AAA 3782/12

The Appellants	1**. Tel-Aviv Jaffa District Commander – Israel Police**
	2. Central District Commander – Israel Police
	3. Israel Police
	v.
The Respondent	**The Israel Internet Association**
The Formal Respondents	**1. 012 Smile Telecom Ltd. (*pro forma*)**
	2. 018 Xphone Ltd. (*pro forma*)
	3. Bezeq International Ltd. (*pro forma*)
	4. 013 Netvision Barak Ltd. (*pro forma*)

In the Supreme Court sitting as the Court of Appeals in Administrative Matters

[24.3.2013]

Before: President A. Grunis, Justices E.Vogelman, N. Sohlberg

Appeal against decision of the Tel-Aviv- Jaffa District Court of 2 April 2012 in Case AAF 45505-10-10 handed down by Deputy President Hon. Judge Michal Rubinstein

Facts: In August 2010, the Israel Police ordered major Israeli Internet access providers to block access to eight gambling websites operating outside the State of Israel. The orders were based on section 229 of the Penal Law that permits the District Police Commander to order the closure of any illegal gaming, lottery, or gambling place. The access providers complied with the orders and the Israel Internet Association petitioned the Administrative Affairs Court against the District Commander, contesting the closure, in the interests of Israeli web-users and the general public. The Internet access providers did not petition against the closure of access to the gambling websites. On April 2, 2012 the Administrative Affairs Court (per Judge Michal Rubinstein) granted the petition, holding that the police had no authority to order Internet service providers to block access to gambling websites.

In granting the petition, the Administrative Affairs Court ruled that the Israel Internet Association had an independent right of standing, given the important public interest in enforcing constitutional values and maintaing the rule of law, notwithstanding that no petition was filed by access providers themselves. Furthermore, the closure of Internet websites violated freedom of expression. Even if the content curtailed was of little social utility, websites closure can only be done with legal authority. Primarily the provision in the Penal Law allowed the closure of a physical "place" and did not include the closure of an Internet website. In this context no analogy can be drawn from the closure of prohibited physical places to the closure of prohibited websites, notwithstanding their similar purposes, because the potential for violating freedom of expression and freedom of occupation, and because blocking access to the Internet

poses technical, political and legal difficulties, including the possibility of blocking legitimate websites and innocent users. Blocks by third parties – the access providers – also raises questions relating to liability, the manner of blocking and its costs. In view of all these factors the petition was granted.
An appeal was filed against the decision in the Supreme Court.

Held:
Regarding freedom of expression, the Supreme Court agreed unanimously that the content blocked on the gambling websites is limited in this case and hence the violation of free speech that resulted from blocking lawful content on gambling websites is of limited degree and lawful. Moreover, the primary infringement here relates to the website operators' freedom of occupation. In this regard, the case law has already held that the infringement of freedom of occupation, the infringement satisfies the constitutional tests.

With respect to the concern that protected information on websites would be blocked, the Court noted that website owners can make such information available on alternative websites, or even on the same website while blocking only prohibited gambling.

Regarding standing, Justice Vogelman ruled that the Internet Association satisfies the conditions for recognizing a public petitioner, given that it seeks to promote the public interest of Internet users, an interest shared by the general public, or significant parts thereof, rather than protect its own special interest. Given this case presents a first attempt to define the boundaries of the district police commander's authority under section 229 of the Criminal Law to block access to Internet gambling websites, the question is a fundamental one that justifies hearing through public petition. As to the sufficiency of the factual infrastructure, had the Appellants felt that any issue was not sufficiently clarified, they could have acted to remedy the situation. Moreover, the public petitioner is required to present the factual infrastructure sufficient for the proceeding. In the current case the factual infrastructure was indeed sufficient for purposes of judicial review.

The dispute and the result involved two basic issues: first, whether the language of the Penal Law authorizing police to close a "place" can and should be interpreted broadly to include a virtual Internet website, which is not a physical place, without a specific legislative amendment. The second and more important question was whether the police can and should be permitted to exercise their authority of closure with respect to a website by way of a third party, namely the access providers.
Justice Vogelman (for the majority, with concurrence by President Grunis), wrote that a gambling website may be viewed as a "place," and its blocking can also be viewed as its "closing" within the meaning of section 229(A)(1). Additionally, an online gambling site may be considered a "prohibited gaming venue," under a purposive interpretation of the Criminal Law's relevant provisions and in the context of time and advancing technology, which render section 229 of the Criminal Law applicable in the "virtual" world. Nonetheless, the main obstacle to such interpretation is the lack of express authority to order private third parties – access providers – to assist in implementing the authority to block websites. According to Justice Vogelman, when the law empowers a governmental agency, it is assumed that the legislature intended that agency, and not another, would implement that authority, and that the agency may act only within the boundaries of the authorizing law. Even if the authorization to close a place can be interpreted as authorizing closing websites, it is not identical to authorizing third parties to block access to websites.

This is consistent with the principle of administrative legality which only permits an agency to act within legislation that empowers governmental agencies to order third parties to assist in exercising that agency's authority. Such authority is not even implied in the Penal law's provision concerning police authority to order the closing of a place. Absent explicit statutory source, it is impermissible to compel a person or private entity to act for the authorities. Hence the orders to access providers here violated the principle of administrative legality. The current statutory framework is insufficient because it lacks authorization to order a third party to assist enforcement agencies in exercising their powers.
Even though the rule is that the authority is permitted to receive assistance from private persons or entities as far as the technical aspects of fulfilling their task, there is also an interpretative presumption against delegating authority to private entities and in the absence of appropriate legislative framework, enforcement authority cannot be granted to those not part of the enforcement mechanism

Even if the access providers were not required to exercise discretion, and the police only requested help from them in the exercise of its authority – in the technical act of blocking a website identified through its IP address specified on the order – it is still necessary to prove that the access providers agreed to assist the police. Once the police imposed an obligation upon access providers, it can no longer be considered assistance – hence the need for explicit statutory authorization.

Justice N. Sohlberg, writing for the minority, found that as a rule the court will not grant a public petition where there is a private victim in the background who chose not to apply to the court for relief, and that in light of the website owners failure to file an appeal, it is doubtful whether the Internet association has standing. Furthermore, granting standing when the relevant party did not file a petition might mean that the required factual infrastructure would not be presented to the Court. Nonetheless under the circumstances, where the Administrative Court recognized the Internet Association's standing and ruled on the merits, it would be inappropriate to reject the appeal for of lack of standing without examining the matter on the merits.

Regarding the substantive issue, though a specific legislative arrangement would be preferable, the law's existing language provides a satisfactory solution as to the police authority to issue orders, and waiting for legislative authority frustrates appropriate response in law enforcement and service of justice.
Both in terms of language and purpose the word "space" should be interpreted to also mean virtual space, given that terms that serve in virtual space are borrowed from the tangible world. Accordingly there is no deviation from the principle of legality by finding that "place" also includes virtual space. As the damage wrought by gambling on the Internet is immeasurably greater than that which is caused in physical places and that the legislative purpose was to prevent illegal gambling regardless of its location, a purposive interpretation would and should interpret "place" as meaning virtual space. Accordingly, apart from certain, isolated exceptions, the rule should be that the Internet fits the definition of place.
With respect to the difficulty in using third parties for carrying out a criminal proceeding, the law recognizes the possibility to use a third party to present an object necessary for interrogation or trial. Considering the license the State has granted them, access providers bear public responsibility. It is therefore justified to use them to execute orders to restrict access, given that the order requires the technical acts that do not involve any discretion regarding the closing of a site with a particular IP address specified in the order. Regarding the requirement for third party consent, Justice Sohlberg analogized the status of the website owners to receptionist in a physical place whom the police would have been authorized to require to open.

Justice Sohlberg also found that failure to petition against blocking access may be viewed as the website's owner's consent to to being used to carry out the police order. Justice Sohlberg based this conclusion on the Talmudic rule of "silence is regarded as admission."

Legislation Cited
Administrative Affairs Court Act, 5760-2000, s. 5 (1)
Basic Law: Human Dignity and Liberty
Civil Procedure Regulations, 5744-1984, reg. 3(a)
Criminal Procedure (Arrest and Search) (New Version) Act, 5729-1969, s.20 23
Criminal Procedure (Powers of Enforcement- Communication Data), 5768-2007, s.1, 3 (2)
Interpretation Act 5741-1981, s.17
Penal Law, 5737-1977 s. 224, 228, 229
Police Ordinance [New Version], 5731-1971, s. 3
Prohibition of Discrimination (Products and Services) in Entrance to Places of Entertainment and Public Places, 5761-2001, s.2
Regulation of Sports: Gambling Act, 5727 – 1967

Supreme Court Decisions Cited
[1] HCJ 243/62 *Israel Films Studios Ltd v. Levi* [1962] IsrSC 16 2407.

[2] HCJ 651/03 *Citizens Right Bureau in Israel v. Chairman of Central Elections to the Sixteenth Knesset* [2003] IsrSC 57 (2) 62.

[3] AAA 4436/02 *Tishim Kadurim Restaurant, Member' Club v. Haifa Municipality* [2004] IsrSC 58 (3) 782.

[4] HCJ 8070/98 *Citizens Rights Office in Israel v. Ministry of the Interior* (10.5.04).

[5] LCA 4447/07 *Mor v. Barak I.T.T.* [1995] *Society for the Bezeq International Services Ltd* (25.3.10).

[6] CA 9183/09 *The Football Association Premier League Limited v. Anon* (13.5.12).

[7] Cr.A 1439/06 *Zaltovski v. State of Israel* (28.3.06).

[8] CrA. 7430 /10 *Anon. State of Israel* (5.2.2010).

[9] LCrApp 787/79 *Mizrahi v. State of Israel* [1980] IsrSC 35 (4) 421.

[10] (HCJ 131/85*Savizky v. Minster of Finance* [1965] IsrSC 19 (2) 369.

[11] HCJ 651/03 *Citizens Rights Bureau in Israel v. Chairman of the Sixteenth Knesset Central General Elections Committee* [2003] IsrSC 57 (2) 62.

[12] HCJ 3809/08 *Citizens Rights Bureau v. Israel Police* (28.5.2012).

[13] *Association of Renovations Contractors for Restoration v. State of Israel* (14.3.2011).

[14] HCJ 1/81 *Shiran v. Broadcasting Authority* [1981], IsrSC 35 (3) 365.

[15] HCJ 910/86 *Ressler v. Minister of Defense* [1988], IsrSC 42 (2) 441.

[16] HCJ 287/91 *Kargal Ltd v. Investments Center Council* [1992], IsrSc 46 (2) 851,

[17] HCJ 962/02 *Liran v. Attorney General*(1.4.2007).

[18] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.

[19] HCJ 80/70 *Elizur v. Broadcasting Authority* [1970],IsrSC 24 (2) 649.

[20] HCJ 852/86 *Aloni v. Minister of Justice* [1987], IsrSC 41 (2) 1.

[21] HCJ 606/93 *Kiddum Yezumot v. Broadcasting Authority* [1994], IsrSC 48(2) 1.

[22] HCJ 2303/90 *Philipovitz v. Registrar of Companies* [1992], IsrSC 46 (1) 410.

[23] (HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, (19.11.2009).

[24] AAA 6848/10 *Erez v. Giva'ataim* (30.5.2012).

[25] HCJ 5031/10 *Amutat Ir Amim v. Israel Nature and Parks Authority* (26.3.2012).

[26]CA 630/*97 Local Committee for Planning and Building Nahariya v. Shir Hatzafon Construction Company Ltd* [1998] IsrSC 52 (3) at 399.

[27] HCJ 5394/92 *Hoppert v 'Yad Vashem' Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3)353.

[28] 7368/06 *Luxury Apartments Ltd v. Mayor of Yabneh* (27.6.2011).

[29[HCJ 6824/07 *Mana v Taxation Authority* (20.12.2010).

[30] HCJ 7455/05 *Legal Forum for Land of Israel v. Israeli Government* [2005] 905.

United States Decisions Cited

[[31] Center for Democracy & *Technology cy & Technology v. Pappert*, 337 F.Supp.2d 606 (E.D Penn. 2004).

For the Appellants: Advs. Yuval Roitman; Adv.Orli Aharoni

For the Respondent: Adv. Haim Ravia, Adv. Dan-Or Hof; Adv. Yossi Markovitz

Judgment

Justice N. Sohlberg

1. The Israel Police issued orders restricting access to gambling websites on the Internet. The Tel-Aviv-Jaffa District Court, sitting as the Court for Administrative Affairs (Judge Michal Rubinstein) granted the petition by the Israeli Internet Association and ruled that the orders were issued *ultra vires* and should therefore be voided. The Israel Police appealed and requested the orders be resotred.

Background

2. Crime is burgeoning and taking new forms. As a result, on 1 January 2006 Government Decision No. 4618 was adopted, establishing a Standing Committee for Direction and Coordination of Activity in the Battle Against Severe Crime and Organized Crime and their Offshoots. The Committee determined that because its far-reaching and grave consequences the phenomenon of Internet gambling would be a central enforcement target combining several tools – criminal, fiscal, and administrative. This is a growing crime-generating phenomenon that is accessible to a broad segment of the population. Within this context, with the knowledge of the Attorney General and the State Attorney, the Committee decided to restrict Israeli users' access to gambling websites. Internet access providers were issued warning letters and given a list of gambling sites and their IP addresses to be blocked. The access providers and the website operators were also allowed the opportunity to object. In August 2010 the orders were issued. In October 2010 the Israel Internet Association petitioned to the Administrative Affairs Court to revoke the orders, and in April 2012 the petition was granted

The Ruling of the District Court

3. The principle elements of the Administrative Affairs Court's ruling are:

(a) *Locus Standi*: The direct victims – the access providers and the website operators – chose not to exercise their right to petition against the orders. Nonetheless the court found there were grounds for recognizing the *locus standi* of the Israel Internet Association, given that it does not represent the interests of the access providers and website operators, which have primarily commercial interests, but rather as the representative of users in Israel and their rights to free expression and access to information. This is a matter of general public importance pertaining enforcing constitutional values and maintaining the rule of law.

(b) *Restricting access to Internet gambling sites infringes freedom of expression*: The Internet is an excellent tool for exercising the right to access information in a practical, efficient, cheap and reliable manner. It is a democratic tool that promotes equality, enables a decentralized and diverse discourse, facilitates economic growth, and is an excellent platform for business ventures. Access to information is a constitutional right and limitations on the use of Internet are therefore rare. yet, the Internet is also subject to abuse, to violation of copyright, publication of slander, pornography, encouragement of violence, drug abuse etc. The desire to minimize the harm caused by damaging uses of the Internet has led the authorities of different countries to adopt various means, including blocking access to websites that function as platforms for illegal activity, or use technological screening measures. The Israeli approach has been that freedom of expression is "all encompassing" and applies even to expressions that encourage illegal activity. Still, freedom of expression is not an absolute right. When there are interests that justify it, such as security, or social, political and other interests, freedom of expression may be curbed. When applying a proportionality test, the balance may vary according to the type of expression and its inherent social value weighed against the benefit of restriction. The content of illegal gambling sites – for example game instructions, various lists, graphics and other audio-visual aides – are, generally speaking, of little social value. The expressions are of a purely commercial nature, encouraging acts restricted under criminal law. Conceivably, limiting access to such expressions may be justified by legitimate purpose. But the mere fact that an expression may be harm does not exclude it from protection. As such, restrictions on free speech, even on expressions with little social value such as those in illegal gambling sites, must pass constitutional muster and be legally authorized.

(c) *The Police has no authority to order Internet access providers to restrict access to gambling websites*. The relevant sections of the Police Ordinance [New Version], 5731-1971 ("Police Ordinance"), and the Penal Law, 5737-1977 ("Penal Law"), through their language and purpose, authorize the Israel Police to order the closing of places where gambling is takes place, but these are only physical places, as opposed to preventing access to an Internet website. A website is not a "place" but rather an amalgamation of information and applications installed in a computer that communicates with other computers via the Internet. Information is transferred from the computer to the server. The police is authorized to order the closing of a "place" of prohibited games or a "place" where lotteries or gambling are held, but preventing access to a website is not equivalent to the closing of a place, and is not covered by that authorization, neither explicitly nor implicitly. That the law grants the police the power to shut down physical places cannot, in itself, be understood as legislative intention to broaden the authority to allow "censorship" power to the police, without clear guidelines for its exercise. Even if the purpose of the orders – reducing the prevalence of gambling – is identical to that of the authorizing closing down physical gambling places, blocked access to a website implicates freedom of expression and freedom of occupation differently. Blocking access to the Internet poses technical, political and legal difficulties: the concern for possibly blocking legitimate websites or innocent users. Executing blocks by a third party – the access providers – raises questions of liability, methods for blocking and costs. The appropriate legal policy would be to wait for explicit regulation of restrictions to free expression on the Internet in primary legislation, following in depth public debate. "Acrobatic" interpretations should not be invoked to authorize the police to violate civil rights. Furthermore, over the past few years the legislature has considered proposals for legislative amendments on this issue, but the legislative initiatives were hindered for being insufficiently balanced. The subjective and concrete

legislative intention indicates a desire not to authorize the police to block access to gambling websites at its own discretion.

In short, the orders to restrict access to gambling websites were issued *ultra vires* and should be voided. This was the ruling of the Tel-Aviv-Jaffa District Court, sitting as the Court for Administrative Affairs.

Principal Arguments of the Parties

4. Attorneys for the State argue that the Administrative Affairs Court erred in determining that the Israel Internet Association has standing. The latter is a public petitioner with no personal interest in the orders, and his petition should therefore have been dismissed *in limine*, especially given the existence of petitioners who could have presented the factual infrastructure required, yet they ultimately refrained from filing a petition. The petition seeks to permit illegal activity, rather than preserve the rule of law, and there was no justification for conducting a judicial hearing for this kind of petition by a public petitioner. Attorneys for the State further argue that the Administrative Affairs Court erred in holding the orders infringe freedom of expression. The websites subject to the orders do not serve as a venue for expression and their entire *raison d'etre* is conducting prohibited gambling. There is no justification to fully exempt the Internet from rules that apply to other media. Blocking access to gambling is accepted practice all over the world, and is necessary for crime prevention.

5. The primary claim the State's attorneys make is that the police is authorized to order blocking access to websites. The Administrative Affairs Court adopted a "rigid" interpretation that failed to fully account for the law's language and purpose. The Administrative Affairs Court failed to consider a possible alternative in the authorizing statute. In any case the relevant provision can be seen to include Internet space, as well as physical space: a "*place of gambling*" is also a "*virtual place*". The authority to close a place also encompasses orders to block access to virtual space. The attorney for the State argues that when the law was passed it was impossible to anticipate the existence of virtual space, but the purpose is the same: preventing illegal gambling, which causes immense harm to both the individual and the public. Waiting for primary legislation to explicitly grant parallel authority to virtual space means perpetuating Internet gambling, its grave consequences and its harm, while forcing the police to combat it with hands tied behind its back.

6. On the other hand, the Israel Internet Association discussed the public interest in Internet access, and as a natural outcome, its right of standing in this petition vis-à-vis its activities to promote Internet use in Israel as a technological, research, educational, social, and business resource. The limited economic interest of website owners and access providers is not comparable to the public interest in having unfettered access to the Internet. This is the purpose of granting standing rights to a public petitioner, thus enabling judicial review in a matter of public and constitutional importance that implicates the rule of law. The Israel Internet Association also emphasized the right to know. "*A governing authority which claims the right to decide what the citizen ought to know, will eventually decide what the citizen should think; and there is no greater paradox to true democracy, which is not 'guided' from above*" (HCJ 243/62 *Israel Films Studios Ltd v. Levi* [1] at p. 2416). A website consists of layers of information, each of these a protected expression, including: the code, the graphic design, games, trailers, data and explanations. The suspicion of a criminal offense does not excuse limits on expression in advance.

7. The Israel Internet Association further claims that the law does not authorize the Police to order a third party to block access to gambling websites. An Internet website is neither a "place", nor "premises" but rather a collection of "pages" which contain information collected from files on a service computer that communicates with other computers via the Internet (Abraham Tenenbaum "On Metaphors in Computer and Internet Law", *Sha'arei Mishpat* 4 (2), 356, 374 (2006)). The analogy between "site" and "place" is fundamentally flawed. Blocking access to knowledge is distinguishable from closing a physical place, *inter alia* because of the infringement upon freedom of expression. Physical closing does not implicate the rights of the general public. Blocking access to knowledge does. Internet access providers are not enforcement agents of the police. They serve as a channel for providing information to Internet users, and they have an immensely important role in exercising the right to access information.

8. The Israel Internet Association requests we uphold the Administrative Affairs Court's decision regarding standing based also on the fact that the consequences of blocking access to a website differ from the consequences of blocking a physical place. Blocking access to websites involves technical challenges that may block access to innocuous sites. Blocking may be ineffective, as well. It may have implications for international obligations, and raise questions about access providers' liability. Costs are likely to be "rolled" onto users. As a matter of judicial policy, infringements upon freedom of expression and access to information should only done in explicit primary legislation. The Knesset debates around private bills on the matter reflect substantive reservations against conferring the police with the requested powers. Upholding the appeal would turn the police into investigator and prosecutor, judge and executor, while performing interpretive acrobatics and infringing free expression.

Discussion and Ruling

9. I divide the discussion into three categories, following the path taken by the Administrative Affairs Court:

(a) Standing; (b) Freedom of Expression; (c) Police Authority.

(a) *Right of Standing*

10. As mentioned, the orders compelled Internet providers to block access to a number of websites used for illegal gambling. The access providers and the website owners chose not to challenge the orders. *Prima facie*, as claimed by the attorney for the State, the Israel Internet Association is stepping into a dispute in which it has no part. The Administrative Affairs Court deviated from the rule that "*the court will generally not grant a public petition where there is a private victim who chose not to turn to the court for relief* " (HCJ 651/03 *Citizens Right Bureau in Israel v. Chairman of Central Elections to the Sixteenth Knesset* [2] at p. 68). Recognition of standing rights for the Israeli Internet Association prompted the petitions' adjudication without presenting the Administrative Court with the required factual infrastructure. The precise contents of the websites subject to the orders were not presented, nor was a full description of the technical ability to block access. No basis was presented for the argument – which the Administrative Court found acceptable – that blocking access to gambling sites could also be expected to block other sites.

11. The Israeli Internet Association further argued before the Administrative Affairs Court that the Internet providers' right to hearing had been violated. It further argued that the decision to block certain sites was discriminatory. The problem however is that these are not arguments that can be raised by a public petitioner. These are arguments that only the website owners and the access providers could have raised, had they so wished to do so.

12. It seems that *a priori* the petition should have been dismissed *in limine* in the absence of standing. However, *post factum,* once the Administrative Affairs Court recognized the Israel Internet Association had standing, and ruled as it did on the merits, it seems inappropriate at this stage to uphold the appeal merely based on his issue, without ruling on the merits of the appeal itself. It is incumbent upon us to rule on the legality of the orders.

Freedom of Expression

13. The attorneys for the parties spoke loftily and at length about freedom of expression and the right to access information that derives from it. Indeed, we must make every effort to avoid infringing the free dialogue in the new "town square" and the flow of information on the Internet. Freedom of expression is the air we breathe, and the right to access information – our daily bread. All the same, in its decision, the Administrative Affairs Court stated that illegal gambling on the Internet certainly *is not a protected right, and that in such circumstances indeed there is no "discourse of rights"* (para. 21). However, the gambling sites also feature additional content: expressions, pictures, texts, explanations, lists and other audio-visual information. According to the Administrative Affairs Court all of these are of social value, concededly of "low value". Nevertheless, "*in the prevention of access to gambling websites the Respondents infringed the freedom of expression of users interested in entering the website and in browsing the information and of the site owners who uploaded the content*" (para.23).

14. This infringement upon free expression was scathingly criticized by the Israel Internet Association, but it appears to me that the alleged infringement is not quite what it was made out to be. Attorneys for the State dispute this, claiming that the aforementioned gambling websites contain gambling content and nothing else, and that in any event, it is not content of a kind to which access cannot be denied based on freedom of expression. As mentioned, the petition was filed by the Israel Internet Association and not by access providers or website operators, with whom the relevant information is stored. This matter again exemplifies the problematic nature of granting standing to a party meddling in a dispute that is not its own, because the factual infrastructure laid before the court was insufficient and a court may follow it blindly.

15. Regardless, even had the gambling websites under discussion included legitimate content alongside platforms of illegal gambling, there is nothing to prevent website owners from making the information accessible to users by one of two methods: either on an alternative site, or on the same site, together with blocking possible engagement in prohibited gambling there. The infringement of free expression is therefore quite marginal, if at all.

16. We should not forget that the closure of a physical gambling place violates the right to property, a basic constitutional right, but is nonetheless permitted and frequently done according to the law. Case law, too, has permitted the closure of a physical gambling place, even when it serves for other legitimate activities (per former Justice Grunis in AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [3] at p.798 (hereinafter: *Tishim Kadurim*). As mentioned above, the Israeli Internet Association argues that not all of the content on the gambling sites at issue is illegal and that these sites serve as platforms for chatting and other legitimate uses. This is a factual claim that requires factual substantiation. But assuming it is correct, we again analogize to a physical gambling place, which may undisputedly be legally closed. In addition to serving for illegal gambling, such a place can also serve as a place for social interaction, where conversations, even on matters of highest importance, may be held. But this would not rise to the level of speech protected by the right to free expression that would prevent closing a physical place of gambling. Visitors would be able

to continue to meet, to speak, and to exchange opinions in alternative venues. Similarly, there is nothing to prevent taking the same action regarding a website where illegal gambling takes place. Access to the latter would be blocked, and to the extent that other legitimate activities took place on the website, there would be no impediment to continuing those, whether on this site or on another site.

17. Hence, in terms of practical implementation the concern for violating a fundamental principle has been alleviated. The elevated status of freedom of expression is far beyond dispute. It remains intact and its status is securely enshrined, and access to illegal Internet gambling can be restricted without infringing freedom of expression or the right to access information. I make additional comments on guarding against any infringement of free expression below, in my discussion of discretion in exercising police authority.

(c) *Police Authority*

18. Law enforcement agencies source their actions in two statutory provisions. Section 3 of the Police Ordinance provides that: "*The Israel Police shall work toward prevention and detection of offences, apprehension and prosecution of offenders, safe custody of prisoners, and maintenance of public order and the safety of persons and property*". This is a basic and important provision, but because of its generality is of limited value to us. A more important provision for our purposes is the specific provision of section 229(a)(1) of the Penal Law, which addresses "*closure of places*", as follows:

> "A district police commander may order the closing of a place for prohibited games or a place for the conduct of lotteries or gambling."

19. There are two, similar alternatives. The first: "a place of prohibited games", and the second, "a place for the conduct of lotteries or gambling". The Administrative Affairs Court focused on the first alternative, which is defined in section 224 of the Penal Law:

> "'Place of prohibited games': premises where prohibited games are held regularly, whether open to the public or only to certain persons, regardless of whether those premises are also used for some other purpose."

Based on dictionary definitions in both Hebrew and English, the Administrative Affairs Court ruled that the statutory definition refers to a physical, delineated place; such as a house, building, field (para. 36 of the Administrative Affairs Court opinion). The court relied on Y. Kedmi's book, which interprets premises "*in the broad and comprehensive sense of the concept... Immovable property as distinct from movable property.*" (Yaakov Kedmi, *The Criminal Law (Part IV)* 2283 (2006).

20. Can the term "*premises*" be said to include the world of Internet? In my opinion "virtual premises" are also "premises" but this question can be left for future decisions. Section 229(a)(1) of the Penal Law, as mentioned above, consists of two alternatives. The second alternative, as worded, does not necessitate reference to the definitions section. The question therefore arises as to whether "place" can be broadly interpreted to mean "virtual space". The Administrative Court answered this question in the negative, with sound, logical and, at first blush, persuasive reason:

> "Moreover, relating to a website as a 'place' is inconsistent with its mode of operation. A website, by definition, is an

> agglomeration of information and applications, installed on a computer, that connects with many other computers over the Internet. When a user 'enters a website;, their personal computer contacts another computer ('the website server') which is found elsewhere, and requests information. The user's computer has a unique number (IP address) and the website server has a unique number (a different IP address). The website server transmits the information to the personal computer, which uses a browser to arrange the information for reading. When "actions" take place on the website, the personal computer asks for new information from the website server, receives it, and arranges it on the personal computer. Information is transmitted between the personal computer and the server, but there is no "place" here at all. Justice Tenenbaum described this well in his article: 'The choice of the Hebrew word "site", intuitively conjures the notion of a geographical site. Perceiving the site as a "place" induces us to say "enter a site", "exit a site" and the like… all the sites on the Internet are connected to each other and the vulnerability of one also harms the other… the Internet was created, developed and exists by virtue of all the individuals which support it and maintain its integrity. Correct and appropriate public policy must be based on this and facilitate these efforts… a "website" is not a place. In fact, a "site" is nothing more than a computer that holds software that regularly communicates with many other computers'" (para. 37 of the Administrative Affairs Court opinion).

21. These comments were repeated and reiterated by the attorney for the Israel Internet Society, and I am prepared to endorse them unreservedly. A website, in essence, is not a "place" according to its technological definition. However, even if this is our point of departure, the necessary conclusion does not specifically exclude virtual space from the scope of section 229(a)(1) of the Penal Law, as will be explained. But prior to doing so a few comments must be made about the Internet, progress and the attempts of law and justice to keep up with the times.

22. Humanity in its entirety, laymen and experts, almost all of us are still learning, wondering and marveling at the Internet. Its influence is felt all over the world, but it will certainly take a long while before we can assess its full effect and implications: *"We are living at the height of a revolution: Technological development in the computer realm, digital information and digital networks are generating a social, economic and political upheaval* (Niva Elkin-Koren and Michael Birnhack, Introduction, in LEGAL NETWORK: LAW AND INFORMATION TECHNOLOGY (with Niva Elkin-Koren, 2011);

> The computer – and with it the Internet – are not merely a mutation of previous life forms that we have known, which we have given a home to in the legal system. They are a new life form, and their movement is not the movement of the life forms with whom we are accustomed to live. They move in the manner of the knight (the horse) in a chess game; its movement is not

> altogether forward, nor altogether backward or altogether to the side. It is not altogether diagonal. Its movement is a tinkling of this and a tinkling of that, and it exists in its own right. But here is how the new life form differs from the knight: we know in advance how the knight will move and we know, more or less, how to protect ourselves when it attacks us. As for these new life forms of the computer and the Internet – we have yet to fully explore them; we have yet to reach the bottom of the pit. One click in Jerusalem, and you are in Tel-Aviv, a second click and you are in Australia, a third click – and the system rebels and everything is erased as if it never was. We have begun to move at the speed of light whereas our bodies are in the carriage, and our stream of thought moves at the speed of the carriage (Mishael Cheshin, "Introduction" THE COMPUTER AND THE LEGAL PROCEEDING: ELECTRONIC EVIDENCE AND PROCEDURE (2000).

Some view the Internet as a new universe. "*In a short time the Internet has created a new universe of inconceivable dimensions. This universe dominates almost every aspect of civilization, replicates it and corresponds to it*" (Rubick Rozental, A Few Comments on the Language of Internet, LEGAL NETWORK: LAW AND INFORMATION TECHNOLOGY, eds Michael Birnhack and Niva Elkin-Koren, 2011, 61). The Internet has come to our world, entering into its inner domains, but we still have trouble defining it. It exists all over the world and simultaneously in no *place* at all. More precisely, there is access to Internet and its activity all over the world, but its existence is "*nowhere*".

23. As is well known, the law follows sluggishly in the footsteps of innovations, and legislation does not keep up with the pace of scientific progress. Offenders against the law adapt to progress more rapidly than its enforcers. This is axiomatic. The former have no restraints; the latter do. Many years passed between the invention of the computer and the enactment of the Computers Law, (1995). Less than a generation or two passed in terms of computers, and the law is already out of date, because the legislature did not foresee, nor could it have foreseen the innovations in technology. But not only is the legal world perplexed. Psychology too has encountered new phenomena of addiction and psychological injuries, and is attempting to develop updated, "on the go" reponses. The same is true for sociology, and other disciplines in social sciences, natural sciences and the humanities. Not surprisingly, the world of law too is still unequipped. Some have taken an extreme view, claiming that given the virtual nature of the Internet, it cannot be subjected to the laws of space, time and state (see written references for this approach in the article of Yuval Karniel and Chaim Wismonski, *Freedom of Expression, Pornography, and Community in the Internet*, BAR ILAN LAW STUDIES 23 (1) 259 (2006); Michal Agmon-Gonen, *The Internet as a City of Refuge?! Legal Regulation in Light of the Possibilities of the Technological Bypass Technologies and Globalism of the Net*, LEGAL NETWORK: LAW AND INFORMATION TECHNOLOGY, eds. Michael Birnhack and Niva Elkin-Koren, 2011, 207).

24. This extraterritorial approach is unacceptable. Concededly, an abundance of legislation that would impair the tremendous benefit inherent in the Internet is undesirable, nor is there any point in legislation which is unenforceable given the characteristics of the network. However, for good or bad, virtual space exerts a tangible influence over the concrete world,

and our world will neither consent to nor tolerate the virtual realm's exemption from the law. Act of pedophilia committed online are still pedophilia, drugs sold via the Internet still have the same addictive and destructive affect as drugs sold on city streets, the terrible harms of Internet gambling are no less damaging than danger from gambling in a physical place. Quite the opposite, the Internet opens new horizons for the world of crime. They should be blocked. The approach of excluding law and justice from virtual space must be kept off bounds.

25. All the same, undeniably, the legal regulation of activity in virtual space is complex and complicated. Normative claims as to what the law ought to be are difficult to make, nor is it easy to apply the existing law. Not by chance, there are those who have concluded that this is an area best suited for legislation; while others feel that case law is the appropriate method for adjusting the law to the Internet era. Both camps are uncertain about the extent to which Internet users should participate in formulating the rules governing virtual space and their application. (For a comprehensive review of the possible models, see: Iris Yaron Unger *Uncovering the Identity of an Anonymous Internet wrongdoer – Comparative Review*, The Knesset, Legal Department, Legislation and Legal Research, 2012). A variety of models in case law and legislation have been adopted by states around the world (Miguel Deutch, *Computer Legislation in Israel*, TEL-AVIV LAW STUDIES 22 (2) 427, 428 (1999)). The issue is weighty and broad and its influence far-reaching, but I will not elaborate on it beyond what is required for discussing the concrete questions of this appeal: *the authority of the police to issue an order restricting access to gambling websites on the Internet*.

26. It seems that a comprehensive statutory regulation of this field, in a precise manner adjusted to the virtual era is preferable. The question is whether, absent updated and comprehensive legislation, the law as currently worded satisfactorily considers the police's authority to issue the orders in question. The Administrative Affairs Court decided to defer the legislative process, but to void police powers to order closure of virtual gambling places until the statute is expressly amended to confer such authority. This ruling involves difficulties.

27. The 'waiting period' created restricts, and occasionally frustrates, appropriate responses toward law enforcement and justice. This approach, coupled with the previously described pace of technological progress, can be expected to lead to a situation where many legislative acts will be neither relevant nor applicable. Even after the legislature has amended the legislation, it is entirely possible that within little time that amendment will no longer be useful. Hence waiting for the legislature to act will not necessarily provide a solution. "*The judge interprets the law. Without his interpretation of the law, it cannot be applied. The judge may give a new interpretation. This is a dynamic interpretation that attempts to bridge between the law and changing reality without having to change the law itself. The law remains as it was, but its meaning has changed because the judge gave it a new interpretation that is consistent with society's new needs. The court ... realizes its judicial role in bridging law and life* (Aharon Barak, *The Judge in a Democratic Society* 57 (2004); and see HCJ 8070/98 *Citizens Rights Office in Israel v. Ministry of the Interior* [4], para. 12 of former Justice Grunis' opinion; LCA 4447/07 *Mor v. Barak I.T.T.* [1995] *Society for the Bezeq International Services Ltd* (hereinafter: *Mor*) paras. F-I, of Justice Rubinstein's opinion; CA 9183/09 *The Football Association Premier League Limited v. Anon* [6] paras. 4-6 of Justice Melcer's opinion (hereinafter: *Anon*)).

28. On one hand, Internet crime is becoming increasingly sophisticated. On the other, criminal law develops slowly. The chasm between the two must be bridged. The Knesset achieves this through legislation, while the courts through case law. The reality of life does not

allow us to wait for the Penal Law to be amended to determine which offences can escape sanction when committed over the Internet and which cannot. Nor is it legally necessary to wait until the legislature has reviewed all of the criminal law's provisions and decided which of them are applicable to the Internet. The court must respond to the specific matter brought before it and rule one way or another. This is not a question of '*judicial legislation*', but rather of '*judicial creation*'. The same criminal offences proscribed many years ago and committed on city streets, are now committed on a larger scale and with greater force via the Internet. Occasionally, the *actus reus* is identical, the *mens rea* is identical, the legislative purpose is identical, and the damage, is quite often more extensive and severe in the virtual realm.

29. Needless to say, we are still bound by linguistic restraints and cannot deviate from their boundaries to cast our net over whatever we see as a crime or a tort in the "real world" and possibly appears as such in the virtual domain. All the same, the legislative purpose, generally common to all offences, whether committed here or there, requires an interpretative effort to prevent greatly harmful artificial loopholes in enforcement. The tremendous damage that can be wrought by the Internet was descussed by Justice E. Hayut: "*The infringement concerned enlists human progress and technological innovations in computing in the service of crime, thus yielding a new and dangerous form of criminality that cannot be taken lightly. This form of criminality does not involve physical-tangible harm that leaves its marks on the victim's body. It is committed remotely, with the click of a button, but its damage is extensive and carries different levels of implications, including to, as stated, a victim's personal security and privacy, his property, his business, and his commercial secrets*" (Cr.A 1439/06 *Zaltovski v. State of Israel* [7]). In the same vein, former Justice Grunis wrote: "*The Internet is fertile ground for committing different types and categories of criminal activity, and inter alia, activities directed against state security. That the Internet era has made it significantly easier, technically, to commit offences such as a conspiracy to commit an offence cannot be ignored. Hence, in the case before us it is undisputed that "A" and "S" became acquainted by chance… via the Internet. In other words, conceivably, if not for the chance Internet meeting they would not have met and could not have conspired to commit the acts described in the indictment. Hence, the case before us demonstrates a need to impose punishment that deters from the negative and criminal side-effects that accompany technological developments*" (CrA. 7430 /10 *Anon v. State of Israel* [8]). There are numerous other examples, and we take judicial notice of the Internet being exploited for grave and dangerous harm on a broad scale.

30. Pedophilia is a pernicious scourge on the Internet. Is pedophilic material in virtual space nothing more than a collection of 'pixels' – with no substance – that the law is powerless to reach? In practice, the courts do not stand idly by, and they ideed apply the Penal Law's provisions to offences committed over the Internet. Naturally, this is not done reflexively, but rather the required physical and mental elements have been examined, under the circumstances of each case, and the principles of criminal law have been applied. (See Assaf Hardoof, CYBERCRIME, 17 (2010) who sharply criticizes the approach that the Internet's characteristics undermine the foundations of criminal law. According to his approach, the mental complexities leading to criminal conduct committed in a physical environment also exist on the Internet.)

31. We will return to the meaning of a "place… of gambling" in section 229(a)(1) of the Penal Law, which the police is permitted to close. If, according to the Administrative Affairs Court's decision, it refers to a physical and not virtual place, then logic dictates that this would also be the meaning of a "place… of gambling" immediately above in section 228 of the Penal Law. If so, then not only would the police be prevented from issuing orders restricting access to

gambling websites, but it is doubtful it would even be possible to convict a person operating, over the Internet, "a place for prohibited games or a place for the conduct of lotteries or gambling" (section 228 of the Criminal Law). On its face, this would conclusively preclude not only restricting access to illegal gambling websites, but also the enforcing the prohibition of possessing or operating illegal gambling websites. This state of affairs would remain until we are saved by a statutory amendment, which may or may not come soon.

32. Moreover, in Israeli legislation, the term "place" is used for different offences and in numerous contexts. For example, "public place" is defined in section 34(24) of the Penal Law and is mentioned in numerous other sections concerning offences and punishments; Chapter C of the Preliminary Part of the Penal Law, deals with "Applicability of Penal Laws according to *Place* Where the Offense Was Committed (emphasis mine – N.S.). A place in which an Internet website is viewed, or is used is a "place" that establishes judicial jurisdiction. Should we exempt the Internet from the Penal Law going forward because it is excluded from the definition of a "place"? Similarly, would we permit discrimination on the Internet just because it is excluded from the definition of a "public place" in section 2 of the Prohibition of Discrimination (Products and Services) in Entrance to Places of Entertainment and Public Places, 5761-2001? (See e.g. the conviction for supporting a terrorist organization on the Internet, where the internet was found to be a "public place" CrimF (Nazareth) 12641-11-10 *State of Israel v. Abu-Salim* (Deputy President Yung-Gefer) paras. 47-56 (1.4.12)).

33. The civil law, too, is frequently required to apply the concept of "place" to the Internet. On more than one occasion courts have held that Internet-based conduct fall within the jurisdiction of courts all over the country. For example, in a breach of copyright and intellectual property case, concerning a website for a virtual shop selling household goods and gifts, the court held that "the picture was presented on the Internet, namely – in each and every place within the area of the State of Israel. It is therefore clear that the place of the omission was in the entire state and by extension in each and every district… the territorial jurisdiction extends to the entire area of the State of Israel" (Comments by Judge Tenenbaum in App. (Magistrates – J-Lem) 8033/06 *Steinberg v. Levi* (10.4.2007). These remarks, made in his role as judge are inconsistent with his decisive remarks in his role as scholar in the article cited above: that "an Internet site 'is not a place', which the Administrative Affairs Court relied upon in the decision appealed here (para. 37)). Even more accurately, all the alternatives stipulated in Regulation 3(a) of the Civil Procedure Regulations, 5744-1984 employ the language of "place" (place of residence, place of business, place of creating obligations, place intended for fulfillment of obligations, place of delivery of asset, place of act or omission). Is it possible to exclude the Internet from territorial jurisdiction because it does not fall into the category of "place"?

34. Due to space constraints and in the absence of satisfactory arguments it cannot be responsibly councluded that wherever the term "place" appears in primary or secondary legislation it must be applied to the Internet as well. Conceivably, there could be certain, isolated exceptions, but the rule should be that the Internet fits the definition of "place". The Israeli Internet Association's claim, which the Administrative Affairs Court accepted, that both in truth and according to its dictionary definition, virtual space is not a "place" is not sufficiently persuasive. The settled, entrenched and well-accepted law is that "*the words of the law are not fortresses, to be conquered with the help of dictionaries, but rather the packaging of a living idea which changes according to circumstances of time and place, in order to realize the basic purpose of the law*" (comments by then Justice A. Barak (LCrApp 787/79 *Mizrahi v. State of Israel* [9] at 427). There, the Court held that the "one who escapes from lawful

custody" refers not only to an inmate who literally escapes from prison but also to a prisoner who fails to return from furlough: "*it may be argued that our concern is with a criminal provision that should be accorded a narrow construction, by attaching only 'physical' meaning to the terms 'custody' and 'escape'. I cannot accept this line of thought. A criminal statute, like any other statute should be interpreted neither narrowly nor broadly but instead by attaching to it the logical and natural meaning that realizes the legislative purpose*" (*ibid).*These statements have retained their vitality and are applicable to our case too, and even *a fortiori*: in that case the issue concerned a criminal offense, whereas our concern here is with an administrative measure.

35. As stated, the legal world is still not best prepared to handle the Internet, and this is also true of the world of language. The terms that serve us in virtual space are borrowed from the tangible world. On the Internet we use a "desk top"; the user "cuts", "copies", "pastes" and "deletes"; "writes" "notes"; "stores" in "files"; and "sends" to the "recycling bin" and receives "documents" and "junk mail" into a "mail box". Given this background, the word "place" is by no means exceptional. It would not be a deviation from the 'principle of legality', nor from the rules of interpretation were we to determine that "place" also includes virtual space, and that its meaning also encompasses a website. Since we speak of an Internet "site" in our daily conversations, we should remember its dictionary definition and its Talmudic root (*b.Zevahim* 7a): a "site" is a "place".

36. Therefore, in interpreting section 229(a)(1) of the Penal Law, I see no justification for taking a literal and narrow approach, which interprets the word "place" as a physical place only. In the current modern era, a website is also a type of place. The section's language also tolerates the classification of virtual space – or perhaps better termed as "computerized space" – as a "place".

37. From *language* to *purpose*: In the case of *Tishim Kadurim* [3] then Justice A. Grunis explained the purpose for prohibiting certain games as a value-based goal. Man is born to labor rather than easy enrichment based on luck. Addiction to gambling is a serious scourge that harms the individual, their family and society as a whole. Before the Penal Law there was the Criminal Law Amendment (Prohibited Games, Lotteries and Bets), 5724-1964, and before Justice A. Grunis there was Justice Haim Cohn who made the following remarks about the legislative purpose behind the previous statute:

> The legislative purpose, as reflected clearly in the nature and the language of the law, is to combat, by criminalization, the scourge of gambling and betting – the scourge of winning money or its equivalent other than by work or other reasonable consideration, but rather by the luck of the draw. Mr. Terlo rightly mentioned the well-known fact that mankind has an evil tendency to try his luck in gambling. One need not have a particularly developed commercial instinct to assess the tremendous prospect for profit in the commercial exploitation of this natural human tendency. Mr. Terlo said, and I agree with him, that such commercial exploitation, in all of its various forms, produces demoralization. I further add that from my perspective, the wrong that the law seeks to prevent is not only the encouragement of desire for lawful easy enrichment without labor, but also – and perhaps primarily – the placing of an obstacle before the blind, where

> instead of spending his money on his own sustenance and that of his household, he invests in dubious ventures based on luck (HCJ 131/85 *Savizky v. Minster of Finance* [10] at 376).

38. As we can see this plague is nothing new to us. The following is a reliable testimony from two hundred years ago about this phenomenon and the harm it causes, relating to the fate of those who wager on dice: "The number of those involved has multiplied, where their foolish preoccupation is such that they spend nights and days gambling, in their homes, on their roofs and on street corners, until they lose everything. Even if they are wealthy, eventually they lose all and must steal and resort to violence, while their family members starve; their children beg for bread, and there is none to give them, for they do not work to bring food to their families. And one sin leads to another, in that they neglect prayer and fulfillment of the commandments, for when temptation seizes them and they engage in gambling, it is extremely difficult for them to forsake it, as difficult as separating one's fingernail from one's flesh. They do not take care of themselves and do not tear away from gambling, even to eat at the time for eating and to sleep at the time for sleeping. One who is addicted to gambling will not leave it even when he is old, for only will-power can separate from it." (Rabbi Eliezer Papo, *Pele Yo'etz*, Constantinople, 5584 - 1824).[1] […]

39. In 1975 the legislature added a provision to the Penal Law Amendment (Prohibited Games, Lotteries and Bets), 5724-1964, which granted the District Commander of the Police the authority to issue an order to close "a place for prohibited games or a place for the conduct of lotteries or gambling" (S.H 5735, No. 779, 222). According to the introduction to the Explanatory Note of the bill, the legislature was dissatisfied with the existing criminal sanction, and sought to close places where prohibited games were conducted, as a preventive measure: "*The Law imposes a punishment on the possessor or operator of a place for conducting games with cards, dice, game machines, and the like, But there is no law that prevents the actual existence of such place… The proposed law seeks to establish provisions… by enacting legislation directly designed to address the phenomenon of the crime that thrives in such places, and to confer the authority for the advance prevention of the opening of businesses that are liable to harm public safety and generate crime. It also proposes to stiffen the punishments and to adapt them to any given situation* (H.H. 5735-1975)." Incidentally, the Explanatory Note refers to the closing of "a certain place". In light of our conclusions above, it is not inconceivable that "a certain place" encompasses the Internet, it being a place where anonymity is preserved and where we have no knowledge of a website owner's or users' identities, nor do we know what that place is, or where is it located, all of these are considered "*anonymous*".

40. The harm wrought by gambling on the Internet is immeasurably greater than that which is caused in physical place. Gambling websites on the Internet are accessible to all sections of the population, from adult to child, the rich and the poor, the honest and the corrupt, the wise and the legally incompetent. With just a click of a button and press of a key any novice can gamble on the Internet. But not only accessibility is concerning, there is also availability – at any time and any hour. Identity can be disguised to enable the use of all features of virtual spaces. All of these come together to exacerbate the phenomenon and its range of harms: addiction, vast loss of funds, money laundering, tax evasion, incidental crime, and more. A

[1] Justice Sohlberg goes on to cite an anonymous poem about the many evils of gambling. See original Hebrew version of decision.

large physical gambling venue can hold hundreds, perhaps even thousands of clients, but it pales in comparison to the Internet, which is available to millions of people. With these capacities, the number of victims also rises exponentially, as well as the amounts of funds dubiously invested.

41. When section 229(a)(1) of the Penal Law was enacted, the legislature did not anticipate the Internet and by extension did not consider the illegal gambling that would be conducted there. However, the legislative purpose evidently was to prevent illegal gambling, regardless of location. The police pursuit of offenders does not end at virtual space; the Internet cannot become a city of refuge. The material factor is not the platform for illegal gambling but rather the phenomenon itself. "Do not look in the canister, but at what is inside (*Mishnah, Avot* 4.2)" If it is technically possible to close a gambling place, even if the closure is not an enclosure but rather a prevention of access, the legislative purpose should be realized, to the extent possible, through proper interpretation. And again, if we assume that it refers to a physical place, then illegal gambling need not necessarily be conducted in a closed structure, for example, a vast area in which illegal gambling takes place. The possibility of ordering its closure exists and can be done by preventing access through the gate. The police would be authorized to close the gate and prevent access to a space used for criminal activity. In the same vein, the Internet too is a space: a computerized space (some have used the expression "global public space". See Jurgenb Habermas, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE, Thomas Burger & Frederick Lawrence translations (1989); Tal Samuel-Azran, *Global Public Sphere on the Internet: Potential and Limitations*, LEGAL NET: LAW AND INFORMATION TECHNOLOGY, 433, 434 (Niva Elkin-Koren and Michael Birnhack eds, 2011)). Entrance into *computerized space* is also through a "gate" embodied by the access provider and the website operator. Concededly, the entrance is not physical, actually consists of communication between computers, but this is immaterial, because the technological definition is inconclusive as to the interpretative question.

42. Jewish Law can enlighten us. The Torah was given at Mt. Sinai. In the ancient world, modern technology and the Internet era were unimaginable. Nonetheless, the Torah seeks to adapt to present and future reality by way of interpretation, for otherwise it would become a dead letter instead of a living document. Interpretation must adhere to language in order to fulfill the Divine words and to not deviate from them in any way. It was specifically because of this that the Talmudic Sages saw no difficulty in adapting terms such as ox or donkey or camel, used in those times for labor and transport, to the context of vehicles and planes. This is the present need for otherwise Jewish law will no longer be relevant or valuable. Rabbi Aharon Lichtenstein made remarks pertinent for our purposes, and they should guide us:

> In the developing technological reality the ability to cause damage, physical or even virtual continually increases, without incurring any liability under the criteria of Nahmanides or of Rabbi Yitzhack.[2] The harm may be more abstract and the process of causing it may be more indirect than the minimal threshold for liability under *garma*.[3] Nonetheless, the result is quite severe.

[2] Rabbi Yitzchak, abbreviated at R"I – was one of the *Baalei Tosafot*- 11th-12th century Talmudic commentators [Translator]

[3] Talmudic term for indirect damage for which liability may be incurred – Translator.

> Accordingly, a learned and sharp-minded thief would be able to plan and execute the perfect burglary, with the assistance of *grama* tools for breaking in, without consequences, whether due to direct damage or force of *garmi.* Should we persist to grant exemptions in this kind of scenario based on the law of *grama* in torts?...
>
> The request is simple, the authority exists and eyes are raised in anticipation. In the event that leading Jewish authorities succeed in enacting an amendment for this matter it would provide a remedy for a real concern for society, and at the same time, would elevate the glory of the Torah (Lessons of Rabbi Aharon Lichtenstein, *Dina d'Grami*, 200 (5760); See also in the comments of Justice N. Hendel, para. 6 *Anon.*)

43. Thus far on the *laungauge* and the *purpose*. We now proceed to address some of the difficulties the Administrative Affairs Court considered in the decision appealed here, in terms of applying of the law to the virtual sphere. These difficulties also lead the court to conclude that the solution lies with the legislature and not the court, and that it is appropriate to wait for legislative amendment.

44. A primary difficulty is that the orders restrict access to the Internet through third parties – the access provider. According to the Administrative Affairs Court, based on the Israeli Internet Association' claim, the law authorizes closing a place, but does not authorizes ordering a third party to prevent access to an Internet site. The claim is a weighty one. Access providers' legal responsibility poses questions in different legal contexts. For example, in the *Mor* [5] case the Court held that the provider is not obligated to disclose the identity of anonymous "talkbackers", and called upon the legislature to regulate the matter. Similarly, in *Anon* [8] the Court ruled that a supplier cannot be compelled to reveal the particulars of a site owner who breaches copyright in order to file an action for that breach. This decision was also accompanied by a call for legislation of the matter. At the same time, the Court held that if a certain matter did not find a legislative solution, courts would have to provide solutions in case law, and the legal doctrines required to fill in the lacunae were presented. The matter before us is different. Here, it cannot be said that there is no legislative provision that confers authority. There is no need for primary legislation of the issue. The section's interpretation leads to the conclusion that the section applies to the virtual realm. Legal issues concerning the access provider may be adequately resolved in the context of how the police may exercise its authority to order restricted access to gambling websites. That such difficulties exist should not be a determinative factor in whether the authority exists.

45. I also believe that the legal challenges involved in restricting access to gambling websites vis-a-vis the access providers were exaggerated. First, using a third party to execute criminal proceeding is not illegitimate. The law recognizes, for example regarding a summons to present evidence for investigation or a trial (section 43 of the Criminal Procedure (Arrest and Search) (New Version) Act, 5729-1969. Second, given the license they receive from the State, access providers have a public duty. They sit at a central intersection – the "Internet points of control" – and under these circumstances using them to execute orders restricting access is justified. Third, it appears that had it concerned the closure of a physical place by the police, with third party assistance, there would have been no problem. The attorneys for the State demonstrated this in another context thus: Illegal gambling is being conducted in an isolated

villa. A guard is in charge of the path leading to the villa. Would the police not be authorized to order the policeman to prevent gamblers' access to the path leading to the villa? Fourth, a police order directed at access providers instructing the to restrict access to illegal gambling websites does not require them to conduct any investigation or inquiry and does not unlawfully breach any of their rights, ordering them only to "execute a technical act that does not involve any discretion of the closing of a site with a particular IP address, explicitly specified in the order" (section 41 of the State's summations). Case law has stressed that imposing legal responsibility on the supplier raises concerns that should be regulated statutorily (see Rachel Alkalai, *Civil Liability of Internet Services Suppliers for Transfer of Harmful Information* HAMISHPAT 6, 151, 154 on the Report by the Knesset Sub-Committee for Communications and Information on the Need for a Legislative Arrangement). However the situation in the case before us differs from the one described there. We do not hold that Internet providers are legally responsible to prevent, on their own initiative, access to websites used for illegal gambling. Moreover, our ruling does not prevent access providers from petitioning a court in appropriate cases in order to subject it to judicial review. This right is stipulated in section 5(1) of the Administrative Affairs Court Act, 5760-2000 (item no. 7 of the First Schedule). Recall that the access providers did not exercise this right and did not challenge the order.

46. The Israeli Internet Association claims that this is an "unprecedented and exceptional measure" (page 1 of the summations). This is not so. The Administrative Affairs Court recognized that restricting access to Internet websites used for gambling is accepted practice around the world: "*The desire to minimize the harm from negative uses has led certain authorities, even in liberal democratic countries, to take various measures against websites that support anti-social activities* (see: *Betting on the net: An analysis of the Government's role in addressing Internet gambling*, 51 FED. COMM. L. J. (1999)). One of those measures is blocking access to websites that are breading grounds for illegal activity, by various technological means…" (para. 19 of the opinion) (ed. note: translated form the Hebrew opinion's translation). In Australia, a law was enacted in 2001, stipulating that "*access providers shall block access to illegal gambling sites should they receive an express demand to do so from the authorities*" (ed. note: translated from Hebrew opinion's translation), subject to the conditions set forth in the Interactive Gambling Bill 2001. In 2006, the United States passed a law prohibiting Internet gambling – the Unlawful Internet Gambling Enforcement Act of 2006, which *inter alia* allows that under certain circumstances, the court may grant orders to compel internet providers to block access to gambling websites (paras. 54- 55 of the Administrative Affairs Court opinion).

47. Additional restrictions are common around the world. The Council of Europe's Convention on Cybercrime deals with the adoption of legislation intended to protect society from crimes committed online (http://conventions.coe.int/Treay/en/Treaties/Html/185.htm). It provides *inter alia* that all parties to the convention will adopt legislative and other measures as may be necessary to criminalize various acts of child pornography, which is disseminated over computer systems (Article 9). In 1998, Sweden passed a law addressing liability for electronic bulletin boards, including various categories of Internet pages (Act (1998:112) on Responsibility for Electronic Boards). This statute requires service providers who store information (as distinct from Internet access providers) to make illegal content inaccessible or to remove the content. If further refers to a number of provisions in Sweden's Penal Law, for example, incitement to racism, or child pornography (http://www.nai.uu.se/forum/about-nai-forum-1/SFS-1998_112-Act_E-boards.pdf.).

48. Australia established an agency known as Australian Communications and Media, which is charged with, *inter alia*, regulating Internet content. The agency is authorized to investigate potentially prohibited content on the Internet, and to issue access providers "notice of warning and removal" relating to the contents of Internet websites used for illegal gambling. In Italy, since 2006, Internet gambling has been prohibited, unless on authorized websites. Internet access providers are required to restrict access to unauthorized websites listed in a "black list" kept by an administrative body: Autonomous Administration of State Monopolies, http: www.aams.gov.it/site.php?id=6560). As it turns out the restriction of access to websites is an accepted measure, occasionally following an order by an administrative body. The *a priori* involvement of a judicial body is not always necessary, and there is no need for a criminal investigation to precede the administrative directive. States around the world acknowledge the necessity of restricting prohibited activities on the Internet as well. The State of Israel is not a pioneer in this realm.

Police policy is to exercise this authority with caution. The investigations and intelligence branch prepare the infrastructure required for issuing an order. Legal counsel to the police examines the material, and so does the State Attorney. Immediately before issuing the order, the access providers and websites operates are given the right to present their arguments. The decision to issue the order is given at the level of the district commander. A party who could have been aggrieved may file an application for a second review, and following that, as stated, may also petition the courts. After issuing the order, the police examines it periodically, and at least once a month considers whether to extend it, revoke it or amend it. Against this background, if the police orders, consistent with its authority, a third party to assist it in preventing an offence, and if the latter agrees, why should the court prevent it from doing so? If the same access providers wish to object, the doors of the court are open to them in order to hear their claims.

50. As we have said, the authority is there; the manner of exercising it is subject to discretion and judicial review. Recall, that the access providers filed no petition to any court, and in this sense, the Internet Association is indeed meddling in a dispute to which it is not a party (HCJ 651/03 *Citizens Rights Bureau in Israel v. Chairman of the Sixteenth Knesset Central General Elections Committee* PD 57(2), 62.) Regardless, in the absence of appropriate factual infrastructure, there is no practical possibility or legal need to elaborate further on this matter.

51. The Administrative Affairs Court stated that restricting access through the orders in question could incidentally block innocent websites. Attorney for the State responded to this argument, claiming that from a technological perspective this fear was negligible because the IP address can be crossed with the website's URL address in order to prevent restricted access to innocent sites. Personally, I see no need to rule on this point, given that it was not fleshed out in the Administrative Affairs Court. The state can consider these claims in light of its discretion to exercise the authority. In preparing the order, the police must ensure that execution by access providers does not harm innocent websites, but only restricts access to the targetted website. Where it is impossible to avoid harm to innocent websites, as a side-effect of blocking access to a gambling website, to the extent that the Israeli Internet Association is correct and such situations indeed occur, the police would not be permitted to order restricting access to the site. Presumably, a provider wishing to avoid harm to innocent websites would present such claims under the right to be heard, in a petition for second review by the police, or in a petition to the court.

52. The Israeli Internet Association also claimed that restriction of access was ineffective. The attorney for State argued in response that the inefficacy claim directly contradicted the Israel Internet Association's claim concerning the damage such orders would cause: If the orders are ineffective, then naturally no harm would be caused. In any event, the court has no expertise regarding the efficacy of the orders. The position of the Israel Police – the professional body charged with the matter – is that the orders have a substantial effect and that this is another effective tool against illegal Internet gambling. The Israel Police is aware of the methods used in an attempt to 'bypass' the orders (for example, changing the URL website address, or its IP address). But this involves costs and not all end users know how to do it, and the police also has the tools for dealing with 'bypass' attempts. Actually, enforcement difficulties are not unique to virtual space and are common in all areas of crime: "For by wise counsel thou shalt make thy war" (Mishlei 24:6).

53. The Administrative Affairs Court had difficulty not only with "place", but also with "the closure". According to the court, "*closure is one thing, blocking access is another*" (para. 41), and "*even a broad interpretation of the law cannot confer the police commander authorities not specified in the law*" (*ibid)*. My opinion is different. If the police is authorized to fully close illegal gambling websites on the Internet, then let alone it should be authorized to block or restrict the access to them. This is a less harmful measure. Section 17(b) of the Interpretation Law 5741-1981 provides that "any authorization to act or compel action implies the auxiliary authorities reasonably required therefore." Authorization to close (and *afortiori* if closing is not possible) also means granting powers to block access.

54. The Israeli Internet Association opposed various claims by the State's representatives regarding the legislative regulation of the issue. This may be so, and it would have been preferable had they spoken in one voice, but we must remember that the issue raises real doubt. There is nothing to prevent changes in views or thought processes, and in making deliberations more productive. The binding position of the State's representatives, at the end of the day, is that of the Attorney General, and the arguments were made on his behalf. Without derogating from its claims here, the State also submitted the draft bill to clarify the situation, but one cannot know how the legislative process will develop. The same applies to the four previous draft bills presented to the Knesset. Each one of them attempted to explicitly authorize the police to order access suppliers to block access to gambling websites, but none of them materialized into a legislative act. The Knesset members expressed varying opinions but I do not think it is possible to distill a clear conclusion from their comments regarding the subjective intention of the legislature, as concluded by the Administrative Affairs Court: "*The fact that the legislator debated the proposal substantively and decided not to enact it, indicates that its subjective intention was not to apply its principles in fact… the subjective and concrete intention of the legislature in this matter, indicates that it sought not to give the District Commander authority to block access to gambling sites pursuant to his own discretion*" (para. 61). In my view, this conclusion is by no means inevitable. According to the record, some of the Knesset Members felt that a legislative amendment was entirely unnecessary, and that the authority already exists. In view of the differing views, additional possibilities exist. Summing up the debate, the committee chairperson pointed out the difficulties that were raised, but the general position was to conduct another hearing. A small part of the legislative proceedings and a few Knesset members who are members of the Constitution, Law and Justice Committee cannot provide a basis for a generalized legislature's subjective intention.

Final Word

55. I do not think that there was any justification to cancel the orders issued by the police, with the State Attorney and the Attorney General's knowledge, to restrict access to gambling websites. First, it is doubtful whether the Israel Internet Association has *locus standi* in this petition; second, the alleged infringement of free expression is certainly not as serious as was alleged; third, the main point is that section 229(a)(1) of the Penal Law constitutes an authorization for the police to issue the orders. This is consistent with the section's language, its logic, the legislative history and the legislative purpose. I therefore propose to my colleagues to strike down the decision of the Administrative Affairs Court and to order the restoration of the orders to restrict access to gambling websites.

Note

56. After reading the opinion of my colleague, Justice U. Vogelman, my impression is that he was slightly tough on the State regarding the use of a third party – access providers – for purposes of exercising the authority under section 229 of the Law. I addressed this point in paragraphs 44-45 above. I will add just this: My colleague mentioned the well known distinction between *delegating authority* which also includes the exercise of discretion, and *receiving assistance* in technical matters related to exercising that authority. My colleague acknowledges that the access providers were not required to exercise discretion, and the police only requested their help in exercising its own authority – in the technical act of blocking a website identified by its IP address as specified in the order. However, according to my colleague, it is still necessary to show that the access providers *agree* to assist the police, and once the police imposed an obligation upon the access providers, it can no longer be considered assistance.

My view is different. First, let us assume that the police district commander seeks to order the closure of a room used for gambling. To do so he orders a third party, in possession of the keys to that place, to lock the door, without requesting consent. Is there anything wrong with that? Had the place of gambling not been an Internet site, but rather a room in a hotel, would the police not be authorized to order a reception clerk to assist it in exercising its authority to close that room or to open it? Would this require a legislative amendment?

Second, as mentioned in para. 49 above, prior to issuing the order the access providers were given the right to present their claims; the access providers are entitled to request a second review of the decision to issue an order, and the access providers are also permitted to petition the Administrative Affairs Court. In fact, the access providers took none of these steps. They may have reconciled themselves to the orders as a token of good citizenship; they may have an interest in preventing access to gambling websites, because in doing so they reduce their exposure to law suits (for example: parents suing them for their damages as a result of their children's Internet gambling). I will not belabor the point speculating because the facts suffice: The access providers did not institute any legal proceedings to express their objection to the orders. My colleague seeks to be meticulous about the access providers' rights, and requires that their consent be "explicit", "sincere and genuine willingness". Under the circumstances, my view is different. In the *Haggadah* of Pessach, tomorrow night, with respect to the son who does not know how to ask, we say "you shall open your mouth for him". By way of analogy, this is how we relate to a mute, who is incapable or does not know how to present claims or to ensure their rights are protected. Access providers do not fall into this category and I see no justification for treating them under the criterion of "you shall open your mouth for him", when the gates of the court were open to them, and they knowingly refused to enter. More precisely, in the future too, whenever the police seek to issue an order, Internet providers will be able to

object and to present their case before the order is issued, after it is issued, and also to file an administrative petition. It therefore seems that we may appropriately apply the Talmudic rule that "silence is regarded as consent" (*Bavli*, 87b), to infer their agreement, and thus remove the obstacle to the exercise of the police authority to restrict access to gambling websites.

Justice U. Vogelman

Is the District Police Commander of the Israel Police authorized to order Internet access providers to restrict Israeli users' access to gambling sites on the Internet, under their authority under section 229(a)(1) of the Penal Law, 5737-1977 (hereinafter: the Penal Law), to close down gambling places? This is the question before us.

General

1. The appearance of the Internet has radically changed our world. It enables easy and convenient communication between people. Some use it for interactive entertainment; others use it for electronic trade. Many use it – occasionally on a daily basis – to send electronic mail and for sending instant messages. A countless number of websites enable video and audio, and others enable telephony, files sharing, and the like (Assaf Hardoof, *Hapesha Hamekuvan*) [CYBERCRIME], 114, 117 (2010)). The web also enables access to immense quantities of information pooled on the Internet – an ever growing collection of documents created by independent authors and stored in servers' computers. In that sense, the Internet is the most outstanding feature of the "information era" in which we are living, an era in which advanced technological reality enables the immediate transfer of data on a massive scale compared to the world around us (see HCJ 3809/08 *Citizens Rights Bureau v. Israel Police* [12] para.1 (hereinafter: the "Big Brother" law). In this way the Internet has and continues to contribute to social, economic, scientific and cultural developments around the world. Alongside these numerous advantages, phenomena of lawbreaking are likewise are not absent from the virtual world. The Internet enables activity that is defined as a criminal offence or civil tort, as well as technologies that enable the commission of torts or offences (Michal Agmon-Gonen, *The Internet as a City of Refuge?! Legal Regulation in Light of the Possibilities of the Technological Bypass Technologies and Globalism of the Net*, in LEGAL NETWORK: LAW AND INFORMATION TECHNOLOGY, eds. Michael Birnhack and Niva Elkin-Koren, 2011). Illegal gambling enabled by the Internet is part of the content available on the Internet. Gambling websites offer their services from their locations in countries that permit it, and are accessible from different states around the world, including those in which participation in gambling is prohibited or restricted. Over the past few years these websites have become increasingly ubiquitous, given the high financial incentive for establishing them. Online gambling is one of the most profitable branches of trade on the Internet (Chaim Wismonsky, *Sentencing Guidelines for Computer Crimes*, BAR-ILAN LAW STUDIES 24(1), 81, 88 (2008)).

2. There is no need to elaborate on the negative social value involved in gambling. My colleague Justice N. Sohlberg also discussed this at length. This phenomenon has seen plenty of opposition, including the claim that a one's livelihood should be based on work, a vocation or some other legitimate activity rather than easy enrichment based on luck. Whereas participating in gambling is not creative and undermines one's work-ethic, a person participating in prohibited games may become addicted to this "occupation", and the addict could cause extensive losses to themselves and their family and ultimately become a burden upon their family and upon society. As known, there are a few legal arrangements that permit gambling

games under state auspices, encompassed in the Regulation of Gambling in Sports Act, 5727-1967 and in section 231(a) of the Penal Law. *Mifal HaPayis*,[4] for example, operates under such a permit. Notwithstanding that state-sponsored permitted gambling enables quick enrichment based on luck and also poses the danger of addiction, it should be distinguished from illegal gambling. Permitted gambling enables fundraising for public causes; they are not usually accompanied by negative elements such as coming under the control of organized crime, and finally, the state can oversee their mangagement and the distribution of funds (see AAA 4436/02 *Tishim Kadurim* [3] at p. 804,806; Ofer Grusskopf, *Paternalism, Public Policy and the Government Monopoly over the Gambling Market*, HAMISHPAT (7) 9, 28 (2002)). As an aside, it should be noted that in many states gambling is permitted on a wider scale, but needless to say, our decision at this stage is restricted to Israeli Law and the legislatures' values-based determinations.

3. Techonolgically, it is now possible to block access to a particular website (compare: Rachel Alkalai, *Civil Liability of Suppliers of Internet Services for Transfer of Damaging Information*, HAMISHPAT (6) 151, 159 (2001)). This is the background for the orders subject to this proceeding. The events concerning us unfolded as following. At the end of June 2010 Israel Police district commanders sent warning letters to Internet access providers, notifying them of their intention to order blocking Israeli users' access to various gambling websites (hereinafter: the warning letters). In the warning letters the district commanders specified the URL addresses and IP addresses of these websites. Notably, the Appellants claimed that the website operators also received a similar warning. The Internet access providers received a 48-hour extension to submit their challenges of the orders, and a further extension was granted to providers who so requested. One provider, Respondent 2, exercised its right to object to the orders. In a letter to the district commanders, Respondent 2 claimed that the orders because were unlawful because the district commander is only authorized to order closure of physical places; and also because the Penal Law does not authorize a district commander to use the providers to prevent users in Israel from having access to gambling websites. In August 2010 the police gave notice that it had rejected these claims and the orders forming the subject of the appeal were subsequently issued.

4. Our decision in this appeal therefore relates to the legality of these orders. My colleague, Justice N. Sohlberg, found that there is a doubt regarding the *locus standi* of the Israeli Internet Association in this petition; and that there was no justification to declare the orders invalid because they were issued by the district commander without authority, as per the ruling of the District Court. Having read the comprehensive opinion by my colleague, and having considered the matter, I have concluded I cannot concur with the result that he reached. My conclusion precedes the analysis. As detailed below, in my view, section 229(a)(1) is short of authorizing the police to issue the relevant orders. In the first part of my remarks I will discuss the *locus standi* of the Israeli Internet Association. Next, I discuss the source for the claimed authority – section 229 of the Penal Law, and examine whether it sufficiently authorizes ordering the Internet providers to block access to gambling websites.

Locus Standi of the Public Petitioner

5. The Israeli Internet Association is a non-profit organization that works to promote the Internet and its integration in Israel. The Association seeks to further the interests of Internet users. It has no self-interest beyond the interests it shares with the general public, or at least

[4] Lottery and games organization in Israel, proceeds of which go to public causes.

with significant parts thereof, and as such its petition is a "public petition". As a rule, this Court's jurisprudence has taken a permissive approach to standing rights of public petitioners (HCJ 5188/09 *Association of Renovations Contractors for Restoration v. State of Israel* [13] para. 7.) Our firmly settled rule is that a public petition will be recognized where "*the matter raised in the petition is of a public nature, which has a direct effect on advancing the rule of law and establishing policies to ensure its existence in practice"* (HCJ 1/81 *Shiran v. Broadcasting Authority* [14] at p. 374; see also HCJ 910/86 *Ressler v. Minister of Defense* [15], at 462-463). Who can serve as the public petitioner? It could be any one of many people aggrieved by a certain administrative act (HCJ 287/91 *Kargal Ltd v. Investments Center Council* [16] at p. 862), including any one who is unable to indicate a personal interest in the matter or harm caused to them personally (HCJ 651/03 *Citizens Rights Bureau in Israel v. Chairman of Central Elections Committee for Sixteenth Knesset* [11] at p.68)). The judicial policy on this issue was and still is influenced by fundamental value-based concepts about the role of judicial review in protecting the rule of law and supervising appropriate functioning of public administration. As such, the court should refrain from refusing the hear a person who claims that an administrative authority has violated the rule of law for the sole reason that they have no personal interest in the matter, given that this would lead to providing the authority with a stamp of approval to continue violating the rule of law (HCJ 962/02 *Liran v. Attorney General* [17] para. 14 (hereinafter: "*Liran"*). Yitzchack Zamir *Administrative Power* Vol.1 120-121 (2nd ed. 2010) (hereinafter: Zamir)). Along with broadening of the scope of standing rights, the principle that the court will not generally grant a public petition where there is a particular person or body who has a direct interest in the matter should be preserved, unless they themselves have failed to petition the court for relief in the matter concerning them (see *Liran* [17]). In the words of former Justice M. Cheshin in HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [18]: "*…in a case of this kind we would tell the public petitioner seeking to claim the right of the individual injured: Why are you meddling in a quarrel which does not involve you? If the victim did not complain about the infringement that he suffered, why have you come to provoke dispute?*" (*ibid.,* p. 443).

6. My colleague Justice N. Sohlberg felt that the Internet Association was "meddling in a quarrel which does not involve it". I do not share this position. In the case before us, the Internet Association has raised grave claims about the alleged overstepping of authority in issuing orders to Internet access providers. Our concern is with a first attempt to define the scope of the district commanders' authorities under section 229 of the Penal Law, in terms of blocking access to Internet gambling websites. This is a fundamental question. It is undisputed that the administrative authority's activity within the boundaries of its authority are central to maintaining the rule of law. This Court has already held that claims of exceeding of authority are categorized as claims that justify broadening standing rights, for "*...a court takes a more lenient attitude to the right of standing of persons not directly and substantially harmed where it concerns exceeding authority of a tribunal or agency, or where it concerns an act committed unlawfully, as distinct from other cases*" (per Justice Kister in HCJ 80/70 *Elizur v. Broadcasting Authority* [19] at p.649; compare HCJ 852/86 *Aloni v. Minister of Justice* [20], at p.63).

7. One of the underlying considerations in Justice N. Sohlberg's position on the Internet Association's standing was the concern that conducting a proceeding on the part of the Internet Association might mean that the court would not be presented with the required factual foundation. While I do not deny this concern, it seems that it need not undermine the

Association's standing. First, we may assume that had the Appellants who participated in the proceedings in the lower court wished to clarify any factual matter or otherwise, they would have done so. For example, consider the Appellant's complaint that the trial court was not presented with a full description of the technological ability to order blocking access to the websites. Without making an iron clad determination on the question at this stage, it suffices to say that nothing prevented the Appellants themselves from presenting data on this point, to the extent that they disputed the factual infrastructure in the petition. Second, nothing prevents the public petitioner from presenting the necessary factual foundation. In this case, too, I do not find the legal foundation presented to the Court to have hindered judicial review. Consequently, in my view, there is no ground for us to intervene in the District Court's ruling that the Internet Association has *locus standi* in this proceeding.

With this in mind we can proceed to the merits of the matter.

The Question of Authority

8. Section 229(a)(1) of the Penal Law, titled "Closure of Places" provides that "A district police commander of the Israel Police may order the closing of... a place for prohibited games or a place for the conduct of lotteries or gambling". In section 224 of the Law, a "place of prohibited games" is defined as "premises in which prohibited games are habitually conducted, whether open to the public or only to certain persons; regardless of whether those premises are also used for some other purpose". In order to determine that the orders directed at the access providers requiring them to block access to gambling websites, are within the authority detailed in section 229 of the Law, three interpretative moves are necessary. First, we must determined that a website fits the definition of "place" as defined by the law; second, that blocking access to the website is the equivalent of "closing" as defined in the Law; and third, that the access providers can be used to exercise such authority.

9. I am prepared to assume, in line with my colleague Justice N. Sohlberg's holding that a website could constitute a "place" as defined in different contexts in our legislation, and that an online gambling website may be viewed as a "place of prohibited games" as defined in section 229 of the Penal Law. In this regard, I tend to agree that a purposive interpretation of this legislation, in the spirit of the times and technological progress, may indeed lead us to the conclusion my colleague reached that section 229 of the Penal Law could be also applied to "the virtual world" (compare Assaf Hardoof *Criminal Law for Internet Users: The Virtual Actus Reus*, HAPRAKLIT (forthcoming) (52) 67, 122-124 (2012) (hereinafter - Hardoof)).

10. Regarding the infringement of free expression. Internet sites indeed serve for voicing opinions and exchanging ideas, but – as is well known – the law does not treat each and every expression similarly. Even had some of the gambling websites included pictures, explanations concerning the rules of different games, information about gambling relations, chat rooms, and others – this is content located at the periphery of the protected value. As such, even if blocking gambling websites may cause blocking access to lawful content, it must be remembered that the value of the "expression", which we are asked to protect, is not high and that the extent of protection afforded corresponds to the extent of the interest in question (HCJ 606/93 *Kiddum Yezumot v. Broadcasting Authority* [21] at p. 28). Moreover, to the extent that it concerns the blocking concrete websites, it seems that the primary infringement relates to the website operators' freedom of occupation. Our precedents have already held that this is an infringement that passes constitutional tests (*Tishim Kadurim* [3] at pp.814-815). However, despite this and though I am prepared to assume that the extent of the infringement of freedom of expression is

limited, I think it important to note that I share the general approach of the District Court, that when dealing with the sensitive topic of blocking Internet websites, we should particularly scrutinize the concern for infringement of freedom of expression. With respect to gambling websites, and only to them, my opinion, as mentioned above, is that the infringement of free expression that resulted from blocking lawful content on the gambling websites, is of a limited degree, On the other hand, it is certainly possible that other cases will reache us in the future, where there may be reason to significantly broaden the scope of protection afforded to expressions displayed on any particular website. Each site has its own characteristics.

11. Aadditionally, the sensitivity of the matter – blocking websites – has another aspect , given that the trial court also found that blocking illegal gambling websites could also block access to "innocent" sites which the order did not target. An unintentional block may occur because a number of websites, not linked to each other, may be located on a server with the same address. Regarding this point, the trial court referred to *Center for Democracy & Technology v. Pappert* [31] 337, F.Supp.2d 606 (E.D Penn. 2004), in which the United States Federal Court struck down a law that enabled censorship of pedophile websites, among others because of the filtering of "innocent" websites. The Appellants, for their part, challenge this holding. They claim that from a technological perspective, the fear of blocking sites that are unconnected to gambling activity is negligible, because the access providers were requested to block websites based on the combination of the IP address and the website address (the URL). This combination of the IP address and the URL address, allegedly, minimizes any possibility of blocking innocent websites. Apparently, this point was not fully clarified because even after examining of the papers filed with the trial court, it is unclear whether it is technologically possible to block only "targeted" gambling websites, as alleged by the Appellant, or perhaps, technologically, it poses difficulties. If indeed, there is danger of blocking "innocent" websites, then this would clearly constitute a grave infringement of free expression and the right to access information – an infringement that would necessitate explicit statutory authorization as well as compliance with the limitations clause.

12. Had the question of blocking "innocent" websites been the only difficulty arising from this case, it might have been appropriate to remand to the trial court for an in-depth examination of this issue. However, the central obstacle the Appellants face is fundamental and disconnected to the previous question, namely using a third party to execute an authority, without explicit statutory empowerment to do so. In my view, section 229 cannot be sourced to exercise the authority by *giving an order directed at a third party* – the Internet access providers. My colleague, Justice N. Sohlberg, found that restricting access to gambling websites through a third party does raise concerns, but in his view these difficulties do not negate the authority to do so. My view is different, and I will clarify my reasons.

13. Our concern is with a district police commander who issued orders to the Internet access providers to block access to gambling sites. These are "personal orders" – in other words, orders directed at a particular person or entity, imposing a prohibition or a duty upon them. This is an individualized rule of conduct. This kind of order, like any administrative decision, requires a written statutory source (Zamir, at 284). The question therefore is whether the district police commander is authorized to order the providers – a private body that is not accused of any offence – to perform various actions on behalf of the Israel Police, and to actually serve as its long arm. This authority, arguably, is found in section 229 of the Penal Law, which authorizes the district commander to order the "closure" of places used for gambling. As mentioned, I accept that had law enforcement authorities been able to affect the

closure of websites used for gambling criminalized under Israeli Law (for example by disconnecting the website from its connection to the Internet or by shutting down the server's activity) there would be no question regarding authority. However, in this case, the relevant websites were not actually "closed". Instead, the district police commanders ordered third parties – the Internet access providers – to block access to those websites. The issue then becomes whether the powers granted by by section 229 support doing so.

14. When a governmental authority is conferred with a power, according to settled case law, the authority must exercise this power itself. When the legislature specifies an authorized office holder, it is presumed the legislature wishes that particular office holder, and that alone, exercise it (HCJ 2303/90 *Philipovitz v. Registrar of Companies* [22] (hereinafter: *Philipovitz*), at p. 420; see also Daphne Barak-Erez ADMINISTRATIVE POWER, 178 -170 (hereinafter: Barak-Erez)). These comments are particularly true for criminal enforcement. In the absence of appropriate legislation, law enforcement authority cannot be given to those not part of the enforcement mechanism. Criminal enforcement authority is one of the classic authorities of the state. This authority enables the state to fulfill its responsibility to enforce criminal law through its own execution. It is the state that exercises the Government's authority over the individual in the criminal proceeding. Therefore, the state – having established the behavioral norms and having been charged with their enforcement – is the entity directly responsible for caution and restraint required for exercising this power. It is the entity that is accountable to the public for the way it executes its powers (HCJ 2605/05 *Academic Center for Law and Business v. Minister of Finance* [23], para. 28 of former President D. Beinisch's opinon and para. 14 of Justice A. Procaccia's opinion.)

15. By attempting to source the authority in section 229 of the Penal Law, the State maintains it is exercising the authority by itself, and that enlisting Internet access providers to block gambling websites is merely exercising auxiliary powers that administrative agency must employ in order to exercise its authority (section 17 of the Interpretation Law, 5741-1981). I cannot accept this construction. As well known, there is a distinction between delegating authority that includes exercise discretion regarding a particular authority, and receiving assistance in technical matters related to exercising the authority (*Philipovitz* [22] at p. 424). Whereas the authority is permitted to receive assistance from private bodies about technical aspects of fulfilling their task, there is also a presumption against delegating authority to private entities (AAA 6848/*10 Erez v. Giva'ataim* [24] para 18; HCJ 5031/10 *Amutat Ir Amim v. Israel Nature and Parks Authority* [25] para. 18). Here, the access providers were not required to exercise discretion regarding the websites to which access was to be blocked. As such, it could be argued on its face that the authority did not delegate power but only requested assistance in exercising it, and that such assistance is in principle permitted. However, where assistance is concerned, the first and foremost element to demonstrate is that the person or entity whose assistance is required *consents* to assisting the authority, regardless of whether consent is motivated by commercial and economic motives (compare to *Philipovitz* [22] at 415), or by voluntary motives. The most important thing is that the authority may receive assistance only from those seeking to offer assistance based on pure and genuine motives and after securing explicit consent. When the authority imposes a *duty* on a person or entity to perform any act, one can no longer speak of assistance. In our case, the Appellants claim that the expression "*closing of a place for prohibited games*" mentioned in the relevant section of the Penal Law, also contains the possibility of ordering closure of access routes to that place using auxiliary authority. This is not so. Our concern is with orders that *compel* a private body – the Internet

access providers – to "assist" the authority. Consequently the argument that the providers are an entity that grants its services voluntarily must fail. This is doubly important when the orders themselves warned, in bold print, that failure to comply with the order could constitute an offence of breaching a statutory provision, an offense of assisting the conduct of prohibited games, and an offence of assisting to maintain a place for prohibited games (sections 287, 225, and 228 of the Penal Law, combined with section 31 thereof).

16. Additionally, I wish to clarify that were there an explicit statutory authorization it could be possible to "impose a duty" and receive assistance from any person for the purpose of realize various legislative goals. Indeed, different pieces of legislation empower an authority to order a third party to assist it, even in the criminal context. For example, section 20 of the Criminal Procedure (Arrest and Search) Ordinance [New Version], 5729-1969 provides that every person must help a police officer to arrest any person whom they are authorized to arrest. In a matter close to our own, a similar arrangement exists: the Criminal Procedure (Powers of Enforcement-Communication Data), 5768-2007 (also known as the "Big Brother Law") allows Israeli investigatory authorities to be assisted by "holder[s] of a Bezeq license" (as defined there) in order to receive communications data on Bezeq subscribers for various purposes, such as discovering and preventing offences (section 1 and section 3(2) of this law). The various Internet providers are among the companies that may be required to submit communications data (see in the matter of the *"Big Brother" law*, para.2). This affirmation however also implies the opposite. Imposing a duty, coupled with a sanction, requires legislative bases. Without explicit legislative authority, it is impossible to charge a private entity with performing actions for the authority (compare: Civ.App. 90868/00 (District-T.A.) *Netvision Ltd. v. Israel Defense Force- Military Police*, para.9 (22.6.2000); Crim.F. 40206/05 (District-T.A.) *State of Israel v. Philosof* para. 8 b) (5.2.2007)). We are thus left with the need for explicit lawful authorization. In our case however, the language of section 229 of the Penal Law does not contain so much as the slightest hint of an authorization to impose a duty on a third party. And for good reason. Such authorization involves complex matters of law and policy. In 2008, when the Knesset deliberated over the legislative amendments that would confer authority to block access to gambling websites, representatives of the Minister of Justice (as well as representatives of the police) expressed reservations about conferring authority as stated, for various reasons which will not be addressed here. Today the position of the authorities – with the support from the Attorney General – is different. Of course, the authorities are not bound by their former position, but the only lawful way to confer the district commander with the authority to order a third party service provider, in my view, is an amendment to primary legislation (an amendment which, needless to say, would have to satisfy the limitations clause in Basic Law: Human Dignity and Liberty). Accordingly, the manner in which the orders were issued here deviated from the principle of administrative legality, which is a fundamental norm of administrative law. "*This principle teaches that the power of the public authority flows from the powers conferred upon it by law and nothing else. It is the law that grants the license to act, and defines the boundaries of its scope. This is the ABC of administrative law"* (Baruch Beracha, *Administrative Law*, Vol.1 35 (1987); CA 630/97 *Local Committee for Planning and Building Nahariya v. Shir Hatzafon Construction Company Ltd* [26], at pp. 403-404; HCJ 5394/92 *Hoppert v.'Yad Vashem' Holocaust Martyrs and Heroes Memorial Authority*[27] at , 362 (1994); HCJ 7368/06 *Luxury Apartments Ltd v. Mayor of Yabneh* [28], para. 33; see also HCJ 6824/07 *Mana v Taxation Authority*[29]; HCJ 7455/05 *Legal Forum for Land of Israel v. Israeli Government* [30] at p. 910; Zamir, at 74-890; Barak-Erez at p. 97 and on). This is

especially so in context of a mandatory authority, as anchored in the Penal law (see and compare Hardoof at p. 124).

17. Could future legislation enable imposing the task of blocking gambling websites upon Internet access providers? An arrangement of this kind might take several forms. The legislature might determine that a court must grant such an order; it might grant the district police commanders – or any other authority – the authority to issue these orders, without petitioning a court (compare with "Big Brother" Law, para. 2). We assume that this legislation would also resolve additional concerns stemming from imposing the duty on access providers, while considering the costs likely involved in ensuring effective blocks, including the definition of access providers' responsibility towards third parties, such as users and website owners whose access to them is blocked, and the like. In any event, it is clear that in our legal system the legislature is branch competent to consider the appropriate way to handle blocking access (Hardoof, *ibid*). Therefore we shall not jump the gun. We are not required at this point to pronounce on future legislation that has yet to be enacted and the details of remain unknown (and which, as mentioned, will also have to satisfy the limitations clause).

Other Legal Systems

18. My colleague, Justice N. Sohlberg, found that restricting access to websites used for gambling is acceptable practice all over the world. Before we consider his comparative analysis, we should again note that the treatment of gambling in some countries is more lenient and as such no conclusive analogy can be drawn from the existing law in those countries to our legal system. On the merits of the matter, while certain countries receive assistance from Internet access providers to block gambling websites, as noted by my colleague, these are generally arrangements explicitly mandated by legislation, rather than acts designed to exercise general administrative powers. I will provide some examples.

19. In the United States, gambling is regulated primarily at the state level rather than the federal level. There are significant differences between the various states in whether and how they view gambling and how they treat it. Federal legislation is therefore designed to assist states in enforcing local gambling laws where gambling activity extends beyond state-lines. Four primary pieces of federal legislation serve the authorities dealing with the gambling phenomenon: The *first* is the Federal Wire Act, of 1961 (18 U.S.C. §1084), which targets interstate gambling through linear communication. Though this law was enacted years before the Internet came into common use, and long before the online gambling became prevalent, this is legislation that authorities relied upon in the earlier days of the problem (see e.g. *United States v. Cohen* 260 F. 3d 68 (2d Cir. 2001)). The *second* act regulating the issue is the Illegal Gambling Business Act of 1970 (18 U.S.C. §1955) that was passed to battle organized crime that used gambling businesses as a main source of income, and it regulates the criminal responsibility of owners of large gambling businesses. The *third* is the Travel Act of 1961 (18 U.S.C. §1952), which prohibits the use of mail and interstate travel and travel outside the United States for unlawful purposes, including illegal gambling. The *forth* piece of legislation is the Unlawful Internet Gambling Enforcement Act (31 U.S.C. §5361-67), which prohibits gambling businesses from knowingly receiving payment linked to one's participation in online gambling. It is interesting to note that law enforcement authorities occasionally found it difficult to rely on old statutes to receive Internet access providers' assistance in closing gambling websites. Hence, for example, in April 2009 authorities in Minnesota instructed Internet service providers to block state residents' access to 200 online gambling sites – an instruction given under the Federal Wire Act. However, this was challenged in court based on

the argument that this act is inconsistent with the First Amendment's protections for freedom of expression, and with the Commerce Clause (Edward Morse, *Survey of Significant Developments in Internet Gambling*, 65 BUS. LAW, 309, 315 (2009)). In response, the Minnesota enforcement authorities withdrew the orders issues to the access providers (Lindo J. Shorey, *Anthony R. Holtzman, Survey of Significant Developments in Internet Gambling* 66 BUS. LAW. 252 (2010)

20. In Australia, the Australian Communications and Media Authority's power to order providers to block access to illegal gambling sites is regulated in detail in the "Interactive Gambling Act 2001 (sections 24-31) and in the regulatory code enacted under it (Interactive Gambling Industry Code (December 2001)). In Italy, a state my colleague referred to in his opinion, authorities' authorization to order access providers to block illegal gambling sites is also set in legislation. Section 50(1) of Law No. 296 of 27 December 2006 (the Budget Law for 2007) established the authority of AAMS (Amministrazione Autonoma dei Monopoli di Stato), an organ of the Italian Ministry of Finance, to instruct, in an order to the communications bodies, to take measures toward removing illegal gambling websites, while setting an administrative fine of €30,000-80,000 for any breach by the communication providers. Under this law, Administrative Order No. 1034/CGV of 2 January 2007 was issued. It details the manner of exercising the power. According to the AAMS data, as of October 2010, 24000 websites were included in the "black list". Every month hundreds of websites are added.

21. Therefore we must conclude that even were there countries around the world that recognize the possibility of assistance from Internet access providers in blocking illegal gambling websites – this possibility is authorized there in explicit legislation. Where the subject was not regulated in explicit legislation, questions s about the power of the authorities to do so were raised in various countries, for reasons similar to those given by the District Court.

Afterword

22. Before concluding I would like to respond briefly to my colleague Justice N. Sohlberg's comment regarding my position (para. 56 of his opinion). I wish to clarify that the thrust of my opinion does not turn on the interest of the access providers and the question of their concrete consent to blocking the websites. The conclusion I reached is based on the rule that an authority can only act within the boundaries of the powers the law conferred upon it, and that when exercising police powers the strict application of this rule is especially important. I would point out that I do not accept, as a given, my colleague's assumption that a third party can be compelled to become "the long arm" of the police without its consent. Take a situation in which the reception clerk of a hotel (an example my colleague provides) fears a confrontation with criminal elements and has no interest in coming into contact with them. Would it also be possible then to compel the clerk to close the room? In my view this question is not free of doubt, but regardless, this we are required to rule on this question. In our case the totality of the circumstances that I presented and the sensitivity of the material discussed, in my view, lead to the conclusion that the existing authorization lacks the power necessary for exercising the alleged authority.

Epilogue

I have reached the conclusion that section 229 of the Criminal Law does not authorize a district police chief to issue orders directed at Internet access providers, ordering them to block access to gambling websites. In my view, this requires express statutory authorization and the current

arrangement is insufficient, because it does not contain authorization to order a third party to assist the enforcement authorities in exercising the power.

For this reason, were my opinion to be followed, I would dismiss the appeal against the decision of the Administrative Affairs Court and would order the Appellants to pay the Respondents' attorneys fee, for the sum of NIS 25,000.

Justice

President A. Grunis

My colleagues, N. Sohlberg and U. Vogelman are in dispute both about the preliminary issue of the *locus standi* of the Appellant and about the substantive issue of the district police commander's authority. Regarding the first matter I see no reason to express a position. My colleague, Justice N. Sohlberg who addressed the position that the Appellant had no *locus standi* in the Administrative Affairs Court, analyzed the substantive issue, and concluded that it would not be proper to allow the appeal based on the preliminary issue without having considered the legality of the orders issued by the district police commanders. Under these circumstances I agree that it is appropriate to address the issue on its merits. Regarding the substantive issue, I concur with Justice U. Vogelman. That is to say, that I agree that the district commanders of the Israel Police do not currently have the authority to issue orders to Internet access providers to block access to gambling websites. The solution lies with the legislature.

The President

It was decided by a majority opinion (President A. Grunis and Justice U. Vogelman) against Justice N. Sohlberg's dissent, to dismiss the appeal, and to order the Appellants to pay the Respondent's attorneys fees in the sum of NIS 25,000.

Handed down today 13th Nissan 5773 (24 March 2013).