

HCJ 953/01

MK Marina Solodkin

v.

- 1. Beit Shemesh Municipality**
- 2. Minister of Interior**

HCJ 1355/01

Shinui — the Secular Movement and five others

v.

- 1. Minister of Interior**
- 2. Beit Shemesh Municipality**

HCJ 7406/01

MK Marina Solodkin and three others

v.

- 1. Carmiel Municipality**
- 2. Mayor of Carmiel**
- 3. Minister of Interior**

HCJ 2283/02

Manya Delicatessen Meat and Sausage Product Industries Co. Ltd

v.

- 1. Mayor of Tiberias**
- 2. Tiberias Municipal Council**
- 3. Attorney-General (HCJ 2283/02)**

The Supreme Court sitting as the High Court of Justice

[14 June 2004]

*Before President A. Barak, Vice-President Emeritus T. Or,
Vice-President E. Mazza and Justices M. Cheshin, J. Türkel, D. Beinisch,
A. Procaccia, E.E. Levy, M. Naor*

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

Facts: An enabling law of the Knesset empowers local authorities to enact bylaws that prohibit or restrict the sale of pig meat and meat products within the municipal boundaries. The respondent municipalities enacted such bylaws, which restricted or prohibited the sale of pig meat and meat products within their respective boundaries. The petitioners challenged these bylaws, arguing that they violated the freedom of occupation of the sellers of pig meat, and the liberty of the consumers to adopt whatever lifestyle they saw fit, without interference amounting to religious coercion.

Held: The purposes underlying the enabling law empower the local authorities to prohibit or restrict the sale of pig meat and meat products, provided that each local authority makes its decision in accordance with the proper criteria, namely a balancing of religious and national sensibilities of those persons who object to the sale of pig meat against the violation of the human rights of those persons who wish to sell or consume pig meat. This balancing must be made in view of the local character of the population in each neighbourhood. The Supreme Court returned the matter to the local authorities to reconsider their decisions on the basis of the criteria set out in the judgment, without expressing any opinion as to the propriety, or otherwise, of the specific bylaws that had been enacted.

Petitions denied.

Legislation cited:

Basic Law: Freedom of Occupation.

Basic Law: Human Dignity and Liberty, ss. 2 and 4.

Beit Shemesh (Pigs and Pig Meat) Bylaw, 5760-2000.

Carmiel (Pig Meat) Bylaw, 5738-1978.

Carmiel (Pig Meat) Bylaw, 5761-2001.

Local Authorities (Special Authorization) Law, 5717-1956, ss. 1, 2, 3, 4, 5, 6.

Municipalities Ordinance [New Version], s. 258.

Prohibition against Raising Pigs Law, 5722-1962.

Tiberias (Pigs and Pig Meat) Bylaw, 5718-1958.

Israeli Supreme Court cases cited:

- [1] HCJ 122/54 *Axel v. Mayor, Council Members and Residents of the Netanya Area* [1954] IsrSC 8 1524.
- [2] HCJ 155/60 *Elazar v. Mayor of Bat-Yam* [1960] IsrSC 14 1511.
- [3] HCJ 72/55 *Freidi v. Tel-Aviv-Jaffa Municipality* [1956] IsrSC 10 734.
- [4] HCJ 163/57 *Lubin v. Tel-Aviv-Jaffa Municipality* [1958] IsrSC 12 1041.

- [5] HCJ 129/57 *Manshi v. Minister of Interior* [1958] IsrSC 12 209.
- [6] HCJ 3872/93 *Meatreal Ltd v. Prime Minister and Minister of Religious Affairs* [1993] IsrSC 47(5) 485.
- [7] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.
- [8] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
- [9] FH 13/58 *Tel-Aviv-Jaffa Municipality v. Lubin* [1959] IsrSC 13 118.
- [10] HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [1989] IsrSC 43(2) 22; **IsrSJ 10 229**.
- [11] HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Election Committee for Sixteenth Knesset* [2003] IsrSC 57(2) 62.
- [12] CA 6024/97 *Shavit v. Rishon LeZion Jewish Burial Society* [1999] IsrSC 53(3) 600; **[1998-9] IsrLR 259**.
- [13] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.
- [14] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
- [15] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; **IsrSJ 1 90**.
- [16] HCJ 14/86 *Laor v. Film and Play Review Board* [1987] IsrSC 41(1) 421.
- [17] HCJ 230/73 *S.T.M. Ltd v. Mayor of Jerusalem* [1974] IsrSC 28(2) 113.
- [18] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.
- [19] HCJ 6226/01 *Indor v. Mayor of Jerusalem* [2003] IsrSC 57(2) 157.
- [20] HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [1997] IsrSC 51(2) 509.
- [21] HCJ 4644/00 *Jaffora Tabori Ltd v. Second Television and Radio Authority* [2000] IsrSC 54(4) 178.
- [22] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
- [23] CrimA 217/68 *Isramax Ltd v. State of Israel* [1968] IsrSC 22(2) 343.
- [24] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.
- [25] CrimA 858/79 *Lapid v. State of Israel* [1980] IsrSC 34(3) 386.
- [26] HCJ 3791/93 *Mishlav v. Minister of Interior* [1993] IsrSC 47(4) 126.
- [27] AAA 5042/01 *Zid v. Faras* [2002] IsrSC 56(3) 865.

Israeli Magistrates Court cases cited:

[28] CrimC (Net.) 1312/95 *State of Israel v. Rubinstein* (unreported).

Jewish law sources cited:

[29] Babylonian Talmud, *Menahot* 64b.

[30] Maccabees 2, 7, 1.

For the petitioners in HCJ 953/01, 7406/01 — Z. Farber.

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For the Ministry of the Interior — A. Licht, Senior Assistant to State Attorney.

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For the petitioner in HCJ 2283/02 — U. Edri, O. Kabiri.

For respondents 1-2 in HCJ 7406/01 — S. Geva.

For respondents 1-2 in HCJ 2283/02 — Y. Karni.

JUDGMENT

President A. Barak

Tiberias Municipality prohibited, in a bylaw, the sale of pig meat and meat products in all areas within the Municipal boundaries. Beit Shemesh Municipality and Carmiel Municipality prohibited, in a bylaw, the sale of pig meat and meat products in some of the areas within the Municipal boundaries, while permitting the sale of pig meat and meat products in other areas. Were these bylaws passed lawfully? That is the question before us.

Background

1. Since the nineteen-fifties, the question of the sale of pig meat and meat products within the boundaries of local authorities has remained constantly on the political, legal and judicial agenda in Israel (for a survey, see D. Barak-Erez, ‘The Transformation of the Pig Laws: From a National Symbol to a Religious Interest?’ 33 *Hebrew Univ. L. Rev. (Mishpatim)* 403 (2003)) At first, local authorities made a licence to run a business conditional upon not selling pig meat and meat products within its boundaries. When the legality of this condition was brought before the High Court of Justice, it was held that a local authority does not have the power to made a business licence conditional upon not selling pig meat and meat products. President Olshan said that the

sale of pig meat within the boundaries of the local authority ‘is in our opinion a general and national problem, which is not unique to any particular place, and its solution rests with the sole jurisdiction of the national legislature, unless the national legislature has seen fit to delegate this authority to the local authorities’ (HCJ 122/54 *Axel v. Mayor, Council Members and Residents of the Netanya Area* [1], at p. 1531). The contention that the power of the local authority to prohibit the sale of pig meat derived from its duty to maintain order and security within its boundaries was also rejected. Justice Silberg said that ‘the forum for conducting the various ideological disputes between sections of the public — such as religion, nationality, socialism, etc. — is the Knesset or the central institutions of the Government, and neither the municipality nor the local authority are competent to regulate them or “guilty” of not regulating them...’ (HCJ 155/60 *Elazar v. Mayor of Bat-Yam* [2], at p. 1512).

2. In addition to refusing a licence to open a business that sold pig meat and meat products pursuant to general powers, several local authorities adopted a direct measure: they enacted bylaws that expressly prohibited the sale of pig meat within the boundaries of the local authority. The legality of these bylaws came before the Supreme Court in the middle of the nineteen-fifties. It was held that a local authority does not have the power to prohibit the sale of pig meat by means of subordinate legislation. Giving his reasons for this approach, Justice Goitein said ‘... that a body that had the power to enact subordinate legislation of a local nature should not be allowed to regulate religious problems under the cloak of regulating the sale of meat in a certain place. The Knesset, rather than the municipality, should regulate matters of religion’ (HCJ 72/55 *Freidi v. Tel-Aviv-Jaffa Municipality* [3], at p. 752).

The enabling law

3. The regulation of the prohibition against the sale of pig meat passed therefore to the Knesset, which enacted the Local Authorities (Special Authorization) Law, 5717-1956. The law contains six sections. It deals with the prohibition of raising pigs and the prohibition of selling pig meat and meat products. The first issue was regulated several years later in the Prohibition against Raising Pigs Law, 5722-1962, and the provisions in this regard were removed from the Local Authorities (Special Authorization) Law, which was limited to the sale of pig meat and meat products only. The first two sections provide as follows:

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| ‘Prohibition of the sale of pig meat and meat products | 1. Notwithstanding what is stated in any other law, a local authority shall be competent to enact a bylaw that will restrict or prohibit the sale of pig meat and meat products that are intended for consumption. |
| Commencement of the prohibition | 2. A local authority may impose a restriction or prohibition as stated in section 1 on the whole area of its jurisdiction or on a specific part thereof, provided that they shall apply to the whole of the population in that area or in that part.’ |

Additional provisions in the enabling law grant a local authority ancillary powers (s. 3) and state that whoever breaches a provision of the bylaw after the enactment of the enabling law is liable under the criminal law (ss. 4 and 6). A provision was also included with regard to preserving powers (s. 5).

4. On the basis of the enabling law, many local authorities enacted bylaws restricting the sale of pig meat and meat products. Frequently the bylaw imposed a complete prohibition of the sale of pig meat and meat products within the boundaries of the local authority. Sometimes the prohibition was limited to a certain area within its jurisdiction. Attempts were made in the Knesset to replace the arrangement in the Local Authorities (Special Authorization) Law with a general prohibition (see, for example, the draft Prohibition against Raising Pigs Law (Amendment), 5785-1985). These attempts did not become legislation.

5. During the nineteen-nineties, the sale of pig meat and meat products became significantly more widespread, notwithstanding the prohibitions contained in the municipal bylaws. It is possible that one of the reasons for this is connected with the large waves of immigration from the former Soviet Union. Some of these immigrants, who were accustomed to consuming pig meat in their countries of origin, brought with them a demand for pig meat and meat products in the places where they were living. Against this background, there was an increase in the number of shops selling pig meat and meat products in cities where large numbers of immigrants from the former Soviet Union were concentrated. In several local authorities, criminal proceedings were filed on account of offences against the bylaws prohibiting the sale of pig meat (see, for example, CrimC (Net.) 1312/95 *State of Israel v. Rubinstein* [28]). Against this background, the Attorney-General was required to consider the issue of the bylaws prohibiting the sale of pig meat. He directed the

prosecutors in the local authorities to examine the reasonableness of the restrictions imposed in the bylaws in accordance with the specific needs and circumstances of the local authorities concerned before filing indictments (see the Guidelines of the Deputy Attorney-General (Advice) to prosecutors in the local authorities dated 19 February 1998). Guidelines to the same effect were given to the legal adviser of the Ministry of the Interior, before approving the enactment of bylaws that prohibit the sale of pig meat (Guidelines of the Deputy Attorney-General to the legal adviser of the Ministry of the Interior dated 9 March 1998).

The petitions

6. We have before us four petitions concerning bylaws in three local authorities. Two petitions are directed against the Beit Shemesh (Pigs and Pig Meat) Bylaw, 5760-2000 (hereafter — the Beit Shemesh bylaw). The bylaw was enacted by the Municipal Council, and was approved by the Minister of the Interior. It has not yet been published in *Reshumot*. This bylaw prohibits the sale of pig meat in the areas marked on a map that was attached to the bylaw (ss. 1 and 3). These areas include the whole area of Beit Shemesh, with the exception of the industrial zones, which are situated outside the residential neighbourhoods of the city. MK M. Solodkin filed a petition against the legality of this bylaw (HCJ 953/01). The second petition was filed against the same bylaw by the Shinui movement, four owners of shops in the city of Beit Shemesh that sell pig meat products and a resident who is accustomed to buy these products (HCJ 1335/01). In response to the petitions, an interim order was made prohibiting any actions within the framework of the Beit Shemesh bylaw. As a result, the bylaw was not published.

7. The third petition, in which MK M. Solodkin is also a petitioner, together with three shop owners who sell pig meat (HCJ 7406/01) concerns two bylaws in the city of Carmiel. The first bylaw (the Carmiel (Pig Meat) Bylaw, 5738-1978) prohibits the sale of pig meat in the whole of Carmiel, apart from the industrial zone. The bylaw was reconsidered by the local council, which enacted the Carmiel (Pig Meat) Bylaw, 5761-2001. This bylaw repealed its predecessor and enlarged the area in which the prohibition against the sale of pig meat did not apply to two commercial areas in the city. The petition is directed against the legality of both the old and the new bylaws. During the hearing of the petition, an interim order was made that postponed the commencement of the new bylaw and prohibited the Carmiel municipality from enforcing the old bylaw, all of which until judgment was given in the petition.

8. The fourth petition (HCJ 2283/02) is directed against the Tiberias (Pigs and Pig Meat) Bylaw, 5718-1958 (hereafter — the Tiberias bylaw). The bylaw prohibits the sale of pig meat in Tiberias. The petition was filed by a company involved in the manufacture and wholesale and retail marketing of pig meat products, which markets its products, *inter alia*, to delicatessens in the city of Tiberias. The petition before us was filed as a result of a previous petition that was directed against the Tiberias bylaw (HCJ 9533/00). That petition was struck out after the Tiberias Municipality agreed to the court's recommendation that it should reconsider the Tiberias bylaw, in accordance with the principles of the Attorney-General's position. The issue was reconsidered by the Municipal Council, which decided (on 20 November 2001) to leave the Tiberias bylaw unchanged.

9. When the respondents' reply was received, a hearing of the four petitions took place on 19 June 2002. The hearing took place before a panel of three justices. It was decided to ask for supplementary details concerning demographic and geographic figures in each local authority and with regard to the location of the shops selling pig meat. Finally it was decided to expand the panel to nine justices. The panel heard the arguments of the parties on 7 December 2003. After the hearing, an interim order was made, at the request of the petitioner in the petition against Tiberias Municipality (HCJ 2283/02), to the effect that the Tiberias bylaw should not be enforced. After the hearing was ended, the Movement for Fairness in Government filed an application to join the petitioners as a 'friend of the court.' We see no reason to approve this joinder, both because of the lateness in filing the application and also on the merits. The application is denied.

The petitioners' contentions

10. The petitioners argued before us that the bylaws that are the subject of the petitions violate the freedom of occupation of the shop owners and marketers. In addition, they prejudice the basic right of the secular public that consumes non-kosher meat to freedom of conscience and freedom from religion. In the opinion of the petitioners, the enabling law should be given a meaning that is consistent with the Basic Law: Human Dignity and Liberty and with the Basic Law: Freedom of Occupation. They argue that the only consideration that may be taken into account is the harm to the feelings of the religious public. According to their position, the real motive for enacting the bylaws that prohibit the sale of pig meat and meat products is a national-religious one. The bylaws seek to compel all the residents of the local authorities to comply with religious laws. The municipalities overstepped their

authority in that they did not act within the framework of the purpose of the enabling law, but rather in order to enforce religious laws.

11. The petitioners further argue that the bylaws do not comply with the requirements of administrative proportionality nor are they consistent with the guidelines of the Attorney-General. According to them, the bylaws are disproportionate and unreasonable in the extreme. The degree of harm to the rights of the petitioners and the rights of consumers of pig meat and meat products is excessive. According to the petitioners, it is sufficient to prohibit the sale of pig meat in religious and orthodox residential areas, where the feelings of the religious public may be offended. The municipalities did not examine whether there are areas where pig consumers live. In the three cities there is a significant number of immigrants from the former Soviet Union. The vast majority of the immigrants are not traditional Jews. A large number of them also consume pig meat and meat products. As a rule, even those people who do not do this do not regard the consumption of pig meat and meat products by their neighbours as an injury to their feelings. The bylaws in practice ignore the composition, needs and practices of the population. The Council members did not have all the figures and facts needed to make an informed and proper decision.

12. The petitioners emphasize that the shops that are currently located in prohibited areas are not situated in religious areas and are not adjacent to religious institutions, nor do the shops have a special marking indicating the presence of pig meat, and only by looking at their refrigerators can one discover the kinds of meat being sold. It follows that the mere sale of pig meat in the shops does not injure the feelings of the religious public. The location of the shops and their prosperous activity indicate the large demand for the products. The petitioners warn that enforcing the bylaws will result in serious economic harm to the shop owners to the point of a collapse of their livelihood. In addition, if the consumers of the meat are compelled to travel outside the area where they live, the consumption of the meat may become unfeasible for them from an economic viewpoint.

The position of the Attorney-General

13. In the replies filed by the Minister of the Interior, the position of the Attorney-General was set out in great detail. His fundamental position is that the enabling law has two interconnected purposes: the first purpose is a religious purpose, arising from the Jewish religious prohibition of eating and selling pig meat and meat products. The second purpose is a national purpose, arising from the traumatic events in Jewish history connected with pigs, which

have made it a kind of symbol. The national purpose extends the potential scope of injured person, from the viewpoint of an injury to feelings, beyond the religious residents within the boundaries of the authority. In arguments before us, the representative of the Attorney-General emphasized the national aspect of the prohibition of pig. Against this background, he argued that the legality of the bylaws should not be considered according to the standards set out in case law for a conflict between rights and an injury to feelings. The consideration of the legality should give expression to the national purpose that intensifies the harm to public feelings, even though the overall framework is an injury to feelings.

14. The Attorney-General emphasizes that the enabling law refers the decision concerning the determination and territorial scope of the prohibition to the local authority so that each community can make the arrangement that is ideal for it. Nonetheless, the discretion of the local authority is not unlimited. It is limited by the purposes of the enabling law and the principles of constitutional and administrative law. According to the purpose of the law, the authority has the power to determine arrangements that are based on religious and national considerations. It is authorized to restrict the sale of pig meat or meat products or to prohibit it, even if this involves a burden on the persons who wish to consume this meat and on the persons selling it. Notwithstanding, the restrictions must be proportionate and founded upon common sense. The local authority must also take into account, among the factors it considers, the harm to the occupation of the pig meat sellers and the inconvenience or the impossibility of the consumption of this meat by members of the public near their place of residence. The need to balance the interests arises also from the language of the enabling law itself. The law does not speak only of a blanket prohibition but also of a restriction, and it allows a prohibition only in a part of the area within the authority's boundaries. It follows that the local authority should consider first the restriction of the prohibition to certain areas within its boundaries, by taking into account the needs of the various population groups, on the one hand, and with the purpose of realizing, within the boundaries of the authority, the degradation and disgust occasioned by the sale of pig meat and meat products, on the other hand. After this, it is possible to consider the possibility of a blanket prohibition throughout the jurisdiction of the local authority in the appropriate cases, according to the circumstances. In determining the arrangement, the local authority should act in accordance with the principles of reasonableness and proportionality based on the composition of the population in that authority, the demographic composition in the

different parts of that authority, the needs of the residents, their lifestyle and customs.

15. 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.

16. It should be noted that the personal positions of the Ministers of the Interior, as they were brought before us in the replies of the State, were diametrically opposed to one another. The personal position of the former Minister of the Interior, Mr Eli Yishai, was that in a Jewish state it was proper that in local authorities where Jewish residents live the sale of pig meat and meat products should be prohibited throughout the area of the authority in order not to injure the feelings of the Jewish residents and in order to express the national and religious content and value of the prohibition against selling pig meat and its products. The personal position of the present Minister of the Interior, Mr Avraham Poraz, is that it is not right that any local authority should enact bylaws that restrict the sale of pig meat, and therefore had the bylaws of Carmiel and Beit Shemesh been submitted to Minister Poraz for approval, he would have disqualified them.

The normative framework

17. The enabling law constitutes a compromise between two conflicting trends: *one* is the total prohibition of the consumption of pig meat throughout the State of Israel, similar to the prohibition that was applied shortly afterwards (in the Prohibition against Raising Pigs Law, 5722-1962) on the raising of pigs throughout the State of Israel, with the exception of certain places; the *other* is to refrain from any legislation whose significance — against the background of the rulings of the court in the nineteen-fifties — was the absence of any prohibition on the sale of pig meat and meat products. The compromise arrangement that was determined in the enabling law refrained from imposing a national prohibition (whether total or restricted) on the consumption of pig meat and meat products, but it provided in this regard an arrangement of its own, which authorizes the local authority to determine local

arrangements with regard to the sale of pig meat and meat products. Thus the enabling law rejected the approach that wished to leave this matter to the personal decision of each individual. This was discussed by Justice Sussman, who pointed out that in the enabling law the legislature provided a compromise:

‘... did not impose a prohibition on a national scale, but authorized the local authorities, within the area of their jurisdiction, to prohibit... the sale of pig meat and meat products that are intended for consumption’ (HCJ 163/57 *Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p. 1076).

According to the arrangement that was determined, ‘...a local authority shall be competent to enact a bylaw that will restrict or prohibit the sale of pig meat and meat products that are intended for consumption’ (s. 1 of the enabling law). Such a restriction or prohibition, which a local authority was empowered to make, can apply to ‘...the whole area of its jurisdiction or on a specific part thereof, provided that they shall apply to the whole of the population in that area or in that part’ (s. 2 of the enabling law).

18. The enabling law solved the problems of competency that had arisen in the past. The local authorities were authorized to regulate the issue of the sale of pig meat and meat products. The legal question moved therefore from a question of competency to regulate the sale of pig meat and meat products to the question of the scope of discretion that the local authority has when it wishes to regulate this issue, and mainly to the question of its general or limited application (‘on the whole area of its jurisdiction or on a specific part thereof’) of the subordinate legislation. In the words of President Olshan in the first judgment given after the enactment of the enabling law:

‘... There is no foundation for the argument that the Municipality had no power at all to enact the bylaw under discussion, because the aforesaid enabling law gave the Municipality this power. The enabling law gave the Municipality the power to prohibit the sale of pig meat in its area of jurisdiction, and this is what the Municipality did in the aforesaid bylaw.

Therefore, the complaint of counsel for the petitioner is directed only at the discretion of the Municipality for refusing to exercise its authority that was given to it in s. 2 of the enabling law to exclude the area, where the petitioner’s shop is situated, from the

application of the bylaw' (HCJ 129/57 *Manshi v. Minister of Interior* [5], at p. 214).

The purposes underlying the enabling law

19. The scope of the local authority's discretion when it decides upon the enactment of a bylaw in the matter of the sale of pig meat and meat products is determined in accordance with the interpretation given to the enabling clauses in the enabling law. This interpretation, for its part, gives the language of the enabling law the meaning that realizes the purpose that underlies the enabling law — the specific and general purpose, both subjective ('the intention of the legislator') and objective ('the intention of the law'). What is this purpose? Consideration of the facts gives rise to several purposes that should be taken into account.

20. The *first* purpose that underlies the enabling law concerns the desire to protect the feelings of Jews who regard the pig as the symbol of impurity. This outlook is, of course, religious in origin. 'The pig has always been considered a symbol of abhorrence, abomination and disgust by the Jewish person' (Justice Silberg in *Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p. 1065). A similar approach is accepted also by the Islamic religion. Notwithstanding, the Jewish approach does not merely express the laws of kosher food, which are not restricted merely to pig meat. The prohibition of eating pig includes, in addition to the religious factor and in relation thereto, also a national factor, which goes beyond the religious perspective relating to the laws of kosher food, and which is shared by many who are not religious or traditional. This was discussed by President Olshan when he said that the prohibition of selling pig meat is based on an approach that regards '... the prohibition of eating pig meat a matter of holiness, or a matter that is close to the nation's heart...' (*Axel v. Mayor, Council Members and Residents of the Netanya Area* [1], at p. 1531). This is well illustrated by the story of the civil war between Hyrcanus II and Aristobulus, the sons of Yannai (Alexander Jannaeus) and Shelomzion (Alexandra Salome), which preceded the Roman conquest. According to the story, a pig was sent up to the besieged Jews instead of a sheep. '... When it reached halfway up the wall, it dug its hooves into the wall, and the land of Israel trembled over an area of four hundred parasangs by four hundred parasangs. At that time it was said: Cursed by he who raises a pig...' (Babylonian Talmud, *Menahot* 64b [29]). The pig as a symbol is therefore closely connected with the Roman conquest and the loss of independence. Jewish history is full of heroic stories of Jews who preferred death to eating pig. The story of Hannah and her seven sons who sacrificed

their lives rather than eat pig meat is well-known (Maccabees 2, 7, 1 [30]). Prof. Barak-Erez rightly pointed out that ‘engraved in the collective memory of the Jewish people is the consciousness that the enemies of the Jewish people throughout the generations made use of the pig as a part of the persecutions and humiliations of Jews’ (Barak-Erez, ‘The Transformation of the Pig Laws: From a National Symbol to a Religious Interest?’, *supra*, at p. 413). Indeed, the disgust at the consumption of pig meat is engraved deep in the national consciousness of the Jewish people and the ‘soul of the nation’ (in the language of MK M. Begin, in his remarks in the Knesset during the deliberations on the first reading of the enabling law (*Knesset Proceedings*, vol. 20 (1956), at p. 2428)). A rigorous statement of this approach was made by MK Razieli-Naor, who said that the prohibition of the pig had:

‘... very deep roots in the national consciousness and thought, not merely in religious law, in Torah law, but also in the national consciousness that is shared by the whole people. For what is national consciousness if not a synopsis of the memories, experiences and impressions that have passed as an inheritance from generation to generation and that have become something that is shared by the whole people?’ (*ibid.*, at p. 2387).

Indeed, the pig has become a symbol of the hatred of Jews, the loss of independence and the degradation of Jews as Jews. The purpose of the enabling law is to protect the feelings of Jews (believers and non-believers) who are seriously injured by the sale of pig meat and meat products.

21. The *second* purpose that the enabling law was intended to achieve concerns the desire to realize the liberty of the individual. This was the subjective purpose of the enabling law. This is also, like the purpose of every other law in Israel, its objective purpose. This liberty has been enshrined in the abundant case law of this court since the founding of the State. It is today enshrined in the Basic Law: Human Dignity and Liberty (ss. 2 and 4). This liberty includes the liberty of every individual to determine his own lifestyle and consequently the freedom to decide what food he will buy and eat, and what food he will not buy or eat. The prohibition of the sale of pig meat harms this liberty (see *Axel v. Mayor, Council Members and Residents of the Netanya Area* [1], at p. 1531 (*per* President Olshan); *Manshi v. Minister of Interior* [5], at p. 217 (*per* President Olshan); *Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p. 1067 (*per* Justice Silberg)). Because the prohibition is motivated by religious considerations, it also harms freedom of conscience and ‘freedom from religion’ (see *Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p.

1079 (*per* Justice Sussman)). Underlying this purpose is the outlook that ‘... there is no justification for the intervention of the State in the liberty of the individual’ (*per* President Olshan in *Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p. 1076). Moreover, the seller’s freedom of occupation should be guaranteed. The prohibition of the sale of pig meat and meat products harms this freedom of the seller. Indeed, underlying the enabling law is the outlook that every person in Israel has freedom of conscience and freedom from religious or any other coercion. ‘It is a supreme principle in Israel — originating in the rule of law (in the substantive sense) and the case law made by the court — that the citizen and resident have both freedom of religion and freedom from religion... we do not coerce religion obligations on someone who is not religiously observant and on someone who does not want to observe religious obligations...’ (*per* Justice M. Cheshin in H CJ 3872/93 *Meatreal Ltd v. Prime Minister and Minister of Religious Affairs* [6], at pp. 506-507). Alongside these freedoms a person also has ‘... a natural right to engage in the work or profession that he chooses for himself...’ (*per* Justice S.Z. Cheshin in H CJ 1/49 *Bajerno v. Minister of Police* [7], at p. 82). This is the freedom of occupation that is enshrined today in the Basic Law: Freedom of Occupation. It is derived from the autonomy of the individual will, and it is an expression of a person’s self-determination (see H CJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [8], at p. 383).

22. The *third* purpose, on which the compromise underlying the enabling law is based, concerns empowering the local authority to determine provisions with regard to the sale of pig meat and meat products. 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. In this local balancing, the character of the authority and the changing particulars of each local authority would be taken into account. The result therefore is that the tension between the first two purposes was transferred to the local level. The discretion was given to the local authority. What is the scope of this discretion, and how should it be exercised? Let us now turn to consider these questions.

The discretion of the local authority

23. The discretion of the local authority is not absolute. It may not decide whatever it wants. The discretion of the local authority, like any executive discretion, is always limited. It must exercise its discretion in a manner that realizes the purpose underlying the law that gave it the discretion. In the case before us, it must exercise the discretion in a manner that finds the proper balance between the conflicting purposes against the background of the local particulars. Indeed, in exercising its discretion, the local authority should realize the compromise underlying the enabling law. This was discussed by Justice Sussman in *Lubin v. Tel-Aviv-Jaffa Municipality* [4]:

‘... When we come to examine the enabling law in order to discover in it the instructions of the legislature, we ought to return for a brief moment to the historical background of the legislation and give attention to the fact that the legislature’s intention was to find a compromise between two outlooks that conflict with one another, and not to reject one in favour of the other. It is well known that part of the population sought to impose a complete prohibition, so that the law of the State would be consistent with tradition, but the legislature was not prepared to ignore that part of the public that regarded this as religious coercion. These two “camps” side with their own outlooks, but the legislature wished to respect both of them, and neither is rejected or overridden *entirely* by the other. Whoever interprets the law, therefore, should not ignore this fact, so that neither extreme outlook will lead him astray into discovering concealed meanings in the law that simply are not there’ (*Lubin v. Tel-Aviv-Jaffa Municipality* [4], at p. 1079).

In a similar vein, Justice Landau held in the further hearing of that case:

‘... The enabling law was the result of a compromise between Jewish religious circles that sought to have an absolute prohibition against eating pig, and the “liberals” who regarded such a prohibition as an unjustified intervention in the private sphere. This compromise must guide us in interpreting the collective intention of the Knesset, which was created as a result of the balance of different forces that are represented in it. We will therefore not be justified if we adopt an interpretation that moves the point of compromise to the right or to the left’ (FH 13/58 *Tel-Aviv-Jaffa Municipality v. Lubin* [9], at p. 123).

This compromise is required by the values of the State of Israel as a Jewish and democratic state. It is reflected in the need to balance, on a local level, the Jewish and national values, on the one hand, against the liberty of the individual in a democracy, on the other. It varies ‘... from matter to matter and from time to time’ (Justice M. Cheshin in *Meatreal Ltd v. Prime Minister and Minister of Religious Affairs* [6], at p. 508). It reflects the changes that occur in Israeli society as it moves through history.

The balance between the conflicting purposes

24. According to the compromise underlying the enabling law, the local authority should balance the conflicting purposes, all of which against a background of the local characteristics. In this balance, on one pan of the scales lies the consideration of religious and national sensibilities. These jointly reflect, in a broad sense, considerations of public interest (see: HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [10], at p. 29 {237}; HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Election Committee for Sixteenth Knesset* [11], at p. 73). These considerations have great social importance, and they may, in certain conditions, reduce the protection given to human rights. On the other pan lie considerations associated with the liberty of the individual (who wishes to sell or buy pig meat and meat products). They jointly reflect considerations of human rights. The (vertical) balance between them is made in accordance with the tests of proportionality and reasonableness (see CA 6024/97 *Shavit v. Rishon LeZion Jewish Burial Society* [12]). These tests combine two types of criteria that have been developed over the years by the court. On the one hand, they are based on tests of proportionality. These were developed before the limitation clauses in the Basic Laws dealing with human rights. Now they are influenced by those limitation clauses, and thus create a harmony between old law and new law (see HCJ 4541/94 *Miller v. Minister of Defence* [13], at p. 138 {231}; HCJ 5016/96 *Horev v. Minister of Transport* [14], at p. 41 {193}). On the other hand, they are based on accepted balancing formulae that are based on HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [15]; see A. Barak, *Interpretation in Law*, vol. 2, *Statutory Interpretation* (Nevo, 1993), at p. 679). The methodology of integrating the proportionality tests in their widest sense (proper purpose, values of the State of Israel, a violation that is not excessive) with the historical balancing formulae that were developed since the founding of the State has not yet been finally decided. Sometimes both tests — the limitation clause, the vertical balance between a right and a public interest — are employed, one after the other. Sometimes

they merge with one another (see *Miller v. Minister of Defence* [13], at p. 138 {231}). I adopted this approach in *Horev v. Minister of Transport* [14], at p. 41 {193}, where I regarded the balance between religious sensibilities and freedom of movement a part of the requirements of the limitation clause that the violation of the right will befit the values of the State as a Jewish and democratic State. I will also adopt this approach in this case, since there is no need to decide the proper methodology in this judgment.

25. When analyzing these tests, we should consider a hypothetical case of a local authority that contains three villages or three neighbourhoods within its boundaries. The distance between the villages or the neighbourhoods is not great. There is a regular transport link between the villages or the neighbourhoods, and it is possible to go from village to village or from neighbourhood to neighbourhood within a short time. One village or one neighbourhood (village A) is composed of residents whose religious and national sensibilities will be injured if it will be possible to sell pig meat and meat products in their village. This village has several residents that will not be injured by this but they are few in number. The second village or neighbourhood (village B) is composed of residents who all — with the exception of a small number of opposing residents — wish to buy pig meat and meat products or are not opposed to this. Village C or neighbourhood C is composed of residents of both types without it being possible to separate them on a territorial basis. What does the enabling law say with regard to the discretion of the local authority vis-à-vis each of these villages or neighbourhoods? This hypothetical case reflects the problematic nature of the case before us. Indeed, the enabling law did not seek to determine an overall balance for the whole of the country. It regards each local authority as an independent unit, and it allows an internal division of the territory in it. This is expressed in s. 2 of the enabling law, which provides that a local authority may impose a restriction or a prohibition ‘...on the whole area of its jurisdiction or on a specific part thereof, provided that they shall apply to the whole of the population in that area or in that part.’

Village A; all the residents oppose the sale of pig meat

26. Village A is composed of residents, all of whom, apart from a small minority, have feelings that will be injured if the sale of pig meat and meat products is possible in their village. Underlying this injury to their feelings are religious or national reasons. Is the local authority entitled to determine in a bylaw that the sale of pig meat and meat products within the geographical boundaries of village A is prohibited? This bylaw injures the human rights

(freedom of occupation) of those people who live outside the village and wish to sell pig meat and meat products in village A. It also injures the freedom of conscience of the residents in the two neighbouring villages and the negligible minority in village A itself, who wish to buy pig meat and meat products in village A, and who are prevented from doing so. Is this violation of human rights lawful? The criterion on the basis of which this question can be answered is derived from the principle of proportionality, which seeks to ensure a proper purpose and a proper means of realizing it. According to this test, the restriction of human rights is lawful if it befits the values of the State of Israel as a Jewish and democratic state, is intended for a proper purpose and violates human rights to an extent that is not excessive. It is obvious that the protection of the feelings of those persons who wish pig meat and meat products not to be sold in their village befits the values of the State of Israel as a Jewish state, both because of the injury to religious sensibilities and because of the injury to national sensibilities associated with the sale of pig meat. The strength of this injury is likely to change from village to village. It is obviously stronger when the religious factor and the national factor unite. It also befits the values of the State of Israel as a democratic state. The reason for this is — and I discussed this in *Horev v. Minister of Transport* [14] — that a democracy takes into account the feelings of each individual and in certain conditions it is prepared to allow a violation of human rights in order to protect these feelings. Indeed, democracy recognizes, *on the one hand*, the existence of a ‘level of tolerance’ of injury to feelings, which each member of a democracy takes upon himself as part of the social consensus that forms the basis of society. It recognizes, *on the other hand*, the need to protect the feelings of the individual if the injury to these is on a high level of probability (a certainty or a near certainty in the case of a violation of freedom of expression and movement inside the country: see *Universal City Studios Inc. v. Film and Play Review Board* [10] and HCJ 14/86 *Laor v. Film and Play Review Board* [16]; *Horev v. Minister of Transport* [14]), and it is real, severe and serious; in other words, it exceeds the ‘level of tolerance’ that can be justified in a democracy. Of course, the ‘level of tolerance’ is not uniform. It varies from right to right, from injury to injury, and it is affected by the frequency of the occurrence of the injury. In adopting this criterion in the case before us, I will assume that the injury to the religious and national sensibilities of the residents who oppose the sale of pig meat and meat products in their village (or neighbourhood) is a certainty or a near certainty, and that it is beyond the level of tolerance that can be justified in a democracy (cf. HCJ 230/73 *S.T.M. Ltd v. Mayor of Jerusalem* [17], at p. 121). I will also

assume that the injury to the human rights of those who oppose the prohibition is minimal, since the liberty of occupation of the sellers is only injured minimally. Indeed, the vast majority of the residents of village A in any event would not buy pig meat and meat products in village A, and those persons who live outside village A can, as we will see, buy pig meat and meat products without any difficulty in their own village (village B). Those few residents of village A who wish to buy pig meat and meat products can do so without any difficulty in village B. Their liberty is only harmed a little. It seems to me therefore that in so far as village A is concerned, prohibiting the sale of pig meat and meat products befits the values of the State of Israel as a Jewish and democratic state, notwithstanding the violation of the human rights. It is also intended for a proper purpose, which concerns a protection of these feelings. Is the violation excessive (see HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [18])? It is well known that the test of proportionality is composed of three sub-tests (see Y. Zamir, 'Israeli Administrative Law in comparison with German Administrative Law', 2 *Law and Government* 109 (1994); HCJ 6226/01 *Indor v. Mayor of Jerusalem* [19]). The first of these is the rational connection. The executive measure (prohibition of the sale of pig meat and meat products) must lead, rationally, to the achievement of the purpose (preventing an injury to religious and national sensibilities). The case before us complies with this sub-test. The second sub-test is that the executive measure must violate the right of the individual in the smallest possible degree. The case before us also complies with this sub-test, in view of the possibility of selling pig meat and meat products in the nearby village B. The third sub-test states that the executive measure is improper if its violation of the right of the individual is disproportionate to the benefit that it achieves in realizing the purpose. The case before us also complies with this sub-test.

27. The conclusion is that in village A, which is composed entirely (apart from a negligible minority) of residents who oppose the sale of pig meat and meat products for religious and national reasons, it is permitted to prohibit the sale of pig meat and meat products. The same conclusion will apply if we are concerned with a city that is divided into different neighbourhoods, and in one of the neighbourhoods all the residents (apart from a negligible minority) wish to prohibit the sale of pig meat and meat products because of the injury to their religious and national sensibilities. Indeed, the viewpoint of the enabling law is territorial or local, and it is based on the possibility of dividing the city into neighbourhoods, by considering each neighbourhood as a separate territorial unit for the purpose of exercising discretion under the enabling law.

Village B: all the residents wish to consume pig meat and its products or do not object to the consumption thereof

28. Village B is composed, according to our hypothesis, of residents who wish to consume pig meat and meat products or do not object thereto. It has a small minority of residents whose feelings are injured by the sale of pig meat and meat products. Is it possible to prohibit the sale of pig meat and meat products? This bylaw violates the human rights of the residents of the village. Is this violation lawful? According to the analysis that we discussed (see para. 24 above), the violation of human rights will be lawful if it befits the values of the State of Israel as a Jewish and democratic state, is intended for a proper purpose and the violation of the human rights is not excessive. In the example before us, the violation of the human rights of the residents of village B does not befit the values of the State of Israel as a democratic state. The reason for this is that the injury to the religious and national sensibilities of the residents of village A that results from the sale of pig meat and meat products in village B is albeit a certainty or a near certainty, but the injury does not exceed the 'tolerance level' that is acceptable in a democracy. The strength of an injury to religious and national sensibilities that takes place in close geographical proximity to where a person is situated is not the same as the strength of an injury to these feelings that takes place elsewhere. It is true that the feelings of the residents of village A are hurt if close to their village, in village B, pig meat and meat products are sold, but this is an injury that is part of living together in a democracy and the need to maintain tolerance and consideration for others. And what of the feelings of the small minority of persons who wish to prevent the sale of pig meat and meat products and who live in village B? Their feelings are certainly hurt. Notwithstanding, the 'seriousness of the injury to human feelings, including religious sensibilities and religious lifestyle, is examined, both according to its scope and also according to its depth' (*Horev v. Minister of Transport* [14], at p. 50 {203}; see also H CJ 7128/96 *Temple Mount Faithful v. Government of Israel* [20], at p. 524). In view of the negligible number of residents who wish to prohibit the sale of pig meat and meat products in village B, the protection of their feelings cannot justify the violation of the human rights of the overwhelming majority. Such a violation is disproportionate (the third sub-test), since the violation of the human rights of the vast majority of the residents of village B is completely disproportionate to the injury to the feelings of the negligible minority.

29. The conclusion is therefore that in village B which is entirely composed (with the exception of a small minority) of residents who wish to consume pig

meat and meat products or who do not oppose this, it is not possible lawfully to prohibit the sale of pig meat and meat products. This was discussed by Justice Berinson in *Manshi v. Minister of Interior* [5], at p. 223:

‘From s. 2 of the Local Authorities (Special Authorization) Law, 5717-1957, it is quite clear that the Knesset intended to allow a local authority to exclude from the prohibition or restriction a territorial block. It has not been proved that within the boundaries of the municipality of Tel-Aviv-Jaffa there exists a territorial concentration of persons who are interested in the sale of pig or the consumption of pig meat, and therefore there is no basis for the claim of unreasonableness on account of the total prohibition imposed by the Municipal Council over the whole of the city. This would be even clearer in the case of a whole town, whose residents are not observant with regard to pig consumption, and which is situated within the boundaries of a district authority that includes several separate towns. In such cases, it is possible to say that the Knesset did not intend to grant the power to injure, unnecessarily, the lifestyle and eating habits of the residents who have nothing against the consumption of pig meat.’

The same is true in a city where all the residents of one of its neighbourhoods wish to consume pig meat and meat products or are not opposed thereto.

Village C: some of the residents oppose the sale of pig meat and meat products, and some do not oppose the sale of pig meat and meat products

30. What is the position with regard to the third village (village C)? This is composed of residents from both ‘camps,’ who live alongside each other without any possibility of making a territorial separation. It is possible that half belong to one camp, and half to the other camp; it is possible that two thirds or four fifths belong to one camp, and a third or a fifth belong to the other camp. The residents of both camps live alongside one another, and they are subject to the prohibition provided in the enabling law to distinguish, for the purpose of the law, between types of population ‘...in that area or in that part’ (s. 2). Does the law permit a prohibition of the sale of pig meat and meat products in village C? Naturally, if it is possible to make a territorial separation in village C between the two camps, the law applying to village A or village B will apply. But what is the law if such a separation is impossible? It would appear that the main purpose of the enabling law is to regulate precisely this situation. Indeed, the enabling law does not seek principally to

regulate the sale of pig meat and meat products in village A, where all the residents oppose the sale of pig meat and meat products. The reason for this is practical: there are few cases in which people will wish to sell and buy pig meat and meat products in village A. Indeed, we do not need the enabling law in order to regulate the problem of the sale of pig meat and meat products in the religious neighbourhood of Mea Shearim. Likewise, the enabling law does not fulfil an important role in village B, where all the residents oppose a prohibition against the sale of pig meat and meat products. It is inconceivable that the members of the local council will seek to impose a prohibition of the sale of pig meat in a Christian town. Indeed, the main function and purpose of the enabling law is to authorize a local authority to enact a bylaw that will restrict the sale of pig meat and meat products or to prohibit it in local authorities where residents of both camps live alongside one another, without there being any possibility of a territorial separation. What is the scope of the discretion of the local authority according to the power given to it in the enabling law?

31. Here too, as in villages A and B, we resort to the criterion according to which a decision of an executive authority may lawfully violate human rights if the violation is proportionate, namely it befits the values of the State of Israel, is intended for a proper purpose and is not excessive. Are these conditions fulfilled in village C? A prohibition of the sale of pig meat and meat products in village C naturally violates the freedom of occupation and freedom of conscience ('freedom from religion') of some of the residents of the village. This violation befits the values of the State of Israel as a Jewish state. Does it benefit its values as a democratic state? Is the injury to the feelings of the residents who oppose the sale of pig meat and meat products greater than the 'level of tolerance' that every person in a democracy must accept as part of the social consensus on which society is founded? Naturally, the 'level of tolerance' is not uniform. It varies from right to right, from violation to violation. This was discussed by Justice Zamir, who said:

'The level of tolerance of feelings, such that only an injury above this level will justify protection of feelings, is neither fixed nor uniform for every situation. The level depends, *inter alia*, on the question of what conflicts with the injury to feelings: for example, a fundamental right such as freedom of expression or a material interest such as pecuniary gain. Accordingly, the level of tolerance will vary. It can be very high if the protection of feelings necessitates a violation of freedom of expression; it may

be lower if the protection of feelings necessitates an injury to pecuniary gain. The level is determined according to the balance between the conflicting interests in the circumstances of the case, and it reflects the relative weight, i.e., the social importance, of these interests' (*Temple Mount Faithful v. Government of Israel* [20], at p. 521).

Indeed, in determining the 'level of tolerance,' we must take into account the injured right, the extent of the injury thereto, the extent of the injury to feelings and the likelihood of this injury (see H CJ 4644/00 *Jaffora Tabori Ltd v. Second Television and Radio Authority* [21]). With regard to the nature of the right, it has been held that not all rights are of equal status. In this respect, we must take into account various additional parameters, including '... the subject-matter of the legislation that inflicts the injury (economic, social, security, etc.), the reasons underlying the protected right and its relative social importance, the nature of the injury to the right and its strength in the specific case, the circumstances and context of the injury and also the nature of the conflicting rights or interests' (*per* Justice Beinisch in H CJ 4769/95 *Menahem v. Minister of Transport* [22], at pp. 258-259). With regard to the injury to feelings, we must naturally take into account the strength, scope and depth of the injury. With regard to the likelihood of the injury, this changes from right to right.

32. Does the prohibition of the sale of pig meat and meat products in village C befit the values of the State of Israel as a democratic state? Because of the many variables, the local characteristics must be examined closely. Different towns may reach different answers even if the ratio of residents opposing the sale of pig meat and meat products is similar. By way of a generalization, villages of type C can reach the conclusion that the sale of pig meat inside their village or in the neighbourhood of residents who oppose this for religious and national reasons exceeds the 'level of tolerance' that every resident ought to tolerate as a part of his living in that place. We are dealing, as we have seen, with an injury to religious sensibilities and an injury to strong national sensibilities that characterize the opponents of the sale of pig meat and meat products. This was well expressed by Natan Alterman in his poem 'Free belief and hooves:'

'In every nation's heart, this nation most,
Here where it was born —
Memories of disgust, carved by sword and whip,
Engraved by reluctant choice.

So they that care not if hoof uncloven or cloven be,
They too feel
A Jewish nation in Israel, a pig sacred? inviolable?
The generations tremble.
For reasons of pious and secular alike
agree, this time, it seems...
Strange maybe, but not to be ignored,
Here religion,
There ancient geography and some history of many years...
The pig, uneasy, in the middle.'
(*The Seventh Column*, vol. 2, 1975, at p. 237).

Notwithstanding, in a mixed village, where there is albeit a minority whose liberty is violated if the sale of pig meat and meat products is prohibited, we must ensure that the violation of liberty is proportionate. This condition will be fulfilled if it is ensured that there is a place in the village (even if it is in the outskirts) — or in another village (such as village B) of the same local authority — where it will be possible to buy and sell pig meat and meat products. The location of the sales point will vary from place to place. It will reflect the local characteristics with a proper balance between the right and the violation thereof, in the circumstances of the case, and the public interest and the injury thereto in the same circumstances. In all these cases, it must be ascertained that the sales point is accessible, and that it is possible to maintain, *de facto*, a place for the sale and purchase of pig meat and meat products.

33. This analysis indicates the relationship between the intensity of the injury to religious and national sensibilities of those who wish to prevent the sale of pig meat and meat products and the intensity of the violation of the liberty, freedom of occupation and conscience and freedom from religion of those who oppose the imposition of the prohibition. This relationship naturally varies from place to place, from village to village. On the basis of the assumptions that I have made — including the existence of a regular transport link between village C and village B and a practical possibility of opening in village B or in the outskirts of village C a shop for the sale of pig meat and meat products — it seems to me that it is possible to justify in a democracy the violation of the human rights of those who oppose the prohibition on the sale of pig meat and meat products on account of the religious and national sensibilities of those who wish there to be such a prohibition.

34. Does a bylaw that prohibits the sale of pig meat and meat products in village C violate the rights of the residents of village C, who oppose the prohibition, to an extent that is excessive? Is the requirement of proportionality fulfilled? We have discussed the sub-tests of this test (see para. 26 above). The first sub-test (the ‘rational connection test’) is fulfilled. Just as in village A, in village C too a prohibition against the sale of pig meat and meat products will prevent an injury to religious and national sensibilities. The second sub-test (the ‘smallest violation test’) will be fulfilled only if it is assured that the residents who wish to sell and consume pig meat and meat products can do so in village B or in the outskirts of village C. The third sub-test (the ‘proportionality test,’ in the narrow sense) is fulfilled, since there is a reasonable relationship between the extent of the violation of the human right — considering the various possibilities — and the degree of injury to feelings.

35. My conclusion is, therefore, that if the conditions that I have discussed are fulfilled — of which the main one is proper access to pig meat and meat products in village B or in the outskirts of village C — the local authority that incorporates the three villages may prohibit the sale of pig meat and meat products in village A and village C. Underlying my approach is the serious injury caused to the public interest by the sale of pig meat and meat products. This is an injury to religious and national sensibilities together, where the latter strengthen the former. Nonetheless, these in themselves are insufficient to justify the violation of human rights. Such a violation will be lawful only if it is guaranteed that it is possible to reduce the intensity of the violation of human rights in the matter before us by complying with the conditions that I have discussed. This I regard to be a proper balance between the conflicting purposes (cf. *CrimA 217/68 Isramax Ltd v. State of Israel* [23], at p. 364). We are not concerned with the coercion of religion on those who oppose it, since the purchase of pig meat and meat products is relatively easy (cf. *Meatreal Ltd v. Prime Minister and Minister of Religious Affairs* [6], at p. 507).

36. A central element of the compromise that underlies the enabling law is the discretion of the local authority. Naturally, this discretion is not absolute. The local authority is not free to do what it wants. It must act within the framework of the criteria that we have discussed. It must consider, against the background of the local position, the intensity of the injury to feelings, on the one hand, and the intensity of the violation of the right, on the other. It must examine the practical possibilities concerning the sale of pig meat and meat products. Sometimes this examination recommends one legal solution.

Sometimes there will be several legal solutions. A 'zone of legality' or a 'zone of proportionality' is created (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [24], at p. 437; *Menahem v. Minister of Transport* [22], at p. 280). The decision, which must fall within this zone, is for the local authority to make. This gives expression to a central factor on which the compromise underlying the enabling law is based, since the local considerations are of great importance, and there is no-one like the local authority for assessing these. It was rightly said in a similar context that no-one is as capable as the local authority for '... taking into account the composition of the population in each place, its habits, its lifestyle and the character of that place' (*per* Justice Y. Kahan in CrimA 858/79 *Lapid v. State of Israel* [25], at p. 391). Moreover, this gives expression not merely to the principle of the separation of powers but also to the special status of the local authority. This status is connected with the 'principle of autonomy' (see the remarks of Justice M. Cheshin in HCJ 3791/93 *Mishlav v. Minister of Interior* [26], at p. 131), and the fact that the local authority is elected in democratic elections like a 'mini-Knesset' (see AAA 5042/01 *Zid v. Faras* [27], at p. 896). Dr Y. Blank rightly pointed out that '... the local government is (also) an expression of democracy in that it is elected by the local political community' (see Y. Blank, 'The Location of the Local: Local Government Law, Decentralization and Territorial Inequality in Israel,' 34 *Hebrew Univ. L. Rev. (Mishpatim)* 197 (2004), at p. 211; see also E. Vinograd, *Local Authority Law*, vol. 1, at p. 3).

37. It is now possible, against the background of the example that I gave, to discuss the scope of the local authority's discretion. When the population of a territorial unit (a village within the framework of a district authority; a neighbourhood within a municipal framework) is homogeneous, the solution seems simple. The difficulty arises in 'mixed' situations, where each 'group' is a significant part of the local population and it is not possible to separate the groups. In such a situation, the local authority should examine the character of the territorial unit. It must check the degree of social consensus in that unit and the degree of willingness for reciprocal tolerance within that unit. Consideration should be given to the various possibilities, and especially the accessibility and proximity of shops in which it is possible to buy pig meat and meat products; the transport routes to those shops and the practicality of using that transport. If this consideration shows that there is a practical alternative, it is possible to prohibit the sale of pig meat and meat products in that territorial unit. This achieves the compromise on which the enabling law is based.

The enabling law — practical application

38. We have interpreted the provisions of the enabling law in accordance with the tripartite purpose that underlies it. This interpretation provides criteria for a balance between the injury to religious and national sensibilities, on the one hand, and the violation of human rights, on the other. This interpretation directly affects the scope of the discretion of the local authority when enacting a bylaw concerning the sale of pig meat and meat products. It affects the scope of the discretion of the Minister of the Interior (in exercising the authority given to him under s. 258 of the Municipalities Ordinance [New Version]). In these circumstances, the proper approach that should be adopted is to return to the municipalities (the respondents) themselves. They enacted the bylaws which are the subject of the petitions before us without having before them the criteria for exercising their jurisdiction under the enabling law. Now they must reconsider, against the background of the criteria that balance the conflicting values, as it emerges from the interpretation of the enabling law. The Minister of the Interior shall also reconsider his position. We ourselves are not expressing any position with regard to the compliance of the bylaws that are the subject of the petitions before us with the criteria required by the enabling law. In order to allow the reconsideration to take place, we are suspending the Tiberias bylaw, the Carmiel (Pig Meat) Bylaw, 5738-1978, and the Carmiel (Pig Meat) Bylaw, 5761-2001, and the Beit Shemesh bylaw. Before each of the new bylaws comes into effect, thirty days' notice will be given to the petitioners in order that they may plan what steps to take.

39. The reconsideration by the Municipalities (the respondents) must focus on the local characteristics of each municipality. In this respect, the Municipalities must consider, *first*, the intensity of the injury to the sensibilities of the local residents (both believers and non-believers) from the sale of pig meat and meat products. The intensity of this injury is not uniform, and it varies from place to place and from person to person. Sometimes it goes beyond the level of tolerance of a person in a democracy; sometimes it falls short of it. An examination should be made individually for each municipality. The intensity of the injury is influenced by geographic data, such as the distance between the homes of those residents and the closest place where it is permitted to sell pig meat and meat products. *Second*, the municipality must consider the degree of the violation of the rights of those persons who wish to sell and buy pig meat and meat products, *inter alia*, against a background of the position prevailing before enacting the bylaw. It must consider the scope of the *de facto* violation of the freedom of occupation of each of the sellers of pig

meat and meat products within its boundaries against a background of his whole livelihood, its scope and his investments if he is forbidden to sell them. It must consider the practical options available to them and their ability to realize these options. In this regard, special weight must be given to the 'transition period' required in order to allow the sellers to relocate their business, if this is the solution that is found to be appropriate. The length of this transition period varies from place to place, and it must be given special consideration. It must also consider the various practical possibilities available to those who wish to buy pig meat and meat products, and the degree of injury to them. *Finally*, against the background of the intensity of the injury to sensibilities, on the one hand, and against the background of the violation of human rights, on the other, the municipality should consider the question of whether to prohibit the sale of pig meat and meat products, or not, and if it decides upon a prohibition, whether it will be complete ('the whole area of its jurisdiction') or partial ('a specific part thereof'). This decision should reflect the character of the city; its division into the different neighbourhoods, districts and roads; the degree to which residents whose sensibilities will be injured if pig meat and meat products are sold in their midst and those whose rights will be violated if the pig meat and meat products are not sold in their midst live together in the various neighbourhoods; the various practical solutions that can be adopted against a background of the character of the municipality; the distances and journey times between the relevant places; the possibility of designating places for the sale of pig meat and products inside or outside the various neighbourhoods.

40. The decision facing the municipality may be difficult. It will reflect the degree of tolerance for the conflicting opinion to that which characterizes the residents of the municipality. It will give expression to social coherence and the ability of residents with different and conflicting outlooks to live together. Indeed, let us all therefore remember that living together is not a matter of all or nothing; living together is an expression of reciprocal concessions, which reflect coexistence in a multi-faceted society; it is based on consideration for the opinions and sensibilities of others; it is the result of a recognition that in order to live together, we must recognize the uniqueness of each one of us, and that this uniqueness can be recognized only if we are able to live together.

The result is that we return the issues that are the subject of the petitions to the respondent municipalities, in order that they may consider them and make new decisions in the light of the criteria that we have discussed, without us adopting any position on the merits of their decision. Until a further decision,

the bylaws are suspended, as stated in our judgment. Subject to the aforesaid, we decide to deny the petitions.

Vice-President Emeritus T. Or

I agree.

Vice-President E. Mazza

I agree.

Justice M. Cheshin

I agree.

Justice J. Türkel

I agree.

Justice D. Beinisch

I agree.

Justice A. Procaccia

I agree.

Justice E.E. Levy

I agree.

Justice M. Naor

I agree.

Petitions denied.

30 Av 5764.

17 August 2004.