similarly, Israeli law adopts this approach with regard to the conflict between human rights and the public interest (such as the conflict between the freedom of speech and public order; see HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [21]; freedom of movement and state security; see HCJ 448/85 *Dahar v. Minister of Interior* [22]; freedom of speech and judicial integrity; see CrimA 126/62 *Disenchik v. Attorney-General* [23]; freedom of speech and the public interest in election propaganda; see HCJ 869/92 *Zvilli v. Chairman of Central Elections Committee for Thirteenth Knesset* [24]; freedom of assembly and the public interest in the privacy of a public figure; HCJ 456/73 [25] and HCJ 3080/92 [1]).

Principled balance

20. The ideal balance between conflicting human rights — among themselves and between them and the public interest — should be a principled balance; cf. HCJ 991/91 *David Pasternak Ltd v. Minister of Building and Housing* [26], at p. 60. What characterizes a principled balance — as opposed to an *ad hoc* balance — is that a 'rational principle' (in the language of Justice Agranat in *Kol HaAm v. Minister of Interior* [19], at p. 881 {--}) is established that reflects 'a criterion that expresses a principled guideline', as distinct from a 'chance, paternalistic criterion, the nature and direction of which cannot be anticipated' (Justice Shamgar in *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [5], at p. 361). Indeed, the principled balance reflects a general legal norm, which establishes a constitutional principle that applies to all similar cases (see T.A. Aleinkoff, 'Constitutional Law in the Age of Balancing', 96 *Yale L.J.* 1986-87, 943, 948).

Different kinds of principled balancing

21. The principled balance cannot be expressed by one formula. I discussed this in one case, when I said:

> 'The diversity of possible situations requires a diversity of balancing points. One cannot adopt a single criterion, which can solve all of the problems. The reason for this is that the conflicting interests are not always of the same normative level, and the difficulties raised by the conflict are of diverse kinds' (*Levy v. Southern District Commissioner of Police* [8], at pp. 401-402 {117}).

In a similar vein, Vice-President Justice Ben-Porat said:

> '… the proper criterion is *not* fixed and standard for all types of cases… but a proper test must be adopted by considering the *nature* and importance of the competing principles in our way of thinking as to *their relative priority* and the degree of *protection* that we wish to give to every principle or interest' (*Dahar v. Minister of Interior* [22], at p. 708).

Take the conflict between the freedom of assembly and procession and property rights. The balance between these two constitutional rights when one wants to hold the assembly or the procession on land belonging to the State or to public authorities is not the same as the balance when the assembly or procession are to be held on private property (see *Levy v. Southern District Commissioner of Police* [8], at p. 402 {117}). Moreover, even with respect to land owned by the State or public authorities, one must

distinguish between different kinds of land according to their typical functions. There is therefore a basis for distinguishing between land that has been designated, by social tradition, for holding assemblies or processions (such as streets, roads or airports — see *Committee for the Commonwealth of Canada v. Canada* (1991) [50]) and land not designated for that purpose (such as Government offices). Between these two there are intermediate situations, such as State land which is used for courts and prisons (see *Cox v. Louisiana* (1965) [39], and also H. Kalven, 'The Concept of the Public Forum: *Cox v. Louisiana*' [1965] *Sup. Ct. Rev.* 1). Moreover, with regard to roads and streets, which belong to the State or to public authorities, roads and streets in busy city centres are not the same as roads and streets in residential areas. The same is true of private property. Private property which according to social tradition is the 'castle' of the individual (such as his apartment or house) is not the same as private property that according to social tradition is used by the public (such as a shopping centre: see *Pruneyard Shopping Centre v. Robins* (1980) [40]). Indeed, the balancing formulae vary in accordance with the conflicting values, and within the framework of a given set of values, in accordance with social aims and basic constitutional outlooks. We therefore distinguish between a 'vertical balance' and a 'horizontal balance'. In the 'vertical balance', one value that conflicts with another value is superior to it. Nonetheless, this superiority is realized only if the requirements of the balancing formula are fulfilled with regard to the likelihood and extent of the harm to the superior value. Thus, for example, the public interest in public peace and public order prevail over the freedom of speech, provided that there is 'near certainty' that real damage will be caused to the public interest if the freedom of speech is not curtailed (see *Universal City Studios Inc. v. Film and Play Review Board* [10]). Similarly, the public interest in security will prevail over the freedom of movement outside the borders of the state, provided that there is a 'genuine and serious fear' of harm to security if the right to leave the country is realized (see *Dahar v. Minister of Interior* [22]). In the 'horizontal balance' the two conflicting values have equal status. The balancing formula examines the degree of reciprocal concession of each of the rights. Thus, for example, the right of movement and the right to hold a procession are of equal status. The balancing formula will establish conditions relating to place, time and extent in order to allow the two rights to co-exist. Needless to say, these conditions of place, time and extent are liable to change in accordance with the nature of the 'equal' rights, the social purposes underlying them and basic constitutional perceptions.

Legislative balancing and judicial balancing

22. As we have seen, the balancing formulae determine the extent of the protection that the legal system gives to constitutional human rights, from which the 'relativity' of constitutional human rights is derived. For this reason they are so important. Occasionally it is the constitutive authority, or the legislature (in Israel — the Knesset) that establishes the balancing formula. Thus, for example, the Canadian Charter provides a list of human rights. Alongside these rights, there is a general provision (section 1) according to which these rights are subject:

> '… to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

In a similar vein, the Basic Law: Human Dignity and Liberty provides a list of human rights. Alongside these, there is a general balancing formula ('a restriction clause'), whereby:

> 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive.' (s. 8).

In these situations, there is a statutory balancing formula and the court is required to interpret it and to give it specific content. Sometimes there is no statutory balancing formula. The law (whether legislation or case-law) recognizes human rights and the public interest, even in the absence of a statutory balancing formula. In such a situation, there is no alternative but to develop balancing formulae in case-law. This, for example, is the position in the United States. The First Amendment to the Constitution regarding freedom of speech, establishes this freedom in 'absolute' terms ('Congress shall make no Law… abridging the freedom of speech'). Notwithstanding this, judicial balancing formulae have been established that have moderated the absolute freedom and have restricted the protection given to the freedom of speech, out of consideration for other values. The same is true in Germany. A number of constitutional human rights established in the Basic Law (the Grundgesetz) do not provide balancing formulae, and these have been determined by the courts (see D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham, 1989). A similar approach has been adopted in Israel. Alongside the statutory balancing formulae, case-law balancing formulae were established in the past (such as the test of 'near certainty': see *Israel Filming Studios Ltd v. Geri* [9]). This is the method that the courts must adopt in the future, when

constitutional human rights established in the Basic Laws are in conflict with one another.

Balancing, 'weight' and the 'enlightened public'

23. Before we proceed to the balance required in the case before us, it should be pointed out that the word 'balancing' is merely a metaphor. Behind this word lies a constitutional outlook that the various rights, values and interests do not have the same social importance. 'Balancing' between values and interests is merely an examination of the relative social importance of the different values and interests. I discussed this in one case, where I said:

> 'These terms — balance, weight — are merely metaphors. They are based on the outlook that society does not regard all principles of equal importance, and that in the absence of statutory guidance, the court must assess the relative social importance of the different principles. Just as there is no man without a shadow, so there is no principle without weight. Determining the balance on the basis of weight means making a social assessment as to the relative importance of the different principles' (*Laor v. Film and Play Review Board* [18], at p. 434).

Indeed, the determination of the 'balance' is a normative activity. It is intended to reflect the value society attributes to the values and interests within the values of society as a whole. This action is not done in accordance with the subjective attitudes of the judge. It is an expression of the objective attitudes of society. I discussed this in HCJ 6163/92 *Eisenberg v. Minister of Building and Housing* [27], at p. 265 {**Error! Bookmark not defined.**}, where I said:

> 'In determining "the relative social importance", the court is a "faithful interpreter of the accepted attitudes of the enlightened public, in whose midst it dwells"… These are the attitudes enshrined in basic values and basic conceptions, and not in temporary, passing trends. They reflect the "social awareness of the people in whose midst the judges dwell"… They are an expression of "the national way of life"… They reflect "the nation's vision and its basic credo"... They are not the product of judicial subjectivity. In attaching weight to the various considerations, the judge aims, to the best of his ability, for judicial objectivity. He does not reflect either his subjective values or his personal considerations. The judge reflects "the

> values of the State of Israel as a Jewish and democratic State."…'

The criterion guiding normative judicial activity is the one established by Justice Landau, according to which the judge is obliged:

> 'to be a faithful interpreter of the accepted attitudes of the enlightened public, in whose midst he dwells' (CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [28], at p. 1335 {135}).

The judge must be familiar with the society in which he lives:

> 'He must learn about the social consensus, the foundations and values that are common to members of society. He must absorb the legal ethos and the basic principles that make society a democratic society' (*Efrat v. Director of Population Register at Interior Ministry* [7], at p. 780).

He must express 'the conscience of the general public and the value beliefs of society with regard to appropriate and inappropriate behaviour…' (CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [29], at p. 532). He must give expression to the basic beliefs of society. Against this background, we will now turn to the balancing required in the type of cases to which the case before us belongs.

An assembly, procession or picket outside the apartment of a public figure

24. The petitioner wants to hold an assembly outside the apartment of Rabbi Ovadya Yosef. This apartment is used by him and his family for their home. Nonetheless, persons in government visit him there. The apartment is located in an apartment building, in which there are several residents. The building is situated in a residential area. The District Commissioner of Police refused to give the petitioner a licence to hold the assembly. His main reason was the intrusion on the privacy of Rabbi Ovadya Yosef. He also gave a 'traffic related' reason, but it was emphasized that the 'most important reason' relates to the violation of the right of privacy. On the basis of this factual background, the focus must be on the relationship between the right of someone to hold an assembly with others outside the private residence of a public figure in a residential area and the right of the public figure and his neighbours to protect their privacy. There is no reason, within the framework of the petition before us, to discuss the 'traffic related' consideration and the relationship between the petitioner's right to hold an assembly and the right of any person in the community to move freely on the road or the pavement upon where the assembly is supposed to take place, since this consideration was not the basis for the District Commissioner's decision. Furthermore, the

petitioner wishes to hold the assembly on the pavement or on the road. He does not want to enter the premises belonging to the individual. In these circumstances, we do not need to examine the relationship between the right of assembly and property rights (in the narrow sense). Finally, the permit requested a location outside an apartment which is used by the public figure mainly as his home. It is not a Government office, nor is it even an 'official' residence like the President's House. A change in the designated use of the house changes the proper balance between the conflicting rights. The petition before us focuses on the relationship between the individual's right to hold an assembly in a residential area and the right of a public figure and his neighbours not to have their privacy in their private apartments violated by the holding of the assembly, and the relationship between these two rights and the public interest in maintaining public order.

The right to hold an assembly, procession or picket next to the private house of a public figure

25. The constitutional premise is that every man has the right to hold an assembly, procession or picket. This right is not restricted only to Government or commercial centres of the city. In terms of its internal scope, the right extends even to holding an assembly, procession or picket in residential areas (see Comment, 'Picketing the Homes of Public Officials', 34 *U. Chi. L. Rev.*, 1996-1997, 106). In discussing a picket in a residential area, the Supreme Court of the United States held, in the opinion of Justice Brennan:

> 'There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighbourhoods, the Illinois statute regulates expressive conduct that falls within the first Amendment's preserve' (*Carey* [38], at p. 460).

In explaining this approach, another American court noted that the recognition of the right to hold a protest vigil next to the (private) home of an employer:

> '… brings home the fact that a man may leave his tools at his work but not his conscience or his relations with his fellow man' (*United Electrical, R & M Workers v. Baldwin* (1946) [41], at p. 242).

Indeed, in view of the public reasons which underlie the right to hold an assembly, demonstration or picket, there is no substantive difference between an assembly, demonstration, or picket in a residential neighbourhood and an assembly, demonstration or picket in another area. The individual may also

wish to express himself in a residential area. Sometimes it is precisely the residential neighbourhood that serves as an effective focal point for expressing that view. It creates the direct link between the petitioner and a public figure, which an assembly or procession in Government areas (such as the Government complex) or commercial areas do not create (see D.M. Taubman, 'Picketers at the Doorstep' 9 *Harv. Civil Rights L. Rev.*, 1974, 95, 106). Prof. Kretzmer discussed this, noting that:

> 'There are times when demonstrations outside the home of a public figure are the most effective way of communicating a view on a matter of public importance. In other cases such demonstrations may be the *only* really effective way of communicating that view to the public figure involved. The privacy interests of public figures should not override the expression interest involved in such demonstrations' (Kretzmer, *supra*, *Isr. L. Rev.*, at 120).

There is also no difference — from the viewpoint of the (inherent) scope of the right to hold an assembly, demonstration or picket — between an 'official' residence of a public figure (such as the President's House or the Prime Minister's House) and his 'private' home. Both of these are a focus for an assembly, demonstration or picket and the reasons that underlie the constitutional right to demonstrate, assemble or picket, exist for both of them.

The right of privacy of the public figure and his neighbours

26. 'Every person has a right to privacy' (s. 7(a) of the Basic Law: Human Dignity and Liberty). The public figure is also entitled to privacy. The fact that he is a public figure should not deprive him of the right to live within the privacy of his own home, on his own or with his family. It is precisely because of the public exposure involved in his position or office that he needs the quiet and tranquillity of his home, and the privacy is intended to give him these at the end of the day. Indeed, it is the right of public figures 'to protect at least part of their lives from the media' (Gavison, 'Prohibition of Publication that Violates Privacy,' *Civil Rights in Israel*, The Association for Civil Rights in Israel, ed. R. Gavison, 1982, 177, 200). In one case, the petitioner applied to hold an assembly outside the home of the Foreign Minister. The District Commissioner of Police refused the application. The petition to the Supreme Court was denied. The court said:

> 'The freedom of assembly and the freedom of expression upon which the petitioner relied in his petition do not mean that permission is given to intrude on the privacy of a person holding

> public office and to harass him and the members of his family in their private lives in order to influence him, in this way, with regard to his public activity' (HCJ 456/73 [25]).

In a similar vein, Prof. Kretzmer stated:

> 'All persons, including public figures, are entitled to respect for the privacy of their homes' (Kretzmer, *supra, Isr. L. Rev.*, at 120).

The neighbours of the public figure are entitled to realize their right to privacy. The fact that nearby there lives a person holding public office should not deprive them of that right.

The public interest

27. The public interest in this case is mainly restricted to the realization of the right of assembly, procession and picket on the one hand and the right to privacy on the other hand. As we have seen, the public interest in the freedom of movement was not the basis for the decision in this case. Nor is there any fear of a disturbance of the peace. Indeed, we are concerned with the public interest in protecting the human rights to hold an assembly, procession and picket on the one hand and the privacy of the home on the other. The question is how we can protect, in a democratic society, both the freedom of assembly, procession and picketing and the right of privacy. The answer to this question lies in the necessity of balancing these two values. We will now turn to this balance.

The balance

28. The right to hold an assembly, procession or picket in the city streets and the right to the privacy of a person's home are constitutional rights in Israel. They are cherished by Israeli democracy. They are rights of equal stature. Neither of them is preferable to the other. Justice Burger rightly pointed out in *Rowan* [33], at p. 736, '… the right of every person "to be let alone" must be placed in the scales with the right of others to communicate'. It follows from this equality that it is insufficient for there to be a near certainty of a substantial violation of one right in order to deny the other right. Even if it is proved that it is definitely certain that the freedom of assembly, demonstration or picketing will intrude on privacy, this is insufficient to justify denying that freedom. Similarly, even were it proven that it was definitely certain that the full exercise of the right to privacy would violate the right of assembly, procession or picket, denying the right to privacy would still not be justified. Indeed, we are not dealing with a 'vertical balance' which looks for formulae of reasonable likelihood. We are

concerned with two human rights of equal standing, and the balance between them must therefore find expression in a reciprocal waiver whereby each right must make a concession to the other in order to allow the coexistence of both. The protection of the law does not extend to either of the rights in its entirety. Each right suffers restrictions of time, place and manner in order to allow the substantive realization of the other right. Indeed, the proper balance between the freedom of speech and privacy is one of the foundations of a sound democratic regime. The balance required between the rights is a horizontal balance. We are dealing here — in the language of Justice Landau in *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [5], at p. 343 — 'not with a "vertical" scale of a "supreme right" as opposed to a normal right' but with a horizontal delineation of 'rights of equal standing, without an aim of preferring one right as defined in legislation at the expense of another.' At the heart of the horizontal balance is the recognition that both freedom of assembly, procession and picketing in the streets and privacy in homes are rights that are cherished by the democratic regime, but in a democratic society it is impossible to give protection to each of these rights to the fullest extent without harming the other right. Democracy therefore requires a reciprocal restriction of the extent of the protection given to each of the rights. This restriction must, in so far as possible, preserve the essence of each of the competing values (see L.H. Tribe, *American Constitutional Law*, Mineola, 2nd ed., 1988, 977). It must try, in so far as possible, to prevent a major violation of one right in upholding the other right. With regard to legislation that violates the freedom of speech in order to uphold the right to privacy, Justice Harlan said:

> 'The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is… dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner' (*Cohen v. California* (1971) [42], at p. 21).

The horizontal balance results in limitations of time, place and manner for realizing one of the rights in order to maintain the essence of the other right (see, Emerson, *Toward a General Theory of the First Amendment*, New York, 1966, 75). With regard to legislation restricting the freedom of assembly, procession and protest in order to uphold the right of privacy, Justice Brennan said:

> 'The ordinance is subject to the well-settled time, place and manner test; the restriction must be content and viewpoint neutral, leave open ample alternative channels of

> communication, and be narrowly tailored to further a substantial governmental interest' (*Frisby v. Schultz* [43] at 491).

For this reason, Justice Brennan — who was in the minority in that case — thought that legislation which absolutely prohibited picketing in a residential area violated the constitution and was void. On the other hand, legislation passes the constitutional test if it establishes arrangements governing place, time and manner. Justice Brennan wrote, at p. 494:

> 'Thus, for example, the government could constitutionally regulate the number of residential pickers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and forth with a sign.'

In fact, an assembly or a picket that is held on one occasion is not the same as repeated assemblies or pickets; an assembly or picket held in the morning or afternoon is not the same as an assembly or picket held during hours of rest; an assembly or picket with a large attendance is not the same as an assembly or picket with few participants; an assembly or picket that is supposed to be held over several hours is not the same as a short assembly or picket; an assembly where use is made of loudspeakers or other means of amplifying sound is not the same as one that is held quietly; an assembly held next to a private building is not the same as an assembly held at some distance from it; and an assembly held alongside pickets is not the same as an assembly held without picketing (see A. Kamin, 'Residential Picketing and the First Amendment', 61 *Nw U. L. Rev*, 1966-67, 177; R. E. Rigby, 'Balancing Free Speech in a Public Forum v. Residential Privacy: *Frisby v. Schultz*', 24 *New Eng. L. Rev.*, 1989-90, 888).

Restrictions regarding time, place and manner

29. It follows that in Israel a person in entitled to hold an assembly or picket in a residential area. He is entitled to hold an assembly or picket next to the house of a public figure. Nonetheless, in the circumstances of holding the assembly or picket a proper balance must be guaranteed between a person's right to hold an assembly or picket and the right of the public figure

and his neighbours to their privacy in their apartments. This proper balance reflects the public interest, which the police must protect. Within the framework of the police's statutory powers, it must ensure that the right of assembly of the one does not substantially intrude on the privacy rights of the other. For this purpose, the police may determine reasonable restrictions of time, place and manner. With regard to time, the police may determine that the assembly may not be held during hours of rest. It may also determine that the assembly will be held for a relatively short time. It may determine — on the basis of equality and without any reference to the substance of the message being conveyed at the demonstration — the frequency for holding demonstrations, so that the right of privacy of the public figure and his neighbours is not seriously violated. It may also take into account the frequency of holding assemblies or pickets in the past. With regard to place, the police can determine that the assembly will take place at a certain distance from the home of the public figure. It may determine that the assembly will not prevent free entry and exit to and from the building. With respect to manner, the police may restrict the number of participants. It may regulate the use of loudspeakers, including their volume and number (see *Kovacs v. Cooper* (1949) [44]; *Francis v. Chief of Police* (1973) [46]; *Indulal v. State* (1963) [48]; *Cheema v. Ross* (1991) [51]).

A private apartment used for public activity

30. The balances that I have discussed assume that the public figure does not use his private apartment for his public activity. In this situation, the public figure is entitled to the same measure of privacy as his neighbours. The balance may change if the private home of the public figure is also used for his public activity. The extreme case is that of an official residence (e.g., the President's House or the Prime Minister's House) which are situated at a distance from residential areas. This residence acts as a symbol of the office and here the public figure carries out both his public and private activity, without it being possible to distinguish them. Because of the unique nature of the official residence, it should generally be regarded as a public building (such as a Government office). The appropriate balance between the freedom of assembly, demonstration or picketing and the right to privacy will therefore in these circumstances tend in favour of the freedom of assembly, demonstration and picketing. An intermediate case is one where there is a basic distinction between the place of the public activity of the public figure and his home, even though the public figure carries out some public activity at his home. In this situation, the proper balance between the right to hold an assembly, procession or picket and the right of privacy must take account of

this special situation. The extent of protection for the privacy of a public figure who keeps his public activity and his residential apartment separate is not the same as the extent of protection for privacy when the public figure carries out part of his public activity in his apartment (see: *Carey* [38], at p. 471; *Frisby* [43] at p. 479). The proper balance between the constitutional rights must reflect the special function of the home. It follows that the more the private home is used for public activity, the more the balance will tend in 'favour' of the freedom of assembly, procession or picketing.

31. It is a special case when the private home of a public figure is also used for a part of his public activity. Nonetheless, this apartment is situated in a residential building, where there live additional residents who are not involved in the public activity. How will the proper balance be made in such a case? It seems to me that, in making the proper balance, one must take account of the special aspects of this complex situation. On the one hand, there is no justification, in a democratic society, for substantially limiting the extent of protection for the privacy to which a 'private' resident is entitled, merely because his neighbour is a public figure. On the other hand, there is a justification in a democratic society for demanding some concession with regard to the privacy of a private resident because of the fact that his neighbour is a public figure. This is the 'price' that the private neighbour must pay for the public activity of his neighbour. It seems to me that the proper balance between the constitutional rights must take account of this complicated situation. One must therefore guarantee, within the framework of the proper balance, that the 'private' neighbour is given substantial protection for his privacy, even if this protection may be slightly less than the protection given to a resident whose neighbour is not a public figure.

From the general to the specific

32. Against the background of this normative framework we must examine the case before us. It seems to me that had the petitioner asked to hold a procession on one occasion — with the number of participants proposed by him — which would pass by the apartment of Rabbi Ovadya Yosef and his neighbours, there would be a basis for approving it, subject to restrictions of time and manner, taking account of the question whether such processions took place in the recent past and taking account of the transport factor. A procession passing by the house intrudes minimally on privacy and it upholds the proper balance between the relevant constitutional rights. Similarly, it appears to me that the petitioner would have been within his constitutional rights — in accordance with the proper balance between these and the rights of the residents of the building — if he had asked to hold a

picket on one occasion with a small number of participants, standing silently with signs, without there having been such picketing in the past. Even here there would be justification for fixing restrictions of time and place. The petitioner may hold this picket without a police permit. He is entitled to police protection if he wants to hold this kind of picket (*Levy v. Southern District Commissioner of Police* [8]). It also seems to me that a picket held within the framework of the proper constitutional balance is a legal activity for the purpose of the Protection of Privacy Law (see ss. 18 and 19). It should be emphasized that with respect to the picket, there was a basis for taking account of the fact that in the recent past pickets have been held next to the house and the extent of the intrusion on privacy that these caused.

33. The petitioner does not want to hold a procession or a picket. His request is to hold a 'picketing assembly'. He wants approximately two hundred and fifty people to participate. He wants to use a stage and two loudspeakers. He wants to hold it for two hours (19.00-21.00). Had this assembly been an isolated event, without there having been pickets in the past, it might have been possible to approve it, subject to certain restrictions in terms of time (shortening the length of the assembly) and manner (foregoing the loudspeakers, reducing the number of participants). The problem is that the assembly requested comes against a background where pickets have been held next to the house for a long time. In these circumstances it was proper to consider the overall balance between the freedom of assembly of the petitioner and his friends and the intrusion on the privacy and the property of the residents of the building. Such an examination was not made by the police. It did not take account of the number of pickets that took place in the past, but it was satisfied with the intrusion on privacy as the sole reason for the refusal. In doing so, it acted albeit without discrimination and in accordance with its usual practice. Nonetheless, it did not accord sufficient weight to the freedom of assembly. We asked the petitioner whether he would be prepared to hold the assembly subject to the restrictions that would be placed on him with regard to the size of the assembly (less than two hundred and fifty persons) and with regard to additional factors of manner and time (such as use of loudspeakers, length of the assembly). The petitioner told us that from his viewpoint he was not prepared for any change at all, in the sense of 'all or nothing'. In these circumstances, there is no point in returning the petition for reconsideration by the respondent, and it should be denied.

Supplementary remarks

34. Our premise in examining the petition before us was the discretion of the District Commissioner of Police. In order to examine this discretion, we needed to examine the relationship between the right to hold an assembly, procession or picket, on the one hand, and property rights and the right of privacy on the other. We established a formula for principled balancing in the relationship between one human right and another. This balancing formula was also sufficient for establishing the extent of the administrative discretion, for in the circumstances before us, there was no reason, in view of the positions of the parties, for taking account of additional considerations. Such considerations, had they existed (such as the fear of a disturbance, the traffic consideration), would have necessitated the establishment of additional balances. Indeed, the case before us is based on normative harmony. There is a complete internal balance between public law and private law. An individual's right with respect to the Government (to hold an assembly) within the framework of public law is derived from the balance between that individual's right (to hold an assembly) and another individual's right (to protect his privacy) within the frameworks of both public and private law. Indeed, if the persons holding the assembly were sued by the persons entitled to privacy for committing a tort (such as private nuisance), the action would be dismissed, since the proper constitutional balance between the human rights determined the proper degree for reasonable use of land to which a person is entitled under the law of torts. Indeed, the various torts of private law — and its other remedies — are merely an expression of the proper balance between constitutional human rights. The source of constitutional human rights is in public law and balancing between them is constitutional. Nonetheless, they are afforded protection, *inter alia*, within the framework of private law, and in accordance with the doctrines accepted by private law. Reasonableness, fairness, proper behaviour, public policy and similar working concepts of private law are merely instruments of private law that express the constitutional balance between human rights. Note, moreover, that public law does not merely deal with the structure and powers of Government authorities. Public law (and the Basic Laws that reflect them) also deals with the various human rights, their interrelationship and their relationship to Government authority. It follows that one can consider the case before us from the perspective of public law towards private law (by means of the discretion given to a public authority), and one can consider the case before us from the perspective of private law towards public law (by means of torts). The difference in perspective does not change the balance. The law is consistent. But again, this is not always the case. Sometimes the public authority considers general factors of security, law and order and

keeping the peace. In such cases, the balance between the various human rights may require one balancing formula, whereas the balance between the human right and the requirements of security, law and order and keeping the peace may require a different balancing formula. Thus, for example, sometimes the balancing formula between human rights that conflict with one another is horizontal, whereas the balance between human rights and considerations of security, law and order and keeping the peace is vertical.

The result is therefore that the petition is denied.

Justice S. Levin

1. In HCJ 456/73 [25], this court held, in a short unreported decision, which was given in a petition to allow the petitioner to organize an assembly in the form of a demonstration next to the house of the Foreign Minister, that:

> 'Under the Police Ordinance [New Version], 5731-1971, ss. 84 and 85, the police have discretion to grant the licence requested, to grant it with sureties or with conditions or restrictions, or to refuse it. It appears that the police believe that the freedom of assembly and the freedom of speech, on which the petitioner relies in his petition, do not amount to granting a permit to intrude upon the privacy of a person holding public office, and to harass him and the members of his family in their private lives, in order to influence him, in this way, with regard to his public activity. We found nothing wrong with this attitude.'

For that reason the petition was denied.

I rely on that decision, and had my esteemed colleague, the Vice-President, not written his monumental opinion, with his extensive erudition, in accordance with current practice, I would merely have denied the petition, as our predecessors did twenty years ago, without adding to, or subtracting from, the aforesaid; but since I cannot merely remain silent, I have found at least four reasons for supporting the aforesaid view: first, in my opinion a public figure has — no less than the average man, and perhaps even more so — the right to privacy in his home, and for me the saying 'a man's home is his castle' is not merely theoretical and it applies also to public figures. An intrusion on privacy, under ss. 4 and 5 of the Protection of Privacy Law, is a tort and also a criminal offence. Within the framework of an 'intrusion on privacy', s. 2(1) of the said law also includes 'sleuthing or shadowing a person, which may disturb him, or another harassment'; President Shamgar

also discussed this in his judgment in *Appeals Court Martial v. Vaknin* [16], where he wrote, at p. 851, the following:

> 'What is "another harassment"? It seems that this may include, for example, the usually acceptable act of walking behind another person wherever he goes, openly and closely and even in protest, which does not constitute trailing him secretly but following him openly. Picketing, by standing next to someone's home or by his door, is similar to this. Such an act may deprive a person of his tranquillity, his feeling of personal safety and his feeling that he can conduct his life on his own, without his private affairs being on display for others, and therein lies the harassment in the act and the intrusion on privacy that derives from it.'

Second, there is a fear that permitting demonstrations next to the private home of public figures may dissuade potential public figures, who are qualified, from engaging in public activity, and there is even a fear that under the pressure of the demonstration, or under the pressure of the members of his family as a result of the demonstration, the public figure may change his opinion, not for objective reasons but merely to stop the harassments against him. Third, if we allow demonstrations outside the home of a public figure, we will make him, his family and his neighbours the 'captive audience' of the demonstrators, since they will be left with no choice but to listen to what they are saying, even if they do not wish to do so. Fourth, a public figure, no less than any other person, has the right — within the proper limits — to prevent the harm caused to him as a result of the demonstration within the framework of civil law (such as the commission of a tort of nuisance or trespass) and to prevent a criminal offence that is about to be committed against him and which derives from the breach of law and order.

2. Notwithstanding the right of privacy of the public figure in his home that is his castle, this court has recognized the freedom of demonstration: *Saar v. Minister of Interior* [2]; and even though this freedom is not expressly mentioned in the Basic Law: Human Dignity and Liberty (whereas property rights and the right of privacy and confidentiality are mentioned in ss. 3 and 7), I am prepared to assume, without deciding the matter, that the law does not compel us to prefer one basic right to the other merely because one is not mentioned expressly in the Basic Law whereas the other is mentioned.

Like my esteemed colleague, the Vice-President, I too will not refrain from making a balance between the competing rights, but in my opinion, in the circumstances that have been proved before us, the right of privacy

prevails over the right of demonstration. Before explaining my approach in this matter, I would like to make several fundamental assumptions:

First, what is stated in our judgment does not relate to the freedom of demonstration next to the place of work of the public figure and the place of his public activity, with regard to which there are considerations that do not exist in the circumstances of the present case. Second, the decision whether to allow or not to allow an assembly or procession to be held is the duty of the District Commissioner of Police, who is obliged to consider, mainly (but not only) factors of 'maintaining public safety or law and order' (s. 84(a) of the Police Ordinance [New Version]). The decisions that the District Commissioner must make must naturally be made within a short time, and too complicated a burden of balancing should not be required of him, since he is not in the legal profession, and he will be unable to discharge it. Third, it is precisely for this reason that I believe that it is sufficient in our case to distinguish between the private home of the public figure and his place of work or the place of his public activity, and we should not incorporate in the balance equation the complicated case where we are dealing with a private home that is used, to some extent, also as a place for public activity. Fourth, in view of the aforesaid, I will assume that because of the minimal public activity of Rabbi Ovadya Yosef in his private apartment, we are merely dealing with the private apartment of the revered Rabbi.

3. In my opinion, the right of privacy is of great value especially in an open society that tends more and more to interfere in the affairs of its citizens, whether through Government institutions or through the media, supported by the principle of the public's right to know. In CA 670/79 *HaAretz Newspaper Publishing Ltd v. Mizrahi* [30], I considered the proper balance between the power of the media to publish incorrect facts about the individual and the right of the individual to his good name, and I held that there is no basis for the attitude that 'in the prevailing circumstances it is necessary to disturb the delicate balance established in case-law by a greater restriction on the individual's right to his reputation in favour of extending the power given to the press to publish incorrect facts about him' (*ibid*., at p.200). In the case before us we must evaluate the balancing equation between the right of demonstration and the right of privacy, and what was stated above is even more applicable when speaking of a public figure; the acts of the public figure in his public activity, as well as in most areas of his overt private activity, are exposed to the public, and this is also proper in an open and democratic society; there is no doubt that a person who accepts public office exposes himself to a large extent to the watchful public eye.

There is only one place whither he can escape from his day's work at the end of his onerous public activity — to the bosom of his family, protected for a short time from the major external pressures to which he is subject, so that he may renew his strength for tomorrow. This is his private home. This home must be protected to the maximum extent that the law allows.

The extra protection granted to the right of privacy of the public figure in his private home as compared with other basic rights is nothing new and is accepted in other countries; see in Canada: the *Cheema* [51] case, where the court did not see any reason to distinguish between the rights of a public figure not to be excessively disturbed at his home and the rights of his neighbours not to have their rest disturbed; in the United States, see the *Carey* [38] judgment, at p. 2295, and especially the minority view of Justice Rehnquist, at p. 2296 *et seq.*; and the comment of Justice Black in the *Gregory* [37] case, at pp. 953-954, and also *Frisby* [43]. Kamin's article, *supra*, at p. 182, says something with which I entirely agree:

> 'In the Constitutional value scale, the quiet enjoyment and privacy of residential premises — even of the privately-owned homes of public officials — merits higher priority than freedom of speech.'

Kamin gives reasons for this opinion, at p. 228, that if such demonstrations are to be permitted:

> 'All demonstrations at the homes of public officials will, of necessity, affect neighbors who are strangers to the political controversy. Does assumption of public office by a householder terminate the right of privacy for him, his family and his neighbors? The question has a pervasive significance in a democratic society. If losing the last redoubt of privacy and repose, if subjecting one's family and neighbors to the constant harassment of sidewalk demonstrations is the price of holding public office, then the republic shall have lost the services of its ablest citizens.'

He sums up, at pp. 230-231:

> 'Residential picketing is neither a primary nor a conventional way of communicating the existence of a grievance to a public officer. Rather, it is an instrument of achieving political results by oppressing and harassing the official and his family.'

In American law also, especially recently, there are signs of a trend that sees a need to balance the right of privacy and tranquillity against the right to

demonstrate vertically; in other words, we are not talking of rights on an equal footing but of one right (privacy) that prevails over the other (freedom of demonstration), even when we are speaking of a quiet demonstration held outside the home of a public figure. It therefore appears that in the circumstances of the case before us, when the issue is one of holding a demonstration outside the home of a public figure who lives in the middle of a residential neighbourhood, American law would also have the result of prohibiting the holding of the demonstration.

In Germany: the judgment in the case of *Ovg. Koblenz, Beschl v.* 24.5.86 7B 36/86 [47] considered the question whether to permit or prohibit a demonstration intended to protest Government policy with regard to nuclear reactors, near the home of Chancellor Kohl's home (a building used as the Chancellor's home but where meetings and official events were occasionally held). The Supreme Court for administrative matters held that such a demonstration was prohibited since it violated the rights of the individual. It held that in the balance between the public interest (to hold a demonstration) and the individual interest (the right of the individual, his family and neighbours to enjoy their private property without disturbance), the interest of the individual prevails. The court even added that especially when a public figure is concerned, the importance of the right of privacy and property rights increases, for the public figure is constantly exposed to criticism and his private home is truly his castle, the only place where he can rest and recover from his public work.

If we add to the aforesaid also the interests of the family and the neighbours to prevent nuisance, and the possibility, which has been proved in this case, of holding the demonstration at some distance from the home of Rabbi Ovadya Yosef, I am satisfied that there is no sufficient reason for intervening in the discretion of the first respondent.

For these reasons I too, like my esteemed colleagues, thought on the day we gave our judgment that the petition should be denied.

Justice E. Goldberg

1. An assembly, which is one of the basic freedoms in Israel, is embodied, even according to its definition in the Police Ordinance [New Version], in the simultaneous existence of two elements: the first element, which is the main one, is the actual physical presence of the demonstrators at the place of the assembly, and the second element is verbal expression on the part of those present on the subject of the assembly. The physical presence is

not merely a means of making it possible to hear what is said at the assembly, but in itself it serves as a 'medium' for conveying the message which the assemblers wish to convey, and in this the assembly is different from other methods of expression. The presence attracts the attention of the public, arouses awareness of the subject of the assembly and emphasizes the extent of the support for it. This is in addition to the direct application inherent in the presence to whoever is the target of the assembly.

It can therefore be said that the demonstration is one of the effective ways in which those present at an assembly may express themselves, when direct access to the electronic media is not available to everyone, and an application to the written media is likely to be buried in the vast amount of information conveyed in them.

In this respect Prof. Kretzmer said in his article, *supra*, in *Is. L. Rev.*, at p. 53:

> 'The demonstration is a form of expression which exploits the "physical presence factor" in order to communicate a view likely to be lost if communicated in other ways. It is indeed true that the modern demonstration is very often geared towards the news media, and dependent on coverage therein for its success, but it is the unique "physical presence" factor that makes the view expressed "newsworthy", and which therefore gains the demonstrators access to the media.'

It transpires from what we have said that real implementation of the freedom of speech by way of an assembly occurs when there is a link between the physical presence of the assemblers and the site of the assembly. Without an effective site, the assembly is ineffective.

2. But the right of assembly, despite its great importance, is not absolute. Other interests and rights conflict with it and they may be harmed by it, albeit temporarily. This is the source of the need to balance between the right to hold an assembly next to the homes of public figures and the property rights and right of privacy of the public figures, members of their families and their neighbours.

Since we said that effectiveness of the site is the very essence of the assembly, the appropriate balance when considering the question whether to permit an assembly next to the home of a public figure lies, in my opinion, in whether there is or is not an alternative site for the assembly, an alternative where the effectiveness will be maintained and not materially impaired. If there is such an alternative, then the right of privacy and property rights will

prevail, for the harm to these rights with then be excessive. This is in the spirit of the Basic Law: Human Dignity and Freedom, which protects property rights (s. 3) and the right of privacy (s. 7(a)), but alongside the protection lies the provision in section 8 that:

> 'The rights under this Basic Law may only be violated by a law… and to an extent that is not excessive.

This 'compromise' position was adopted by the author of the article, *supra*, in *U. Chi. L. Rev.*, at p. 140, who said:

> 'The practice of residential picketing exerts "injuries" upon the home-owner public official, making of him and his family a captive audience and intruding into the enjoyment and privacy of their home. In weighing the benefits of the residential sites against the detriments, the argument for prohibition of residential picketing is strongest, since only by such prohibition can the homeowner's interests be protected.
>
> Undeniably, prohibition of residential picketing would work to the detriment of the picketer; he would lose a forum which affords him economy, publicity and effectiveness. These benefits are not completely lost; they can be largely approximated elsewhere. Thus prohibition, its detriments mitigated by the availability of other demonstration sites, offers the most tenable compromise.'

3. This is the basis for the distinction between a case where an assembly next to the home of the public figure is the *only* effective site, and a case where there is an effective alternative site. In this context Prof. Kretzmer states:

> 'There are times when demonstrations outside the home of a public figure are the most effective way of communicating a view on a matter of public importance. In other cases such demonstrations may be the *only* really effective way of communicating that view to the public figure involved. The privacy interests of public figures should not override the expression interest involved in such demonstrations' (Kretzmer, *supra*, *Isr. L. Rev.*, at 120).

4. In my opinion, the home of a public figure should be regarded as the only effective site for holding an assembly only when he conducts all or most of his public activity there. In any other case, there is no reason that the site next to the office of the public figure should not be considered an effective

alternative. In the first case, the assembly will be allowed outside the home of the public figure, albeit subject to proper restrictions of time, number of participants, holding the assembly and the frequency of assemblies at that site. In the other case, it will be prohibited.

5. The circumstances in our case fall into the first category, and therefore I would have seen fit to grant the petition, had not the petitioner refused to hold the assembly with the restrictions required to limit the extent of the intrusion on privacy resulting from it.

The result is that the petition should be denied.

Petition denied.

9 February 1994.