High Court of Justice

FH HCJ 3660/17

Before:	Honorable President M. Naor
	Honorable Justice E. Hayut
	Honorable Justice Y. Danziger
	Honorable Justice N. Hendel
	Honorable Justice N. Sohlberg
	Honorable Justice D. Barak-Erez
The Petitioners:	1. General Association of Merchants and Self-Employed Persons
	2. Noam Knaani
	3. Avraham Levi
	4. Morris Bremer
	5. Yaakov Bremer
	6. Adi Wizaum
	7. Motti Maoz
	8. David Chaimov
	9. Eliyahu Miller
	10. Isaac Alkoser
	11. Pinhas Tsalik
The Respondents:	1. Minister of Interior
	2. Minister of Economy
	3. Ministry of Economy
	4. Tel Aviv-Jaffa Municipality
	5. Mayor of Tel Aviv-Jaffa
	6. Otzar Marine Industries Ltd.
	7. The Tel Aviv-Jaffa Economic Development Authority Ltd.
	8. Israel Land Authority
	9. Gindi Holdings Development 2009 Ltd.
	10. Yaakov Bruchim (formal)

Further hearing of the High Court of Justice's verdict in HCJ 6322/14, HCJ 996/15, HCJ 2998/15, and HCJ 4558/15 (unpublished) rendered on April 19, 2017 by the Honorable President M. Naor and the Honorable Justices A. Hayut and D. Barak-Erez

Date of Hearing: 15 Av 5777 (August 8, 2017)

Representing Petitioner 1:	Adv. David Shuv; Adv. Uriel Boni
Representing Petitioner 2-11:	Adv. Ivri Feingold
Representing Respondents 1-3 and 8:	Adv. Dana Briskman; Adv. Ron Rosenberg
Representing Respondents 4-5 and 7:	Adv. Yisrael Leshem; Adv. Yochi Kadir-Paz; Adv. Idan Liron
Representing Respondent 6:	Adv. Yehezkel Reinhertz; Adv. Avinoam Peretz
Representing Respondent 9:	Adv. Yehoshua Horesh; Adv. Lior Mimon; Adv. Hagar Pines

Verdict

President M. Naor:

At the heart of this further hearing before us is the character of the Sabbath in the city of Tel Aviv-Jaffa. The background for the proceeding is two amendments to the By-Law of Tel Aviv-Jaffa (Opening and Closing Shops), 5740-1980 (hereinafter together: *the Amendments*), which address opening businesses on the Sabbath in the city of Tel Aviv-Jaffa.

Background of the Further Hearing

1. The By-Law of Tel Aviv-Jaffa (Opening and Closing Shops), 5740-1980 (hereinafter: *the By-Law*) provides that businesses should not be opened on the Sabbath and Jewish holidays, with limited exceptions (see section 2 of the By-Law). The enforcement of the By-Law was the focus of a judgment by this court in App Adm Pet 2469/12 *Bremer v. Tel Aviv-Jaffa Municipality* (unpublished) (June 25, 2013) (hereinafter: *the Bremer case*). In that case, the court accepted the position of the appellants there (who are also the petitioners before us) that the enforcement policy then in place - which included imposing fines but refraining from issuing closure orders – is not effective. The court therefore remanded the issue to the municipality to exercise its discretion and make a decision about how to exercise the powers granted to it to enforce the By-Law. It was also held that if the municipality wants to change its policy regarding opening businesses on the Sabbath, it cannot do so by way of non-enforcement but rather should amend the By-Law as required by law.

1. [sic] As a result of the decision in the *Bremer* case, in 2014 the city council approved an amendment to the By-Law (By-Law of Tel Aviv-Jaffa (Opening and Closing Shops) (Amendment No. 1), 5774-2014 (hereinafter: *Amendment No. 1*). Amendment No. 1 basically permitted the opening of businesses on the Sabbath in three commercial sites, the opening of convenience stores in gas stations on the Sabbath and the opening of grocery stores. Then-Minister of Interior Gidon Saar used his authority under Section 258 of the Municipalities Ordinance [New

Version] (hereinafter: *the Ordinance*) to approve most of the provisions of Amendment No. 1, but he invalidated the provision regarding opening grocery stores. Amendment No. 1, as approved, was published in Reshumot [official legislative reporter-trans.].

2. Thereafter, the city council approved an additional amendment to the By-Law (By-Law of Tel Aviv-Jaffa (Opening and Closing Shops) (Amendment No. 2), 5774-2014 (hereinafter: *Amendment No. 2*)). Amendment No. 2 addressed the opening of grocery stores on the Sabbath according to area and subject to various restrictions, including receiving a permit. Amendment No. 2 was submitted to Interior Minister Saar on August 13, 2014. On October 7, 2014, using his authority under Section 258 of the Ordinance, the Minister of Interior ordered the publication of Amendment No. 2 to be delayed. About a month later, on November 3, 2014, Interior Minister Saar resigned from his position. From the time the decision was made to delay, and for two and a half years, no decision was made on the merits of Amendment No. 2. That was despite an agreement reached during legal proceedings and various developments, about which I will expand later.

3. These amendments were at the foundation of four petitions that were disposed of in the verdict that is the subject of the further hearing (HC 6322/14 *General Association of Merchants and Self-Employed Persons v. Minister of Interior* [unpublished] (April 19, 2017). In those petitions a number of claims were raised regarding the amendments. In brief, Petitioner 1 and Petitioners 2-11 (hereinafter: *the merchants*) and Respondent 9 (hereinafter: *Gindi*) raised a variety of claims about the lawfulness, reasonableness and proportionality of permitting businesses to open on the Sabbath. In opposition, Respondent 4 (hereinafter: *the Municipality*) petitioned against the Minister of Interior's decision to delay the entering-into-force of Amendment No. 2. In the verdict that is the subject of the further hearing it was unanimously decided to accept the Municipality's petition and to reject the petitions of the merchants and Gindi. Regarding the delay of Amendment No. 2, it was held that, in light of the long period of time that had passed since the decision to delay, the failure to make a decision on the merits should be seen as an unexplained decision to invalidate Amendment No. 2. The absence of an explanation imposed a burden on the state to prove that the decision to invalidate Amendment No. 2 was made lawfully, but the state did not provide a reason that it believed justified the invalidation. Given that state of affairs, the court invalidated the decision to invalidate Amendment No. 2. It was also held that using the amendments to permit businesses to open on the Sabbath is not *per se* a flawed decision in terms of authority or discretion.

4. The petitioners, who did not accept the result of the verdict, filed a motion for a further hearing, and on July 12, 2017, Deputy President (ret.) E. Rubinstein granted it. In his decision he explained:

> "Do we have before us a rule in the sense of Section 30(b) of the Courts Law? In my opinion, the resulting state of affairs shows an answer in the affirmative. Indeed, sometimes there is uncertainty in cases like this […], and we are further dealing with a procedure in which restraint was exercised, but once the verdict was rendered against the background of a flaw in the conduct of the authority and with a delay by the Minister of

> Interior in making his decision, leading the panel to view the issue as an unexplained decision to invalidate, the amended By-Law became a model that could understandably become a 'national rule', as is written, 'Watch me and do as I do' (*Judges* 7:17); This – regarding the character of the Sabbath in local authorities as it pertains to opening businesses. This would seem to turn a 'lack of a rule' (in the absence of an explanation from the Minister before the panel) to a 'de facto rule'" (*ibid*., para. 11).

And later it was written:

> "Irrespective of the result, the Sabbath, whose status in global Judaism needs no elaboration, deserves to have its case considered and clarified when all positions are before the Court, especially considering the broad implications, stakes and importance for others […]" (*ibid*, para. 12).

5. On August 8, 2017, we heard the parties' oral arguments before this expanded panel. The disagreements between the parties can be distilled into two questions: The first question before us is the validity of Amendment No. 2, in light of the various transformations it underwent; A second question that arose is whether the amendments meet the standards of administrative law. These are the questions that need to be decided in the further hearing. I will address them in order.

The Validity of Amendment No. 2

The Transformations of Amendment No. 2

6. The Municipality submitted Amendment No. 2 to the Minister of Interior for approval on August 13, 2014. About two months later, on October 7, 2014, Interior Minister Saar ordered a delay in publishing the amendment. In doing so, he exercised his power under Section 258 of the Ordinance, which says:

Approving and Publishing By-Laws	(a) Once the council approves a by-law, the mayor will sign it, and the by-law will be published in Reshumot.
	(b) A by-law will not be published as detailed in subsection (a) until six days have passed from the day the mayor brought the by-law to the attention of the Minister; If the Minister or his authorized representative announces that he does not oppose the by-law, the by-law will be published even before the end of this period.
	(c) During the period specified in subsection (b), the Minister may order a delay in publishing the

by-law, so long as he does not decide to do so without the Minister or his authorized representative having first detailed his reservations and given the mayor or his authorized representative an opportunity to raise claims against the delay in publishing the by-law.

(d) If the Minister delays the publication of a by-law as specified in subsection (c), he may do one of the following:

(1) Order a cancelation of the delay;

(2) Invalidate the by-law for reasons he will enumerate;

(3) Return the by-law with his comments to the council for reconsideration.

(e) If the Minister cancels the order to delay publication of the by-law, the by-law will be published in Reshumot.

The text of the section teaches us, therefore, that the decision to delay is not the end of the story. Subsequent to it, there must be a decision on the merits – cancelling the delay and publishing the by-law, invalidating the by-law or returning it to the city council with comments. A decision of this kind was not forthcoming, and in the meantime the petitions that are the subject of the further hearing were scheduled for oral hearings before this court.

7. The hearing took place on July 6, 2015, and at its conclusion it was decided:

> “1. After some back-and-forth, the Tel Aviv municipality […] and the state agreed to the following:
>
> (a) The Municipality will not insist on chapter 4 of its petition [about delaying Amendment No. 2 – M.N.].
>
> (b) Within 7 days, the Municipality will submit answers to the questions that the Minister of Interior has posed regarding Amendment No. 2 to the by-law, without prejudice to the claims that the Minister of Interior acted without authority on the substance of the issue.

> (c) *Ninety days thereafter (the court's recess days are included in the count), the Minister of Interior will issue a decision regarding Amendment No. 2.*
>
> (d) The Municipality and the other parties reserve their right to raise claims regarding the decision that will be issued.
>
> 2. *The Minister of Interior's decision will be submitted to the court and all the parties to the petitions listed in the heading within 100 days from today, counting the days of the court recess.*
>
> 3. We take note of the fact that the other petitions have yet to be considered, and the parties' arguments will be heard at a time that will be determined" (emphases added – M.N.).

8. On October 13, 2015, after the one hundred days set in the above-mentioned decision had passed, the state informed the court that then-Interior Minister Silvan Shalom, who had begun to examine the issue, discovered a conflict of interest that prevented him from making a decision, and that therefore the issue was referred for a governmental decision about transferring the authority to another minister. Two months later, on December 14, 2015, the state informed the court that the government had decided, on December 13, 2015, that "Within 4 weeks a decision will be made regarding the appropriate mechanism for exercising the authority of the Minister of Interior." On December 24, 2015, the state made an additional filing, informing the court that the authority of the Minister of Interior had been transferred to the government, and that a committee of directors-general had been established to discuss the issue and make recommendations to the government within 180 days.

9. On March 28, 2016, an additional hearing was held, and the court subsequently issued *orders-nisi* in the petitions. Seven months after the committee of directors-general was established, on August 4, 2016, the state updated that the committee had completed its discussions, and that the deadline for submitting its recommendations had been extended by 45 days. Approximately five months later, on January 17, 2017, the state informed the court that the government had held a discussion about Amendment No. 2 in its meeting on January 8, 2017, during which the director-general of the prime minister's office clarified that the committee of directors-general had not arrived at a single agreed-upon recommendation. The committee presented the government with a "range of possibilities" that arose in its discussions, which spanned the gamut between approving Amendment No. 2 as written to completely invalidating it. At the end of the discussion, the government decided to delay a decision on the matter, pending a decision on merging the cities of Tel Aviv-Jaffa and Bat-Yam – a process about which, at the time, not even a first decision had been made.

10. On January 23, 2017, a third hearing was held in the petitions, and at its conclusion they were referred to the court for a decision. A week later, on February 3, 2017, the state informed the court that on January 29, 2017, the government decided to restore the authority to the current Minister

of Interior, Aryeh Deri, and that he intended to make a decision within sixty days. From that update and until the issuing of the judgment that is the subject of the further hearing, two and a half months later, no additional update from the state was received. In the verdict rendered on April 19, 2017, it was held that, in light of the long time that had passed – a duration of two and a half years – the failure to make a decision on the merits should be viewed as a decision to invalidate Amendment No. 2 without explanations. Because the state did not meet its burden of providing a reason that would justify such invalidation, the court held that the decision to invalidate Amendment No. 2 was invalid.

11. On May 3, 2017, the petitioners filed a motion for a further hearing. They attached to that motion a document signed by Interior Minister Deri, dated April 9, 2017. That document shows that the Minister of Interior decided to invalidate Amendment No. 2. The reason was his determination that consideration for the autonomy of the Municipality did not justify the scope of the infringement of Amendment No. 2 on the social and religious-national values that form the basis of making the Sabbath a national holiday (hereinafter: *the Interior Minister's position*). The Interior Minister's position was not submitted to the Court prior to the rendering of the verdict, and it was not submitted to the Municipality. The verdict was therefore rendered in the absence of the Interior Minister's position being placed before the Court. In any event, we were not informed that the Minister had reached a decision.

    In its response of June 23, 2017 to the motion for a further hearing, the state clarified that the Minister of Interior first informed the Attorney General of his intention to invalidate Amendment No. 2 on April 18, 2017. At the request of the Attorney General, an unsigned copy of the above-mentioned document was submitted for his review on April 19, 2017, a few hours before the verdict was rendered. Under these circumstances, "the state believed that it would have been inappropriate to submit the Minister of Interior's decision to the Tel Aviv Municipality at that time" (*ibid*, para. 47).

12. The question of the status of the Interior Minister's position is at the heart of the central dispute between the parties to the further hearing. The parties also disagree regarding the lawfulness and reasonableness of invalidating Amendment No. 2 on the merits.

The Parties' Claims Regarding Amendment No. 2 and the Interior Minister's Position

13. The merchants claim that the Interior Minister's position is the sole starting point for the further hearing. That position, they argue, reflects the consistent position of the executive branch and the legislative branch, and therefore it should be determinative. The Merchants also argued that, on the merits, there is no cause for intervening in the Interior Minister's position, which takes into consideration all the ramifications of Amendment No. 2 and reflects a clear, values-based decision on a complex and sensitive issue.

14. In contrast, the state argued that the current proceeding is inappropriate for evaluating the lawfulness of the Interior Minister's position. In its opinion, that position was not reviewed in the verdict that is the subject of the further hearing, and given the unique character of this proceeding, it would be inappropriate to review the position at this stage. In its argument summary, the state

did not address the Interior Minister's position on the merits, but in response to our questions during the oral hearing, the position of the Attorney General was submitted using the following words:

> "The Interior Minister's decision indeed raises significant legal difficulties, primarily given the extent of the intervention that the central government may exercise into the autonomy of the local authority. Having said that, the decision does not rise to the level of extreme unreasonableness, and that is once we consider that, under the unique circumstances of this case, as a practical matter, the result of the decision is to accommodate the will of the local authority to a certain extent by opening the three sites, convenience stores, and shops in Jaffa on the Sabbath. The Attorney General believes that, were the result of the Minister of Interior's decision to be that no shop would be open and there would be no accommodation of the will of the residents, then the issue would reach the level of extreme unreasonableness" (Transcript of August 8, 2017 hearing, p. 28, lines 18-24).

Having said that, the state repeated its position in principle that this is not the appropriate stage at which to consider the lawfulness of the Interior Ministry's position (See: *ibid*, line 25). In his argument summary, filed pursuant to my decision of July 31, 2017, the Minister of Interior argued that it would be proper to rule on the merits of his position, considering the importance of the issue in principle.

15. The Municipality claimed that it would be inappropriate to rule on the Interior Minister's position at the current stage of the proceeding. The Municipality also claimed that the Interior Minister's position, given its timing, does not justify deviating from the finding in the verdict that is the subject of the further hearing, namely that the state's conduct is defective due to laches that are so extreme, they turn the delay into an unexplained refusal. In any event, according to the Municipality, the Minister of Interior's authority to invalidate the amendment expired a long time ago. On the merits, the Municipality claimed that the Interior Minister's position was based on extraneous considerations and suffers from extreme unreasonableness.

The Validity of Amendment No. 2 – Discussion and Resolution

16. Does the Interior Minister's position have consequences for the validity of Amendment No. 2? In my opinion, the answer is no. The state is correct in its argument that the current proceeding is inappropriate for evaluating the lawfulness and reasonableness of the Interior Minister's position, which was not brought before the panel in the proceeding that is the subject of the further hearing. The procedure of a further hearing is intended for clarifying a rule that was decided in a verdict, and not for discussing what the verdict does not contain (see: FH Civ *Haran v. Charitable Trust Foundation of the Late Gavrialovich* [unpublished] (September 15, 2010); FH Civ 8184/13 *Dabah v. State of Israel* [unpublished] (May 8, 2014); FH Civ 1075/14 *Keren Hayesod – United Israel Appeal v. Jewish National Fund via the Israel Land Administration* [unpublished] (July 15, 2014); FH Crim 6876/14 *Doe v. State of Israel* [unpublished] (December 17, 2014); FH HCJ 360/15 *Hamoked: Center for the Defence of the Individual V. Minister of Defense*

[unpublished] (November 12, 2015). The Interior Minister's position was not submitted to the Court in the proceeding that is the subject of the further hearing. The parties to the case did not make arguments about it, and the Court did not give its opinion about it. There is therefore no room to consider it at this stage of the proceeding (See and compare FH 2/64 *Koenigshofer v. Humphert*, 18(3) PD 377, 383 (1964); See also my opinion in FH Civ 3993/07 *Jerusalem Tax Assessor 3 v. Ikafood Ltd*., 65(1) PD 238, 320-324 (2011)).

17. Indeed, "You can't turn back the clock" (FH 3/58 *Finance Minister v. Freight and Container Ships Ltd.*, 12 PD 1849, 1854 (1958); See also *ibid*, page 1852). That is particularly true when, as is in our case, the Municipality was not made aware of the Interior Minister's position, and the position was not made public but rather remained buried in the Minister of Interior's drawer, even though ten days passed between the time it was reached and the publication of the judgment (See and compare App Civ 5945/04 *Jerusalem Tax Assessor 1 v. Sami* [unpublished], para 10 of my judgment (April 22, 2007). The rule is that "Norms that have ramifications for the collective or for the rights of individuals must be made public, so that everyone can know what the law says […]. Law that is made public is binding law, it and not documents of whose existence individuals and the collective, all of them or some of them, are unaware" (App Civ 3213/97 *Naker v. Herzliya Local Planning and Zoning Committee*, 53(4) PD 625, 648 (1999); See also and compare App Civ 421/61 *State of Israel v. Haus*, 15 PD 2193, 2204-2205 (1961)).

18. Another reason not to deviate from the decision reached in the verdict regarding Amendment No. 2 is the timing in which the Minister of Interior's position was received. It should be noted: the decision to delay the publication of a by-law is not a final decision. It must be followed by a decision on the merits (see art. 258(d) of the Ordinance). In my opinion, we don't need to rule on the principled question of what is the precise time period in which a minister of interior, who has ordered delay of the publication of a by-law, must make a final decision on the merits of that ordinance, in order to determine that this particular decision came too late. I will explain.

19. In our case, Minister of Interior Gidon Saar made his decision to delay publication on October 7, 2014, during the sixty day period allotted in Article 258 of the Ordinance. Time passed, and no decision was made on the merids of the amendment. After about nine months, the parties reached an agreement in the context of litigation, which was validated by the court in its July 6, 2015 decision. According to the terms of that agreement, the minister of interior committed, as noted, to submit his decision to the court and the other parties "*within 100 days from today*" (*ibid*, emphasis added – M.N.). The deadline for making a decision on the merits of Amendment No. 2 was – according to the agreement – therefore October 16, 2015. That deadline passed. No decision on the merits was reached, and every few months, the state would issue an "update" to the court, saying that no decision had been reached (as enumerated in paragraphs 9-11). Despite repeated comments from the court to the effect that the executive branch is refusing to decide a question placed before it (see my decision of December 15, 2015 ("[As] we repeated and emphasized, the executive branch must made a decision"); Transcript of March 28, 2016 Hearing; Transcript of January 23, 2017 Hearing), the state acted as if it had all the time in the world. No additional agreement was reached by the parties, and none was requested in any event, and no judicial decision was issued to authorize deviating from the timeline set. The Minister of Interior's Position, dated April 9, 2017, missed the deadline, therefore, by about a year and a half.

I don't see a legal justification for intervening in the holding made in the decision that is the subject of the further hearing, namely that under the circumstances described, we are dealing with a refusal made without providing reasons (see paragraph 18 of the verdict and the sources cited therein). Based on what has been said thus far, the request for a further hearing should be rejected.

20. Having said that, and once Deputy President (ret.) E. Rubinstein decided that "the Sabbath deserves … to have its case considered and clarified when all positions are before the Court" (his decision of July 12, 2017), I see fit to address the merits of the Minister of Interior's position, even though arguments for dismissal forestall that. Evaluating the merits of the Minister of Interior's position leads to the same result, denying the request for an additional hearing. I will explain.

21. As noted, the Minister of Interior thought that Amendment No. 2 should be completely invalidated. To his way of thinking, the consideration that should be accorded to the local authority's autonomy does not justify the "extent and the derivative meaning of the harm that Amendment No. 2 causes to socio-social and national religious values and purposes that are the basis of the designation of the Sabbath as a day of rest" (para. 59 of the Interior Minister's position). In his introduction, the minister addressed the importance of the Sabbath in Jewish heritage:

> "The Sabbath and its observance is [sic-trans.] a bedrock of the secret of the Jewish people's existence. Sabbath observance is one of the commandments that the children of Israel were commanded to observe in the ten commandments […]. Numerous ideas in the foundations of the Jewish people's belief are included in and derive from this commandment and its observance. As is known, the Sabbath was designated as a day of rest in the State of Israel from its very founding. Two purposes are at the heart of this weekly day of rest: a socio-social purpose and a national religious purpose, which are intertwined" (*ibid*, paras. 16-17).

The Minister of Interior believes that Amendment No. 2 significantly infringes on the social purpose of the day of rest. That is due to the competitive disadvantage it creates for small business owners which constitutes "harm to and thwarting of" their ability to exercise their right to a day of rest (ibid, para. 35), and due to the employment of workers who are "an interchangeable work force […] of weak socio-economic status" in businesses that would be permitted to open on the Sabbath (ibid, para. 41).

22. Additionally, The Minister of Interior thought that Amendment No. 2 significantly undermines the national-religious status of the Sabbath and the way the public sphere looks during the Sabbath. That is due to its deviation from the status quo, which allows places of entertainment to open, but prohibits purely business activity:

> "Throughout the years, as per the status quo that represents broad national agreement regarding activities on the Sabbath, places of

> entertainment have been allowed to open […] but commercial activity and opening commercial establishments has not been permitted. The draft by-law put forward now proposes, for the first time, to allow pure, undeniably business activity throughout the city of Tel Aviv" (*ibid*, para. 45).

He believes that should not be allowed, especially considering the scope and size of the area where sales would take place and the fact that the amendment applies to businesses that do not sell food for immediate and urgent needs. Similarly, he thinks it would be wrong "to recognize the Tel Aviv Municipality's claim that a "need" that can be recognized in order to justify undermining the purposes of the Sabbath is essentially just a need to satisfy the "will" of the residents, based merely on their preferring the convenience of a particular arrangement – and no more than that" (*ibid*, para. 51). That is particularly true because, in his opinion, the will of the residents and the "habit" for which they are asking to open businesses "is the result of violations of the law and years in which it was not enforced" (*ibid*).

23. The Minister of Interior also stated that the arrangement that the municipality adopted risks becoming a model for other towns in Israel, and therefore Amendment No. 2 would trigger changes in the character of the Sabbath throughout Israel:

> "Under these circumstances, the dam would burst and [the] opening of businesses on the Sabbath would risk turning into a breached vision throughout the country […]. Therefore, in essence, it is not a single by-law that hangs in the balance but rather the appearance of the Sabbath and its character, as a national, general matter, hang in the balance" (*ibid*, para. 58).

For that reason, he believes, "in the broad perspective granted the central government" (*ibid*, para. 57) emphasis eliminated – M.N.)) invalidating Amendment No. 2 is justified.

24. According to the State, although the Minister of Interior's position "arouses significant legal difficulties," it "does not reach the level of extreme unreasonableness." I cannot accept that argument. The Minister of Interior's position did not appropriately consider the uniquely autonomous status of the Municipality, and therefore is not reasonable. I will explain. Local autonomy, meaning "the direct connection of the local authority to the law, unmediated by other governmental authorities" (HCJ 3791/93 *Mishlev v. Minister of Interior*, 47(4) PD 126, 132 (1993) (hereinafter: *the Mishlev case*) is "the basic principle of local administration" (Itzhak Zamir, *Hasamchut Haminhalit [Administrative Authority]*, Vol. 1 453 (2nd ed. 2010) (hereinafter: *Zamir*) (emphasis added – M.N.)).

25. If that is so, in exercising his authority under Article 258, the Minister of Interior should accord *significant weight* to local autonomy, as "those wielding authority from the central government should be guided by the need to act with respect toward the elected officials of the local authority – toward them and those who elected them – and to remember that the days of coercive paternalism have passed" (*Mishlev* case, p.131; See also: Zamir, pps. 451-453, 477; FH HCJ 3201/96 *Agriculture Minister v. Lod Valley Regional Council*, 61(3) PD 661, 663 (1997); HCJ 2838/95 *Greenberg v. Katzrin Local Council*, 53(1) PD 1, 10-15 (1997); FH HCJ 1913/13 *Muasi v. Minister of Interior*, 52(2) PD 49, 66 (1998); HCJ 10104/04 *Peace Now v. Supervisor of Jewish Towns in Judea and Samaria*, 61(2) PD 193, 168 (2006); See also and compare: HCJ 4381/97

Meizlik v. Petah Tikva Local Planning and Zoning Council [unpublished], para. 57 of Justice E. Rubinstein's judgment (December 29, 2009)). As was noted in a case similar to ours:

> "With regard to the degree of intervention of the central government in the enactment of the bylaws, the Attorney-General's position was that the power to disqualify bylaws that do not deal with issues that affect the central government or that extend beyond the boundaries of that local authority should be exercised in moderation. As a rule, the Minister of the Interior should not replace the discretion of the local authority with his discretion where the authority acted within its power and in a reasonable manner. The Minister of the Interior has no technical ability to consider in depth the considerations that guided the local authority and the factual basis that was used to enact the bylaw, nor is it right that he should do so" (HCJ 953/01 *Solodkin v. Beit Shemesh Municipality*, 58(5) PD 595, 606 (2004)) (hereinafter: *Solodkin case*).

26. The Minister of Interior's position in this case did not really take into consideration the autonomy of the Municipality. Indeed, the Minister of Interior clarified that he does not think the will of the city's residents is adequate to justify any harm to the purposes of the Sabbath and to permit businesses to open. The Minister of Interior focused on the character of the Sabbath at the *national level*, without giving expression to the *local character* and the circumstances of Tel Aviv-Jaffa. His explanation was that if Amendment No. 2 were to be approved, "the dam would burst" and the arrangement that the Municipality adopted would become a model for other towns in Israel. I cannot accept this explanation. Legal standards should not be changed on basis of mere assumptions regarding potential consequences that the future may hold. Indeed, "Thus, while it may very well be that the slippery slope is indeed quite perilous, the slippery slope argument is by far more dangerous" HCJ 5016/96 *Horev v. Transportation Minister*, 51(4) PD 1, 74 (1997)). The infringement on the municipality's autonomy is particularly problematic in this case, because local authorities in Israel were explicitly authorized to legislate by-laws that govern the opening of businesses on the Sabbath (See: Law to Amend the Municipalities Ordinance (No. 40), 5751-1990 (hereinafter: the *Authorizing Law*). One of the purposes at the foundation of the Authorizing Law is specifically that these issues should be regulated at the municipal, local level, and not at the national level.

27. This purpose is well-grounded in precedent. I noted as much in the *Bremer* case:

> "If the nature of the city of Tel Aviv-Jaffa requires, in the opinion of its leaders who represent the population, not to close businesses such as those of the Respondents, on the Sabbath, the By-Law can be changed through the manner prescribed in the law […] The Attorney General stated that the Municipality is authorized to strike a balance "between the interest of preserving the nature of the Sabbath as a day of rest […] and making certain economic activity possible". However, in my opinion, the appropriate place for striking such a balance is in a Municipality decision whether to promulgate a by-law regarding the

> activity of businesses on the Sabbath and formulating the arrangements prescribed" (*ibid*, para. 52 of my opinion).

And in another case, President M. Shamgar ruled:

> "Pursuant to the amendment to the Authorizing Law, which added paragraph (21) […] reasons related to religious tradition were authorized as relevant in enacting by-laws under paragraph 20 […]. Article 249(20) [of the Ordinance-M.N.] does not set mandatory guidance for the local authority but rather merely grants it power. That is understood, because we are talking about an authorizing provision whose application and method of implementation remain in the hands of the local authority" (HCJ 5073/91 *Israel Theaters Ltd. v. Netanya Municipality*, 57(3) PD 192, 207 (1993) (hereinafter: the *Israel Theaters Case*).

This court noted even before the Authorizing Law was enacted:

> "This issue of opening and closing shops is inappropriate for national legislation. It should be regulated specifically at the local legislative level, because it is an issue which requires taking into consideration the make-up of the population of each place, its habits and ways of life and the character of that place" (Crim App 858/79 *Lapid v. State of Israel*, 34(3) PD 386, 391 (1980)).

Regarding another authorizing law, which addresses the sale of pork on the territory of a local authority, it has been established that:

> "The purpose was therefore that the balance between the conflicting purposes — the considerations concerning the protection of religious and national sensibilities, on the one hand, and the consideration of individual liberty, on the other — would not be made on a national level, according to a principled balancing that the legislator determined. Instead, the purpose was to make a balancing at a local level. In this local balancing, the character of the authority and the changing particulars of each local authority would be taken into account. (*Solodkin* case, p. 610; See also: HCJ 163/57 *Lubin v. Tel Aviv-Jaffa Municipality*, 12 PD 1041, 1076 (1958)).

28. We should not mix things up. The authority to make the value judgment within the framework of the by-laws belongs to the Municipality, not to the Minister of Interior. The Minister of Interior does not evaluate whether the decision is optimal, in his opinion, but rather whether it is within the zone of reasonableness. In that sense, in my opinion, the broad perspective given to the Minister of Interior was intended, for example, to ensure that the by-law that a particular local authority enacted does not create a negative externality for other local authorities (take for example a local authority that decides to bury its garbage on the outskirts of its borders, next to another city). Indeed, leaving the judgment in the hands of the municipality was intended to realize the principle of municipal autonomy. Beyond that, however, it was also intended to

realize a central aspect of the Authorizing Law, namely tipping the scales in favor of local considerations, and no one is in a better position than the municipality to evaluate them. A decision by the Minister of Interior is intended to oversee the lawfulness of a decision by the Municipality, not to replace its discretion.

29. Furthermore, the Minister of Interior's position contradicts an additional central purpose at the foundation of the Authorizing Law – the *balancing purpose*. This purpose affects the scope of the Minister of Interior's discretion pursuant to Article 258 of the Ordinance (See and compare: the *Solodkin* case, p. 621). The Minister of Interior's position is sweeping in character, and it would prohibit opening any grocery store at all – and indeed any commercial establishment, except for a critical need – without reference to a city's circumstances or the will of its residents. We might wonder: If the solution is so simple, why did I take more than two whole years to reach it? I will dare to say that the HCJ [High Court of Justice-trans.] is again being called upon to do the dirty work. After the HCJ does that dirty work, one can say, "It wasn't me (the Minister) – it was the HCJ."

30. In any event, the Minister of Interior's position is inconsistent with the Authorizing Law, which relies entirely on a purpose of compromise and balancing (see: the *Israel Theaters* case, p. 207; the *Bremer* case, para. 52 of my opinion; See also and compare: the *Solodkin* case, p. 622). It is a balance between the conflicting rights within the circumstances of the particular case: the balance between freedom of religion, on the one hand, and freedom from religion, on the other; the balance between equality on the one hand, and freedom of occupation on the other. In my opinion, considering this purpose of the Authorizing Law, a sweeping position that lacks a balance reflecting the character of a city, the uniqueness of the different areas within it and the distances between them – is unreasonable.

31. I have thus reached the conclusion that, even if the Minister of Interior's position had been submitted on time and considered on its merits, there would be no cause to deviate from what was decided in the verdict which is the subject of the further hearing determined regarding Amendment No. 2. Amendment No. 2, therefore, remains valid. The question remains whether Amendment No. 2, like Amendment No. 1, meet the standards of administrative law. I will now address that question.

The Amendments' Compatibility with the Standards of Administrative Law

The Parties' Arguments on the Amendments' Compatibility with the Standards of Administrative Law

32. The merchants raised many arguments against the compatibility of the amendments with the standards of administrative law. Regarding authority, the merchants argued that the amendments constitute a primary arrangement that the Municipality is not authorized to regulate. That is especially the case, they argue, because the Authorizing Law only authorizes the Municipality to order the *closing* of places of entertainment and not the *opening* of businesses. The merchants also argued that the amendments contradict the Hours of Work and Rest Law, 5711-1951, which, they say, proscribes the opening of businesses on the Sabbath. Their claim is that the Hours of Work and Rest Law is on a higher normative plane, and therefore

such contradiction negates the amendments. However, after we held oral hearings, and upon hearing our comments, the merchants withdrew that claim (see: Motion of August 31, 2017). Regarding discretion, the position of the merchants was that the amendments are unreasonable, because they contradict the status quo that reflects a decisive rejection of commerce on the Sabbath, in contrast to the activity of places of entertainment. The merchants also claimed that the amendments are unreasonable, both due to their broad implications – which, they argue, threaten to strip the laws regarding rest of their power – and also because they infringe on equality and encourage criminal activity.

33. Gindi also argued that the amendments are unreasonable, emphasizing claims it made in the proceeding that is the subject of the further hearing. It believes that the Municipality should be ordered to add the site, "Sarona Market", which it owns, to the list of commercial sites where Amendment No. 1 permits businesses to open on the Sabbath. That is primarily because the decision not to include the site on the list was based on extraneous considerations, as the Municipality partially or completely owns the three sites which it permitted to open on the Sabbath.

34. The state and the Municipality argue that there is no cause to intervene in the court's holding in the verdict that is the subject of the further hearing, namely that the amendments were enacted pursuant to lawful authority and that they do not deviate from the zone of reasonableness. The state also claims that there is no contradiction between enacting the amendments, which was done pursuant to the Authorizing Law, and the Hours of Work and Rest Law, because these legal provisions address different issues. This approach, the state argued, is consistent with this court's jurisprudence and with interpretive considerations.

35. The Minister of Interior's position, which was separately attached to the state's argument summary (see: my decision of July 31, 2017), was different. Like the merchants, he believes that Article 9A of the Hours of Work and Rest Law proscribes the very opening of commercial businesses on the Sabbath. Therefore, he argues, the Authorizing Law cannot supersede this provision, and it does not authorize the Municipality to permit opening businesses on the Sabbath.

The Issue of Authority – Discussion and Ruling

36. The merchants' arguments regarding the Municipality's lack of authority to enact the amendments are not new. These claims were raised and rejected in the verdict that is the subject of the further hearing. I see no reason to deviate from that ruling. First, the merchants argued that the Authorizing Law does not authorize the Municipality to permit opening businesses on the Sabbath, because it only addresses the closure of places of entertainment. That claim must be rejected.

37. The Authorizing Law came about due to the doubt that arose regarding the authority of local authorities to enact, in their by-laws, provisions that, for religious reasons, proscribe opening places of entertainment on the Sabbath (see: Crim Case (Jerusalem Magistrate) 3471/87 *State of Israel v. Kaplan* [unpublished] 5748(2) PM 26 (1987) (hereinafter: the *Kaplan case*). Indeed, the

Authorizing Law was intended to remove that doubt and to guarantee the continued validity of the existing by-laws. However, its purpose, as defined, was "to grant local authorities the authority to regulate the prohibition on opening *businesses* on days of rest," including for reasons related to religious tradition (Explanatory Notes of the Local Authorities Bill (Prohibition on Opening and Closing Businesses on Days of Rest), 5748-1988, H.K. 134 (emphasis added – M.N.); See also the *Israel Theaters* case, p. 2017; the *Bremer* case, paras. 27-28 of my opinion). In any event, the text of the Authorizing Law is clear.

38. The Authorizing Law *explicitly* authorizes the local authorities in Israel to enact provisions in their by-laws that address *opening businesses* in their domains on the Sabbath. The Authorizing Law added, *inter alia*, Article 249(21) to the Ordinance, which says that:

> **A municipality may use its authority pursuant to paragraph (2) within its jurisdiction or in part of its jurisdiction regarding days of rest, taking into consideration reasons of religious tradition and regarding the day of Tisha Ba'av […];**

The above-reference article explicitly refers to Article 249(21), which addresses "*the opening and closing of shops*":

Opening and Closing Shops	**To regulate the opening and closing of shops, factories, restaurants, coffee shops, tea houses, drinking establishments, cafeterias, canteens and other institutions of this kind, and of cinemas, theaters and other places of public entertainment or a type of it, and to supervise their opening and closing, and to determine – without infringing on the generality of the authority – their hours of operation on any given day; However, the validity of this passage is subject to any exemption that the Minister creates in an order;**

I cannot accept the argument that a law that authorized, *inter alia*, "regulating the opening […] of shops and factories […]" was intended to apply only to places of entertainment or only to regulating the closure of businesses. That argument is incompatible with the clear text of the law (for more on the municipality's authority to permit opening businesses on the Sabbath see: the *Bremer* case, para. 52 of my opinion).

39. The merchants and the Minister of Interior raised an additional argument on the issue of authority, namely that there is a contradiction between the amendments and the Hours of Work and Rest Law. According to that argument, the Hours of Work and Rest Law prohibits opening businesses on the Sabbath, and therefore the By-Law cannot permit them to open. That argument should also be rejected. Indeed, as the state noted, we are dealing with two sets of laws that operate on different planes and do not contradict each other. To the contrary: they complement each other. Business owners whose activity on the Sabbath has been approved within the framework of the amendments are still subject to the provisions of the Hours of Work and Rest Law, and obviously they must abide by them. I do not accept the merchants'

position that the Hours of Work and Rest Law contains a sweeping prohibition against opening businesses on the Sabbath. In my opinion, an interpretation of that kind is inconsistent with the text and purpose of the law.

40. Indeed, during the oral hearing, the merchants argued that the procedure before us is inappropriate for ruling on the interpretation of Article 9A of the Hours of Work and Rest Law. In addition, a week after the hearing (on August 13, 2017), the merchants filed a motion to supplement their arguments on that issue. In our decision of August 14, 2017, we denied that motion. Despite their motion being denied, on August 31, 2017, the merchants submitted a long line of documents on the subject, attached to an "urgent update and motion" from them. In that framework, they moved for the court "to refrain from addressing the question of the meaning of the prohibition set in Article 9A of the law" and stated that they wanted to relinquish their argument about the contradiction between the amendments and the Hours of Work and Rest Law. That motion was also denied (see our decision of August 31, 2017). We must therefore rule on the issue of the correct interpretation of Article 9A of the Hours of Work and Rest Law. That is especially true, given Deputy President (ret.) E. Rubinstein's ruling that "the further hearing will apply to the entire verdict" (para. 12 of his decision of July 12, 2017), and given that the above-stated issue was placed at our doorstep by the merchants in the framework of the procedure that is the subject of the further hearing, and in any event was raised by the Minister of Interior in the summary of argument submitted on his behalf.

41. The Hours of Work and Rest Law prohibits employment and work on the weekly day of rest. It says:

Prohibition Of Employment During Weekly Rest	**9. An employee shall not be employed during his weekly rest, unless such employment has been permitted under section 12.**
Prohibition Of Work During Weekly Rest	**9A. (a) On the prescribed days of rest […] the owner of a workshop of [sic] industrial factory shall not work in his workshop or industrial factory, and the owners [sic] of a shop shall not do business in his shop.** **(b) On the aforesaid days of rest, a member of a cooperative society shall not work in a workshop or industrial undertaking of the society; a member of an agricultural cooperative society shall not work in a workshop or industrial undertaking of the society unless the work is connected with the services necessary for its farm […]**
Permission For Employment On Weekly Rest	**12. (a) The Minister of Labor and Social Affairs may permit an employee to be employed during all or any of the hours of weekly rest, if he is satisfied that interruption of work for all or part of the weekly rest is likely to prejudice the defense of the State or the security of persons or property or seriously to prejudice the economy, or a process of work or the supply of services which, in the opinion of the Minister of Labor and Social Affairs, are essential to the public or part thereof.**

42. My opinion is that the Hours of Work and Rest Law does not address the question of opening or closing businesses on the day of rest, but rather with the personnel question of work on the day of rest. I draw that conclusion from the text of the clauses and their captions, which use the words "employment" or "work" (see: Aharon Barak, *Parshanut Tachlitit Bamishpat [Purposive Interpretation in Law]*, 401-402 (2003) (hereinafter: *Barak*)). Similarly, from reading the explanatory notes for Amendment No. 1 of the law it is clear that Article 9A, which was added at the same time, was not intended to serve as a provision that requires closing businesses, but rather was intended to expand the application of the prohibition of employment (see: *ibid*, p. 407). According to the explanatory notes of the amendment:

> "The Hours of Work and Rest Law, 5711-1951 currently applies to salaried employees only. The suggested amendment would also subject factory owners, members of a cooperative society and shop owners to the provisions regarding days of rest, with some caveats" (Explanatory Notes of the proposed Hours of Work and Rest Law (Amendment), 5727-1966 (1966, H.H. 136).

This approach is supported by the fact that we are dealing with a law that infringes on the constitutional right to freedom of occupation (see: HCJ 5026/04 *Design 22- Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department – Ministry of Labor and Social Affairs,* 60(1) PD 38, 51 (2005)) (*hereinafter*: the *Design 22 case*)) and that carries criminal sanctions (see: art. 26 of the Hours of Work and Rest Law). These reasons also lead to the conclusion that the appropriate interpretation is a narrow interpretation (see: Barak, p. 425).

43. My conclusion that the Hours of Work and Rest Law does not create a sweeping prohibition on opening businesses on the Sabbath is also compatible with precedent regarding the Hours of Work and Rest Law, which held that *it does not contain "a general provision about closing places on days of rest"* (the *Israel Theaters* case, p. 206 (emphasis added – M.N.); See also: the *Design 22* case, p. 63). In any event, let it be clear that the amendments were enacted pursuant to the Authorizing Law, and it is what authorizes the Municipality to permit businesses to open on the day of rest (see para. 39 above). If that is so, even if a contradiction were to exist, it would be a contradiction between the Authorizing Law and the Hours of Work and Rest Law, meaning between norms that are on the same plane. Under the non-interpretive standards we use (see: Barak, p. 117), the Authorizing Law would prevail as a law enacted subsequent to the Hours of Work and Rest Law (*lex posterior derogate priori*), and in any event it is a more specific law that grants power to the local authorities in Israel in a targeted way, in contrast to the generality of the Hours of Work and Rest Law (*lex specialis derogate generali*).

44. In passing, I note that on the issue of the interpretation of the Hours of Work and Rest Law, as well as on additional issues that arose, we were presented with the position of Minister of Interior Deri that was, as noted, different from the state's position. In the oral hearing before us, and in their response of August 20, 2017, the merchants argued that we should have allowed

the Minister of Interior to present his position separately from the state. I reject that argument. According to the case law, "the position of the authorities (as opposed to the personal opinion of those holding office within them) on questions of law is determined, as an institutional matter, by the Attorney General" (HCJ 320/96 *Garman v. Herzliya City Council*, 52(2) 222, 239 (1998); See also: HCJ 4247/97 *Meretz Party in Jerusalem City Council v. Minister of Religious Affairs*, 52(5) PD 241, 277 (1998); HCJ 3094/93 *Movement for Quality Government in Israel v. Government of Israel*, 47(5) PD 404, 425 (1993); But compare: HCJ 6494/14 *Gini v. Chief Rabbinate* [unpublished], paras. 21-26 of the opinion of my colleague, Justice N. Sohlberg (June 6, 2016); But see also: *ibid*, paragraph D of the opinion of Deputy President E. Rubinstein; and also HCJ 6017/10 *Israel Union for Environmental Defense v. Minister of National Infrastructure* [unpublished], paragraph G of the opinion of Justice E. Rubinstein (July 3, 2012).

Indeed, the personal position of Minister of Interior Deri was different from the state's position. The Attorney General agreed to bring it to our attention. In doing so, he acted within the scope of his authority. But that is not the position of the state, which is the litigant before us. The state's position – as was presented before us and as should be presented before us – is the one that is decided by the Attorney General (See: HCJ 4267/93 *Amitai – Citizens for Good Governance and Integrity v. Prime Minister of Israel*, 47(5) PD 441, 473 (1993); See and compare also: *Solodkin* case, p. 607).

45. I have therefore reached the conclusion that the Municipality did not exceed its authority when it enacted the amendments. However, as is known, authority is different from discretion. A number of arguments were raised regarding discretion. I will now evaluate them.

Issue of Discretion – Discussion and Ruling

46. In the verdict that is the subject of the further hearing, it was held that the amendments are within the zone of proportionality within which the Municipality must operate. I do not see a cause for deviating from that holding, either. First, regarding Gindi's claims that extraneous considerations influenced the decision not to include the site it owns on the list of sites in Amendment No. 1, because Gindi is a respondent, I doubt that it is possible to grant its motion for a remedy. In any event, in my opinion, the relevant considerations that the Municipality raised, the most important of which is the proximity to residential areas, suffice to preclude intervention in the By-Law based on Gindi's arguments. Additionally, the merchants also raised a long line of arguments which, in their opinion, show that the amendments are not reasonable and not proportional.

47. These arguments were presented by the merchants in the proceeding that is the subject of the further hearing. *Inter alia*, they repeatedly referred to documents they submitted in the procedure that is the subject of the further hearing, which included various statements that the mayor made on various occasions. I do not think that the procedure of a further hearing is the appropriate framework for reconsidering facts and arguments that were already presented and decided upon (See: FH 6/58 *Mann v. Ayun*, 12 PD 109, 112 (1958); FH Crim 5567/00 *Deri v. State of Israel*, 54(3) PD 601, 613 (2000); FH Crim 2334/09 *Perry v. State of Israel* [unpublished], para. 34 of the opinion of Justice A. Procaccia (ret.) (May 23, 2011)). A further hearing is not intended to facilitate arguments against the result of a particular proceeding by re-arguing the case

before an expanded panel that exercises judicial review of the verdict. Instead, it focuses on the legal aspect. The procedure of a further hearing revolves around the legal precedent that was set in the verdict (See: FH 3379/91 *Caspi v. State of Israel* [unpublished] (August 15, 1991); FH Civ 1075/15 *Blum v. Anglo Saxon – Asset Agency (Israel-1992) Ltd.* [unpublished], para. 18 of my opinion (March 8, 2015)).

48. At the legal level, my opinion is that the amendments are within the zone of discretion that the Authorizing Law granted to the Municipality. The merchants painted a gloomy picture of the amendments wreaking serious harm to their rights to equality and freedom of religion. It is true that the amendments violate the merchants' rights and also the rights of others, a violation which, in my opinion, is beyond *de minimus*. In this context, the violation stems from both the opening of commercial establishments on the Sabbath as well as opening places of entertainment, and it also affects the social purpose and the national purpose at the heart of the designation of the Sabbath as a day of rest. In no way do I minimize this violation. However, the review does not end once a rights violation has been found. On the other side are the other rights that the amendments protect, including freedom of occupation and freedom of conscience. The heart of the review is the balance between the conflicting rights. The balance does not favor one worldview over another. It does not detract, not even a whit, from the status and importance of the Sabbath as national property of the Jewish people and as one of the values of the State of Israel as a Jewish and democratic state, as Ahad Ha'am said: "More than the Jewish people kept the Sabbath, the Sabbath kept them." However, balance means letting a thousand flowers bloom. It means that, in addition to protecting the unique character of the Sabbath, we should also allow each individual to design his Sabbath as he wishes and according to his beliefs and to fill it with content as he sees fit. To borrow the words of Zelda, "To light candles in all the worlds – that is the Sabbath" (Zelda, "Sabbath and Weekday"). There is a reason the legislator saw fit to task the local authority with conducting this balance: so that the balance point it chooses will reflect the unique character of each city, the extent of communal life within it and the potential practical solutions that characterize its circumstances. Indeed, when the Sabbath begins, the city is draped in celebration, but the garment draping one city is different from the garment draping another.

49. The balancing with which the local authority is tasked is not simple, but it is crucial for maintaining communal life in a diverse society like ours. Communal life is not "all or nothing" but rather is based on tolerance for a divergent opinion, mutual respect and mutual compromise. Communal life is not "black and white" but rather a spectrum. It is responsive to the recognition that human beings are free creatures who design their life narratives, but also to the recognition that they do so within the framework of society and not on a desert island. It is based on the understand that each of us bears responsibility for society as a whole, but that does not mean giving up on fundamental components of our identity or the uniqueness of each of us. It is not a perspective of "I won't sign on to desecrating the Sabbath" but rather recognition of the indispensability of the perspective, "Live and let live".

50. In the case before us, a review of the amendments, in my opinion, points to the fact that they were enacted in order to achieve this balance. The amendments were designed to reflect a unique balance point that is appropriate for the city of Tel Aviv, taking into consideration the status of the Sabbath, the composition of the population in each neighborhood, its way of life

and the nature of the city. Amendment No. 1 permits opening businesses in a very limited number of clearly delimited commercial sites that are disconnected from residential areas. Amendment No. 2 permits opening a limited number of grocery stores according to geographic location, in a way that considers the character of each area. The opening is subject to various restrictions, first and foremost the need to obtain a permit. Ultimately, in our case, we are talking about opening a limited number of businesses that constitute a tiny fraction of the number of businesses operating in the city during the week, and that also influences the proportionality of the measure. The balancing point chosen facilitates observing the unique character of the Sabbath and does not significantly change the look of the city, considering the existing *normative* situation. I am not saying this framework is optimal. There may be other frameworks that are also within the zone of proportionality. I am not even saying that this framework should or could be adopted in other cities. My ruling can be summarized as follows: the proposed amendments are within the zone of proportionality within which the Municipality operates, and there is no place to intervene in them.

Conclusion

51. Therefore, if my opinion prevails, the motion for a further hearing is denied. Beyond what the law requires, and despite what is written in paragraph 41 [para. 40-trans.], no court costs will be imposed.

After These Words

52. After writing these words, I read the opinions of my colleagues, Justices N. Hendel and N. Sohlberg. My position has not changed, but I feel I must add the following brief words:

53. My colleague, Justice Sohlberg, commented that I favored "reasonableness above authority", because, in his opinion, I focused on the question of the reasonableness of the Minister of Interior's position and not on the question of the Municipality's authority to enact the amendments to the By-Law (see para. 1 of his opinion). Indeed, as I noted, "authority is different from discretion (above, para. 46 [para. 45- trans.]) – but these are two stages of the review of the *same* administrative decision. In our case, as noted, the Minister of Interior's position was that Amendment No. 2 should be invalidated. What needed to be reviewed was his authority to do so (and there was no dispute that the authority exists pursuant to Article 258 of the Ordinance, and therefore there was no reason to expand on that). At the second stage, the reasonableness of his exercise of discretion must be evaluated. A similar evaluation is required for the passage of the amendments by the Municipality: First, we must ask if the enactment of the amendments was done with the proper authority (see paras. 37-43 above [paras. 36-42-trans.]) and then the question arises whether there were flaws in the exercise of judgment (see paras. 47-51 above [paras. 46-50-trans.]). After that evaluation was completed, my conclusion regarding the authority of the Municipality to enact the amendments was different from that of my colleague Justice Sohlberg.

54. This is not the place to restate all the reasons that formed the basis of my ruling (see paras. 37-39 above [paras. 36-38-trans.] regarding the Authorizing Law and paras. 40-44 [paras. 39-43-

trans.] regarding the Hours of Work and Rest Law), but I will note that, in my opinion, the Authorizing Law specifically granted the local authorities in Israel the authority to regulate the opening and closing of businesses in their jurisdictions on the Sabbath, using by-laws. That is clear from the text of the law as well as from its legislative history (see: KP 12(3) 1192-1193 (5751) (U. Lynn (Chair of the Constitution, Law and Justice Committee)), and compare the wording of the bill in its first reading with the wording in the second and third readings). I think there is no dispute between me and my colleagues, Justice Hendel and Justice Sohlberg, about that. However, our opinions diverge regarding the Hours of Work and Rest Law. In my opinion, as noted, it does not articulate a sweeping prohibition on all business activity on the Sabbath, and they disagree with that. I think the position of my colleagues does not reflect the full range of relevant sources regarding the purpose of the legislation (as noted, I will not repeat my explanation, but see paras. 41-43 above [paras. 40-42-trans.], and see also the comprehensive and clear opinion of my colleague, D. Barak-Erez at paras. 4-25), and especially the way the law was understood and implemented in the nearly half century that has passed since it was enacted, both by this court (see: the *Israel Theaters* case, p. 206; the ***Design 22*** case, pps. 44, 46, 63), as well as by the administrative authority in charge of implementing it. In its argument summary, the state clarified that "the interpretation that has been determined, that Article 9A applies only to the personnel aspect of work during days of rest, is compatible with long-standing enforcement policy and the interpretation according to which the Ministry of Labor (in its various forms) operates" (*ibid*, para. 17).

55. In my opinion, there is no contradiction between the Authorizing Law and the Hours of Work and Rest Law. Regarding this determination of mine, my colleague Justice Sohlberg wondered, "What is the point of the Authorizing Law?" (para. 16 of his opinion), noting that if the Hours of Work and Rest Law does not include a sweeping prohibition on opening businesses on the Sabbath, then the point of departure is that their opening is permitted. However, that, in my understanding, is exactly the justification at the heart of the Authorizing Law. It is a basic principle that one does not prevent a citizen from making a living "and one doesn't get involved in this life in a purely administrative way" (HCJ 144/50 Shaiv v. Minister of Defense, 5 PD 399, 407 (1951)). It is true that the administrative agency has no authority other than that which the law grants it: "If an agency professes to deviate from the domain delimited, it leaves the domain recognized by law, and in that sense, its actions are null and void" (Baruch Bracha, *Mishpat Minhali [Administrative Law]*, Vol. I 35 (1987); See als: Zamir, p. 73; Dafna Barak-Erez, *Mishpat Minhali [Administrative Law]*, Vol. I 97 (2010) (*hereinafter: Barak-Erez*). As I noted, the Authorizing Law was enacted because of the doubt that arose regarding the authority of local authorities to enact provisions in their by-laws regarding prohibitions on opening businesses on the Sabbath (see para. 38 above [para. 37-trans.]; see and compare a similar authorizing law addressing the sale of pork; ***Solodkin*** case, pp. 602, 607-608). The Authorizing Law was enacted and granted the Municipality the authority "to regulate the opening and closing of shops, and workshops […]" on "days of rest, taking into consideration reasons of religious tradition". Accordingly, President M. Shamgar ruled in the *Israel Theaters* case that "Article 249(20) does not set mandatory guidance for the local authority but rather merely grants it power. That is understood, because we are talking about an authorizing provision whose application and method of implementation remain in the hands of the local authority" (*ibid*, p. 207); In accordance with that, I ruled at the time, in the ***Bremer*** case, that if the municipality believes

that the character of a city justifies permitting certain businesses to be open on the Sabbath, it should amend the by-law (See: *ibid*, para. 52), and as a result the Municipality enacted the amendments that are the subject of our case. That was also my position in the verdict that is the subject of the further hearing, and that is my position now.

56. For that reason, I cannot agree with the approach of my colleague, Justice Sohlberg, which declines to view the Authorizing Law as a law enacted subsequent to the Hours of Work and Rest Law. It is well-known that laws are not enacted for the sake of enacting them. The legal situation that existed prior to the passage of the Authorizing Law is different than the legal situation now. The Authorizing Law changed the face of the Municipalities Ordinance, which predates the Hours of Work and Rest Law. Article 249(20) of the Ordinance, which also predates the Authorizing Law, but within whose framework the case law had barred taking religious tradition into consideration, changed its form, and thanks to Article 249(21) it took on a new form. Therefore, as I noted (see para. 43 above [para. 42-trans.]), *even* if there were a contradiction between the Authorizing Law and the Hours of Work and Rest Law, then under the non-interpretive standards we use, the Authorizing Law prevails as a later law. That is because it was enacted in 1990, while Article 9A was added to the Hours of Work and Rest Law in 1969.

57. As to the comment of my colleague Justice Sohlberg about the need "to limit the wingspan" of the reasonableness rationale (see paras. 35-36 of his opinion), I emphasize that my opinion differs from his. In this court's jurisprudence going back nearly four decades, the reasonableness rationale is as an essential tool in reviewing the decision of an administrative agency (See: HCJ 389/80 *Dapei Zahav Ltd. v. Broadcasting Agency*, 35(1) PD 421, 435-449 (1980); See also Barak-Erez, Volume II, pps. 723-769 and especially p. 733). In my opinion, there is no flaw in the reasonableness rationale just because it is an abstract norm or an open-ended term. On the contrary: "that fact allows reasonableness to be a 'bridge through which the law can provide modern solutions to new social problems'" (HCJ 3997/14 *Movement for Quality Government in Israel v. Foreign Affairs Minister* [unpublished], para. 2 of my opinion (February 12, 2105); For more on the importance of the reasonableness rationale in administrative law, see, e.g.: *ibid*, paras. C-D of Deputy President E. Rubinstein's opinion, and paras. 3-6 of the opinion of my colleague, Justice E. Hayut; see also HCJ 5853/07 *Emunah National Religious Women's Movement v. Prime Minister*, 62(3) PD 445, 486-489; 510-512 (2007), to which my colleague Justice Sohlberg referred (in that case, Justice A. Grunis's position regarding the reasonableness rational, on which my colleague relied, remained a minority opinion, and Justices A. Procaccia and E. Arbel addressed the status and importance of the reasonableness rationale)). The sting of its vagueness is dulled following years in which case after case in Israeli common law shaped it, something that provides us a comprehensive body of rules to govern its implementation.

58. My position, as stated, has not changed, and it is that the Municipality is authorized to enact provisions in its by-laws concerning the regulation of business activity on the Sabbath. Exercising this authority must withstand the standards accepted in our administrative law, and specifically it must be proportional. I also held (see paras. 49-51 above paras. 48-50-trans]) that the amendments in our case are within the zone of proportionality accorded to the Municipality, and therefore there is no room to intervene in them. This determination does not mean that there are no other frameworks for regulating business activity on the Sabbath that would also be within the zone of proportionality. If, for example, the municipality wanted to distinguish

between places of entertainment and business establishments within the By-Law and to permit opening the former only – even though that distinction has no grounding in the legislation – and some petitioner challenged a hypothetical by-law such as this, I also would think there is no room for intervention. The very exercise of the authority granted it, as well as its method of exercising it within the zone of proportionality, are up to the Municipality.

59. In the *Bremer* case, there was no doubt that the by-law did not permit opening businesses on the Sabbath. I thus ruled in that case that the Municipality should work to ensure that businesses are closed on the Sabbath, and if the character of the city justifies, in its opinion, permitting certain businesses to be open on the Sabbath, the Municipality should change the by-law. That was – as I noted (see above, para. 49 [para. 48-trans.]) – not to make a value judgement regarding the desired character of the Sabbath, but rather as an expression of the view that laws, including the By-Law, should be followed. Those words also apply to the case at hand. My ruling does not seek to express a "secular" or "religious" view. My verdict reflects what, in my mind, is the correct interpretation of the law, as I explained at length.

The President

Justice Y. Danziger

With complete concurrence, I join the comprehensive judgment of my colleague the President.

At the heart of the matter – the question of the Sabbath. How it should be treated and how it should be observed. This question is a question of values, and the answer will vary depending on the identity of the respondent. Recognition of that fact of course supports the conclusion that the discretion to determine the appropriate balance concerning the Sabbath should not be exercised generally, "at the national level", but rather in a more focused and considerate way, for each urban space, keeping in mind the difference and diversity among the populations that comprise the various cities. This approach facilitates optimal expression of the character and uniqueness of the cities and their residents. It facilitates maximal expression of the free wills and autonomies of the residents. The appropriate perspective, as my colleague the President expressed well, is the perspective of "live and let live". In a society composed of a complex human mosaic, this perspective is necessary and essential. It is the cornerstone of successful communal life. In this sense, as noted, it is hard to give priority to a value judgment at the "national" level, which is inherently more general and less pluralistic, at the expense of a narrower judgement, aimed at the local character only. In addition, it should be noted that the Sabbath is not a singular thing. There is no one correct way to observe it. It can be done this way and that way. In that context, I am concerned that the dichotomous division between one who "observes" the Sabbath and one who "violates" it oversimplifies the reality and its complexity. This is especially so regarding the concern that the Minister of Interior expressed, that the national religious look and character of the Sabbath will be changed in one fell swoop, and in place of the "national agreement" about it, there will be one big confusing mess. As noted, this concern assumes, in theory, that there is one correct "national way" to observe the Sabbath, which is not the case.

Justice

Justice Y. Amit

1. I concur with the precise and exhaustive judgment of my colleague, the President.

   For years, the conduct of the executive branch indicated that, in effect, it had decided not to decide regarding the validity of the amendment to the By-Law. As noted in the President's judgment, that conduct should be viewed as an unexplained refusal which does not withstand judicial review. I also share the President's opinion regarding the relevance of the Hours of Work and Rest Law, 5711-1951, because there are different purposes at the foundation of the two laws, and "the division of labor is as follows: the Hours of Work and Rest Law regulates the Jewish worker's rest on the Sabbath, while the by-laws address the question of opening (or closing) the businesses themselves" (Gidon Sapir, "'Vikaratem Lashabat Oneg?' Avoda Mis-char Vibilui Bishabat Biyisrael Mekom Hamidinia Viad Hayom ['And Call the Sabbath a Delight?' Work, Commerce and Leisure on the Sabbath in Israel from the Founding of the State to the Present]", 31 *Mehkarei Mishpat* 169, 182 (2017); hereinafter: *Sapir*). Similarly, I don't think there was a flaw in the discretion of the Municipality, which chose to legislate a balanced arrangement within the zone of proportionality.

2. The decision to grant a further hearing was also based on the honored status of the Sabbath "in the world of Judaism", and, I would add, the honored status of the discussion of the Sabbath's character in Israeli society. Given the importance of the issue, I will address it briefly.

   I completely agree with the President that "The Minister of Interior's position did not appropriately consider the uniquely autonomous status of the Municipality (para. 27 [para. 26-trans.] of her verdict). Indeed, the present case exemplifies the clash between the central government and the local government. The relationship between these governments is complex, and this is not the place to exhaust the discussion (for an expansion, see: Nehamia Avneri, *Mishpat Hamakom: Shilton Atzmi Mekomi Vichakika Mekomit* [*The Law of the Land: Local Self Rule and Local Legislation*], 23-58 (2013) (*hereinafter*: Avneri); Shalom Zinger, *Dinei Shilton Mekomi: Hoveh Viatid* [*The Law of Local Government: Present and Future*], 121-147 (2013) (hereinafter: *Zinger*); Yisachar Rosen-Zvi, "'Makom Hatsedek': Mishpat Hashilton Hamekomi Vi-i-Tsedek Chevrati" ['The Place of Justice': The Law of Local Government and Social Injustice]", 28 *Iyunei Mishpat* 417 (5766-5767)). To avoid getting off scot-free, I will add a few words about the status of local government in the context of multi-culturalism, shaping the public sphere and the relationship between religion and state. I will note that I address these issues from a broad perspective and therefore will not address the legal distinctions between a municipality and a local council.

3. There are two discernable principled perspectives regarding the status of the local government, and for our purposes we will make do with the succinct description that Justice Folgelman provided in HCJ 4790/14 *Yahadut Hatorah v. Minister of Religious Services* [unpublished] (October 19, 2104) (references deleted):

   > "The *administrative perspective* views the local government as part of the central government. On this view, the central government is the source of authority for the local government, and the central government has supervisory powers over and the power to intervene in the local government. This position sometimes expresses a paternalistic

> view of the local government as pertains to its relationship with the central government. It views the local government as one who is dependent on the [national-trans.] government or as an arm of the central government; 'a contractor' that plays a role for another governmental body, subject to its instructions and under its supervision [...] in contrast to this perspective, there is another perspective regarding the local government -- the *autonomous perspective*. In contrast to its predecessor, this perspective considers the local government to have independence from the central government [...] It is based on the opinion that the local government is a body of independent-democratic rule that represents the interests of the local residents. It views the local government as a tool for realizing communal-cultural values regarding different issues, meaning: an institution whose role is to facilitate members of the community running their 'internal' affairs without intrusion from the state, while preserving the ability of the communities to control their public space and to translate the preferences of their members into public policy [...]
>
> Throughout the years, various approaches have been expressed in the case law (in various contexts) regarding the above-mentioned perspectives, to the point where some said that the law of local government 'is swinging like a pendulum' between two opposing perspectives on local government [...]"

To continue the image of the pendulum, I note, by the way, that I doubt if the legislative branch and the executive branch invest sufficient efforts to improving the organizational and legal framework within which local government agencies operate. Over the years, commissions have been established, experts have invested time and effort, but a significant portion of the reports on the subject have not been implemented. It is particularly worth nothing the report of the Governmental Commission on Local Government Affairs (Zinbar Commission), which was approved by the government as far back as 1985 but was neglected. In addition, the Municipalities Bill, which was proposed by the government and put before the Knesset for consideration in 2007, was not promoted (for academic writing on the bill, see the publication *Chukim*, which devoted its first issue to the subject, and also Ron Shapira's article, "Hirhurim Al Hatzaat Chok Iriot Chadash [Reflections on the New Municipalities Bill]", 7 *Din Vidvarim* 677 (2012)).

4. In any event, the Israeli legal system recognizes the autonomy of local governments to act within the framework of their lawful authority. In our case, the authorization is unambiguous: The Law to Amend the Municipalities Ordinance (No. 40), 5751-1990 (known as the Authorizing Law) authorizes the municipality to design the local legal arrangements for opening places of business on the Sabbath. This means that for this sensitive issue, the legislator chose to transfer the authority to the local government, which acts according to its considerations and commensurate with the character of the residents and the place (see paras. 26-29 [25-28-trans.] of the President's opinion). This starting point is in large part also the ending point that dictates

denying the motion. I chose to go beyond that only in order to expand the view-point and to highlight the fact that the Authorizing Law is just one branch of the branches of a broader principle, which is expressed in legislation, case law and the legal literature.

5. *Legislation*: The most prominent example of the legislator's consideration of the local character is the Authorizing Law that is the subject of our discussion, but additional laws regarding the relationship between religion and state contain a similar discernable trend. The prohibition on selling pork was left to the discretion of the local authorities (Local Authorities Law (Special Authorization), 5717-1956), as was the opening of places of entertainment on Tisha Ba'av (Law Prohibiting Opening Places of Entertainment on Tisha Ba'av (Special Authorization), 5758-1997). The prohibition on openly displaying leavened products on Passover does not apply in a town where a majority of residents are not Jewish (art. 2 of the Law of the Holiday of Matzot (Prohibitions on Leavened Products), 5747-1986), and the prohibition on raising swine excludes a number of local authorities enumerated in the schedule of the Law Prohibiting Raising Swine, 5722-1962. From an additional perspective, the Law of Jewish Religious Services [Integrated Version], 5731-1971 regulates religious services by establishing *local* religious councils, and the local authority's council significantly influences the appointment of the council's members (art. 2 of the law; See also art. 6A) and also influences the appointment of the municipal rabbi (Amendment 7 of the Jewish Religious Services Regulations (Elections of Municipal Rabbis), 5768-2007).

6. *Case Law*: The President's opinion cited judgments that emphasized the important of creating local arrangements regarding opening and closing businesses on the Sabbath, as well as in the context of selling pork and its products, according to the legislation cited above. I can add statements that have a more general hue. Thus, for example, Justice Cheshin emphasized in HCJ 6741/99 *Yekutieli v. Minister of Interior*, 55(3) PD 673, 705 (2001): "Unlike the state, whose policy is inherently state-wide, a local authority is authorized and required to focus itself – subject to specific exceptions enumerated in law – on its own domain only, and its policy must express local interests of the authority and its residents. A local authority is supposed to take care of its community – not the entire community of the state – and its policy must adapt itself to the community as a whole living within the authority's domain".

   In another matter, Justice Cheshin directly addressed the provision of religious services by the local authority:

   > "Even though religion – doctrinally – knows no boundaries of place or time, religious services have a local character and are supposed to adapt themselves to the specific needs of the residents of this or that local authority […] The demands for Jewish religious services, while sharing a common denominator, vary in their points of emphasis from community to community; the demands for religious needs can be heterogeneous and dependent on worldview" (HCJ 4247/97 *Meretz Party in Jerusalem City Council v. Minister of Religious Affairs*, 52(5) PD 241, 253 (1998)).

Prior to the above words came comments by Justice Alon, who expressed himself in this spirit: "Local authority elections give expression, first and foremost, to the will of the residents of that authority regarding the municipal issues of that place, and the religious services provided by the

religious council constitute a substantial part of these municipal needs" (HCJ 121/86 *Shas Party v. Minister of Religious Affairs*, 40(3) PD 462, 466 (1986).

Justice Dorner's words in HCJ 2838/95 *Greenberg v. Katzrin Local Authority*, 53(1) PD 18 (1997) (dissenting opinion regarding the result):

> "Referring the handling of local issues to the local authorities is based on the view that it is better for local issues to be regulated according to the conditions of each place and its needs. The appropriate solution for a particular problem in a particular town does not necessary fit another town. The local authority has a relative advantage over the central government in handling local issues. Additionally, for considerations of democracy, local issues should be managed according to the will and aspirations of the residents of the place, and by their elected officials."

7. *The literature* and academic writing of legal scholars also include expressions of recognition of the special status of the local authority, and I will cite a few of the sources relevant to our issue. Professor Itzhak Zamir thought that the special status of the local authority is even expressed in the context of primary arrangements. He said: "It is one thing to grant authority for setting primary arrangements to a local authority, such as a municipality, which is a democratic body directly responsible to the residents. Democracy, even micro-level democracy, deserves sweeping authority to serve the residents according to the policy it set. It is another thing to grant such authority to a minister or another administrative agency" (Itzhak Zamir, "Hasamchut Haminhalit [Administrative Authority]", 81(a) *Mishpat Umimshal* 103 (1992); See also Itzhak Zamir, *Hasamchut Haminhalit* [*Administrative Authority]*, Vol. 1 446-457 (2nd ed. 2010)).

Prof. Menachem Maunter addressed this issue in the framework of a discussion of the State of Israel as a multi-cultural state. According to his approach, the solution for disagreement stemming from different cultural groupings is to implement the principle of decentralization. As he wrote:

> "Decentralization needs to be an important principle in the life of a multi-cultural state. The citizens of such as state should get used to the perspective that the state is not supposed to comprehensively realize their normative viewpoints within the context of its uniform arrangements. Instead, citizens of a multi-cultural state should expect to realize their normative viewpoints comprehensively at the sub-state level, namely: at the municipal level, within cultural communities, in associations […] to say it another way, citizens of a multi-cultural state need to get used to the recognition that only some of the normative arrangements that apply to them will be uniform, while others will be differential – they will apply only to some citizens" (Menachem Mautner, *Mishpat Vitarbut Biyisrael Bifetach Hameia Hesrim Viachat [Law and Culture in Israel at the Turn of the Twenty-First Century*] 322 (2008)).

Mautner went on to specifically address realizing the principle of decentralization as concerns the public character of the Sabbath in Israel. In light of the definition of Israel as a Jewish state, the Sabbath was established as the official day of rest, but regarding the specific content that is

to be expressed in the public sphere, Mautner supports a solution that allows different communities to design arrangements that suit the character of the place, so long as they don't severely infringe on those whose culture and beliefs differ (*ibid*, pps. 326-327; Compare Sapir's suggestion on page 223, that primary legislation can regulate the issue at the national level, together with authorizing local authorities to make changes via a special majority; See also the draft Sabbath Law, 5776-2016). It is worth mentioning Mautner's comment that the response to the disadvantages of the principle of decentralization is developing social solidarity and emphasizing the common good (*ibid*, p. 331 and thereafter; for more on trends and challenges of decentralization see, Ishai Blank, "Mikomo Shel Ha'mekomi': Mishpat Hashilton Hamekomi, Bizur Vi-I Shivyon Merchavi Biyisrael [The Place of the 'Local': the Law of Local Government, Decentralization and Spatial Inequality in Israel", 34 *Mishpatim* 197 (5764-5765); Ishai Blank, "Mamlachtiut Mivuzeret: Shilton Mekomi, Heipardut Vi-i-Shivyon Bichinuch Hatzibori [Decentralized Statehood: Local Government, Secession and Inequality in Public Education]", 28(2) *Iyunei Mishpat* 347 (2004); Ishai Blank, "Kihila, Merchav, Subyekt – Tezot Al Mishpat Umerchav Biakvut Sifro Shel Yisachar (Isi) Rosen-Zvi [Community, Space, Subject - Theories on Law and Space Following Yisachar (Isi) Rosen-Zvi's Book]", 2 *Din Udvarim* 19 (5767)).

As part of Prof. Ruth Gavison's attempts to find a remedy for the perpetual tension in the relationship between religion and state in Israel, she also addressed questions related to the character of public life. Prof. Gavison expressed regret that "these battles are waged using such dogmatic language, and they deteriorate into a threat against the rule of law and the legitimacy of the institutions authorized to make communal decisions in our society. That stems from, *inter alia,* the breakdown of mechanisms for negotiation and compromise". She later emphasized that "Some of the coercion stemming from enforcing a particular public character can be minimized using spatial limitations", and as an example she mentioned activities in the public sphere on the Sabbath (Ruth Gavison, "Medina Yehudit Videmokratit: Etgarim Visikunim [Jewish and Democratic State: Challenges and Risks]", *Rav-Tarbutiut Bimidina Demokratit Viyehudit [Multi-culturalism in a Democratic and Jewish State*] 213, 258-259 (eds.: Menachem Mautner, Avi Sagi and Ronen Shamir; 1998)). Indeed, he who ignores the difference between the population of Ramat Gan and the population of Bnei Brak, or between Jerusalem and Tel Aviv, and seeks a uniform, rigid solution, will find himself forcing an inappropriate social arrangement in a broad manner. The differences are not just between cities. Within the same city, there are differences between neighborhoods and between areas, and the local authority is tasked with these distinctions. The variations and differences at the municipal level are not just at the geographical-territorial level but also along the axis of time. What was right for yesterday is not necessary right for today, creating a need to allow the local authority, which has its "finger on the pulse", the flexibility it needs. We need not go far back to see that "the city of Tel Aviv at that time was a single house on the seashore" but now Tel Aviv is a vibrant and bustling city, a city that never stops, and its character in the 2000's is not the same as its character decades ago.

8. Following our minor digression, we get back on track and point to the targeted conclusion: Israeli law recognizes the autonomy granted the local government to exercise its lawful authority, commensurate with the nature of its residents and the local character. Indeed, "Regarding the *source* of authority, according to the principle of administrative rule of law [*intra*

vires-trans.] […] the local authorities are subject to the favor of the governmental branch (legislative or executive) which grants them the power to act. On the other hand, regarding the *content* of the authority, the various authorizing statutory provisions grant the local authority powers with a generous hand" (Avneri, p. 91; emphasis in original). That is the general principle, and for the specific issues of religion and state it has advantages that cannot be disregarded: creating a public sphere that suits the character of the surroundings and the way of life of the residents of the place, as well as minimizing coercion of different cultural populations. However, it is not a silver bullet, and the principle should be implemented with caution and sensitivity.

Similarly, the autonomy granted the local authority is not, of course, absolute. The various legislative provisions detail the powers of the central governmental agencies to supervise and intervene. *Inter alia*, legislating by-laws is subject to the authority of the Minister of Interior pursuant to Article 258 of the Municipalities Ordinance [New Version]. In the current case, we need not exhaust the discussion of the boundaries of the local authority's autonomy or the limits of the power of the Minister of Interior to intervene in the content of a city's by-law (on this, see para. 26 [para. 25-trans.] of the President's opinion, and compare: HCJ 58/53 *Haviz v. Haifa Municipality*, 7 PD 701, 713 (1953); HCJ 6249/96 *Association of Contractors and Builders in Israel v. Mayor of Holon*, 52(2) PD 43, 47 (1998); HCJ 7186/06 *Malinovsky v. Holon Municipality* [unpublished], paras. 57-62 (December 29, 2009); HCJ 1756/10 *Holon Municipality v. Minister of Interior* [unpublished], especially para. 41 (January 2, 2013); Avneri, pps. 78-84; Zinger, p. 211).

In my opinion, to extrapolate, we can say that the scope of the legitimate intervention of the Minister of Interior (or another agency of the central government) is inversely proportional to the scope of the discretion granted the local authority, pursuant to the authorizing law and its purpose (compare: HCJ 953/01 *Solodkin v. Beit Shemesh Municipality*, 58(5) PD 595, 621 (2004)). In our case, the legislator authorized the local authority to act according to its discretion, which requires, as noted, adapting to the character of the residents and the place. The Tel Aviv City Council did the work of designing a measured and balanced arrangement that expresses observance of the character of the Sabbath in the public sphere along with considering the daily needs of a respectable portion of city residents.

In contrast, the Gavison-Medan Contract contained an agreement for a general prohibition on commercial activity on the Sabbath, but suggested allowing limited activity for small grocery shops (Yoav Artsiali*, Amanat Gavison-Medan: Ikarim Viekronot [Gavison-Medan Contract: Essences and Principles*] 40 (Israel Democracy Institute; 5763)).

Before concluding I note that in light of the special status of the Sabbath in the State of Israel and against the background of the distinction between the local level and the central government, I did not see fit to evaluate what has been done in this area in foreign countries. In that context, I will briefly say that the arrangement that the Municipality of Tel Aviv set is moderate compared with the global trend toward limiting restrictions on commercial activity on days of rest (see Tomer Yahud and Ariel Finkelstein, "Chukei Hamischar Vihavoda Biyom Hamenucha Bimidinot Haolam: Mechkar Hashvaati [Law of Commerce and Labor on the Day of Rest Throughout the World: A Comparative Study]" (Institute for Zionist Strategies; July 2016).

9. *Conclusion*: Regarding the petition before us, I concur with the President's opinion.

Justice

Justice N. Hendel

1. Again, the Sabbath. The queen for whom the State of Israel forces the court to define the boundaries of her kingdom.

   The current procedure raises for further hearing the question of the lawfulness of two amendments to the By-Law of Tel Aviv-Jaffa (Opening and Closing Shops), 5730-1980, K.T. 745, 1448 (hereinafter: *the By-Law*), which moderate and abridge the scope of the prohibition that the By-Law had imposed in the past on opening businesses on the Sabbath and Jewish holidays. The first one - By-Law of Tel Aviv-Jaffa (Opening and Closing Shops) (Amendment), 5775-2015, K.T. H.S.M. 358 (hereinafter: *the First Amendment*) – permits the opening of "convenience shops" in gas stations and other shops – "including any office, commercial establishment, kiosk […] public entertainment, workshop or factory" at three defined sites within the city. Similarly, the First Amendment significantly reduces the restrictions on the format for operating coffee shops, a term that includes also "restaurant, bar, a shop selling ice cream or any other food establishment" and pharmacies throughout the city. An additional element of the amendment – the authority to grant a permit to open grocery stores on the Sabbath and Jewish holidays on certain streets – was invalidated by then-Minister of Interior Gidon Saar. In addition to the argument that it essentially authorized activities of businesses "that for years trampled upon the By-Law with a heavy boot" and was not an arrangement based on relevant criteria, the invalidation was explained by reference to the disproportional infringement that opening the grocery stores via the proposed framework would cause to "the value of the Sabbath as the general day of rest in the State of Israel".

   Following the invalidation of this aspect of the First Amendment, the Tel Aviv-Jaffa City Council approved the second amendment – that is the Tel Aviv-Jaffa By-Law (Opening and Closing Shops) (Amendment), 5777-2017, K.T. H.S.M. 698 (hereinafter: *the Second Amendment*). Like its predecessor, this amendment authorized the mayor to grant permits to open grocery stores on the Sabbath and Jewish holidays. However, the framework proposed in the Second Amendment is more detailed, grounded and proportional in a number of ways: first, it limits the size and character of the grocery stores – and clarifies that permits can be issued only to kiosks or businesses used for "selling food and consumer items for personal or household use, that do not include handling the food, including food delivery", whose size does not exceed 500 square meters. The second amendment limits the number of permits and subjects the authority of the mayor to a maximum "regional quota". The starting point for calculating that quota is 15% "of the number of units used for transacting in food in that same area during all the days of the week." In addition, the amendment gives clear priority to opening grocery stores located in central areas that are noisy anyway, while minimizing the infringement on the character of the Sabbath in residential areas, and it outlines clear and egalitarian criteria for allocating permits, in order to avoid rewarding lawbreakers.

   The Second Amendment was also brought to the approval of then-Minister of Interior Gidon Saar, who noted its relatively limited nature, compared with its predecessor. However, the minister saw fit to clarify certain aspects of the amendment -- the criteria for granting permits

and the scope of discretion allowing the authority in the future to expand the quota for permits. The minister therefore ordered the publication of the Second Amendment in Reshumot to be delayed, pursuant to his authority under art. 258(c) of the Municipalities Ordinance [New Version], and left the final decision on the issue to his successor. However, the successor failed to make a decision, his authority - which at a certain point was transferred to the Israeli government - was later restored to the current Minister of Interior, Aryeh Deri, but still the decision was delayed. With the continued silence of the Minister of Interior and the government as background, the verdict that is the subject of the further hearing was rendered, in which this court (President M. Naor and Justices E. Hayut and D. Barak-Erez) rejected the petitioners' claims in HCJ 6322/14 and HCJ 996/15 [unpublished] (hereinafter: *Association of Merchants*), accepted the Tel Aviv Municipality's petition (HCJ 4558/15) [unpublished] regarding the Second Amendment, and authorized the two amendments to the By-Law (hereinafter: the verdict). At first, it was held that the failure, over a long period of time, to make a final decision on the fate of the amendment -- deviating from the deadlines set out in the Municipalities Ordinance – was a violation of the general obligation to act with due diligence, and ignoring the agreements reached during the litigation was essentially "an unexplained decision to invalidate Amendment No. 2" (para. 18 [para. 17-trans.] of President M. Naor's judgment). The burden of proving the lawfulness of the decision therefore passed to the state – which did not meet it and did not present any reason for invalidating the Second Amendment.

Regarding the substantive merits of the Association of Merchants' arguments, it was held that the Law Amending the Municipalities Ordinance (No. 40), 5751-1990, S.H. 1336, 34 (hereinafter: *the Authorizing Law*) explicitly authorizes the local authorities to regulate the opening and closing of businesses on the Sabbath and Jewish holidays – and that the amendments do not contradict the provisions of the Hours of Work and Rest Law, 5721-1951, because the latter "concerns the regulation of individual labor relations internal to the place of business. In contrast, the amendments to the By-Law regulate the activities of businesses without reference to the identity of the employee". Regarding the issue of discretion, it was held that the amendments are within the zone of proportionality and fulfill the purposes of the Authorizing Law – conducting a balance between the conflicting rights, according to the unique characteristics of each local authority. The petitioner's arguments in HCJ 2998/15 [unpublished], seeking to expand the list of sites where the First Amendment allowed shops to open, were also rejected.

The Association of Merchants, which was dissatisfied with the result, filed a motion for a further hearing in which it repeated, *inter alia*, the argument that the amendments to the By-Law are contrary to the Hours of Work and Rest Law which, it claimed, prohibits the very existence of commerce on the Sabbath. Furthermore, the Association of Merchants found that, although it was not brought to the court's attention in real time, the Minister of Interior, as early as April 9, 2017 – ten days before the verdict was rendered – signed a letter intended to be sent to the mayor of Tel Aviv-Jaffa, containing a reasoned decision regarding the invalidation of the second amendment (hereinafter: *the reasoned decision*). Under these circumstances, and considering the substantive ramifications of the verdict on Israeli society as a whole, the Association thought that the position of the minister should not be ignored, and his reasons should be evaluated before invalidating the decision. The Minister of Interior shared this position, and the state

supported holding a further hearing on the question of the relationship between the Hours of Work and Rest Law and the Authorizing Law – although, on the substance of the matter, it accepted what was decided in the verdict on this issue. On July 12, 2017 Deputy President (ret.) E. Rubinstein granted the Association of Merchant's motion, and decided that "the further hearing will apply to the entire verdict". Hence the hearing before us.

2. Before getting into the heart of the issue, as a preliminary matter, I will outline general contours for the image of the Sabbath, about which – as the Babylonian Talmud relates – the Holy One Blessed Be He said to Moses our rabbi, the most revered of prophets:

> "I have a precious gift in My treasure house, called the Sabbath, and desire to give it to Israel; go and inform them" (Babylonian, Shabbath, 10a).

This "present" occupies a central place in the world of Judaism – and found a place of honor in the Ten Commandments, on the seam-line between the fundamental commandments that concern the relationship between a person and God, and those that are among people. The Sabbath carries a double normative duality. First – the universal as opposed to the particular. The world as opposed to the Jewish people. The holy scriptures contain a distinction between the "Genesis Sabbath" and the "Jewish Sabbath". In this sense, the Sabbath has undergone permutations. At the conclusion of the story of creation in the chapter Genesis, the Sabbath is presented as "the crown of creation" – "God blessed the seventh day and made it holy because on it he ceased all the work that he had been doing in creation" (Genesis 2:3). Ibn Ezra clarifies that "doing" means that humankind continues the doing, starting on the eighth day. Construction of the physical world hence concluded in six days, but from a moral point of view, the world is not yet complete. The Sabbath is the mediator between the creation of the physical world and the creation of humankind, responsible for continuing its spiritual construction (see the comments of the Rabbinical Judge Dr. Isidor Grunfeld on the book "Horeb" of Rash"ar Hirsch [Samson Raphael Hirsch, *Horeb: A Philosophy of Jewish Laws and Observances*, Volume I, 273 (the Soncino Press, 1962)].

The second stage in the development of the Sabbath is the obligation to "keep and remember" that was imposed on the Jew in relation to the Sabbath day. As was written in the Ten Commandments in the Book of Exodus –

> "Remember the Sabbath day to set it apart as holy. For six days you may labor and do all your work, but the seventh day is a Sabbath to the Lord your God; on it you shall not do any work, you, or your son, or your daughter, or your male servant, or your female servant, or your cattle, or the resident foreigner who is in your gates. For in six days the Lord made the heavens and the earth and the sea and all that is in them, and he rested on the seventh day; therefore the Lord blessed the Sabbath day and set it apart as holy" (Exodus 20:8-11).

The Sabbath therefore has a complex and multi-faceted nature. Indeed, the Sabbath prayers and blessing over the wine mention the universal aspect ("in memory of the act of creation") as well as the Jewish historical aspect ("in memory of the exodus from Egypt").

There is an additional duality. On the one hand, the Sabbath is a commandment concerning the relationship between people and God, but simultaneously it is also a commandment concerning the relationship among people. More precisely, between a person and his society. The aspiration is to create a different society. A society of equality and rest. The Sabbath is supposed to be the religious experience that brings a person closer to his creator, and also a social experience that topples societal boundaries and brings a person closer to himself. We should pay attention to what the Book of Exodus commands – that all of us should rest on the Sabbath: the landlord, the citizen and the foreigner, and even the slave (at the time this concept existed) and the domestic animal. Jewish law even recognizes the concept of the "resting of utensils" (See Babylonian Talmud, Shabbath, 18b). Such is the Sabbath – a diverse, multi-purpose and multidimensional creature.

The Sabbath contains a national-particularistic aspect, in which it is presented as a kind of symbolic and perpetual reminder of the extraordinary relationship between God and his people – a relationship that has a constitutive expression in the exodus from slavery in Egypt to spiritual liberation and receiving the Bible. In this sense, the Sabbath expresses the national uniqueness and spiritual uniqueness of the Jewish people: "It is a sign between Me and you for your generations, to know that I, the Lord, made you holy […] Thus shall the children of Israel observe the Sabbath, to make the Sabbath throughout their generations as an everlasting covenant. Between Me and the children of Israel, it is forever a sign" (Exodus, 31:13-17). In parallel, but in harmony, the image of the Sabbath – as it is portrayed in the Ten Commandments of the Book of Exodus (20:8-11) and in the Book of Deuteronomy (5:12-15) – also expresses a universal human experience of exodus from slavery to freedom. It puts the social aspect in center-stage and calls for the learning of lessons from past experiences, internalizing the value of a day of rest that momentarily blurs the gaps between social classes – "in order that your manservant and your maidservant may rest like you".

Given the many layers and meanings of the Sabbath, it is no wonder that, even when other traditions found themselves tossed about in the winds of change or bowing under the burden of new and challenging world views, the Jewish public maintained broad agreement regarding its importance. On this point, we recall the famous words of Asher Ginsberg, "Ahad Ha'am":

> "One need not be Zionist or scrupulous about religious commandments in order to recognize the value of the Sabbath […] we can say without exaggeration that *more than the Jewish people kept the Sabbath, the Sabbath kept them*. Had it not reshaped their 'soul' to them and rejuvenated their spiritual life each week, the hardships of the 'days of action' would have pulled them further and further down, until they would have finally descendent to the lowest storey of materialism and moral and intellectual nadir. Therefore one definitely need not be Zionist to feel the glory of the historical holiness that surrounds this 'good gift'" (Ahad Ha'am, *Al Parshat Drachim [At a Crossroads*], Vol. 3, Chap. 30; emphasis added).

Haim Nahman Bialik, a graduate of the Volozhin Yeshiva and the national poet, also noted, in that spirit, that "without the Sabbath, there is no image of God and no image of humankind in the world. If work were an end in itself, there would be no difference between human and beast

[…] the Sabbath is culture" (Letters of Haim Nahman Bialik, Vol. 5, 228 (Fishel Lachower, ed., 5699)).

These perspectives quickly became entrenched in the law of the young State of Israel. As early as June 9, 1948 – less than a year after the establishment of the state – the official newspaper published the Days of Rest Ordinance, 5708-1948, which declared the Sabbath, together with Jewish holidays, to be "the fixed days of rest in the State of Israel". The Work and Rest Hours Law, 5711-1951 granted the Sabbath a more substantial and tangible status, determining that "the weekly rest will include […] for Jews, the Sabbath Day." These provisions, on whose details I will expand below, express the diverse purposes that allow even a person who is not religious to recognize the importance of the Sabbath. As Justice A. Barak noted a decade ago:

> "There are two purposes that underlie the arrangements concerning the hours of weekly rest in the Hours of Work and Rest Law, and these complement one another […] one purpose is a social purpose, which is concerned with the welfare of the worker and gives him social protection […] The second purpose is a national-religious purpose, which regards the observance of the Sabbath by Jews as a realization of one of the most important values in Judaism that has a national character" (HCJ 5026/*04 Design 22- Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department – Ministry of Labor and Social Affairs,* 60(1) PD 38, para. 20 (2005)) (hereinafter: *the Design case*).

And Justice Barak wrote in the *Horev* case (HCJ 5016/96 Horev v. Minister of Transportation, 51(4) PD 1, para. 55 of his opinion (1997) –

> "Sabbath observance is a central value in Judaism. The fourth of the Ten Commandments, the Sabbath constitutes an original and significant Jewish contribution to the culture of mankind. See 31 The Jewish Encyclopedia, [107], under The Sabbath, at 422. It is a cornerstone of the Jewish tradition and a symbol, an expression of the Jewish message and the character of the Jewish people. Deprive Judaism of the Sabbath, and you have deprived it of its soul, for the Sabbath comprises the very essence of the Judaism's nature. Over the generations, throughout its blood-soaked history, our nation has sacrificed many of its children in the name of the Sabbath".

However, we cannot ignore the Israeli reality – which accords the Sabbath a character that is not necessarily compatible with the Jewish law conception over the generations. The delight of the Sabbath in Bnei Brak and Safed is not like the delight of the Sabbath of citizens who take advantage of their vacation day for a walk in the bosom of Israeli nature, a visit to football fields or museums – often with a fascinating integration of the traditional "blessing over the wine" – or "just" for rejuvenation. At the heart of the issue is a deep and profound ideological dispute, which is at the center of a prolonged public discourse that has reached this court on more than one occasion. I personally think that, given the respect with which we should treat each other's

world view – Sabbath view – we would do well to avoid a binary determination and rather shape the public space by way of compromise. We should give expression to the traditional view of the Sabbath, to which I subscribe, without pushing aside a significant segment of the population whose view of the Sabbath – as a national symbol and as a social symbol – differs. And what a good example we have before us. Israeli law does not impose on an individual the Jewish law prohibition against working on the Sabbath. It focuses on his right to rest from everyday troubles. It is no accident that the term day of rest relies on the commandment, "in order that your manservant and your maidservant may rest like you". That is out of recognition that the Sabbath is the day of rest of the Jewish people in its country. This sensitivity to the worker, to the individual, integrates the universal with the particular; the history of the nation with the needs of the individual and safeguarding his human dignity. Indeed, the Sabbath is a secret gift that reveals a new face in every generation.

3. I now state that I cannot concur with the position of my colleague, President M. Naor. Were my opinion to prevail, we would rule that the motion for a further hearing should be granted, in the sense of invalidating the Second Amendment, because the reasoned decision of the Minister of Interior on this issue does not deviate from the zone of reasonableness.

   Indeed, the decision was made with great delay, blatantly violating the obligation of the administrative agency to exercise its authority with appropriate speed, according to Article 11 of the Law of Interpretation, 5741-1981, and according to the agreements reached during the previous proceeding. Furthermore, the Minister of Interior kept quiet and refrained from informing this court – through the Attorney General – about the substantive change in the state of affairs due to his signing the decision to invalidate the Second Amendment. However, as serious as his conduct may be, when it became clear that at the time the verdict was reached, there was a reasoned decision to invalidate the Second Amendment, we are not at liberty to ignore it and to shift the burden from the Tel Aviv Municipality – which petitioned against it – to the state. Indeed, art. 258(d)(2) of the Municipalities Ordinance authorizes the Minister of Interior "to invalidate a by-law *for reasons he will provide*". The obligation to provide reasons, in our case, is therefore grounded in the specific norm that authorizes the minister to invalidate by-laws – and does not derive (only) from the general obligation to provide reasons, which is grounded in Article 2A of the Law to Amend the Organization of Administration (Reasoned Decisions), 5719-1958, or from the obligation of fairness that the administrative agency bears (see Civ App 3886/12 *Zeev Sharon Construction and Earth Contracting Ltd. v. VAT Director* [unpublished], para. 39 (August 26, 2014)). Therefore, had the reasoned decision not been given in time, we would surmise – in light of the combination of the obligation to provide reasons and the provision of Article 6(b) of Law to Amend the Organization of Administration (Reasoned Decisions), 5719-1958 – that it is insufficient to transfer the burden to the state, and that we should render invalid the decision to invalidate the Second Amendment. However, once the reasons for invalidating the Second Amendment were given (even if not delivered) before the verdict was rendered, the obligation to provide reasons was met, and there is no longer a justification for transferring the burden to the state – not to mention "automatically" invalidating the decision to invalidate.

4. My colleague President M. Naor reasons that (para. 17 of her opinion) [para. 16- trans.] "the procedure of a further hearing is intended for clarifying a rule that was decided in a verdict, and

not for discussing what the verdict does not contain" – and therefore the Minister of Interior's reasons, which were not presented to the court in the prior proceeding, cannot influence the result of the further hearing. However, even if the Minister of Interior's reasons were missing, their absence was very "present" – and even played a central, if not determinative, role in the verdict. The discussion of "what is" in the decision in the previous go-round, namely authorizing the Second Amendment due to the Minister of Interior's unexplained invalidation, does not allow us to ignore the reasoned decision that came into the world, at the end of the day, before the verdict was rendered. Under these circumstances, we can understand Deputy President E. Rubinstein's (ret.) approach, which held that a decision bearing such substantial ramifications for the character of the Sabbath in the State of Israel is important enough "to justify further consideration, when all the positions are laid out" (para. 11 of the decision to hold a further hearing). That includes the position of the Minister of Interior, to whom the legislator trusted with broad discretion on the issue.

I will add that even if "the Minister of Interior's position" was not formally presented in the prior proceeding, its substantive reasons were raised before the court and were even analyzed in the verdict. In his reasoned decision, the minister noted that the Second Amendment undermines the social-societal purpose of the days of rest – violating the rights of Sabbath-observant small business owners and workers to equality, freedom of occupation and freedom of religion (paras. 34-42 of the reasoned decision). That is in addition to the infringement on the national-religious purpose and the status quo, which does not allow for "pure, unadulterated" business activity (*ibid*, paras. 43-47). In the minister's view, we can accept limited commercial activity that fills a "critical need" for residents, but the Second Amendment deviates widely from that definition – both because of the number of permits that it seeks to grant, as well as because of the characteristics of the relevant businesses (*ibid*, paras. 51-56). Given the national implications of approving the Second Amendment – which the Minister of Interior believed, for the above-stated reasons, would open the floodgates and lead to a significant and undesirable change in the character of the Sabbath throughout the State of Israel – "the broad perspective that is the purview of the central government" leads, in his opinion, to the conclusion that this amendment should be invalidated (*ibid*, paras. 57-59).

A study of the verdict reveals that the precedent it set is also grounded in analysis of the substantive position of the minister, as described above – which was expressed in the proceeding by other litigants (see paras. 5-7 [paras. 4-6-trans.] of President M. Naor's opinion). That is true regarding the appropriate balance between the conflicting rights and purposes (*ibid*, paras. 24-28 [paras. 23-27-trans.]; paras. 4-5 of Justice D. Barak-Erez's opinion) and also regarding the question of the scope of autonomy that is granted to municipal authorities in this context (para. 25 [para. 24-trans.] of President M. Naor's opinion; para. 3 of Justice D. Barak-Erez's opinion). Considering that the Minister of Interior's *substantive* position was present in the prior proceeding, arguments were argued over it and normative determinations were made about it, I do not see an obstacle to addressing it in the framework of the further hearing – and this time with the *formal* status as a reasoned decision regarding the fate of the Second Amendment.

In the absence of a procedural obstacle to addressing the merits of the reasoned decision, I do not think that the *delay* which it was received – without minimizing its severity – justifies

ignoring its content. Even if I assume that we could have avoided holding a further hearing in the verdict, once the Deputy President ruled positively on that issue – the very holding of the procedure, on all elements of the verdict, is the departure point requiring the panel to render an opinion. The judges on the panel have a broad spectrum of discretion regarding the result of the further hearing, from accepting it to rejecting it. Having said that, it had already been decided to hold a further hearing. I respect the procedural position of the President, but for the reasons I discussed, that it is not the only possible way to deal with the procedural hurdle that the delayed decision of the Minister of Interior puts before us. Indeed, my view is also that there is meaning – if you will, a limit – to the Minister of Interior's conduct. Thus, for example, we should not have considered, in this proceeding, the minister's decision, had it been received after the verdict was rendered. However, once the decision was made and signed before the verdict was rendered, in such a way that it would have been possible to bring it before the court, I am willing to accept the argument that we should not accord decisive weight – certainly not for such a sensitive and loaded issue such as the status of the Sabbath – to the delay in receiving it. We should not minimize the obligation of the administrative agency to act with appropriate speed, but in light of the importance of the issue before us, the flaws in its conduct do not overshadow the reasoned position. Sometimes, the subject of the hearing and its essence affect procedural considerations (compare, only for purposes of analogy, this court's approach regarding the flexibility we should exercise in applying the rules of procedure to adoption issues; Leave App Fam Mot 2205/09 *Jane Doe v. Attorney General*, [unpublished], paras. 6-7 of President A. Grunis's opinion (April 22, 2009)). In any event, once the further hearing was granted, in my opinion, that provides a consideration and a certain guidance in favor of discussing the issue on its merits, even if we are not obligated to do so.

5. We therefore must decide whether the reasoned decision deviates far enough from the zones of reasonableness and proportionality to justify invalidating it. My colleague President M. Naor answered that question in the affirmative. In her opinion, the Minister of Interior's position – believing that there should be a sweeping prohibition against opening businesses on the Sabbath that do not fulfill an "essential need" – undermines the purposes of the Authorizing Law and ignores the municipality's autonomy and the legislator's intention to create a balanced, compromise arrangement. My view is different. Even though the Minister of Interior could have reached a different result, the result he actually reached does not deviate from the zone of reasonableness. At the root of the disagreement between the President and me is the question of the relationship between the Hours of Work and Rest Law and the Authorization Law – a question that affects the interpretation of the latter and the scope of the discretion of the local authority and the Minister of Interior regarding by-laws that address the opening or closing of businesses on the Sabbath and Jewish holidays.

6. A study of the relevant provisions of the Hours of Work and Rest Law Law teaches us that it contains two different norms regarding days of rest: the first, also chronologically, prohibits employing salaried employees during their "weekly rest", which is determined by their religious affiliation –

> "7. (a) An employee's weekly rest shall be not less than thirty-six consecutive hours in the week.
>
> (b) The weekly rest shall include –

(1) in the case of a Jew, the Sabbath day;

(2) in the case of a person other than a Jew the Sabbath day or Sunday or Friday, whichever is ordinarily observed by him as his weekly day of rest.

9. An employee shall not be employed during his weekly rest, unless such employment has been permitted under section 12.

The second level of the obligation of rest, which is of central importance in our case, was added in the Hours of Work and Rest Law (Amendment), 5729-1969, and it imposes an obligation on business owners to stop working on the "fixed days of rest" in the State of Israel. Unlike its predecessor, which established that the weekly rest of a Jewish employee will include the Sabbath day, but left those who are not Jewish a choice regarding their weekly day of rest (see, for example, App Lbr (nat'l) 396/09 *Kisselgof – Mayanei Hayeshua Medical Center* [unpublished], para. 16 of Justice A. Rabinovich's opinion and para. 2 of Justice I. Itah's opinion (November 9, 2010)), this layer creates a different arrangement. It requires that –

> "9A (a). On the prescribed day of rest, *within the meaning of the Law and Administration Ordinance, 5708-1948*, the owner of a work-shop or industrial undertaking shall not work in his workshop of [sic] undertaking and the owners of a shop shall not do business in his [sic] shop.
>
> […]
>
> (c) A non-Jew may – in respect of his workshop, industrial undertaking or shop, *situated in the area of a local authority whose non-Jewish inhabitants, according to the determination of that authority, are at least 25 per cent of its total population* – observe the prohibitions imposed by this section, at his option, either on the aforesaid days of rest or on his own Sabbath and holydays. The same shall apply in a quarter of a local authority if the area and the proportion - not less than 25 per cent - of the non-Jewish inhabitants of that quarter have been determined for this purpose by that authority." (emphasis added).

In other words – the rule is that the business owners that Article 9A addresses are not permitted to work or engage in commerce in their businesses on the Sabbath or during Jewish holidays – which are defined, in Article 18A(a) of the Law and Administration Ordinance as "the fixed days of rest in the State of Israel" – irrespective of their personal religious identity. That conclusion derives not just from the text of Article 9A(a) of the law, which is phrased in a sweeping manner, but also from the exception contained in Article 9A(c) of the Hours of Work and Rest Law – according to which a non-Jewish merchant can choose whether to engage in commerce in his shop on the Sabbath if it is located in an area in which a considerable part of the population is not Jewish. Thus when a shop – or workshop – is within a substantially Jewish area, commerce or work is forbidden in that place even if the owner is not Jewish. That is, as noted, in contrast to the arrangement of "the weekly rest" which allows non-Jewish salaried employees to choose their day of rest.

7. The variation I noted testifies to the deep and substantial difference between the two arrangements that address days of rest. While Article 9 of the Hours of Work and Rest Law focuses on protecting the religious and social rights of the individual employed as a salaried employee – and guarantees him “a weekly rest” – Article 9A includes an additional dimension. In addition to expanding the personal protection, so that it also applies to a business owner who is not an employee, the article attaches significant weight to the public interest in maintaining the unique character of the Sabbath and Jewish holidays. It is concerned not just with guaranteeing individual rights, but also with shaping the character of the Jewish public space during the national days of rest. For that reason, in substantially Jewish areas, even a non-Jewish business owner is required to stop working on the Sabbath and during Jewish holidays – and he cannot freely choose his days of rest. Of course, such a person is also entitled to stop working on the days of rest of his religious community, but he cannot use them to exchange the obligation not to work or engage in commerce on the Sabbath and Jewish holidays – for example, to engage in commerce on the Sabbath and to stop working on Friday or Sunday – even though such an exchange would fully realize the individual social purpose. The emphasis is on “fixed days of rest”, which have a *national* character, and not on the “weekly rest”, which derives from the *individual* religious identity of each employee. Opening a shop for commerce in a substantially “Jewish” area is viewed as infringing on the status of the Sabbath in that space, and therefore Article 9A forbids it, irrespective of the religion of the shop owner. An interpretation that ignores the national-public element of Article 9A of the Hours of Work and Rest Law would be hard-pressed to explain negating the right of choice of a non-Jewish shop owner – in contrast to the employee who may freely choose his weekly day of rest – just because of the location of his shop.

8. The inevitable result of this textual and purposive interpretation is that the prohibition that Article 9A of the Hours of Work and Rest Law imposes on working in a workshop and industrial factory or engaging in commerce in a shop, is not a “gevara” prohibition – meaning a personal prohibition against the business owner working in the place. Indeed, this element of the law creates a “heftsa” prohעקibition (object-based prohibition on opening the business) [gevara and heftsa are Aramaic terms in Jewish law for prohibitions relating to persons or objects respectively -trans.] – meaning a prohibition on opening industrial factories, workshops or shops in Jewish residential areas on the fixed days of rest – and prevents activity in these businesses irrespective of the worker’s specific religious identity. Not just the owner of the business is not permitted to work in the place, but also his salaried employees – Jews and non-Jews – because otherwise the national-social purpose of the law would be thwarted. It is would be inconceivable for a non-Jewish owner of a shop to be personally barred from engaging in commerce in a shop located in a substantially Jewish space, but for his non-Jewish salaried employees to be permitted to take his place – even though the influence on the public space would be identical.

   According to the interpretive picture sketched here, the relevant provisions of the Hours of Work and Rest Law can be described as having three focal points: worker; business owner; and the business itself. Article 9 of the law focuses on the worker and prohibits his employment during the weekly days of rest that derive from his religious identity. In contrast, Article 9A of the law regulates the obligation to rest in relation to the two additional focal points and requires

the business owner (who fits the categories enumerated in the article, which I will discuss below) as well as the business itself to stop working during the fixed days of rest in the State of Israel, namely the Sabbath and Jewish holidays.

9. Having said that, the prohibition relating to the third focal point mentioned – opening businesses on fixed days of rest – is not absolute, and does not apply to all business activity. As President M. Shamgar clarified in HCJ 5073/91 *Israel Theaters Ltd. v. Netanya Municipality*, 57(3) PD 192, 207 (1993), "the above-stated law does not include a *general* provision regarding closing places on days of rest". Instead –

   > "In establishing the principle of observing a weekly day of rest and designating it on the Sabbath, the legislator sought to achieve two integrated goals: first, a social goal, that a weekly day of rest should be designated for each person *to rest from his work, spend time with his family or in the company of friends and have time for holiday and entertainment, according to his choices and preferences*" (*ibid,* 207-208, emphasis added).

   Consistent with President Shamgar's analysis, we should strictly interpret the prohibition in Article 9A of the Hours of Work and Rest Law, to apply not just to activity of an *industrial* nature (work in a "workshop" or "industrial factory") or commerce. In contrast, closing businesses used for *holiday, recreation or entertainment* would betray one of the primary goals that the legislator sought to promote and would place workers in a Catch 22: they would indeed get to rest from their work on the Sabbath, but they would not be able to engage in the holiday and entertainment they prefer. Therefore, according to both the text of Article 9A as well as its purposive interpretation, the article seeks to impose a limited prohibition on engaging in industry and commerce. Opening and operating restaurants, coffee shops, theaters or cinemas – as well as additional institutions that contemporary Israeli society considers to be places of recreation – is therefore not prohibited in itself; indeed, according to this perspective, I may help realize the purpose that the legislator pursued in setting days of rest (See and contrast Crim Case (Jerusalem Magistrate) 3471/87 *State of Israel v. Kaplan* [unpublished] (2) PM 26 5748 (1987), para. 4G).

   Furthermore, for the reasons I stated, we should be cautious in interpreting the terms "will engage in commerce" and "shop". A furniture shop is different from a stand offering passers-by ready-made food, and a multi-faceted shopping center is different from a "convenience store" offering clients of a gas station incidental refreshment. It is highly doubtful that the legislator, who sought to allow citizens to take advantage of their Sabbath rest to go to theaters or cinemas, would have insisted to prevent them from acquiring essential food items at a small grocery store or to refresh themselves at a gas station on their way to a place of recreation (See and compare Crim App 217/68 *Izramex Ltd. v. State of Israel*, 22(2) PD 343, 358-360 (1968), in which the justices in the majority narrowly interpreted the term "shop" in Article 249(20) of the Municipalities Ordinance – and held that a gas station is not included in the term, even though technically commerce does indeed take place in it).

10. This interpretation of the Law of Work and Rest House, creating a substantial distinction between engaging in industry and commerce on the Sabbath and Jewish holidays and recreation

and holiday activities and which is primarily positively received – is consistent with the principles that Prof. Ruth Gavison and Rabbi Yaakov Medan formulated in the Gavison-Medan Contract (see Yoav Artsiali*, Amanat Gavison-Medan: Ikarim Viekronot [Gavison-Medan Contract: Essences and Principles*] 40-45 (2003)). According to the contract, "Government offices, educational institutions, industrial factories, banks, services and commercial institutions will be closed on the Sabbath". However, "Restaurants and recreational establishments will not be prohibited from operating on the Sabbath […] a limited number of small grocery stores, gas stations and pharmacies will not be prohibited from operating on the Sabbath". That, as Prof. Gavison explained, is out of a desire to preserve the uniqueness of the Sabbath in the Israeli public sphere, with the understanding "that the operation of restaurants and recreational establishments on the Sabbath is not exceptional but rather is necessitated by the character of the Sabbath" (*ibid*, p. 42). This sharp distinction between commerce and industry and entertainment and holiday is also expressed on a different level –interpreting the discretion that Article 12(a) gives the Minister of Labor to grant a permit to employ workers during their weekly rest. It was held that –

> "This broad power that was given to the […] is intended to extend the power to grant permits not only to the supply of essential physical necessities, but also in order to ensure essential necessities of the public or of parts thereof in spiritual matters and the spheres of culture, art, leisure and entertainment. It is intended to ensure the individual's quality of life in a free society that has freedom of religion and freedom from religion. It is intended to allow a person to realize in a proportionate manner the social aspect of the Sabbath in accordance with his tastes and his lifestyle, and to give expression thereby to customs, lifestyles and the various cultures in the many strata of Israeli society" (the *Design* case, para. 3 of Justice A. Procaccia's opinion).

As an aside, I will add that this narrow interpretation of Article 9A of the Hours of Work and Rest Law is also appropriate for external reasons, given its infringement on the constitutional right to freedom of occupation and the criminal sanction that attaches to its violation (see para. 43 of President M. Naor's opinion).

Note that the distinction between commerce and industry and business activity in the field of recreation and entertainment derives from two sources. On the normative plane, it is based on the text of Article 9A of the Hours of Work and Rest Law and on the position the case law takes regarding the purposes of days of rest, as was presented above. Indeed, this position may raise difficulties from the traditional Jewish law point of view regarding the appropriate character of the Sabbath and Jewish holidays. For that reason, I attach primary importance to the secondary source – namely, the Gavison-Medan Contract. The beauty of the contract in my opinion is that it is a sincere and real attempt of respected and prominent leaders of the hawkish ideological camps – Rabbi Yaakov Medan, among the leaders of the Har Etsion Hesder Yeshiva, and Prof. Ruth Gavison, winner of the Israel Prize in law, who specializes in issues of religion and state and does not come from the world of Jewish law – to reach a necessary compromise on the sensitive issue of the status of the Sabbath in the public sphere (and at the broader level, of the relations

between religious and the State of Israel). In my perspective, only a true compromise in which both sides give up the aspiration of "all mine" regarding the public sphere – and certainly the personal sphere – suits the complexity of the social fabric, the national as opposed to the personal, if you will – an expression of the fact that the State of Israel is a Jewish and democratic state.

11. Against the background of this interpretation of the Hours of Work and Rest Law, the question arises of how to interpret the authority granted the municipality, in Articles 249(20)-(21) of the Municipalities Ordinance –

> "(20) To regulate the opening and closing of shops, factories, restaurants, coffee shops, tea houses, drinking establishments, cafeterias, canteens and other institutions of this kind, and of cinemas, theaters and other places of public entertainment or other kinds, and to supervise their opening and closing, and to determine – without infringing on the generality of the authority – their hours of operation on any given day; However, the validity of this passage is subject to any exemption that the Minister creates in an order;
>
> (21) A municipality may use its authority pursuant to paragraph (2) within its jurisdiction or in part of its jurisdiction regarding days of rest, taking into consideration reasons of religious tradition and regarding the day of Tisha B'av; "days of rest" – as detailed in Article 18A of the Ordinance on Governance and Law Organization, 5708-1948, on this issue, the Sabbath and Jewish holidays – from the start of the Sabbath or Holiday until their conclusion; 'the day of Tisha Ba'av' – in its meaning in the Law Prohibiting Opening Places of Entertainment on Tisha Ba'av (Special Authorization), 5758-1997".

The combination of these clauses would appear to create explicit authorization granting the local authorities broad discretion for all that concerns opening and closing businesses on the Sabbath – be they shops and workshops or restaurants and coffee shops. However, this interpretation creates a problem, because it puts Articles 249(20) and (21) of the Municipalities Ordinance on a collision course with Article 9A of the Hours of Work and Rest Law, which prohibits, as noted, opening workshops or shops on the Sabbath and Jewish holidays in areas with a substantial Jewish population.

12. As a theoretical matter, we could deal with this apparent contradiction using three different models: *First*, allowing the earlier norm to prevail, for the reason that the later norm does not address the same issue, and therefore there is no contradiction between them. In our case, the substantive similarity between Article 9A of the Hours of Work and Rest Law and Articles 249(2)-(21) of the Municipalities Ordinance is too great to allow us to choose this path. *Second* – allowing one of the norms to prevail, according to the rules of conflict of laws that give supremacy to the later norm (*lex posterior derogate priori*) or the specific norm (*lex specialis derogate generali*). Given the centrality of the Hours of Work and Rest Law, this position does not seem appropriate in our case – because it is hard to argue that Article 249(21) of the

Municipalities Ordinance sought to cancel, implicitly, such a substantive arrangement. That is especially true, given the Explanatory Notes of the Local Authorities Bill (Prohibition on Opening and Closing Businesses on Days of Rest), 5748-1988, H.K. 1872, 134, which became (in the framework of the Law to Amend the Municipalities Ordinance (No. 40), 5751-1990, S.H. 1336, 34) Article 249(21) of the Municipalities Ordinance. These explanatory notes make it clear that "the goal of the proposed law is to remove the above-stated doubt [regarding the power of local authorities to regulate the opening and closing of businesses on days of rest; N.H.] and to preserve the 'status quo' for that issue" (emphasis added). Because Article 9A of the Hours of Work and Rest Law, which was passed in 1969, constitutes a later norm relative to Article 249(2) of the Municipalities Ordinance (from 1964), then preserving the status quote actually means not infringing on the Hours of Work and Rest Law. It would therefore appear that in our case, we should adopt the *third* model, which contemplates an interaction between the later and earlier norms, which together form a harmonious common arrangement. This model is also appropriate because of the important normative status of the Hours of Work and Rest Law, including its Articles 7-9A.

Preferring this model is consistent with the position of the learned former President A. Barak, according to which:

> "The presumption should be in favor of legislative harmony within a legislative system, in such a way that the meaning given to a piece of legislation will be woven 'faithfully into the embroidery of the legislation and will form together with it a single, whole entity' […] one who interprets any particular provision interprets the entire body of legislation, and *the meaning given to any particular provision must integrate into the meaning given the rest of the legislative provisions*" (Aharon Barak, *Parshanut Bamishpat – Parshanut Hahakika* [*Interpretation in Law - Legislative Interpretation*] Vol. 2, 327-328 (1993)).

In other words, before an interpreter resorts to conflict of laws rules, which determine which of the competing norms will prevail – he should evaluate whether "the contradiction is real or imagined", where "he is guided by the interpretive perspective that seeks to guarantee normative coherence and systemic consistency". Only after the interpretive attempt to create legislative harmony fails, and it becomes clear that the contradiction between the norms is real, is there room to move to the second phase and evaluate which norm enjoys supremacy – either because its normative status is higher or because it is a specific or later norm relative to its rival (Aharon Barak, *Parshanut Bamishpat – Torat Haparshanut Haklalit [Interpretation in Law, General Theory of Interpretation]*, Vol 1, 540 (1992)). Faithful to that principle, we must seek, therefore, the interpretation that allows Articles 249(2) and (21) of the Municipalities Ordinance to live together under the same roof as the prohibition that Article 9A of the Hours of Work and Rest Law imposes on opening shops and workshops during the fixed rest days.

13. It seems that we can resolve the apparent contradiction between the above-mentioned norms using the distinction between a situation of "default" that Article 9A of the Hours of Work and

Rest Law creates – closing businesses that operate in the areas of industry and commerce, and the absence of a prohibition on opening others – and the authority given to local authorities to *deviate* from that arrangement: if you wish, to allow a certain scope of industry and commerce; if you wish, to prohibit even the opening of places of entertainment.

In other words, Article 9A of the Hours of Work and Rest Law creates a *national-state-wide arrangement*, establishing that on the Sabbath, workshops or industrial factories will not be opened and there will be no commerce in shops, except in the framework of the exception grounded in Article 9A(c). However, based on the same rationale that prevents imposing a prohibition on operating places of entertainment at the national level – in other words, recognition of the existence of divergent approaches to the desired practical character of the Sabbath, and of the need to allow expression for groups whose worldviews reject the Jewish law model – the local authorities have been given the possibility to deviate from the general norm and create *municipal arrangements*. Thus, it is possible to balance the competing rights in the best way possible, while according weight to the unique characteristics of each urban area – including the preferences and worldviews of its residents. Sometimes, these characteristics will lead to relaxing the restrictions on business activity on the Sabbath and will permit a certain scope of commerce, and sometimes the result will be the opposite – to the point of limiting activities of recreation and entertainment.

This interpretive journey, which absolves us of the necessity to resort to conflict of laws rules, leads to the conclusion that in the absence of a relevant by-law, the nation-wide prohibition on business activity belonging to the categories in Article 9A of the Hours of Work and Rest Law will apply – and only on that business activity. It is clear that a local authority that wants to do so may deviate from the national arrangement, subject to the general restrictions imposed on municipal discretion.

14. The normative picture arising from this interpretive journey has great meaning, because it leads to the conclusion that – in contrast to other contexts in which the legislator authorized the local authorities to regulate a certain issue at the municipal level – in our case the authorities have been given relatively narrow discretion. I will demonstrate the uniqueness of the case before us using a comparison with the Local Authorities Law (Special Authorization), 5717-1956, which authorizes a local authority "to enact a by-law that limits or prohibits sale of pork and pork products intended for consumption" within its jurisdiction or in parts of it. As this court noted in the *Solodkin* case (HCJ 953/01 *Solodkin v. Beit Shemesh Municipality*, 58(5) PD 595, 610 (2004)) (hereinafter *the Solodkin case*) –

> "Unlike the prohibition of the raising of pigs, with regard to which a national arrangement was adopted, a local arrangement was determined for the prohibition of selling pig meat and meat products. The purpose was therefore that the balance between the conflicting purposes — the considerations concerning the protection of religious and national sensibilities, on the one hand, and the consideration of individual liberty, on the other — would *not be made on a national level,* according to a principled balancing that the legislator determined. Instead, the purpose was to make a balancing at a local level" (emphasis added).

The legislator therefore deliberately refrained from setting a general norm regarding sale of pork, and left the issue, with the value-laden decisions it implicates, to the *exclusive* regulation of the local government – just as it did in the context of opening places of entertainment on Tisha Ba'av (Law Prohibiting Opening Places of Entertainment on Tisha Ba'av (Special Authorization), 5758-1997). Therefore, this court could have concluded that the municipal level had been granted broad discretion, and the legislator sought to give it – and not the central government – the choice among different solutions that are within the zone of lawfulness (*Solodkin* case, 620). However, that is not the situation in our case. As noted, the legislator chose to create a national arrangement regarding the existence of business activity on the Sabbath, and disclosed its opinion regarding the appropriate balancing model between freedom of religion, freedom from religion, freedom of occupation and the right to equality -- imposing a prohibition on commercial and industrial activity.

Under these circumstances, while the local authorities indeed have the authority to deviate from the national-country-wide arrangement that the legislator set - their discretion is relatively narrow. And the relativity regards the Minister of Interior, as I will explain. The authorities are not operating in a normative vacuum, and they should view the balance that the legislator created on the national level as a kind of anchor, or point of departure, for conducting the balances at the municipal level (It should be noted that a similar model, sketching general principles and leaving the local government space for discretion in its implementation, was also adopted in the framework of the Gavison-Medan Contract; See art. 14 of the principles [pp. 41-42] and the explanatory notes of Prof. Gavison [p. 43]). The zone of lawfulness within which the authorities operate to regulate business activity on the fixed days of rest is limited, therefore, relative to the one in which they operate in the context of selling pork and pork products. The mirror image is that the Minister of Interior has a much broader sphere of intervention in our case – certainly when he believes that the influence of a particular local arrangement will spill over beyond the four corners of the relevant authority and may eat away at the provision of Art. 9A of the Law of Work and Rest Ours at the national level.

To summarize – the local authorities have broad discretion, and they may deviate from the provisions of Article 9A of the Hours of Work and Rest Law. However, this is not a situation in which the legislator refrained from making a normative decision and left the issue for determination at the municipal level – as it did regarding the sale of pork or opening places of entertainment on Tisha Ba'av. On the contrary, a general norm prohibiting activities of industry and commerce on the Sabbath has unequivocally been established. In this state of affairs, the autonomy granted the local government for the issue at the focus of our case leaves room for more intensive oversight by the central government. A decisive part of that oversight is analyzing the ramifications of the local decision for the national arena – and the extent of infringement on the principled normative arrangement that the legislator adopted in Article 9A of the Hours of Work and Rest Law.

To that I add that the justification for more comprehensive oversight of the central government also derives from the substantive purposes of the days of rest – which deviate from the symbolic realm (similar to, let's say, the prohibitions on selling pork or engaging in public entertainment on Tisha Ba'av), and it concerns the fundamental rights of the workers. These rights, which the

Minister considered in his reasoned position, influence the scope of the discretion of the local authorities regarding opening businesses on fixed days of rest.

15. Given the principled ruling regarding the scope of the Minister of Interior's intervention in decisions of the local authorities under Articles 249(20)-(21) of the Municipalities Ordinance, I accept the Attorney General's position (presented in Paragraph 15 of the opinion of my colleague, President M. Naor), that the decision to invalidate the Second Amendment does not suffer from extreme unreasonableness – even though the Minister could, of course, have arrived at a different result. I will explain.

    My colleagues, President M. Naor (paras. 26-27 [paras. 25-26-trans.] of her opinion) and Justice Y. Amit (paras. 2, 4 and 8 of his opinion) believe that the decision to invalidate the Second Amendment suffers from extreme unreasonableness, because it does not give sufficient consideration to the autonomy of the local authority. However, the normative picture that I presented offers, in my view, a response to that. It teaches that the legislator didn't authorize the municipal level to act in a vacuum – but rather presented the nation-wide arrangement set in Article 9A of the Hours of Work and Rest Law as a departure point for exercising the authority. The autonomy granted, therefore, to local authorities is relatively limited – in a way that inherently increases the scope of the Minister of Interior's legitimate intervention (compare with para. 8 of my colleague Justice Y. Amit's opinion). In the case before us, the Minister of Interior explained his invalidating the Second Amendment with the concern that the supposedly local arrangement would erode the nation-wide arrangement that the legislator outlined – and would shape, *de facto* if not *de jure*, a reality that contradicts his value judgment (paras. 57-58 of the reasoned decision). In other words, it is not the balance that the Tel Aviv-Jaffa Municipality chose *in itself* that led to invalidating the Second Amendment – but rather its presumed influence on the national arena, beyond the borders of Tel Aviv. This explanation would appear to be at the heart of the Minister of Interior's legitimate intervention, given the delicate system of balances between the two levels of the arrangement: national and local.

    Furthermore, a study of the reasoned decision indicates that the minister did not sweepingly negate any opening of shops for selling food on the Sabbath. We should remember that the First Amendment permitted the opening of convenience stores in gas stations, the selling of food items in pharmacies – and even allocated three urban sites in which commerce is permitted. Beyond that, in his decision, the Minister of Interior took into account the number of businesses that would be permitted to open pursuant to the Second Amendment (para. 53 of the reasoned decision); their size (*ibid*), and the scope of discretion given to the Tel Aviv City Council regarding a future increase in the quotas (*ibid*, para. 56). In other words, the decision doesn't completely negate the municipality's ability to confer on the Sabbath a unique local character – but rather seeks a more appropriate balance between that character and the legislator's normative determination regarding the national arena. Even if it would have been possible to arrive at a different decision, we should remember "that the appropriate solution is actually in the balance, and not in the complete negation of one world view in favor of another (para. 24 [para. 23-trans.] of President M. Naor's opinion in the verdict). We cannot define a result that allows the unique character of Tel Aviv to be expressed – albeit in a balanced way, without completely discarding the value judgment that Article 9A of the Hours of Work and Rest Law reflects – as deviating in an extreme way from the zone of reasonableness.

Viewed in this way, the Minister of Interior's decision does not constitute "intervention" in the municipality's affairs. The model established is that the municipality's position is a first decision, but it is subject to the Minister of Interior. The latter is the one authorized to approve or invalidate the by-law ("If the Minister delays the publication of a by-law […] he may do one of the following: (1) Order a cancelation of the delay; (2) Invalidate the by-law for reasons he will enumerate; (3) Return the by-law with his comments to the council for reconsideration"; Article 258(d) of the Municipalities Ordinance). Of course, he may take local considerations into account, but national considerations are not beyond the zone of his discretion – and are not an illegitimate consideration. Naturally, the range of the Minister of Interior's discretion depends on the subject. My opinion is that, given the existing legislative picture – namely, the legislator's decision to create a guiding national arrangement for the issue; as well as the public, moral, symbolic and practical importance of the Sabbath, including its ramifications for the substantive, fundamental rights of those who engage in the work, the local authorities' discretion is limited. Consequently, the space for the Minister of Interior's intervention in their decisions in this area is broader than usual. The starting point – in other words, the position of the authority – need not be the ending point. I note that Minister Deri's decision is explained well, is thorough, and presents a consolidated position not just regarding the Sabbath but also regarding the legal situation.

Again, I emphasize, we are dealing with judicial review of the Minister of Interior's decision. There is no dispute that the minister could have arrived at a different result, and could have approved the Second Amendment. Had he done so, I would have refrained from intervening for the very same reasons – recognition of the broad discretion granted him on the issue. Regarding the balance he chose, and review of that balance, caution is appropriate. In every decision requiring a balance between different considerations, one could arrive at a broad spectrum of results. For example, in general, one could accord equal weight to a number of considerations, or attach greater weight to a particular consideration. The decision by the executive branch to accord greater weight to a particular consideration does not necessarily render the result unreasonable – or even less reasonable. I think that the decision to invalidate the second amendment, due to considerations of protecting the nation-wide arrangement that the legislator outlined for the issue, is in the heart of the zone of reasonableness and proportionality, and there is no cause to intervene in it.

16. Following these words, the opinions of the rest of the members of the panel came to me for consideration, including various additions. I again pondered the issue, and I will say this:

    In the past, in various Jewish diasporas, in Poland, Morocco, and in the old settlement of Safed, Jews observed the Sabbath according to religious law. Today, in the 21st century State of Israel, Jews argue about the Sabbath. That is especially true regarding the Sabbath in the public sphere. This argument, which is appropriate in character and image, preserves, at first glance paradoxically, the relevance of the Sabbath and guarantees that it will constantly change its shape, but will remain a unique day in the Israeli-Jewish public experience. To paraphrase the famous words of Ahad Ha'am, cited above, we can say that "More than the Jewish people kept the argument over the Sabbath, the argument kept the Sabbath and its status in the State of Israel."

The truth must be told, and it is apparent. In the State of Israel, a large group observes the Sabbath according to Jewish law, and another large group does not do so. The range between the extremes is broad and rich. Concerning the character of the Sabbath in the public sphere, there is considerable debate among the groups and even within them. And yet, and this would be a sad irony if specifically in the State of Israel, there would be an infringement on the social-spiritual component of rest on the Sabbath, which is grounded in the Hours of Work and Rest Law. That is because the Jewish religion is the one that brought the social revolution into the world – maybe the first of its kind – that is latent in the Sabbath. The idea at the foundation of the weekly day of rest was accepted and implemented by humanity in its entirely. The angel of rest whispers into the ear and tells the worker: You are a worker but not a slave. Indeed, you shall eat bread earned through your sweat, and the work is difficult and essential, but it should not be allowed to swallow the human being and his personality. Simultaneously, the angel of rest whispers into the ear and says to the employer: You are the strong party, but for one day of the week there is equality between you and the worker, who is exempt from your affairs. Values of equality, rest and the freedom of the spirit that the Sabbath represents are strongly tied to the religious origin and history of the Jewish people and reasons of tradition.

Our framework is legal. As judges, our role is to rule according to the law of the State of Israel. Indeed, from a birds-eye perspective, and theoretically, the various opinions show that it is possible to interpret the Hours of Work and Rest Law and the Authorizing Law in different ways. However, that situation itself may constitute, in my opinion, an additional reason for the caution required regarding the court's intervention into the delicate issue placed before us. In any event, and without diving into the details again, my interpretive position is that the existing legal framework is built on an interaction between the local and the national, the religious and the social, individual liberty and recognition of the special public status of the Sabbath, and the city council's powers and the powers of the Minister of Interior. The interpretation that seems correct to me, for the reasons enumerated, is that at the start of the game, the ball is in the city council's court, but it later passes to the Minister of Interior's court. Given the implications of municipal decisions about the rest of the worker, the employer and the business on the Sabbath – not to mention the status of the Sabbath as a national cultural symbol – the local authorities have not been granted exclusive discretion on the matter. The law authorizes the Minister of Interior to approve or invalidate by-laws. In my opinion, what emerges is the conclusion that the rest of the worker, the employer and the business on the Sabbath constitutes an issue that is not just local. In addition, it is hard to accept that the legal ruling in our case would not affect different places in Israel, beyond the borders of Tel Aviv-Jaffa. We should recall that the Minister of Interior is a member of the government chosen through parliamentary elections. Had the Minister of Interior chosen another position, I would think that the law would require refraining from intervening. In contrast to the majority position and the position of my colleague, Justice N. Sohlberg, I think that the outline of the law allows for broad interpretation, which could lead to two results. On the one hand, the law authorizes the local authorities to permit commerce on the Sabbath, and on the other hand it imparts to the Minister of Interior broad discretion in which we should not rush to intervene. Given the Minister of Interior's position, which is reasoned and to the point, my opinion is that we should respect it, and this court should not intervene.

17. Were my opinion to prevail, then, we would order the motion for a further hearing granted so far as the Second Amendment is concerned – in the absence of a cause for intervening in the reasoned decision of the Minister of Interior in our case. Given the result, and the way the proceedings have played out, I would not order court costs.

Justice

Justice N. Sohlberg

I read the important opinion of my colleague, President M. Naor, and I considered its reasons, but I do not agree with it.

1. Two central questions have been set before us: *first*, were the amendments to the Tel Aviv-Jaffa By-Law of Tel Aviv-Jaffa (Opening and Closing Shops), 5740-1980 enacted pursuant to *authority* in law? *Second*, does the Minister of Interior's decision not to approve these amendments rise to the level of extreme *unreasonableness*? Note: the question of *authority* precedes the question of *reasonableness*; in the absence of *authority*, there is no need to address the question of *reasonableness*. However, in her opinion, my colleague places *reasonableness* before *authority*.

   According to her methodology, the principle of local autonomy means that the discretion over opening and closing businesses on days of rest should be first and foremost given to the local authority. That is the principled point of departure for my colleague, the President, in her opinion – from the beginning and in the end – and it seamlessly weaves together the opinions of my male and female colleagues who joined the majority opinion. In their approach, "it is hard to give priority to a value judgment at the 'national' level, which is inherently more general and less pluralistic, at the expense of a narrower judgement, aimed at the local character only" (see the opinion of my colleague Justice Danziger). Against the background of this fundamental presumption, and with all due respect to my colleagues, I think they are not giving the discussion of the question of authority the attention it deserves. In my opinion, if we are particular about the interpretive question before us, we would conclude that under the current state of the law, local authorities do not have the power to order the opening of businesses on the Sabbath.

2. The dispute between my colleague and me – similar to the dispute that emerged between us recently in FH HCJ 5026/17 *Gini v. Chief Rabbinate* [unpublished] (September 12, 2017) (hereinafter: *Gini Further Hearing*) – is not just the question of *what* is the interpretation of the law; the root of the dispute is deeper, and it is entrenched in the question of the *way* in which the law should be interpreted. My colleague, it seems to me, interprets the law 'from top to bottom', according decisive weight to the fundamental, value-laden perspectives that are *suitable* (in our case, the *desired* division of authority between the central government and the local government); as a consequence, the desired law takes the place of the law in fact, and fundamental perspectives are what shape, *de facto*, the correct interpretation. According to my approach, interpretation of the law should be done 'from bottom to top', through the work of 'digging', which is sometimes exhausting, from the foundation to the

rafters. It is not (just) perfuming ourselves with fundamental principles and constitutional rights, but rather analyzing the law and all its parts, from its legs to its guts.

3. Before we address the merits of the issue – a brief comment on the justification for holding a further hearing. According to the methodology of my colleague, the President, "the procedure of a further hearing is intended for clarifying a rule that was decided in a verdict, and not for discussing what the verdict does not contain" (para. 17) [para. 16-trans.], and therefore there is no room to address the Minister of Interior's position in the context of the further hearing before us, "which was not submitted to the panel in the proceeding that is the subject of the further hearing" (*ibid*). According to her position, that is sufficient to warrant rejecting the motion for a further hearing, and her addressing the merits of the Minister of Interior's position is therefore 'not required by law'. As far as I'm concerned, there is no justification for saddling the petitioners with the Minister of Interior's omissions. In any event, even without addressing the question of whether the Minister of Interior's position in itself warrants holding a further hearing (given the date it was submitted), the motion for a further hearing is based in more than just that position alone. In addition to the Minister of Interior's position, we have been presented with a question of the interpretation of the provisions of Article 9A(a) of the Hours of Work and Rest Law, 5711-1951 (hereinafter also: *the Law*), of the provisions of Articles 249(2) and 249(21) of the Municipalities Ordinance [New Version] (hereinafter also: *The Ordinance*), and the relationship between them. As counsel for the Attorney General noted in their response – "*Concerning the honorable court's determination in Paragraph 22 of the verdict* [that is the subject of the further hearing – N.S.] *regarding the normative relationship between Article 9A of the* Hours of Work and Rest Law *and Articles 249(2)-(21) of the Municipalities Ordinance – this is a new and important precedent*" (para. 25 of the response). My colleague, the President agrees, in her ruling that this issue needs to be decided (para. 41 of her opinion [para. 40-trans.]), and I agree. I will now address the question at hand.

The Authority

4. Does the Tel Aviv-Jaffa Municipality have the authority to order the opening of businesses on the Sabbath? In order to answer that question, we must address the correct interpretation of the provision of Article 9A(a) of the Hours of Work and Rest Law, and of the provisions of Articles 249(2) and 249(21) of the Municipalities Ordinance, and the symbiotic relationship between them.

Article 9A(a) of the Law of Work Hours and Rest

5. According to my colleague's position – "the Hours of Work and Rest Law does not address the question of opening or closing businesses on the day of rest, but rather the personnel question of work on the day of rest" (para. 43 of her opinion [para. 42-trans.]). My colleague learns this from the text of the provisions of Articles 9 and 9A of the law and from their captions, as well as from the explanatory notes to the draft law through which Article 9A was added. To borrow from the world of yeshiva erudition: my colleague believes that the provision of Article 9A(a) creates a "gevara" prohibition – hinging only on the shop-owner; as opposed to a "heftsa" prohibition – whose application is on engaging in commerce in the

shop itself. This division, which is also relevant on the conceptual level, may also have a certain hold in the text of the law; in any event, in my opinion, it cannot withstand an evaluation of the purpose of the law – subjective and objective alike. As will be clarified below, the purpose of Article 9A is to prohibit a shop-owner from engaging in commerce in his shop on the days of rest; either personally or not personally.

6. As noted, according to my colleague, the text of Article 9A and its caption indicate that its application is personal. As for me, I think the text of the article ("A shop owner shall not engage in commerce in his shop") and its caption ("Prohibition on Work During the Weekly Rest") do not help our case; both are consistent with the two interpretive possibilities before us. The term "work" and the phrase "shall not engage in commerce" can be interpreted as a personal act, as well as a description of general activity. Thus far, the court has not had to directly address the interpretation of Article 9A, and in any event not to rule on it. It is true that we can find statements about the article and tiny hints about the relationship between it and the Authorizing Law, but only as *obiter dictum*, because there was no need for an exhaustive, in-depth discussion of the interpretation of the law's provisions. That was true for the *Israel Theaters* case (HCJ 5073/91 *Israel Theaters Ltd. v. Netanya Municipality*, 57(3) PD 192, 207 (1993) (the verdict addressed cinemas, and as will be clarified below, there is no dispute over the fact that Article 9A does not apply to them); that was also the case for the *Design* case (HCJ 5026/*04 Design 22- Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department – Ministry of Labor and Social Affairs,* 60(1) PD 38, 63 (2006)) [sic-trans.]. There is therefore no 'precedent' on the issue, and that is why we have convened. I will evaluate the intention of the legislator, as reflected in the legislative history, in case it can shed light on the correct interpretation of the article (on the importance of legislative history as a primary interpretive source, see my opinion in the *Gini Further Hearing*, paras. 4-11).

7. In bringing the draft law through which Article 9A was added to The Law before the Knesset plenary for the first reading, then-Minister of Labor Yigal Allon began by presenting the bill as such:

> "I am satisfied that this time I can submit to the Knesset a bill that can expand the application of the obligation of rest on additional kinds of workers, without violating the status quo regarding religion.
>
> As far back as the debate that emerged in the last government, I opined that instead of legislating a law having a religious character, which could infringe on freedom of recreation, we should amend the Hours of Work and Rest Law, which blends a social principle with recognition of the days of rest traditional to members of each religion.
>
> While at the start of this century, there was a conception that labor laws are intended to protect only manual wage laborers, this conception has expanded, and there is no dispute today that the state should extend its protection to every worker as such – a manual laborer and an office clerk, a salaried employee and an independent contractor.
>
> The draft law before you seeks to establish that what is accepted for the Sabbath and Jewish holidays rest for salaried employees in manual labor

and industry will also apply to independent contractors and members of cooperatives in those same sectors. Similarly, commerce in shops will be prohibited.

[…] In general, labor laws seek to ground existing practices, to improve the situation while setting legal determinations. In this case, too, the proposed legislation gives a legal imprint to the existing situation. Currently, private, cooperative factories and workshops throughout Israel and in the agricultural settlements also stop working. That is true for commerce in the shops. The concept of shop does not include guest houses, restaurants, coffee shops, places of entertainment, clubs, gas stations, beaches, swimming pools, sports facilities, etc. For these issues, the situation remains as it is today, both legally as well as in terms of the reality.

[…] It is hereby proposed to expand the application of the Hours of Work and Rest Law without infringing on the accepted status quo" (D.K 30, 2157-2158 (5726); emphasis added – N.S.).

8. It is clear: the provision of Article 9A was not passed in a vacuum, but rather against the background of the existence of a 'status quo', in which people stop working on days of rest in factories and workshops, and shop owners cease their commerce; at the same time, businesses that meet needs for culture, entertainment and leisure are allowed to continue to operate as usual, even during days of rest. Excepting these kinds of businesses (called "*places of entertainment*") from the prohibition grounded in Article 9A(a), in order to preserve "recreational freedom", provides an indication about the bounds of the general prohibition. Infringing on 'recreational freedom', which the legislator feared, would happen only if places of entertainment were *closed*. If the application of Article 9A is indeed personal, how is it relevant to a violation of the status quo? If businesses – *commerce* or *entertainment* – can remain open independently through non-Jews, what is the point of distinguishing between the owners of this and the owners of that?

9. Furthermore, the interpretation that the application of Article 9A is personal and does not seek to prohibit the commerce itself within the shops on days of rest appears to be inconsistent with the explicit words of then-Minister of Labor Yigal Allon, who said "commerce in shops will be prohibited" (*ibid*). Note: that was not an aside, but rather a faithful expression of the substance of the legal arrangement. *Inter alia*, comments made during the various debates of the draft law – both in the Knesset plenary as well as in the Labor Committee – clearly testify to the fact that the members of Knesset and the legal advisors related to the prohibition in Article 9A – clearly and simply – as a prohibition on *commerce itself*, which therefore requires closing businesses on days of rest. Thus, for example (and this is just a 'tiny taste' of the examples), in a debate held in the Labor Committee on January 1, 1969, Menahem Harniv, the legal advisor of the Ministry of Labor, said that "*the provisions of the law require Jews to close their shops on the Sabbath*"; Later in the debate MK Moshe Aram, the committee chairperson, noted that "this law guarantees that a Jew will not open his shop on the Sabbath" (Transcript of Meeting No. 185 of the Labor Committee, 6th Knesset, 13-14 (January 1, 1969). Similarly, during the debate on July 3, 1968, one of the committee members asked the legal advisor of the Labor Ministry, will

the law require closing businesses that were open prior to its entering into force? His answer was as follows: "*If there is currently a local authority in which shops are open – because there is no by-law that closes – let's assume theoretically there is a city in which shops are open on the Sabbath – and this will obligate the shops even without the local authority doing anything*" (Transcript of Meeting No. 154 of the Labor Committee, 6th Knesset, 14 (July 3, 1968) (hereinafter: *Transcript of the July 3, 1968 debate*).

10. We can find another unequivocal expression of the legislator's intention in comments made during a debate in the Labor Committee over Article 9A(c), which provides as follows:

> "A non-Jew may – regarding his workshop, industrial factory or shop that is within the jurisdiction of a local authority or in a quarter of the local authority where the number of non-Jewish residents are at least one third of all residents of the authority or quarter, depending on the circumstances – observe the prohibitions of this article on the above-stated days of rest or on his Sabbath and holidays, as he chooses".

11. This article, which creates an exception to the provisions of Article 9A(a), teaches us that a non-Jew may open his shop on the days of rest, provided that it is in an area where the number of non-Jewish residents constitute at least one third of the residents of that area. The deputy legal advisor of the Ministry of Religious Affairs said, against the background of the enactment of this article:

> "The trend is in fact a compromise between two opposing interests. In general, it is in the interest of every person to observe the days of rest in his religion freely, and in the State of Israel there is freedom of religion for all who desire it, for all the religious communities. On the other hand, we should ensure that a small minority living in the same quarter or city will not disturb the Sabbath or holiday rest of the large majority of people living in the same area. Therefore we made this formula of compromise, of two thirds and a third. That means if the minority in that same place is large enough to constitute more than a third of the residents, then we should take it into consideration. It is already a factor, even though it is still a minority. It might be only 40%, but it is a large enough minority that we should take it into consideration and give it the possibility to choose its days of rest according to its religion. <u>But if the minority is small, let's say 20%, in my opinion it would infringe on the large majority, the 80% of residents, if that 20% would open their businesses on the Sabbath. That is what the law seeks to prevent</u> […]
>
> Were we not to make this limitation, every person would be able to open his business without any limitation – let's say if there were just 5% non-Jews in an area of a Jewish community, without taking into consideration the 95% Jews there – <u>we might even encourage fictions, of Jewish business owners fictitiously, or through other arrangements, selling their businesses to non-Jews in order to open them on Sabbath days. That is what the law explicitly seeks to prevent and therefore</u>

> established residents of that same area and not business owners as a criterion for opening or closing the shops (Transcript of Meeting No. 162 of the Labor Committee, 6th Knesset, 9 (July 31, 1968); emphasis added – N.S.).

12. The consequence of the above is that the purpose of the prohibition established in Article 9A is also aimed at preserving the character of the public sphere on days of rest by closing commercial establishments on the Sabbath, because if that were not the case – why would the legislator set a limitation related to the composition of the population?

    Furthermore, setting this limitation is also embedded in the fear of a fiction, in which Jewish business owners would sell their shops to non-Jews and thus ("or through other arrangements") bypass the prohibition on opening the store on days of rest. Note well: the same fiction that the legislator feared would be brought in by Jewish shop owners through the "back door" – my colleague, the President, seeks to bring in through the "front door"; It would be sufficient for a Jewish shop owner to engage in commerce in his own shop through a non-Jewish employee, and he would not have to make the effort to "sell" his shop.

13. We have before us explicit and unequivocal expressions of legislative intent. Had counsel for the Attorney General not argued that "It is difficult […] to know the subjective intention of the legislator at the time it enacted the above-mentioned Article 9A" (para. 54 of the Attorney General's response; in my opinion it is not so difficult, it is our obligation in interpreting a law to deal with all its aspects), I would barely have bothered to expand on the issue. I have brought only the conspicuous examples, which can enlighten us and give us a clear explanation. One who wishes to learn and go into depth can read the various transcripts, and he will come to know that the debates over the draft law – explicitly and implicitly – are all based on understanding the prohibition as relating to the very commerce in the shop, and not just the labor of the shop owners.

14. Beyond the unequivocal intent of the legislator (and even if I were to accept the approach that its weight in legislative interpretation is not great; see the position of my colleague in the *Gini Further Hearing*, para. 19 of her opinion), we will address the fundamental internal contradiction created by approaching Article 9A, with its subsections, as dealing with the personal question of work on the day of rest. As is known, "Every legislative unit is evaluated against the background of the entire piece of legislation in which it appears and from which we can learn the purpose that the legislator sought to achieve. We should aspire to achieve harmony among the various parts of the law (Aharon Barak, *Parshanut Tachlitit Bamishpat [Purposive Interpretation in Law*] 402 (2003); emphasis added – N.S.). We should therefore interpret the prohibition established in Article 9A(a) in a way that is consistent with the provision of Article 9A(c), and we should not abide by an interpretation that places them in a state of contradiction (see also HCJ 6494/14 *Gini v. Chief Rabbinate* [unpublished], para. 34 of my opinion (June 6, 2016)). As the Minister of Interior noted in his letter of June 26, 2017 to the Attorney General (which was submitted for our consideration under the heading 'Position of the Minister of Interior'; emphasis in original): "Adopting the interpretation [according to which the application of the prohibition set in Article 9A is personal – N.S.], would lead to an absurd situation in which a non-Jew would be prohibited from working as an independent business owner on the Sabbath in most cities in the State

of Israel (insofar as they don't have 'at least a quarter of the authority's residents' who are non-Jews, pursuant to Article 9A(c-d) of the law), amazingly, he would be permitted to work as an employee for a Jewish business owner. Does a fundamental contradiction like that make sense?"; It is a good question, and it has no answer – neither in the response of the Attorney General nor in the opinion of my colleague, the President.

15. The intention of the legislator, as well as a logical and harmonious reading of Article 9A of the Hours of Work and Rest Law, with its subsections, indicates that the prohibition grounded in it does not apply just to the work of shop owners, but rather to the *very fact of commerce* in shops on the days of rest.

16. Note: if indeed, as my colleague concluded, the application of the prohibition set in Paragraph 9A(a) of the law is personal, and the point of departure is that it is permissible for commercial establishments to be opened on the days of rest (by non-Jews), then we would, it seems, close the discussion at this stage, because what would be the value of the Authorizing Law? My colleague adopts the argument of counsel for the Attorney General, namely that "we are dealing with provisions of a law that cover various issues, which we can compare, metaphorically, to two stories completing each other to form one building. One who enters the first floor – the licensing floor – would find himself facing the power of the local authority to regulate the opening and closing of businesses on the Sabbath. Once he leaves the first floor, holding a license to open a business, he approaches the second floor – the floor of the non-waivable labor laws. There the business owner discovers he is obligated to observe the prohibition against employing Jews and Jews working on the Sabbath, together with all the other provisions of the Hours of Work and Rest Law" (para. 68 of the Attorney General's opinion; para. 40 [para. 39-trans.] of the President's opinion). Think about it: If the default set in Article 9A is that the entirety of businesses is permitted to open on days of rest, why do we need two stories? Why should the business owner bother entering 'the first floor'? It would be enough to approach 'the second floor', which allows him to open his business through a non-Jew, even in the absence of the Authorizing Law. However, to the extent that Article 9A prohibits the very act of commerce in shops during days of rest, then we must evaluate the bounds of the power granted the local authority pursuant to Articles 249(2) and 249(21) of the Municipalities Ordinance (quoted in para. 39 [para. 38-trans.] of the President's opinion) and the relationship between it and the above-mentioned prohibition. I will address that now.

The Authorizing Law

17. According to my colleague, "the Authorizing Law *explicitly* authorizes the local authorities in Israel to enact provisions in their by-laws that address *opening businesses* in their domains on the Sabbath […] The above-referenced article [Article 249(21) – N.S.] explicitly refers to Article 249(21), which addresses '*the opening and closing of shops'* […] I cannot accept the argument that a law that authorized, *inter alia*, 'regulating the opening […] of shops and factories […]' was intended to apply only to places of entertainment or only to regulating the closure of businesses. That argument is incompatible with the clear text of the law"

(*ibid*; emphases in original). According to my colleague, even if we accept the interpretation that Article 9A articulates a sweeping prohibition against opening businesses on the Sabbath, "it would be a contradiction between the Authorizing Law and the Hours of Work and Rest Law, meaning provisions that are on the same normative plane. Under the non-interpretive standards we use […] the Authorizing Law prevails as a law enacted after the Hours of Work and Rest Law […] and in any event it is a more specific law that specifically grants authority to the local authorities in Israel in a targeted way, in contrast to the generality of the Hours of Work and Rest Law" (para. 44 [para. 43-trans.] of her opinion).

18. It cannot be denied. The broad language of Article 249(20), on which Article 249(21) rests, apparently contradicts the provision of Article 9A of the Hours of Work and Rest Law. In order to deal with this contradiction, we must evaluate how things developed chronologically. As I will clarify below, according to the non-interpretive standards that my colleague discussed, the Hours of Work and Rest Law is the later, and also the more specific law regarding the power granted the local authority pursuant to the Municipalities Ordinance.

19. The Municipalities Ordinance [New Version] was enacted in 1964, based on the Mandatory Municipalities Ordinance. Article 249 of the ordinance establishes the powers granted to the municipality, including the general authority to regulate "the opening and closing of shops" (caption of art. 249(20) of the ordinance). Based on that authority, together with the authority granted the municipality to enact by-laws pursuant to Article 250 of the ordinance, local authorities have, throughout the years, enacted by-laws regulating the opening and closing times of various businesses in their jurisdictions on days of rest.

20. In 1969, the Hours of Work and Rest Law was amended, and Article 9A was added to it, which set, as aforementioned, a prohibition on commerce in shops on days of rest, with a distinction drawn between *commerce* and places of *entertainment*. The question of the meaning of "shop" as stated in the article, and the need to define it, were debated at length within the Labor Committee; during the debate on July 3, 1968, a letter signed by the Minister of Justice, The Minister of Religion and the Minister of Labor was presented, in which they proposed to add to Article 9A the following clarifications:

> "(a) To add a definition of the term 'shop' as follows: a shop for purposes of this article – a place of business whose primary business is selling goods to be consumed outside the place. Excepting pharmacies and gas stations.
>
> (b) To add a provision establishing that in order to remove doubt, it is hereby clarified that each local authority will be authorized to enact by-laws adding, within the jurisdiction of the authority, a prohibition on running, on the weekly day of rest, a business whose running is not prohibited by this article" (Transcript of the July 3, 1968 debate, p.2; emphasis added – N.S.).

21. From the above we learn two things relevant for our case: *First*, in legislating Article 9A, the legislator had in mind the local authority's power to enact by-laws regarding opening and closing times for businesses on days of rest. The clarification that the legislator considered adding on this issue was only "to remove doubt"; *Second*, the provision of Article 9A sought to establish an

arrangement that set a threshold of closing businesses on days of rest, to which the local authority would be allowed to add a prohibition regarding "a business whose running is not prohibited by this article" (meaning – an *entertainment* establishment), but not to subtract from it (meaning – to permit the opening of *commercial* establishments). The words of Menahem Harniv, the legal advisor to the Ministry of Labor, as he clarified the need for the addition proposed in the ministers' letter, are instructive regarding the scope of the municipality's authority under the amendment to the Hours of Work and Rest Law and thereafter:

> "For those who think that the local authorities have the power to prohibit [opening businesses – N.S.] – this only adds. It says the same thing that already exists, and in fact does not change something. For those who, by the way, want to say: If I prohibit, then I can also permit […] then there's no need to accept the whole law. Then there's no need for a state law. We can leave it as is. Every local authority – if it wants, may prohibit, and if it doesn't want – may permit" (*ibid*, p. 12).

22. We thus see that prior to the legislation of Article 9A, the local authority's power in regulating the opening and closing of *commercial* and *places of entertainment* on days of rest was quite broad – if it wanted, it prohibited, if it wanted, it permitted. Article 9A of the law narrowed the bounds of that power, and essentially negated the power of the local authority to enact a by-law that permits the opening of 'shops' that had been prohibited from opening on days of rest. Note: Unlike my colleague, Justice N. Hendel, I do not think that Article 9A defines a 'default' from which the local authority may deviate (para. 13 of his opinion). In my opinion, this article, which was, as noted, enacted out of recognition of the power of the local authorities to regulate the opening and closing of 'shops' in their jurisdictions on days of rest, in practice limited such power. To complete the picture, I note that at the end of the day, it was decided not to add the above-mentioned clarifications from the ministers' letter (because, *inter alia*, the main points were clarified in the transcript), but that does not alter the fact that Article 9A was enacted while the legislator had in mind the power granted to the local authorities pursuant to Article 249(2).

23. I will therefore repeat what I said at the start: Indeed, the arrangement grounded in Article 9A of the Hours of Work and Rest Law stands in contradiction to the text of Article 249(2) of the Municipalities Ordinance. However, the arrangement in Article 9A is the later in time, it is the more specific of the two, and therefore it narrows the broad authority imparted to the municipality under Article 249(20).

24. Having clarified the relationship between Article 9A and Article 249(2), we can evaluate the substance of the amendment that was done by adding Article 249(21) to the ordinance. As my colleague the President noted in her opinion (para. 38), the basis of the Authorizing Law in the Magistrate Court's verdict in Crim Case (Jerusalem Magistrate) 3471/87 *State of Israel v. Kaplan* [unpublished] 5748(2) PM 26 (1987) (hereinafter: the *Kaplan case*), in which it was held that local authorities may not order the closing of *places of entertainment* on days of rest for religious reasons. Given that, the Municipalities Ordinance was amended, and Article 249(21) was enacted, which sought to permit the local authority to also consider religious considerations in exercising its power under Article 249(2) of the ordinance. In bringing the draft bill before the Knesset plenary for a second and third reading, the

committee chairperson, MK A. Lein, emphasized that, "this is not a special law, that is the authorizing law; what is before us is an amendment to Article 249 of the Municipalities Ordinance […] this law is not about changing an established and accepted legislative norm. We have here a decision of a Magistrate Court in Jerusalem, which has created confusion about the meaning of the law" (Transcript of Meeting No. 241 of the 12th Knesset, 3, 8 (December 17, 1990); emphasis added-N.S.). The consequence of the above is that the addition of Article 249(21) was not intended to establish a new power of the local authority to regulate the opening and closing of businesses in its jurisdiction on days of rest, but rather explicitly to clarify that the power granted the local authority at the outset, under Article 249(2), could also be exercised "taking into consideration reasons of religious tradition". As the committee chairperson noted: "The central and most important change in the draft bill before you is encompassed in the provision that says that opening and closing businesses and places of entertainment in Israel may be done, by explicit authorization, also for reasons of religious tradition. That is the central, principled and exclusive change included here in the draft bill" (*ibid*, p. 5; emphasis added- N.S.). In my opinion, Article 249(2) clarified what is already clear.

25. To summarize this part: Article 249(20) grants the local authorities power to regulate the opening and closing times of businesses in their jurisdiction, including during days of rest. Article 9A of the Hours of Work and Rest Law established a specific arrangement, later in time, for the opening and closing of businesses on days of rest. That arrangement, in practice, narrowed the broad power that had been granted to the local authorities under Article 249(2). Article 249(21), which was worded by reference to Article 249(20), sought explicitly to clarify that this power of the local authority can also be exercised for religious considerations. In any event, Article 249(21) does not seek to change the bounds and substance of the authority, which is still subject to the arrangement set in Article 9A.

Social Purpose

26. An evaluation of the Hours of Work and Rest Law from a broader perspective also supports the conclusion that the local authority lacks the power to order the opening of commercial establishments on the days of rest. As is known, "There are two purposes that underlie the arrangements concerning the hours of weekly rest in the Hours of Work and Rest Law, and these complement one another" (the *Design* case, p. 57). One purpose is a social-societal purpose, "that a weekly day of rest should be designated for each person to rest from his work, spend time with his family or in the company of friends and have time for holiday and entertainment, according to his choices and preferences. Establishing the day of rest was also intended to protect the health of the worker and guarantee fair labor conditions" (*Israel Theaters* case, 207-208). The *second* purpose is religious-national, "which regards the observance of the Sabbath by Jews as a realization of one of the most important values in Judaism that has a national character. In a similar spirit, designating other days of rest for persons who are not Jewish realizes their religious outlook" (*Design* case, p. 58; On the national, spiritual and cultural importance of the Sabbath see the beautiful words of my colleague, Justice N. Hendel, in paragraph 2 of his opinion).

27. The prohibition on opening commercial establishments on the Sabbath, which dictates – and to a large extent compels – a unitary day of rest for the entire economy, with some infringement on freedom of occupation, constitutes a central means of achieving the purposes of the law, and it is what allows business owners to rest from work without worrying about their livelihoods: "This violation — which is mainly a prohibition of working on the Sabbath — applies in principle equally to all owners of businesses, and therefore *prima facie* it cannot give an unfair competitive advantage to one competitor or another" (*Design* case, p. 63). If we accept the interpretation that permits the opening of commercial establishments on days of rest, we would, in practice, negate the ability of business owners who wish to do so to stop working on their day of rest; they were crying in grief under the weight of their work on the Sabbath, and their cry for help rose up. Thus, the owner of a commercial establishment who decides to make his own Sabbath, meaning to open his shop on the Sabbath (through a non-Jew) acquires for himself – and according to my colleague, lawfully so – a competitive advantage over the commercial establishments operating nearby. The latter, who fear incurring financial loss – both in terms of loss of profits as well as the 'leaking' of their customer base – would be forced to open their shops, too, in order to avoid 'being left behind'. Therefore they will have to hire non-Jewish workers (see Articles 9 and 7(b) of the Hours of Work and Rest Law), but the ability to do so is reserved particularly for the owners of large businesses, who have the financial resources required to do so. A small business-owner, on the other hand, who cannot afford to hire a non-Jewish worker to work in his place on the day of rest, will throw his hands up in the air. The small business owners don't even have the possibility of giving up their day of rest and competing: On one hand, they can't afford to hire a non-Jewish worker; on the other hand, they are not permitted to engage in commerce in the shop themselves. The small merchants are the ones expected to absorb the financial loss stemming from opening commercial establishments on the days of rest (see and compare the words of Justice (as he was then called) E. Rubinstein in App Adm Pet 2469/12 *Bremer v. Tel Aviv-Jaffa Municipality* (unpublished) (June 25, 2013), para. 3). Clearly, such a result is not desirable, and it is completely opposed to the social purpose of the Hours of Work and Rest Law.

28. We should now ask: if the social purpose is indeed so important, why distinguish between *commercial establishments* and *places of entertainment*, as the legislator did? Shouldn't – from both a national and social perspective – places of entertainment also stop their work? I think we can actually find an answer to that question in the words of my colleague the President (para. 50 [para. 49-trans.]):

> "Communal life is not 'all or nothing' but rather is based on tolerance for a divergent opinion, mutual respect and mutual compromise. Communal life is not 'black and white' but rather a spectrum. It is responsive to the recognition that human beings are free creatures who design their life stories, but also to the recognition that they do so within the framework of society and not on a deserted island. It is based on the understand that each of us bears responsibility for society as a whole, but that does not mean giving up on fundamental components of our identity or the uniqueness of each of us. It is not a perspective of 'I won't sign on to desecrating the Sabbath' but rather recognition of the indispensability of the perspective, 'Live and let live'.

29. The social purpose has two layers: *The first layer* is concerned with rest from labor and relaxation from travail; the *second layer* stands on the back of the first, and it is concerned with the quality of that rest. Specifically, due to the great importance of days of rest, we should recall that the character of the rest varies among people. For one person, the Sabbath delight is in prayer, the blessing over the wine, a feast, and rest within the bounds of Jewish law; another person, in contrast, seeks to delight in a museum exhibition, a family outing to the cinema or resting on the seashore. We should therefore allow each person to shape his day of rest according to his world view and belief:

> "Alongside the protection of Sabbath observance from the national-religious aspect, the law leaves the social aspect of the day of rest open to be shaped in accordance with the variety of different lifestyles and tastes in the many sectors of Israeli society. Indeed, there are many different ways in which people decide how to act on the day of weekly rest given to them, each person in accordance with his way of life, belief and lifestyle [...] Within the framework of the social aspect of the Sabbath we require a recognition of the needs to depart from the prohibitions of employment where this is essential in order to allow the Sabbath to be shaped as the day of rest for the general public in a free, pluralistic and tolerant spirit, without causing disproportionate harm to other social groups, and without uprooting the unique national character of the Sabbath from among the Jewish people. We should thereby recognize that in order to realize the individual character and leisure culture of the individual, we also need public frameworks that will assist and allow this, including public transport that will allow the public to move freely, the opening of museums and cultural institutions, the activity of theatres and cinemas, the holding of lectures and congresses, and the like" (*Design* case, pps. 66-67).

30. A person's right to shape his day of rest in his image is not unlimited; additional values and interests hang in the balance, and we must balance between them. Opening *commercial establishments* on the Sabbath is different than opening *places of entertainment* – from both the point of view of the shop owners as well as the consumers' point of view. The absence of a prohibition on opening *places of entertainment* on the Sabbath does indeed inflict a certain harm to the Sabbath day profits of owners of *places of entertainment* who seek to stop their work, but that harm is of a more limited quality and nature:

> "A person who buys a pair of shoes on the Sabbath will not buy another pair during the week. Therefore, if some shoe stores are open on the Sabbath, those interested in closing on the Sabbath will lose part of the proceeds that would have otherwise accrued during the week, had all the shops been closed on the Sabbath. This loss would apparently be considerable, in light of the fact […] that the proceeds that would be received at this kind of business on the Sabbath would be considerably greater than the proceeds received during the week. Consequently, opening one shoe store on the Sabbath exerts significant pressure on all the owners of shoe stores in the area to open their businesses and work

on the Sabbath. The situation regarding places of entertainment is different: a person who sits in a coffee shop or goes to the cinema on the Sabbath will not, for that reason, refrain from sitting in a coffee shop or going to the cinema again during the week. Therefore, the loss caused to one who chooses to close his coffee shop on the Sabbath will not substantially influence his proceeds during the week" (Gidon Sapir, "'Vikaratem Lashabat Oneg?' Avoda Mis-char Vibilui Bishabat Biyisrael Mekom Hamidinia Viad Hayom ['And Call the Sabbath a Delight?' Work, Commerce and Leisure on the Sabbath in Israel from the Founding of the State to the Present]", 31 *Mehkarei Mishpat* 169, 222 (forthcoming 2017)).

31. There is also a substantial difference from the point of view of the consumers. As noted, the social purpose supports the right of consumers who want to experience pleasure according to their viewpoints, belief and preferences. That is not the case concerning commercial activities. Commerce is concerned with buying and selling, its main point is financial profit, functional needs that are not related to rest or leisure. Furthermore, the functional nature of commercial activity is expressed, *inter alia*, in the fact that there is no advantage to engaging in shopping particularly on the day of rest. Making purchases at the grocery store or similar place can also be done before or after the Sabbath. That is different from activities of leisure and rest, which by their nature can take place particularly on the Sabbath, the day of rest, when all family members have stopped working together and are perfecting their rest with joint activities. I will clarify and emphasize: there is no doubt that opening commercial establishments on the Sabbath constitutes a significant addition of convenience for a broad community of consumers. That should not be dismissed at all. Convenience, while it is not a fundamental constitutional right, is not a vulgar word. A person's desire to have the chance to buy milk and eggs and soy sauce (and also clothing and furniture) on the Sabbath is understandable and legitimate. However, that desire is not the whole story; hanging in the balance is also the fundamental right of the owners of the commercial establishments who want to stop their work on the day of rest. The addition of comfort likely to stem from commercial consumption on the Sabbath does not justify such significant harm to the small-scale merchants.

32. Furthermore, excepting places of entertainment from the bounds of the prohibition set by Article 9A of the law allows the owners of places of entertainment – small and large, rich and modest – who choose to give up their weekly rest, to operate their businesses themselves, without relying on salaried employees. It should also be noted that the distinction between *commercial* establishments and places of *entertainment* is deeply rooted and accepted in the discourse about the image of the Sabbath in the State of Israel; it is not by chance that, for years, it has taken root in draft laws and various public contracts (Ruth Gavison and Yaakov Medan, *Masad Liamana Chevratit Chadasha Bein Shomrei Mitzvot ViChofshiim Biyisrael [Foundation for a New Social Contract between the Religious and Secular in Israel*], 223-237 (5753); Sapir, pps. 217-222; Elyakim Rubinstein and Noam Sohlberg, "Dat Vimidina Biyisrael Bishnat Hayovel [Religion and State in Israel in the Jubilee Year]", *Manhe Liyitzhak; Kovetz Mamarim Lichvodo Shel Hashofet Yitzhak Shilo Bigvurotav [Mediator for Yitzhak: Collected Articles in Honor of Judge Yitzhak Shilo in his Courage]* 399 (eds. Aharon Barak and Menashe

Shava, 5759), also printed in Elyakim Rubinstein's book, *Nitivei Mimshal Umishpat [Paths of Governance and Law]* 196, 214-218 (5763)).

33. The key word: *Balance* – between the rest of the merchants and the rest of the consumers. It is not a perspective of "I won't be party to desecrating the Sabbath" but also not a perspective of "I will buy milk and eggs on the Sabbath for spite". "Live and let live," my colleague said; and I say – "Rest and let rest". How appropriate for our issue are the words of the Jewish-American philosopher and theologian, Abraham Joshua Heschel, in his monumental book, 'The Sabbath':

> "Someone wishing to reveal the sanctity of the day is tasked with abandoning the alienation that exists in the vulgar commerce of life, and his being trapped under the yoke of his labor and sweat. He should walk far from the strident voices of the other days, from the tensions and greed of acquisition […] he should detach from his work, and understand that the world has already been created and will survive even without the help of humankind. Six days a week we wrestle with the world, wringing profit from the earth; on the Sabbath we especially care for the seed· of eternity planted in the soul […] Six days we strive to master the world, and on the seventh day we should be wise enough to master our selfhood" (Abraham Joshua Heschel, *Hashabat [The Sabbath]* 33 (trans. Alexander Ibn Hen, Yediot Ahronot 2003)).

On the Sabbath, the darling of days, we 'should be wise enough to master our selfhood' , to exit the trap of "the yoke of labor and sweat'; so that we can relax, rest, and fulfill the words of the prophet Isaiah (58; 13) 'And call the Sabbath a delight", and to distinguish, as the law instructs, between commerce and pleasure.

34. The subjective purpose of the above-mentioned law's clauses, as clearly reflected in the legislative history; the reciprocal relationship between them over the axis of time; and also the objective purpose, which relates to the social considerations at the foundation of the Hours of Work and Rest Law – lead to the conclusion that the local authority does not have the power to order the *opening* of *commercial* establishments on days of rest.

In the Margins: The Reasonableness of Reasonableness

35. At the heart of my opinion – the question of the power of local authorities to order the opening of commercial establishments on the Sabbath. Once I reached the conclusion that such *authority* does not exist, I need not address the question of the *reasonableness* about which my colleague expounded, but it is impossible to remain exempt, without saying anything. I will say only this: according to my colleague, the Minister of Interior's position suffers from *extreme* unreasonableness, because it "did not appropriately consider the uniquely autonomous status of the Municipality" (see par. 25 [para. 24-trans.] of her opinion; emphasis added – N.S.). I saw the words of my colleague, the President, and I was reminded of the words of President (ret.) A. Grunis; his words are logical, and we should set them in our sights:

> "The court's expertise in general, and in the field of administrative law in particular, relates to questions of authority and procedural flaws [...]

> By contrast, the court has no special advantage or expertise on the subject of unreasonableness [...] the ground of unreasonableness has undergone a change and has almost developed into a kind of 'supreme norm' […] In the course of this development, it has swallowed up, like a person whose appetite is insatiable, specific grounds for judicial scrutiny that were recognized in the past (for example, the grounds of irrelevant purposes and irrelevant considerations). The great disadvantage of this ground in its current scope lies in its high degree of abstraction. The high degree of abstraction expands the role of judicial discretion and thereby increases legal uncertainty. It creates a huge disparity between its exalted position in the legal universe and its application in a concrete case […] Often use is made of the concept of weight in order to emphasize the concrete application of the ground of unreasonableness. Thus it has been said on more than one occasion that a decision will be set aside for unreasonableness even if the authority that made the decision took into account all of the relevant considerations, where it gave the wrong weight to one or more of the considerations that were taken into account […] Admittedly metaphors, such as weight, are an accepted tool of legal language. The imagery helps the court to analyze, develop its thoughts and convey the reasoning to the reader. At the same time, the use of metaphors may sometimes make the reasoning vaguer rather than clearer. The use of the image of weight in the context of unreasonableness admittedly helps to some extent. But we cannot ignore the fact that a determination of unreasonableness is almost entirely based on an examination of the end product, i.e., the outcome of the decision. In other words, the use of the metaphor of weight with regard to considerations that the competent authority making the decision took into account can sometimes, it would seem, be used to disguise disagreement with the result" (HCJ 5853/07 *Emunah National Religious Women's Movement v. Prime Minister*, 62(3) PD 445 (2007), para. 9 of his opinion; See also the words of President M. Landau in HCJ 389/80 *Dapei Zahav Ltd. v. Broadcasting Authority*, 54(1) PD 421, 431-32, who as far back as nearly fifty years ago expressed his concern about the misunderstandings that using the concept of *reasonableness* risked creating).

36. R*easonableness* has many faces, and what is *appropriate* also depends on the eyes of the beholder (HCJ 43/16 *Ometz Movement: Citizens for Good Governance and Social and Legal Justice v. Government of Israel* [unpublished], para. 15 of my opinion (March 1, 2016). What one might consider to be extremely unreasonable is seen by another as reasonable and appropriate. That is true in general, and specifically when the issue at hand is value-laden and general, part of a long-running public discussion. Our issue is proof of this. We should continue to strive to focus the cause of *reasonableness* into minute details, into standards, and even to clip its wingspan, as part of a trend "to dispel the cloud of vagueness, to add to clarity and to constrict the space of uncertainty in which *reasonableness* lives, also in a forward-looking way" (*ibid*).

The Social Purpose as a Bridge

37. We cannot conceal the truth. The argument over the image of the Sabbath is profound, ideological, principled. That is true of additional issues concerning the relationship between religion and state and the fundamental values of the State of Israel as a Jewish and democratic country. No side is willing to give up on its holy of holies – religious holiness or secular 'sanctity'. There is a reason I sought to rely on the important words of my colleague, the President, in her opinion (see para. 28 *ibid* [para.27-trans.]), regarding the principled approach that should guide our path. Doing so can illustrate that the dispute between us is not broad, deep and principled as might otherwise seem. We do not disagree on the point of departure: there is no perspective of 'all or nothing', 'black or white', but rather tolerance for a different opinion and mutual concessions. We will not obscure the dispute between us – over authority and reasonableness and interpretation, but we neither will we exaggerate it; this is not "religious" against "secular", "north" against "south" or periphery against "the State of Tel Aviv". I wrote at length above about *the social purpose*, one of the two purposes at the foundation of the Hours of Work and Rest Law. I think that reasonableness can unite all of them, without paying the price of giving up on religious or secular ideology. On the issue of the Sabbath, rather than serving as another bone of contention, the social-societal consideration can act as a cornerstone of agreement.

Epilogue

38. Prohibiting work on the Sabbath under Article 9A of the Hours of Work and Rest Law applies to *commercial* establishments but not to places of *entertainment*; the prohibition is not merely personal but rather applies to the fact of commerce in the shop; the Authorizing Law does not grant power to the local authority to order the opening of commercial establishments. From my point of view, therefore, the motion for a further hearing – should be granted.

Justice

Justice E. Hayut

1. In the verdict that is the subject of this further hearing, I joined the opinion of my colleague, President M. Naor, that there is no flaw at the level of authority or discretion that justifies intervening in the By-Law of Tel-Aviv-Jaffa (Opening and Closing Shops) (Amendment No. 2), 5774-2014 (hereinafter: *Amendment No. 2*). Hearing the arguments that the parties raised again in the further hearing has not changed my mind.

2. The Law Amending the Municipalities Ordinance (No. 40), 5751-1990 (hereinafter: *the Authorizing Law*) applies, also to days of rest, the power granted to the local authority under Article 249(2) of the Municipalities Ordinance [New Version] (hereinafter: *the Ordinance*) to regulate "the opening and closing of shops, factories, restaurants, coffee shops, tea houses, drinking establishments, cafeterias, canteens and other institutions of this kind, and of cinemas, theaters and other places of public entertainment or a type of it". Thus the Authorizing Law anchored the special-autonomous status of the authority also concerning days of rest, and allowed it to use by-laws, according to its discretion, to shape activity in the public sphere on these days, within its area of jurisdiction. As early as 1993, this court, in the opinion of President Shamgar, addressed the significance of the Authorizing Law and the bounds of the power it imparts to the local authority (HCJ 5073/91 *Israel Theaters Ltd. v. Netanya Municipality*, 57(3)

PD 192, 207 (1993), hereinafter: the *Israel Theaters Case* and also see on this issue para. 28 [para. 27-trans.] of the opinion of my colleague, the President).

My colleague the President repeated and emphasized these words when she noted that "the authority to make the value judgment within the framework of the by-laws belongs to the Municipality, not to the Minister of Interior. The Minister of Interior should not evaluate whether that judgment is optimal, in his opinion, but rather whether it is within the zone of reasonableness … A decision by the Minister of Interior is intended to supervise the lawfulness of a decision by the Municipality, not to replace its discretion" (para. 29 [para. 28-trans.] of her decision. I share this position. For the reasons my colleague the President detailed in her opinion, I also take the position that the Hours of Work and Rest Law, 5711-1951 (hereinafter: *Hours of Work and Rest Law*), including its Article 9A(a) does not address the question of opening and closing businesses on the day of rest but rather with the personal question of work on that day. Therefore, to my way of thinking, we don't find within the Hours of Work and Rest Law a prohibition on opening businesses on the day of rest, and in any event there is no clash between its provisions and the provisions of the Authorizing Law and the by-laws that were enacted pursuant to it.

3. In his decision to grant the motion for a further hearing, Deputy President E. Rubinstein (ret.) noted that "the Sabbath, whose status in the Jewish world needs no elaboration, deserves to have its case considered and clarified when all positions are before the Court".

   Indeed, the Sabbath has been adorned with many crowns, and there is a special place reserved for it in the heart of every Jewess and Jew, even if they do not fulfill the commandment of observing the Sabbath according to Jewish law. The national poet H.N. Bialik said about the Sabbath that "it is the most genius invention of the Hebrew *spirit*" (*Sefer Hashabat* [*Book of the Sabbath*] (Dvir Publishers, 5708, p. 517)) (hereinafter: *Book of the Sabbath*), and many others have reified the wonderful blending of religious values and social values (*Book of the Sabbath*, p. 521; Leave App Crim *Handyman Do It Yourself Ltd. v. State of Israel*, 57(3) PD 1, 6 (2003)). But with its founding, the State of Israel raised the banner of Jewish and democratic values together, and the need to integrate the state's Jewish contours with its democratic contours requires us to walk the path of balance and compromise. That is the case in general, and that is the case regarding the Sabbath.

4. In the *Israel Theaters* case, President Shamgar addressed the purposes at the foundation of the Hours of Work and Rest Law:

   > "In establishing the principle of observing a weekly day of rest and designating it on the Sabbath, the legislator sought to achieve two integrated goals: first, a social goal, that a weekly day of rest should be designated for each person to rest from his work, spend time with his family or in the company of friends and have time for holiday and entertainment, according to his choices and preferences … second, designating the day of rest on the Sabbath takes place against the background of the commandment of religious law and Jewish tradition" (*ibid*, 206-207).

The effort to integrate these two goals, while allowing certain economic activity for places of entertainment and commercial establishments on the days of rest, as well, was expressed in the Authorizing Law. According to this law, as noted, the local authority was imbued with power to order, *inter alia*, "the opening and closing of shops and workshops…" on the days of rest, but it was emphasized that the authority must exercise this power while taking into consideration "reasons related to religious tradition" (arts. 249A(20) and (21) of the ordinance). The legislator thus did not completely prohibit the local authorities from regulating the opening and closing of shops and workshops on the days of rest but outlined for them a clear standard of consideration for reasons related to religious tradition, and in doing so chose the path of balance and compromise (see para. 31 [para. 30-trans.] of the opinion of my colleague, the President). My colleague Justice Sohlberg seeks to establish the balance point in this context as the distinction between places of entertainment and commercial establishments. However, this distinction has no basis either in the text of the Authorizing Law, and as my colleague the President described so well, or in the law's legislative history. It therefore cannot be accepted. Having said that, I accept the position that we should be very cautious with provisions that permit the opening of shops and workshops on the days of rest, and that provisions that allow that with "too generous a hand" risk upsetting the delicate balance that must be preserved in this context between the State's Jewish values and its democratic values.

5. In his opinion that was submitted to us at the stage of the further hearing, the Minister of Interior expressed concern over creating a precedent that would create a fissure in the status quo and change "the appearance of the Sabbath and its character throughout the country". First, I note that there is merit in the ruling of my colleague, the President, that this is a decision that was not submitted and in any event was not addressed in the procedure that is the subject of the further hearing (see paras. 17-20 [paras. 16-19-trans.] of her opinion). For that reason, I doubt that we can address it now. However, even on the merits of the issue, I did not find a justification, under these circumstances, for the concern that the minister expressed in his decision over a sweeping infringement on the appearance of the Sabbath and its character at the national level, to the point where he would believe there is cause for invalidating Amendment No. 2 of the Tel-Aviv Jaffa [sic] Ordinance. That is the case, given the very limited scope of the sites and the businesses whose opening was permitted in Tel Aviv on the Sabbath, both according to Amendment No. 1 and according to Amendment No. 2, which exemplify a reasonable and proportional balance between the existing interest in observing the character of the Sabbath as a day of rest while allowing for the possibility of some economic activity that suits the city's character, with its various neighborhoods and its diverse population.

   For these reasons, I concur with the position of my colleague, the President, in the further hearing as well.

Justice

Justice D. Barak-Erez

1. Should we respect the choice of the Tel Aviv-Jaffa Municipality city council to amend its by-law in such a way as to allow the opening of grocery stores on Sabbath days holidays? That, in essence, is the question that again was placed before us. That – and not additional

questions, although additional questions were wound up in the parties' arguments. As I noted in the verdict that is the subject of the further hearing, we are not addressing the question of whether, at the level of norms and viewpoints, we should prefer arrangements that take the side of broadly closing businesses on the Sabbath or those that regulate ways of opening them. We are also not addressing the question of what is the optimal application of the national and social ideal of the Sabbath. I believed in the past, and I still believe, that we should respect the decision of the city council, and allow the value-laden dispute in the background to continue to take place in the arena that is appropriate for it – the public arena. For that reason, I concur with the opinion of my colleague, the President, also in the further hearing, and for the reasons she provides. Having said that, in light of the dispute that has erupted between my colleagues, Justices N. Hendel and N. Sohlberg and the rest of the colleagues on the panel, and while focusing on the question of the authority of the municipality to permit the opening of stores on the weekly day of rest, I seek here to present the details of my position.

Further Hearing and Not a Retrial

2. Before I dive into the merits of the issue, I will add that, like my colleague, the President, I also think it important to be punctilious in not permitting a further hearing of a verdict to become a platform for a retrial. Finality in litigation is an important value in our system, and actually in every legal system. That is particularly important, in light of the fact that giving a government agency a chance to present a new position, that would be addressed on the merits after the legal proceedings have ended risks incentivizing strategic behavior – at first presenting one position, and if it is not accepted, it can present another position.
3. Truth be told, I agree with my colleague, the President, that this reason is sufficient to justify denying the motion for a further hearing. However, given that the scope of discussion has been broadened, I will continue and also address the merits of the issue. However, it is important to emphasize that the reasons behind the late decision of the Minister of Interior should not be at the center of the discussion, but rather the question of the lawfulness of the Tel Aviv-Jaffa's by-law, including its amendments – both in terms of authority as well as in terms of discretion.

A Municipality's Authority to Permit the Opening of Businesses on the Sabbath

4. The petitioners' arguments in the further hearing were largely based on the legal position that Article 9A of the Hours of Work and Rest Law, 5711-1951 (hereinafter: the Hours of Work and Rest Law) should be interpreted to completely prohibit activities by businesses belonging to the category of "shops" on the Sabbath, and therefore, in any event, the authority of the municipality to permit the opening of businesses would be limited to regulating the opening of places of leisure and recreation – hotels, restaurants and cultural institutions – what are often called "places of entertainment". My colleague, the President, rejected this argument. In contrast, my colleagues, Justices N. Hendel and N. Sohlberg, reached a different conclusion on this issue. According to them, a reading of Article 9A of

the Hours of Work and Rest Law reveals that the law creates a prohibition on the activities of shops, workshops and factories on the Sabbath. My colleague, Justice Hendel, believes that the resulting conclusion is that the local authority has extremely limited discretion to permit businesses to open on the Sabbath, while the Minister of Interior has broad oversight powers over its decisions on the issue. My colleague, Justice Sohlberg, takes the point even further, finding that the municipality acted *ultra-virus* and lacks the authority to permit the opening of businesses in the category of "shops" on the Sabbath.

5. In this dispute, I agree with my colleague, the President. I believe, with all due respect, that the opposing position does not reflect the correct interpretation of the Hours of Work and Rest Law – neither in terms of its text and legislative purpose, nor in terms of its relationship to other provisions in the very same law and to provisions of the Municipalities Ordinance [New Version] (hereinafter: *Municipalities Ordinance* or *the Ordinance*), and not even in terms of its legislative history. When it is evaluated more broadly, including, *inter alia*, the way people have understood the law to amend the Municipalities Ordinance (No. 40), 5751-1990, known as "The Authorizing Law". I will explain my position.

6. In order to address the interpretation of Article 9A of the Hours of Work and Rest Law, whose caption is "

    (a) On the prescribed days of rest, within the meaning of the Law and Administration Ordinance,, 5708-1948, the owner of a workshop of [sic] industrial undertaking shall not work in his workshop of undertaking and the owners [sic] of a shop shall not do business in his shop

    (b) On the aforesaid days of rest, a member of a cooperative society shall not work in a workshop or industrial undertaking of the society; a member of an agricultural cooperative society shall not work in a workshop or industrial undertaking of the society unless the work is connected with the services necessary for its farm.

    (c) A non-Jew may, in respect of his workshop, industrial undertaking or shop situated in the area of a local authority whose non-Jewish inhabitants, according to the determination of that authority, are at least 25 per cent of its total population, observe the prohibitions imposed by this section, at his option, either on the aforesaid days of rest or on his own Sabbath and holydays. The same shall apply in a quarter of a local authority if the area and the proportion - not less than 25 per cent - of the non-Jewish inhabitants of that quarter have been determined for this purpose by that authority.

7. The opposing view focused on the provision that says "the owner of a shop shall not do business in his shop". According to this position, the prohibition set in Article 9A applies to activity in the business in general, in contrast to the activity of the shop owner himself on his weekly day of rest. We disagree with that.

8. A reading of the Law of Work Hours and Rest sharpens the clear distinction that it contains between the terms "will work" and "will employ". The law ordinarily regulates the issues of employers and their employees. In contrast, there are prohibitions on someone who is a

shop owner to "employ" workers through a formula that deviates from the law's dictate. The law therefore clearly distinguishes between the "work", which is the activity of the worker himself, and the "employment", which is the employer's part of it. Accordingly, Article 9A of the law says that the owner of a workshop and the owner of a factory shall not "work" in his workshop or factory – "*shall not work*", and not "*shall not employ*".

9. Against that background, I think that Article 9A was intended to extend the obligation of rest on Sabbath days and holidays to non-salaried workers, including workshop owners and shop owners (see: HCJ 347/84 *Petah Tikva Municipality v. Minister of Interior*, 39(1) PD 813, 821 (1985) (hereinafter: *Petah Tivka Municipality case*). In other words, the legislator sought to take care of independent business owners by imposing an obligation of rest on them, to take care of them and their family members, too, as it had already done in regulating this forced rest (as a welcome personal arrangement) for salaried employees. From that alone we should not conclude that the legal provision is intended to require the absence of activity in the business itself. Indeed, pursuant to the reality at the time the legislator enacted the law, namely that most commerce was retail commerce, and workshops were mostly small, the Sabbath rest of the owner of the business would be expected to end the operation of the business itself. That is even, from my point of view, a result that in many cases brings a social blessing. However, from a legal point of view, it is not a necessary outcome.

10. In my opinion, this interpretation is required not just by the text of Article 9A of Hours of Work and Rest Law, but also by its purpose. As we know, the Hours of Work and Rest Law is, first and foremost, a protective labor law whose purpose is to regulate the rights of workers and to guarantee their rest, whether they chose it or not (see: HCJ 6522/06 *Kochavi v. National labor Court in Jerusalem* [unpublished], para. 17 (April 22, 2009); FH HCJ 10007/09 *Glutan v. National Labor Court* [unpublished], para. 11 of then-Justice S. Jubran's opinion (March 18, 2013)). Broad areas of regulating the national character of the Sabbath deviate from the bounds of this law, and that is without detracting from the national-identity purpose of the law, which is expressed in the choice of Sabbath days and Jewish holidays as the primary days of rest (See Leave App Crim *Handyman Do It Yourself Ltd. v. State of Israel*, 57(3) PD 1, 6 (2003) (hereinafter: *the Handyman case*); HCJ 5026/*04 Design 22- Shark Deluxe Furniture Ltd. v. Director of Sabbath Work Permits Department – Ministry of Labor and Social Affairs,* 60(1) PD 38, (59) (2005) (*hereinafter*: the *Design 22 case*).

11. My colleague, Justice Sohlberg, cited statements made during the process of enacting Article 9A of the Hours of Work and Rest Law, with the goal of understanding its subjective purpose. However, I think that a complete reading of the debates that took place in the Knesset and the committees raises a more complex and even different picture. Of course, legislative proceedings always include many speakers and participants, and in any event some of the participants' statements in the debates express their own positions and do not necessarily indicate the "legislative intent" (see: Aharon Barak, *Parshanut Bamishpat – Parshanut Hahakika* [*Interpretation in Law, Legislative Interpretation*] Vol. 2, 265 (1993) (hereinafter: *Legislative Interpretation*). That is particularly true when we are dealing with a subject that is in social-public dispute such as the subject of the Sabbath, such that the Knesset debates over it reflect a broad spectrum of positions (for more on this, see Gidon

Sapir, "'Vikaratem Lashabat Oneg?' Avoda Mis-char Vibilui Bishabat Biyisrael Mekom Hamidinia Viad Hayom ['And Call the Sabbath a Delight?' Work, Commerce and Leisure on the Sabbath in Israel from the Founding of the State to the Present]", 31 *Mehkarei Mishpat* 169, 173-184 (2017) (hereinafter: *Sapir*)).

12. Even before I address statements made during the debates, we should begin with the draft law's explanatory notes, where it is explicitly written that "the Hours of Work and Rest Law … currently applies to salaried employees only. The proposed amendment seeks to apply its provisions regarding days of rest to factory owners, members of cooperative societies and shop owners, too, with certain caveats" (Explanatory Notes for the draft Hours of Work and Rest Law (Amendment), 5726-1966, HH 136). If that is so, the explanatory notes of the draft bill that includes Article 9A establish, as noted, that the intent of the legislator was to apply the law to independents, as well. That – and no more. There is no mention of broader aspects of ceasing the activity of businesses on the Sabbath as an objective in itself.

13. My colleague quoted the words of then-Minister of Labor Yigal Allon, in the Knesset plenary at the time he brought the amendment that included Article 9A for a first reading. My impression is that reading the statements made by Minister Allon in the plenary can actually indicate the emphasis that Article 9A puts on regulating employment and not the opening of businesses: "I am satisfied that this time I can submit to the Knesset a bill that can *expand the application of the obligation of rest on additional kinds of workers*, without violating the status quo regarding religion" (D.K. 5726, 2157). He went on to say: "While at the start of this century, there was a conception that labor laws are intended to protect only manual wage laborers, this conception has expanded, and there is no dispute today that the state *should extend its protection to every worker as such* – a manual laborer and an office clerk, *a wage laborer and an independent contractor*" (*ibid*. Emphasis added). This language, which presents to the reader the employee and the employer – and not the business – is, as noted the same language used in the Hours of Work and Rest Law itself, and it is the language that is compatible, as explained, with law's objective purpose as a protective labor law.

14. This conclusion becomes stronger/more plausible when we examine statements by Adv. M. Harniv, the legal advisor of the Ministry of Labor, during the debates over the amendment in the Knesset Labor Committee. For example, he explained: "In bringing this law before the Knesset, the Minister of Labor did not hide the fact that this law is an outcome of the coalition agreement; having said that, he added that the law is part of the development of labor legislation throughout the world. If labor legislation was initially intended to protect the wage laborer, as time passed, the perspective that the independent contractor should also be protected developed further and further. Article 9 of the original law prohibits employing a worker on his day of rest, and this draft law seeks to impose such prohibition on the independent contractor as well" (Transcript of the Knesset Labor Committee of November 16, 1966). In my opinion, the following statement of his is particularly enlightening:

    "When I debate this law I look at it as a social law and not just as a religious law. That was the foundation, and I participated in coalition negotiations over it, and I know. In many other previous governments, there was a coalition agreement that promised to enact a "Sabbath

> law". In this law, the word "Sabbath" is not even mentioned. And when it was agreed upon, the Minister of Labor required two things: first, that if this is a Sabbath law and a religious law, why does it have to be part of the Hours of Work and Rest Law? And second – then the Minister of Religious Affairs would have had to be responsible for it … I call your attention to the fact that this law does not discuss the Sabbath but rather the weekly day of rest … it's a social law. As we do for salaried employees, that is how we shall do for independents, who are also workers. From the point of view of the national legislation, they will have a day of rest" (Transcript of Labor Committee of July 3, 1968).

15. My colleagues, Justices Hendel and Sohlberg, find support for their interpretation in Article 9A(c) of the Hours of Work and Rest Law, which forbids a non-Jew from opening his shop on the Sabbath in an area where there is a decisive Jewish majority. For them, that article indicates the legislator's intention not to allow the opening of businesses in Jewish areas on Saturdays, even if those who work in the business as a practical matter are not Jewish. I do not think that the above resembles a piece of evidence. At the heart of those words, there could be an alternative explanation to the one that my colleagues propose, one that is based on simple market logic. What does that mean? In my opinion, with Article 9A(c), the legislator sought to prevent a situation in which the "vacuum" created in a certain area – in which all the Jewish-owned businesses were closed on the day of rest – would be exploited by non-Jewish business owners, who are not required, under the law, to stop working on the day of rest (See, e.g. statements by Member of Knesset T. Sanhadrai in the transcript of the Labor Committee of November 22, 1967).

16. As an aside, I will note that I do not agree with my colleagues' position regarding the interpretation of the term "shop" as it appears in Article 9A of the law. For them, this term is limited to businesses that sell products, as opposed to places of entertainment. It would appear difficult to interpret Article 9A as necessarily intending to refer to a "shop" in the narrow sense. This interpretation is inconsistent with the social purpose of Article 9A, because it leaves open the question of whether it applies to many other businesses that are not a "shop" in the narrow sense and are not a "workshop" or "factory". What about offices that supply professional services such as accounting, legal representation or medicine. Are they workshops? Or should we say that the prohibition does not apply to them at all? Furthermore, I believe that the positions presented regarding the interpretation of the term "shop" in the statements made during the legislative debates do not necessarily express the appropriate interpretation of that term, primarily if we pay attention to the fact that repeated requests to add a definition of that term were repeatedly rejected, deliberately, *inter alia*, for reasons that were defined as "relating to the governmental coalition" (See, e.g. D.K. 5729 1904). In any event, I do not think we need to address the full range of the above-mentioned aspects in our case, given the conclusion that Article 9A of the law does not include a prohibition on opening businesses on the Sabbath, but rather imposes restrictions on the work of those for whom it is their weekly day of rest, including the business owners themselves.

17. Similarly, I want to point out that the interpretation proposed by the opposing position puts the Hours of Work and Rest Law on a direct collision course with the Authorizing Law. As we know, Article 249(2) of the Ordinance imparts the local authority with power to regulate "the opening

and closing" of shops, workshops, places of entertainment and additional institutions, and "to determine … their opening and closing hours on any given day". Article 249(21) of the Ordinance adds and explicitly clarifies that the local authority may exercise such power in respect of the weekly day of rest, too, taking into consideration reasons of religious tradition. My colleagues tried to resolve this difficulty through various interpretive paths. I think the solution is much simpler: there is no contradiction between the Hours of Work and Rest Law and the Municipalities Ordinance, and in any event there is no interpretive tension that needs to be bridged. Article 9A of the Hours of Work and Rest Law is a protective law that guarantees the Sabbath rest for those who work as independent contractors, while the Municipalities Ordinance regulates the scope of what is permitted for opening businesses, and each of those kingdoms remains within its own domain.

The Post-Legislative History: Implementation of the Law Throughout the Years and New Proposed Laws

18. In addition to the aforesaid, I want to emphasize that the interpretation of Article 9A of the Hours of Work and Rest Law cannot be done as if we were reading a blank slate. As we know, as part of the method of purposive interpretation, we should examine the legislative history of a piece of legislation. In that context, one examines both the pre-legislative history (the legal and social background that led to the act of legislation, as well as the stages that the law passed on its way to enactment) and the post-legislative history, meaning the events that occurred after the act of legislation that are relevant to it (See: Barak, *Legislative Interpretation*, pps. 351-352).

19. We have in the record decades in which the Hours of Work and Rest Law has been discussed and implemented in the rulings of this court. In each case, the legal proceedings were based on the fundamental assumption that the Hours of Work and Rest Law does not *per se* prohibit opening businesses on Saturdays and holidays, in contrast to employing workers on their days of rest in these businesses (See, e.g., the *Petah Tikvah Municipality* case, pps. 821-822). Thus, in the two central judgments in which this court addressed arguments against the prohibitions on employing salaried workers on the Sabbath – the *Handyman* case and the *Design 22* case – the proceedings were entirely based on the assumption that it is possible to operate the business itself, and the discussion was over the restriction on employing Jewish workers in the business on the day of rest. This state of affairs becomes clearer, as noted, if we examine the *Bremer* case, in which most of the judges on the panel concurred with the result, including then-Justice E. Rubinstein, who granted the motion for a further hearing in this case. The *Bremer* case essentially referred the leaders of the Tel Aviv-Jaffa Municipality to enact a new by-law that would take a clear position about the operation of businesses on the Sabbath (*ibid*, paras. 52-56 of then-Deputy President Naor's judgment). Was that ruling intended to direct the city's leaders toward a path that is blocked in advance? I would be astonished if that were the case.

20. It is worth noting that many of the petitioners for the further hearing, who reified the argument based on the interpretation of Article 9A of the Hours of Work and Rest Law, were essentially the appellants in the *Bremer* case. Despite that fact, they did not move for a further hearing after the verdict in case and did not argue that directing the Tel Aviv-Jaffa City Council toward the path of enacting a by-law regarding the operation of businesses on the Sabbath was a new and difficult precedent, which allegedly contradicts the law, as they are arguing now. This kind

of procedural conduct would seem to arouse wonder and even discomfort. In contrast to an appeal, which can be filed only by one who wants to challenge the operative result of the verdict, a motion for a further hearing is intended to restore the law to its proper path.

21. Furthermore, we should note that interpreting Article 9A to completely prohibit opening businesses on the Sabbath is inconsistent with the practice in which local authorities have engaged for many years. Many authorities – excluding the Tel Aviv municipality – enact by-laws pursuant to their authority under the Municipalities Ordinance in which they regulate the issue of opening and closing businesses on the Sabbath (for more on this, see: Gidon Zaira and others, *Achifat Hahoraot Bidvar Ptichat Asakim Visgiratam Bimei Hamenucha Al-Yidei Harishuyot Haekomiot [Enforcing the Provisions on Opening and Closing Businesses on Days of Rest by the Local Authorities]* (Haknesset, Research and Information Center, 2014)). Without addressing the question of the intensity of the enforcement of these laws – which is a separate question – one wonders why many local authorities need to regulate, in detail, the question of closing and opening businesses on the Sabbath using by-laws, if the assumption is that in any event the law sweepingly prohibits it? In my opinion, that fact demonstrates that the above-mentioned interpretation does not reflect the consensus among the local authorities.

22. It is worth noting that an examination of the permits issued for work on the Sabbath under Article 12 of the Hours of Work and Rest Law (on the list available on the Ministry of Economy's web site) indicates that in practice, these are permits for *employing workers*. Were the Ministry of Economy to instruct itself to follow the interpretation proposed ty the opposing position, each time it issued a permit for employment on the Sabbath, it would have had to issue, in parallel, a permit for the operation of the business itself – based on the assumption that employing a worker is like operating the business. It did not do so.

23. Furthermore, the draft laws that were submitted in recent years seeking to adopt a clear distinction between the law that applies to businesses in the area of commerce and that applying to cultural and recreational institutions are all based on the assumptions that this is an innovation worthy of being introduced – as opposed to a reflection of the current legal state of affairs (see, e.g. Draft Law Weekly Day of Rest, 5776-2015, P/20/2112; Draft Sabbath Law, 5776-2016, P/20/3340. See also Sapir, pps. 230-231).

24. We can say the same thing, with the necessary adjustments, about the way my colleague, Justice Hendel, relates to the principles outlined in the document called "the Gavison-Medan Contract". This contract is a comprehensive proposal for a new status quo, which seeks to present a new compromise on issues of religion and state (see: Yoav Artsiali*, Amanat Gavison-Medan: Ikarim Viekronot [Gavison-Medan Contract: Essences and Principles*] (2003)). It has no normative force, and its fundamental assumption is that it does not reflect the current state of affairs. I say that without addressing the details, for example the fact that the document includes additional agreements regarding the Sabbath, such as limited operation of public transportation on the Sabbath (as part of a new social agreement on the subject).

25. Having said all that, I believe that there is no basis for the argument that the interpretation of Article 9A in the President's judgment is a "new" interpretation. In my opinion, the opposite is true: the interpretation on which the opposing position is based is an interpretation that is inconsistent with previous rulings and with the *de facto* conduct in the field.

On the Autonomy of the Local Authority and the Minister of Interior's Supervisory Role

26. If this is the case, I agree with my colleague the President that the local authority is authorized to regulate the issue of opening and closing businesses on the Sabbath within its jurisdiction, by enacting by-laws. We should evaluate the considerations that the Minister of Interior may consider regarding by-laws from the perspective of the general reciprocal relationship between the local government and the central government, as the legislation designs it, and for our case, primarily the Municipalities Ordinance.

27. As is clear from the Municipalities Ordinance, the body that is tasked with establishing the organization of life in the municipality is the city council. This principle stems from the fundamental perspective viewing local authorities as the governmental bodies that express the autonomy of the community and democracy that has enhanced representative mechanisms (See further: HCJ 3791/93 *Mishlev v. Minister of Interior*, 47(4) PD 126 (1993); HCJ 953/01 *Solodkin v. Beit Shemesh Municipality*, 58(5) PD 595, 620 (2004) (hereinafter: the *Solodkin* case) and the references it contains; Itzhak Zamir, *Hasamchut Haminhalit [Administrative Authority]*, Vol. 1 446-447 (2nd expanded ed. 2010)). In contrast, the Minister of Interior has an *oversight* function, which is supposed to reflect protection of the general public interest, but not to replace the municipality's discretion at the outset (HCJ 7186/06 *Malinovsky v. Holon Municipality* [unpublished], paras. 60 (December 29, 2009) (hereinafter: the *Malinovsky* case)). As I noted in the verdict that is the subject of the further hearing – "the Minister of Interior's decision is supposed to oversee the lawfulness of the of the authority's action, to ensure that it is not tainted by aspects of negative externalities *vis a vis* other authorities, and to give expression to the system's common values (subject to the principle that their implementation is not supposed to be uniform throughout the entire country)" (*ibid*, para. 3 of my opinion). I will therefore seek to repeat what I wrote in this context and to clarify it.

28. One of the clear aspects necessary for the Minister of Interior's oversight relates to the required coordination between local authorities and cooperation between them. This is coordination that can be termed *horizontal coordination*. Thus, for example, there is a concern over unfair competition between authorities, which would require intervention by the minister. Indeed, such competition could have positive aspects, in the sense of allowing people to choose among different and diverse services that each authority offers, according to their preferences and how they wish to shape their lives (See: Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956); Ishai Blank, "Mikomo Shel Ha'mekomi': Mishpat Hashilton Hamekomi, Bizur Vi-I Shivyon Merchavi Biyisrael [The Place of the 'Local': the Law of Local Government, Decentralization and Spatial Inequality in Israel", 34 *Mishpatim* 197, 208-210 (2004) (hereinafter: *Blank*)). However, having said that, competition between authorities has certain limitations, considering, for example, the difficulties related to moving between them and information gaps regarding the attributes and character of a particular local authority (See, e.g.: Blank, p. 209). I have written in the past that action within a competitive paradigm can lead to a situation in which a local authority will avoid weighing broad considerations, for example considerations of distributive justice at the regional or even national level (See e.g. HCJ 7425/09

Tuttnauer Ltd. v. Minister of Interior [unpublished], para. 31 (January 3, 2013). An additional concern that arises in this context is about externalizing the costs of one authority to another (*ibid*, paras. 32-25). In that vein, in our context, we might imagine a difficulty wound up with the fact that a municipal council might order the opening of businesses on the Sabbath particularly close to a quiet residential (or even religious) neighborhood of another city, in such a way as to infringe on the quiet it enjoys or to influence its character. The Minister of Interior's broad gaze can prevent such situations.

29. On another level, it is important to consider the question of whether this is an area in which both the local and central governments have been granted authority to act in parallel. This is coordination that can be termed *vertical coordination*. Addressing issues of security and public order is an example of an area of this type. Local authorities are authorized to act in this area to a certain extent (pursuant to Article 249(29) of the Municipalities Ordinance), but that is also a core area of activity for police and other security agencies belonging to the central government. If that is the case, where parallel authority exists for the local government and the central government to regulate a particular area, there is space for the Minister of Interior to exercise his supervisory power.

30. Having said that, there are areas whose regulation is primarily assigned to the local authority, and for these, one should accord substantial weight to its autonomous space. Designing the local authority's public space is a clear example of an area in which one should, to a great extent, cede to the local authority, because it is close, double-meaning intended, to the residents and the environment in which they live, and can express human diversity (See: Blank, p. 211). It is not by chance that the legislator chose to authorize the local authorities to regulate various areas concerned with religion and state, as will be detailed below.

Arrangements for Opening Businesses on the Sabbath from the Perspective of the Authorities' Autonomy

31. Further what has been said thus far, the legislator's choice to impart the local authorities with the authority to regulate the opening of businesses on days of rest was not made unintentionally. It reflects the historical complexity of the relationship between religion and state in Israel. As far back as the founding of the state, Israeli society struggled to reach comprehensive arrangements in the area of Sabbath observance, and therefore it was decided to set a number of framework principles, but to leave great space for decisions reflecting local tradition – instead of setting a general governmental policy. In essence, this choice of the legislator is based on the traditional perspective that views the issue of opening and closing shops on Sabbath days and holidays as a primarily local issue (See: Crim App 858/79 *Lapid v. State of Israel*, 44(3) PD 386 (1980)), except for certain kinds of businesses, such as gas stations (See Crim App 217/68 *Izramex Ltd. v. State of Israel*, 22(2) PD 343 (1968)). In that, it differs from the choice that characterized the regulation of other subjects related to the Sabbath, such as oversight of public transportation (See: Article 71(7A) of the Transportation Ordinance [New Version] and Regulation 386A of the Transportation Regulations, 5721-1961).

32. It is worth noting that this choice of delegating decisions to the local level also characterized, at least in the past, additional areas of regulation that relate to issues of religion and state. We can see a prominent example of this in the authorization to enact local municipal ordinances on the

subject of the pork prohibitions under the Local Authorities Law (Special Authorization), 5717-1956 (see the *Solodkin* case on page 620). See also: Dafna Barak-Erez, "Gilgulo Shel Chazir: Mesemel Leumi Liinteress Dati? [The Evolution of Pork: From a National Symbol to a Religious Issue?]", 33 *Mishpatim* 403 (2003); Dafna Barak-Erez, *Chukim Vichayot Acherot [Laws and Other Animals]* (2015)). In truth, the legislators had in mind the success of this bizarre model in the symbolic area of pork prohibitions when they sought to establish an additional authorizing provision concerning by-laws on the subject of the Sabbath, thirty years later.

33. Nothing said here detracts from the recognition that the issue of the Sabbath has an important national aspect. This recognition is integrated in the view that there are subjects that have both local aspects and national aspects (See generally: Yisachar (Isi) Rosen-Zvi, "Mahuto Shel 'Hamekomi' – Hirhurim Al Mekomiut Biakvut Bagatz 10104/04 Shalom Achshav v. Yosef [The Essence of the "Local" – Musings on Locality Following HCJ 10104/04 Peace Now v. Yosef]", 12 *Mishpat Umimshal* 333 (2010). Similarly, we are not holding that the central government has no authority to intervene in regulating activity on the day of rest. As noted, there is no absolute partition between "local" areas and "national" areas, and we can imagine extreme cases in which the local authority's decision would give so little weight to the general-national consideration in the framework of the balancing it conducts, that the minister's intervention would be justified. Thus, for example, the broad perspective of the central government could be expressed in the cases in which the local authority completely ignores the national value of observing the Sabbath as a day of rest. However, that is not the case before us, and it is even far from it.

34. My colleague, Justice Hendel, says that the uniqueness of the subject of the Sabbath justifies regulating it at the national level, as opposed to the local level. That is a possible approach. However, we can also imagine an approach that says that actually, the difficulty in reaching a decision on this issue at the national level justifies decentralizing the decision to the different communities. In any event, that is currently the approach that the legislator chose for all that concerns opening businesses on Sabbath days (as opposed to the subject of employment during those days), and we must respect it.

Back to the Minister of Interior's Updated Position

35. Having said that, we return to the concrete issue before us. A reading of the Minister of Interior's position that was submitted in advance of the further hearing indicates that it does not reflect the customary legislative hierarchy. Thus, the Minister of Interior presents an organized world view but barely addresses the local authority before us – the City of Tel Aviv-Jaffa – and its special characteristics. In essence, these characteristics are not mentioned or discussed at all, except for mentioning that, according to the formulation of the current by-law, sale of food is permitted in convenience stores, pharmacies and three distinct sites. The autonomy of the local authority essentially is treated only by way of negation: "I am not persuaded, despite the weight that should be given to respecting the autonomy of the local authority, that the by-law as proposed by the Tel Aviv Municipality justifies the infringement …" (para. 17 of the Minister of Interior's Position). The local authority's autonomy therefore remains a saying, even lip service, as opposed to a value that has actuality.

36. The diminishing treatment accorded to the consideration of autonomy of the local authority in the Minister of Interior's position is also expressed in the way it contrasts "need", which is presented as a legitimate consideration, with the consideration of "will". The position says that such will "is based on making the convenience of this or that arrangement a priority and nothing more (para. 13 of the Minister of Interior's position). If that is so, the evaluation is purely instrumental – what is a "need" and what is "convenience". There is no respectful mention of the fact that this is a choice of the community, who chose their public officials as the product of a political process that expressed debate and thought, and not just the will of the "residents".

37. If that is so, the approach that arises from the Minister of Interior's position is that he is tasked with forming policy on the subject from a nation-wide perspective. This approach transgresses the legislative arrangement, and it is opposed to the point of departure we discussed above. I therefore concur with the conclusion that my colleague, the President, reached, namely that there was no room for the Minister of Interior to intervene in the by-laws that the Tel Aviv-Jaffa City Council enacted. In this context, I wish to note that I also concur with the words of my colleague, the President, regarding the cause of reasonableness (para. 58 of her opinion), following the comment of my colleague, Justice Sohlberg on this issue. As my colleague noted, I also think that the cause of reasonableness is a central and critical tool for exercising judicial review of the administration, and in any event, throughout the years, our case law has enshrined guiding rules for exercising and implementing it, while being scrupulous about respecting the space for the discretion that the authority has been given in law. These principles become even more important in cases in which the flaw in the activity of the local authority rises to the level of completely ignoring a relevant consideration (See and compare: FH HCJ 3299/93 *Wechselbaum v. Minister of Defense*, 49(2) PD 195 (1995).

38. I will add that I do not see much in the concern that the Minister of Interior expressed, that authorizing opening shops in the city of Tel Aviv would become "the new standard" for opening businesses in other authorities, as well, in such a way as to redesign the character of the entire nation. There is no basis for thinking that all local authorities will necessarily rush to open businesses on the Sabbath, to the extent of what was decided in Tel Aviv. Each city has its own characteristics, and in that vein, we actually might expect variety in the decisions that will made on the issue. I will add, beyond what is necessary, that I personally believe that the public status of the Sabbath is strong in the hearts of many citizens in Israel. Why assume that this position will not be given serious consideration by public officials in the local authorities, each authority according to its characteristics?

On Social Justice and the Sabbath Rest

39. We should acknowledge: Choosing to open businesses on the Sabbath is not devoid of dilemmas. The Sabbath is a national symbol whose status and dignity should be preserved in the State of Israel. Furthermore, the Sabbath rest is a precious social asset whose protection we should safeguard – in general, and especially for disempowered populations in the labor market. These arguments presented by the petitioners, who are thoroughly convinced of them, do not fall on deaf ears. However, as was explained at length, the Hours of Work and Rest Law chose to

protect these values without establishing a sweeping prohibition on opening businesses on the Sabbath. I wish to add two important clarifications on this issue.

40. *First*, protecting the special status of the Sabbath in the public space of the State of Israel is not the same thing as observing the Sabbath according to Jewish law. This is true not just regarding the operation of places of entertainment (recreational and cultural institutions and coffee shops and restaurants), as the petitioners noted, but also regarding opening other businesses.

41. *Second*, the petitions did not lay out a sufficient factual basis for the argument that their position is essential for protecting disempowered workers. Indeed, it is possible that opening businesses on the Sabbath will expose disempowered workers to work on their weekly day or rest, against their will and in violation of the law. However, the way to combat that is by appropriate enforcement of labor laws. During the hearing, no real basis was presented for the argument that opening grocery stores on Saturdays in the scope defined in the municipal law would create a special risk for disempowered workers – more than do the many restaurants and coffee shops in the city or the hotels on its beaches, which operate on a broad scale on Saturdays. In these establishments, one should be scrupulous about the workers' weekly day of rest, and the authorities should prepare for that. Furthermore: to the extent we are talking about protecting small business owners who struggle, as was argued before us, to withstand the competition of businesses open on the Sabbath, we should add and evaluate the weight of opening businesses on the Sabbath versus other economic pressures that may be larger, for example, competition with businesses that operate continuously. If that is so, we should protect the special place of the Sabbath, but some of the social struggles lie in other places. To a certain extent, one gets the impression that this is one of those cases in which the petitioners "are looking for the coin under the lamppost" and not in its place.

In Conclusion: An Historical Look at the Sabbath Arrangements in Tel Aviv

42. As I briefly noted in my opinion in the verdict that is the subject of the further hearing, we cannot view the dispute before us disconnected from the historical continuum on which it is located. I think that evaluating the issues from that perspective as well indicates that we should not see in the by-law an expression of a process of "continuous erosion" of the image of the Sabbath, but rather an expression of a lively debate that has taken place throughout the years on this issue (on the different perspectives regarding the characteristics of the Sabbath day among the founding generations of the Zionist movement, see further: Tzvi Tsameret, "Mordim Vimamshichim – Itzuv Hashabat Lifi Y.H. Brenner, A.D. Gordon, G. Katzenelson, S.H. Berman, E. Schweid Vi M. Eyali [Rebelling and Continuing – Designing the Sabbath According to Y.H. Brenner, A.D. Gordon, G. Katzenelson, S.H. Berman, E. Schweid and M. Ayali]", *Hayashan Yitchadesh Vihaddash Yitkadesh – Al Zehut Tarbut Viyahadut, Asufa Lizichro Shel Meir Eyali [The Old Will Be Renewed and the New Will Be Sanctified – On Identity, Culture and Judaism, A collection in Honor of Me'ir Ayali]* 347 (2005)). In the hearing before us, the beautiful and moving saying of Ahad Ha'am was repeated: "More than the Jewish people kept the Sabbath, the Sabbath kept them" (from his article, "Shabbat Tzionut [Sabbath and Zionism]"), which was also mentioned in the opinion of my colleague, the President. Specifically for that reason, it is worth mentioning the context in which those words were written, whose force was directed at the time against those who wanted to replace the Sabbath with rest on another day, and the author was lending his ear to the "voice of protest of the national sentiment against canceling

the Sabbath". They thus expressed opposition to canceling the national status of the Sabbath, and did not address the specific content of how it would be observed.

43. These words also apply, with the necessary changes, to the City of Tel Aviv-Jaffa itself. The petitioners sought to present to us a picture of a "Tel Aviv status quo" based on consensus founded on a "division of labor" that distinguishes between opening places of entertainment on days of rest and opposition to opening other businesses. According to this narrative – opening grocery stores "broke" that agreed upon status quo, and that alone is reason enough to restore the situation to what it was. However, a deep examination of the issue exposes a much more complex picture. In essence, a historical look indicates that the appropriate scope of observing the Sabbath in the City of Tel Aviv-Jaffa was the subject of disputes as far back as the city's early days, and that these disputes have continued to the present time. In essence, even opening places of entertainment and recreation was not without controversy. And I will emphasize that this is not merely an anecdote. Examining the subject from the perspective of a number of decades helps to better understand the issue before us.

44. In my opinion in the verdict that is the subject of the further hearing, I addressed the fact that the first by-law limiting the opening of businesses on the Sabbath within the City of Tel Aviv was enacted during the British Mandate, as far back as 1926, and it was invalidated by the Supreme Court of the Land of Israel in 1928 (Attorney General v. Altshuler (1928) 1 P.L.R. 283). Afterward, an updated by-law was enacted on the subject of the opening and closing times of businesses in 1932. That by-law did not include restrictions on opening businesses on the Sabbath (By-Law Regarding Opening Shops Within the Jurisdiction of the Area of the Tel Aviv Local Council, I.R. 1932, Ann. 2, 225). The continued public debate on the issue led to its replacement in 1937 with another by-law that imposed limitations on opening businesses on the Sabbath and indeed distinguished between coffee shops and restaurants and shops (By-Law (Opening and Closing of Shops), 1937, I.R. 1937, Ann.2, 664. See also Y. Frankel, "Hashabbat Umoadei Yisrael Bamishpat Hai Bazman Hazeh [The Sabbath and Jewish Holidays in Israeli Law at this Time]", 2 *Haparklit* 107, 110 (1945)). However, the by-law from 1937 also did not end the disputes on the issue, and did not bring about the total closure of commercial activity, of peddlers for example (See: Anat Helman, "Torah, Avoda Ubatei Café: Dat Vifarhasia Bitel-Aviv Hamandatorit [Bible, Work and Coffee Shops: Religion in Public in Mandatory Tel Aviv]", *Katedra* 85 (5763); Anat Helman, *Or Viyam Hakifuh – Tarbut Tel Avivit Bitkufat Hamandat [Sun and Sea Surrounded It – Tel Aviv Culture During the Mandate Period]*, 91-99 (2007)). It is worth noting that already at that time, public intellectuals such as Bialik did not approve of the characteristics of the public space in Tel Aviv on the Sabbath (*ibid*, p. 99). In essence, the disputes extended throughout the years, despite the opening of cultural institutions, and we recall in this context the decision of the mayor of Tel Aviv in 1979, barring the holding of a production in the Kamari Theater on the Sabbath eve (See: HCJ 11/79 *Mirkin v. Minister of Interior*, 33(1) PD 502 (1979)).

45. This is not, therefore, a "state of nature" that was violated, but rather an ongoing public dialogue, and its internal balances change periodically, according to the times – and subject to the consensus that the Sabbath needs to be different and distinct from weekdays.

46. These issues are noted here, of course, in brief, and the goal is just to show that we are not dealing with a rule and deviation from it, but rather a dynamic development of city life. As

noted, our case is not a question of what is the correct way to mark the Sabbath in the State of Israel, but rather what can the local community determine for itself.

Looking to the Future

47. From my point of view, concern over eroding the traditional image of the Sabbath in the public sphere in the State of Israel is out of place. These are more complex processes. It is well known, for example, that in residential areas in which the religious population is in a clear majority, there are restrictions on driving vehicles on the Sabbath and holidays, even if that was not the case in the past, because the composition of the population there was different. The legal arrangements reflect the current needs of society and its widespread points of view, together with preserving principles that do not vary with the changing winds. Having said that, the details may change, just as life itself changes. By-laws that negate the special status of the Sabbath would be out of place. However, there is certainly a place for by-laws that respect the Sabbath in different ways, commensurate with the local community's ways of life. One should hope that the discussion of this subject will continue in the appropriate place – the public arena.

Justice

It was decided by majority opinion (President M. Naor and Justices E. Hayut, Y. Danziger, Y. Amit and D. Barak-Erez, against the dissenting opinion of Justices N. Hendel and N. Sohlberg), as stated in the judgment of President M. Naor, to deny the motion for a further hearing and to uphold the verdict that is the subject of the further hearing. No costs are imposed on the parties.

Decided today, 6 Heshvan 5778 (October 26, 2017)

President Justice Justice

Justice Justice Justice

Justice