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HCJ 5016/96

HCJ 5025/96

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HCJ 5025/96

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2. Member of Knesset Ophir Pines
3. Member of Knesset Yosef Sarid
4. Arnon Yakutiali
5. Aliza Avinezer
6. Yehuda Gabay
7. Meretz-Democratic Israel Faction
8. The Association for the Rights of the Religious Community in Israel

v.

1. The Minister of Transportation

2.

The Supreme Court of Israel sitting as the High Court of Justice

[April 13, 1997]

Before President A. Barak, Deputy President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, Ts. A. Tal, D. Dorner

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

Facts: The Minister of Transportation, assuming the powers of the Traffic Controller, ordered the closure of Bar-Ilan Street in Jerusalem to motor traffic on Sabbaths and Jewish holidays during hours of prayer. Petitioners are secular residents of the area and representatives of the secular population in Jerusalem, who claim that the decision of the Minister infringes their right to freedom of movement. One petitioner—the Association for the Rights of the Religious Community in Israel—counter-petitioned that Bar-Ilan should be closed to motor traffic for all hours on the Sabbath and Jewish holidays.

Held: The Court held that the Traffic Controller was to weigh the freedom of movement of those who chose to use Bar-Ilan Street against the possible injury of such traffic to the religious sensibilities and lifestyle of the local residents. The Court noted that the latter consideration was a valid one in a democratic society. The Court held that the Minister of Transportation, in his capacity as the Traffic Controller, did not adequately consider the interests of the local secular residents of Bar-Ilan Street. As such, the Court struck down the Traffic Controller's decision. Several dissenting Justices contended that the Minister had no authority at all the close Bar-Ilan Street to traffic.

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- [3] HCJ 390/79 *Dawikat v. The Government of Israel*, IsrSC 34(1) 1.
- [4] HCJ 935/87 *Poraz v. Mayor of Tel-Aviv/Jaffa*, IsrSC 42(2) 309.
- [5] HCJ 98/54 *Lazarovitch v. Food Products Comptroller (Jerusalem)*, IsrSC 10 40.
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- [7] HCJ 217/80 *Segal v. Minister of the Interior*, IsrSC 34(4) 429.
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JUDGMENT

President A. Barak

1. In Israeli public discourse, Bar-Ilan Street is no longer simply a street. It has become a social concept reflecting a deep-seated political dispute between the Ultra-Orthodox and the secular populations in this country. This debate is not limited to the matter of freedom of movement on Bar-Ilan Street on Friday evenings and on the Sabbath. It is, in essence, a difficult debate involving the relationship between religion and state in Israel, which pierces through to Israel's very character as a Jewish or a democratic state. It is a bitter debate about the character of Jerusalem, which has found its way to the Court's doorstep. This being the case, it is incumbent upon us to decide this case irrespective of its political and social ramifications. The dispute before us is a legal one.

Our concern is with the scope of the Central Traffic Authority's powers under Regulation 17 of the Traffic Regulations-1961. More specifically, the issue at bar involves the scope of the Central Traffic Authority's discretion to direct its local counterpart in regulating traffic on Bar-Ilan Street, so that the street will be closed to traffic during certain hours during the Sabbath. The answer to these questions must be drawn from the Regulation's wording and purpose. Our decision will be made in accordance with legal criteria, as has always been the practice in Israel. For this Court has dealt with similar issues in the past. Indeed, this Court ruled on the closing of a particular section of King George and Shmuel HaNagid streets in Jerusalem during morning hours of the Sabbath and Jewish festivals, in order to avoid disturbing worshippers at the "Yeshurun" Synagogue over thirty years ago. *See* HCJ 174/62 *The League for Prevention of Religious Coercion v. Municipality of Jerusalem* [1]. In a similar vein, twenty years ago, this Court decided to close a certain section of HaShomer Street in Bnei Brak on the Sabbath and Jewish holidays. *See* HCJ 531/77 *Baruch v. Tel-Aviv District Central Traffic Supervisor* [2]. And so, this time too, we will decide these matters according to legal criteria. Significantly, our concern is not with the social debate; our considerations are not political. Rather, we are concerned with the legal dispute, with normative considerations. Our concern is not

with the relationship between the secular and the religious in Israel; nor is it with the relationship between religion and state in this country. Nor is our concern the character of Jerusalem. We are simply concerned with Bar-Ilan Street, in its literal sense, and with the Central Traffic Authority's powers and the scope of its discretion. We will examine the balance between the freedom of movement and any resulting injury to religious sensibilities and the observant way of life.

This having been said, I am well aware that many members of the public will not read our decision. Their interest will lie with the social ramifications of our decision, not with the legal reasoning underlying it. They will not examine our normative considerations and will occupy themselves with the political ramifications of our ruling. We are quite conscious that our legal decision will have extra-legal ramifications. This, we cannot prevent. Our judicial role obligates us to rule on the state of the law in accordance with our best understanding. In this context, I need only cite the words of Acting President Landau, who in HCJ 390/79 *Dawikat v. The Government of Israel* [3], at 4, wrote:

There is still great fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am forced to rule in accordance with the law, in complete awareness that the public at large is not interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the stature of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges.

In dealing with the *Bar-Ilan* case, I cannot help but feel as Justice Landau felt in *Dawikat* [3], but what can I do? This is my role and this is my obligation.

2. I begin with a description of the factual background, based on the briefs before us and upon an examination of the material before the Public Committee Appointed for the Purpose of Making Recommendations Regarding Sabbath Traffic on Bar-Ilan Street [hereinafter the Tzameret Committee.] Subsequent to the factual description, I shall examine the normative framework. Within the confines of this framework, I will proceed to address the principles in question. Namely, to what extent it is possible to limit human rights, in order to spare human feelings. I will also address the issue of whether it is possible to limit freedom of movement because of the harm caused to religious sensibilities. I shall conclude by applying the general law to the particular instance at bar.

The Facts

3. Bar-Ilan Street is a main traffic artery. Its length (including a segment of Yirmiyahu Street) is approximately 1.2 kilometers. In its southern section, it joins Yirmiyahu Street, reaching the entrance to the city. To the north, it merges with Harel Brigade Street, which becomes Eshkol Boulevard. Bar-Ilan Street connects the city entrance to Jerusalem's northern neighborhoods, including Ramat-Eshkol, Ma'alot Dafna, Givat Shapira, and Pizgat Ze'ev. Bar-Ilan Street cuts through an Ultra-Orthodox neighborhood. It serves the residents of this neighborhood. It also serves those who, entering the city, wish to reach its northern neighborhoods, or those who, leaving Jerusalem's northern neighborhoods, wish to exit the city. It also serves the residents of those northern neighborhoods who enter the city for services and commerce. The volume of traffic on Bar-Ilan on weekdays is great. The traffic on Sabbaths and holidays is less significant, approximately 21-28 percent of weekday traffic.

4. Up until the Six Day War, Bar-Ilan Street was situated at the periphery of Ultra-Orthodox neighborhoods, which were located to its east. After the Six Day War, two phenomena occurred. First the Ultra-Orthodox neighborhoods expanded west of Bar-Ilan, transforming it from a peripheral street to one that cuts through the heart of the Ultra-Orthodox areas, which now envelop the street on both its sides. Second, after the Six Day War, the northern neighborhoods were built. Bar-Ilan Street became the main traffic artery that connected the central part of the city to its northern neighborhoods.

5. Since the Israel's establishment, and even before that, there have been clashes between the Ultra-Orthodox and secular populations in Jerusalem over traffic flow on the Sabbath. Demonstrations in Jerusalem around "Sabbath Square" took place at the beginning of the 1950s. Nearing the mid-1950s, these demonstrations spread to Jaffa Street, Beit HaDegel Square ("Dvidka Square"), Herzl Boulevard, and the Etz Haim neighborhood, situated at the entrance to the city. During the early 1960s, the city of Jerusalem discussed a proposal regarding the prevention of some traffic on the Sabbath. Following this proposal, the street near the "Yeshurun" synagogue was closed to

traffic on the Sabbath during prayer times. This was done in reliance on a similar precedent in Tel-Aviv and Haifa. The petition challenging this decision was rejected. *See League* [1].

The tension between the secular and the religious increased during the 1960s and the 1970s. Essentially, these tensions revolved around the opening of swimming pools and the City Stadium. The clashes around the issue of Sabbath traffic were renewed and have persisted since the 1970s. This debate was sparked by a dispute over Ramot road, which connects the Ramot neighborhood to the downtown area. In the midst of these clashes, the Jerusalem municipality closed dozens of streets located in Ultra-Orthodox and other religious neighborhoods to traffic on the Sabbath.

6. The first of the demonstrations by Ultra-Orthodox groups on Bar-Ilan Street occurred in 1988. This struggle escalated following the street's one-time closure in June of 1991, on the occasion of the Satmar Rebbe's visit, and in November of 1995, on the occasion of the Vishnitzer Rebbe's visit. Moreover, the Ultra-Orthodox voters' increasing political clout gave rise to heightened expectations among the Ultra-Orthodox public that the street be closed to traffic on the Sabbath. In addition, the availability of surrounding streets, paved through the years, which could potentially serve as alternate routes, strengthened the Ultra-Orthodox belief that the secular public should accede to their request and refrain from traveling in their midst on the Sabbath.

Conversely, the request to close Bar-Ilan Street to traffic was perceived by the secular public as the continuation of an ongoing policy to effectively push the non-Ultra-Orthodox population out of Jerusalem. As a result, counter-demonstrations took place, accompanied by violent clashes. Against this backdrop, in August of 1994, the Mayor of Jerusalem, Mr. Ehud Olmert, appointed a committee headed by Mr. Elazar Sturm [hereinafter the Sturm Committee].

7. The Sturm Committee held a significant number of meetings. Dozens of city residents, among them representatives of neighborhoods, parties, and interested bodies, appeared before the Committee. The Committee heard from experts in the fields of transportation, geography, sociology, law and religion. In its report of September 29, 1995, the Committee noted:

The issue of traffic on the Sabbath divides Jerusalem's populace deeply. Solutions befitting the conflicting interests of the city's residents must be found. The situation is difficult and complicated. Accordingly, our examination was conducted in the spirit of compromise and in careful analysis of the conflicting needs. The testimony before the Committee, from every shade of the social and political rainbow, religious and secular, reflected agreement and broad understanding. There is general agreement in favor of respecting the request of many religious neighborhoods to foster a public atmosphere befitting their own religious lifestyle, while bearing in mind the needs of others.

Against this backdrop, the Committee recommended closing particular streets, such as Keter Sofer Street, Shmuel HaNavi Street and Brandeis Street. It also recommended closing the neighborhood of Har-Nof to traffic on the Sabbath and Jewish holidays. Having said this, the Committee did note that it recommended leaving access routes open to secular residents and their visitors. Accordingly, it called on secular residents to inform them of their place of residence. Only after the secular residents' places of residence were mapped out and the relevant roads and accessways clearly marked, would the Committee make its recommendations. Additionally, the Committee decided not to recommend closing other streets, such as Malchei Yisrael Street, Yam-Suf Street, and Michlin Street. With respect to Bar-Ilan Street, it recommended that:

Bar-Ilan Street be closed during prayer times on Sabbaths and Jewish holidays.

More specifically, the Committee recommended that the street be closed on the eve of the Sabbath, from the beginning of the Sabbath (sunset) to an hour and forty-five minutes thereafter; on the Sabbath day the street would be closed from 7:30 a.m. to 11:30 a.m.. Bar-Ilan would also be closed for an hour and forty five minutes prior to the end of the Sabbath. It shall be noted that one of the Committee's members, Mr. Yitzhak Rubin, opposed closing the street during prayer hours, noting that the street is a main traffic artery.

8. While the Sturm Committee was still at work, the local and national media published articles regarding its recommendations. On the heel of these publications, November 29, 1994, Mr. Langer, the National Traffic Controller, approached the Mayor, Mr. Ehud Olmert, regarding Bar-Ilan Street. In his letter Mr. Langer stated that:

In light of publications in the media and the situation on the street itself, I found it appropriate to apprise

you of our position on the matter. The Ministry of Transportation considers Bar-Ilan Street to be a main traffic artery, connecting Jerusalem's northern neighborhoods to the city's center and south, every day of the week. It would be unthinkable to close this route to traffic on the Sabbath or on any other day. Arrangements to close streets on the Sabbath are only feasible on local streets, following a careful examination, and certainly not on important, central arteries.

9. Jerusalem's City Council deliberated the Sturm Committee's report, and decided to close off a number of streets. In light of Mr. Langer's letter, and in view of the city's legal advisor's position, the Council held: "Jerusalem's City Council does not have the discretion to close off Bar-Ilan Street to traffic on Sabbaths and Jewish holidays." The Council added that it will take note of the Sturm Committee's recommendations and forward them to the Minister of Transportation "with a recommendation to consider the plight of the local public."

10. A number of requests to close off Bar-Ilan Street on the Sabbath reached the Minister of Transportation, Mr. Israel Kaiser. A meeting was held, on January 10, 1996, between the Minister and residents of Bar-Ilan Street—a meeting that Mr. Langer also attended. In concluding the meeting, the Minister asserted that:

the Traffic Controller is the highest professional authority in this area, and I, as Minister of Transportation, must act in accordance with his professional opinion. The Traffic Controller's professional opinion is that this street is a main traffic artery and therefore cannot be closed on the Sabbath. I will only be able to change this decision if the Traffic Controller is swayed by the data presented here before him, and decides that, on Sabbaths during prayer times, the street may be closed. As I have said, the decision shall be on a professional basis, and if there is room to take a more lenient view—as the House of Hillel did in the times of the Talmud—I shall take that path. If, however, the Traffic Controller does not change his professional opinion, we will only close the street if the government or the Court compels us to do so.

Minister Kaiser concluded his meeting with the Mayor of Jerusalem, on February 13, 1996, on a similar note. During all this time, demonstrations against Sabbath traffic on Bar-Ilan Street grew more violent. The police were forced to intervene and traffic in the area was disrupted.

11. In May of 1996, Rabbi Yitzhak Levi was named the new Minister of Transportation. The National Traffic Controller, Mr. Langer, listened to the position of the new Minister, who noted that he had received many complaints regarding the offense to the sensibilities of the local Ultra-Orthodox public on Bar-Ilan Street. The Minister expressed his opinion that a compromise solution was desirable and notified Mr. Langer that, in light of the issue's ramifications, he planned on meeting with Israel's President to discuss it. After meeting with the President, the Minister of Transportation informed Mr. Langer that the President also believed in reaching a compromise regarding Bar-Ilan Street. Mr. Langer consulted with professionals—with the Ministry of Transportation's Chief Engineer and with its Legal Advisor. He revisited and reconsidered his original stance. After this assessment, Mr. Langer became convinced that he should change his previous decision.

12. On July 10, 1996, Mr. Langer submitted a new decision. According to this decision, Bar-Ilan Street was to be closed to traffic, in both directions, on the Sabbath and Jewish holidays, during prayer times. On Friday evenings and holiday eves the street would be closed from 6:30 p.m. to 9 p.m.; on Saturdays and Jewish holidays from 7:30 a.m. to 11:30 a.m., and from 5 p.m. to 8:30 p.m. This traffic arrangement would be in force for a four month period. Intersections themselves would remain open to traffic. During this period, the impact on traffic in the area would be monitored. The Minister of Transportation informed the Knesset of his decision—a decision which the current petitions challenge.

The Petitions

13. The first petition before us (HCJ5016/96) was filed by Lior Horev, a resident of Jerusalem active in the struggle against the street's closure. He claims that the decision was illegal, as it was taken without consulting the Mayor or the residents of the affected secular neighborhoods. The petitioner further maintains that the decision is patently unreasonable, for it involves the permanent closure of a central traffic artery for a number of hours, as distinguished from a temporary closure for a particular event. The petitioner claims that the decision is based on political considerations. He also noted the problem with impeding the freedom of movement of emergency and security vehicles. Indeed, Bar-Ilan Street is used by such vehicles for the purpose of reaching the hospital on Mount Scopus. Consequently, the petitioner requests that we declare the Minister's decision invalid and issue a temporary restraining order, until we render a final decision.

14. The second petition (HCJ 5025/96) was filed by Member of Knesset Ophir Pines, a resident of the neighborhood of Ramot. M.K. Pines argues that he is liable to be harmed by the Traffic Controller's decision. He claims that the Minister forced the Traffic Controller to decide as he did. The decision, he submits, is patently unreasonable, for it leaves entire neighborhoods in Jerusalem without any reasonable alternative routes. Nor, he claims, did the respondents consult with representatives of the secular public prior to adopting the decision. He further contends that the placing of traffic signs, such as the ones indicating Bar-Ilan's closure, is a regulatory act that requires official publication. There was no such publication and the new traffic regulations were made without proper authorization, when both the Prime Minister and the Mayor were overseas. The petitioner further emphasized that the parallel road, Yechezkel Street, had already been closed to traffic on the Sabbath and holidays in order to meet the religious needs of the Ultra-Orthodox public. Thus, closing Bar-Ilan Street would impose a total detour of about nine kilometers on motorists. The petitioner therefore requests that the Court strike down the Traffic Controller's decision. He also requests that we issue an interim order, prohibiting the placing of traffic signs, pending a final resolution.

15. Knesset Member Yosef Sarid and others filed the third petition (HCJ 5090/96). They argue that limiting traffic on Bar-Ilan Street on Sabbaths and festivals is a matter that should be determined by the Knesset, as it impacts basic civil rights. It was further argued that the decision was taken without consulting with the Prime Minister, the Head of the Regional Authority, the Head of the Local Traffic Authority, or with residents who were likely to be harmed by the decision. Petitioners maintain that a better solution would be to build pedestrian walkways over Bar-Ilan Street.

Petitioner number three is a resident of Tzefania Street, adjacent to Bar-Ilan. She works at Hadassah Ein Karem Hospital. Petitioner number three claims that closing Bar-Ilan Street on Sabbaths and festivals will force her to park her car about a kilometer away from her home and that, if she decides to visit her brother, also a resident of Jerusalem, she will have to walk about five kilometers. Petitioner number four is a disabled Israel Defense Force (IDF) veteran, with restricted mobility. His parents live on David Street, which intersects Bar-Ilan. He visits them every Friday and Sabbath. Petitioner number four argues that closing the street will prevent him from seeing his parents on Sabbaths and holidays. Petitioners also submit that the Controller's decision was made under the pressure of the demonstrations of the local Ultra-Orthodox public. These demonstrations sometimes involved acts of violence, which ended in damage to both persons and property. They argue that the Controller's decision would give dangerous legitimacy to such violence. We were therefore requested to strike down the Controller's decision.

Issuing an Order Nisi and an Interim Order

16. The petitions were filed with the Justice on Duty, Justice D. Dorner, and transferred to a panel of justices, who decided that they would hear the petition the following day. During the hearing, before President A. Barak, Justice E. Mazza and Justice D. Dorner, it was decided to issue an *order nisi*. The interim order was also granted. Respondent was given fifteen days to file a response. It was decided that, upon receiving respondent's response, a date would be set for hearing the petition.

17. After the *order nisi* was issued, an additional petition was filed (HCJ 5434/96). The petitioner was the Association for the Rights of the Religious Community in Israel. They request that we order the Traffic Controller and the Minister of Transportation to show cause as to why Bar-Ilan Street should not be completely closed on Sabbaths and holidays. They claim that these areas are completely and exclusively religious and Ultra-Orthodox. This being the case, the use of the road for traffic on Sabbaths and festivals injures the sensibilities of the residents of Bar-Ilan Street and its environs. It also causes ongoing tension between this population and Jerusalem's secular population. As a result, there are repeated incidents of violence between these sectors of the public. Petitioner also claims that traffic on the Sabbath endangers the welfare of the local population, for whom the road serves as a pedestrian promenade on the Sabbath. It turns the Sabbath into a regular weekday, violating the beliefs by which the local residents abide. The secular population, they argue, has reasonable alternative roads on which to drive on the Sabbath. The petition was filed with the Justice on Duty, again Justice D. Dorner, and an *order nisi* was issued as requested. A hearing was set and combined with the hearings of the other three petitions.

18. The continuation of the hearing of the four petitions was scheduled for August 15, 1996. The Traffic Controller's response to the four petitions was submitted to the Court prior to this hearing. With respect to the first three petitions, the Controller noted that, in his decision to partially and temporarily close Bar-Ilan Street, he had appropriately balanced between freedom of movement and the sensibilities of the religious residents of Bar-Ilan Street and its vicinity. Employing the information provided by the Sturm Committee, the Controller asserted that the volume of traffic on the Sabbath and festivals is only 12 per cent of the volume of traffic on regular days.

According to the Controller, his decision did not leave motorists without alternate routes. These alternative routes, however, do require longer trips.

19. According to the data submitted by the Traffic Controller, Bar-Ilan's closure would mean that, instead of travelling 2.2 kilometers along the road, motorists wishing to reach the Sanhedria intersection from the entrance to the city would have to turn left at the entrance to the city, at Route no. 4 (Mie Naftoach) and then turn right at Golda Meir Boulevard prior to reaching the Sanhedria intersection. The trip would be lengthened by only 1.5 kilometers and the time difference would be only two minutes. For the residents of Jerusalem's eastern neighborhoods (Katamon, Talpiot and the German Colony) as well as for residents of the city center, the direct route to the northern suburbs is via Route no. One. For residents of the western neighborhoods (Beth Hakerem, Kiryat Hayovel and Kiryat Menachem) an alternate route to the northern suburbs through Route no. Four is available, which, as stated above, lengthens the trip by only 2.2 kilometers. Residents of Jerusalem's northern neighborhoods, for their part, can exit the city directly via Route no. Four to Tel-Aviv, as well as via Route no. 443 to Modi'in.

20. In light of this data, the Controller balanced the conflicting interests. He considered the intensity of the harm caused by alternate courses of action. He concluded that the appropriate balance between the relevant factors necessitated a partial closure of Bar-Ilan Street, during those times when a large portion of the religious population was on its way to or from the synagogue. As these times motor traffic along Bar-Ilan presents the greatest affront to religious sensibilities. Even so, the Traffic Controller was of the opinion that the closure ought to be on a temporary basis only. During the period of the closure, the damage caused motorists using Bar-Ilan and its alternate routes would be examined. The respondent's position is that, "at this stage," closing the road beyond prayer times should not be permitted.

21. In his response, the Traffic Controller addressed the change in his position. He asserted that his initial response only addressed the strictly traffic-related aspects of the matter and failed to give full attention to the scope of the offense to the Ultra-Orthodox public's sensibilities. His second decision was adopted following a renewed examination of all the circumstances. As a result, he is now convinced that the appropriate balance of the conflicting interests warrants the temporary, partial closure of Bar-Ilan Street during and around prayer times.

22. Further on in his response, the Traffic Controller discussed the arguments for consulting sections of the secular population. The Controller contended that he was not under a duty to consult but that, as a matter of fact, he was aware of the positions of both the Ultra-Orthodox and the secular. He had studied the Sturm Report and had been apprised of the Jerusalem City Council's stance regarding the Sturm Committee's recommendations. The Traffic Controller also asserted that placing a traffic sign does not require official publication.

23. Regarding the inconvenience caused to petitioners three and four (HCJ 5090/96), the Traffic Controller contended that:

the reasonableness of an administrative decision in a case is assessed subsequent to balancing all the relevant interests. The fact that a particular individual suffers in a more serious way does not affect the reasonableness of the decision as a whole.

24. In his reply, the Traffic Controller specifically related to the petition in HCJ 5434/96, which requests that Bar-Ilan Street be completely closed for the entire Sabbath. He noted that even though the alternate routes only lengthen the commute by about two kilometers, this still constitutes an infringement of the city residents' interests in general, and the interests of the residents of the northern suburbs in particular. Of course, their rights must be balanced against those of the Ultra-Orthodox population who live along the road, and their interest not to have their religious sensibilities offended on the Sabbath and festivals. The appropriate balance between these conflicting interests, argues the Controller, warrants the partial closure of the road, during the Sabbath and festivals. This closure will be temporary. After the trial period, the situation will be reexamined, with consideration for statistics regarding the volume of traffic on the street. Towards the end of his response, the Traffic Controller also raised the possibility of establishing an electric sign, which would advertise the times that the Sabbath and festivals commence and end. This sign would be connected to the traffic lights, and would facilitate the road's closure at the precise times of prayers.

25. In view of the matter's significance and at the request that the original panel of judges be broadened, I decided to add Deputy President S. Levin and Justices Or, Cheshin and Tal to the original panel. The hearing began on the August 15, 1996. At the start of the hearing, we ordered the joinder of a number of petitioners (HCJ 5341/96, 5354/96 and 5377/96) as respondents to the first three petitions. These respondents included the Committee of Tel-Arza and Bar-Ilan Street Neighborhoods. The Committee noted the numerous times it had approached the Minister of

Transportation, Israel Kaiser, with requests that Bar-Ilan Street be closed. These requests were appended with the petitions of rabbis, of institutions for Jewish learning and of thousands of residents, including a petition signed by 1,000 children, all of whom requested that the Bar-Ilan Street be closed to traffic on the Sabbath. According to petitioner, those signing these petitions included “almost all of Bar-Ilan Street’s residents, house after house, religious, traditional and secular.” The Committee asserted that, on the Sabbath, “Bar-Ilan Street serves as a main artery for pedestrian traffic. Residents, together with their families, go to services three times a day, visit their rabbis and the homes of relatives and friends in the neighborhood, attend lessons in Torah, and go to the synagogue for the afternoon meal. Children, after a week of long days in school, also attend services, and go to lessons, Psalm reciting groups, games and meetings with their friends. The pedestrian traffic on the Sabbath and festivals on Bar-Ilan Street involves thousands of people and is of a far greater scope than the motor traffic, which poses a serious danger to the pedestrians, particularly the children. In addition, according to petitioner, the presence of motor vehicles “disturbs prayers and Torah classes in the synagogues and infringes upon the Sabbath rest enjoyed by the local residents.”

According to the Committee, the proper solution is the absolute closure of Bar-Ilan Street to traffic on the Sabbath. At minimum, the road should be closed in accordance with the Sturm Committee’s recommendations and the Traffic Controller’s decision. With respect to ambulances or other emergency vehicles, the Committee noted that these would be able to move freely. It asserted that “[w]ho is as well-known as the Ultra-Orthodox public and its volunteers for their commitment to saving lives and helping others?” The Committee further contended that Bar-Ilan Street was only a vital traffic artery on weekdays. On the Sabbath, traffic is minimal and the road becomes “a traffic artery for pedestrians.” The Committee also asserted that “almost 100% of the residents living in the vicinity of the Shmuel HaNavi and Jeremiah Streets, as far as Shamgar Street, are all religious or Ultra-Orthodox, and their religious sensibilities, convenience, and way of life should be taken into account.” In addition, it emphasized that the section of the road designated for closure contains over one hundred synagogues and religious institutions. As for the violence of Ultra-Orthodox groups on Bar-Ilan Street, the Committee deemed these to be fringe groups, who do not reflect the views of the overwhelming majority of local residents. “It is well known that rabbis from all circles and communities have prohibited stone-throwing or any kind of violence at demonstrations, especially on the Sabbath, as such is prohibited by Jewish law.”

With respect to petitioner number three (HCJ 5090/96), the Committee submits that an ambulance would be able to pick her up on the Sabbath. In addition, she would be able to obtain an ambulance sign for her car through the hospital. Regarding travel to members of her family, she would be able to do so during the hours when the street was open on the Sabbath. The same would apply to petitioner number four.

26. When the Minister of Transportation and the Traffic Controller began their oral arguments, the Court asked for further details from the National Traffic Controller, Mr. Langer. He answered our questions. He provided us with a detailed explanation of the traffic issues in Jerusalem on the Sabbath, noting the conflict between the desire of the religious and Ultra-Orthodox communities to maintain an observant way of life and between the secular public’s freedom of movement. In the Controller’s view, closing Bar-Ilan Street for a four-month period constituted an attempt to find the proper balance between these conflicting considerations, in order to facilitate finding a more permanent solution.

27. On the basis of his testimony before us, and in the view of the petitions and the responses to them, the Court thought it best to resolve the matter by way of an agreement. Such an agreement would quite naturally be premised on mutual patience and tolerance and on a long-term understanding regarding the future of Jerusalem. Rather than focusing solely on the issue of whether to close Bar-Ilan Street, it would relate to expected social dynamics and their effect on the secular-religious relations in the coming years. On the basis of such this agreement, it would be possible to find long-term solutions for the various problems that these petitions raised.

28. This led to our proposal that a public committee be established, whose members would provide a balanced reflection of the spectrum of views and perspectives on secular-religious relations. The committee’s goal would be to strike a social covenant for secular-religious relations. The committee’s recommendations would be considered by the government agencies, which would assist them in determining policy in traffic matters, including the potential closure of Bar-Ilan Street.

29. The Court’s proposal was immediately submitted to the Minister of Transportation, who accepted it. We were informed that the Minister intended to have the Committee set-up immediately so it could begin deliberations without delay. The other sides also welcomed our proposal. Under the circumstances, we thought it appropriate to postpone the continuation of the hearing for two months, in order to allow the committee to function.

30. In view of this development, the state and the petitioners in HCJ 5434/96 petitioned the Court to strike down the interim order. Petitioners in HCJ 5016/96, 5025/96 and 5090/96 opposed this motion. We held, with Justice Tal dissenting, that there was no reason to revoke the interim order at that stage. It was our understanding, given the response of the National Traffic Controller and, on the basis of accepted guidelines regarding interim orders, that the interim order should remain valid. We further noted that the petitions were still pending and that, as long as we lacked exact and verified data regarding an appropriate solution, there were no grounds for changing the status quo that had existed on Bar-Ilan Street prior to the Controller's decision. This having been said, we noted that there was nothing to prevent the Controller or one of the other litigants, subsequent to the establishment of the committee, from approaching us at his or her own initiative with a request to strike down or alter the interim order, on the basis of developments in the committee.

31. The Court emphasized its hope that a public committee that would make recommendations, which would be submitted with appropriate haste and which would reflect the social consensus of all walks of Israeli society, would facilitate an eventual solution to the critical problem of religious-secular relations both in Jerusalem and outside of it, based on mutual tolerance. We also expressed our concern that the committee be allowed to do its work in a quiet atmosphere, free from threats or violence. As noted above, the Controller or any of the litigants would be able to return to us in the future with a request to strike down or alter the interim order.

32. In his dissent, Justice Tal opined that the interim order should be cancelled. In his view, the National Traffic Controller's decision was temporary, and was intended to allow for assessment of the proposed arrangement. Upon termination of the trial period it would be possible to ascertain whether the proposed arrangement had been an appropriate and reasonable alternative. Justice Tal noted that he saw no reason for this Court to prevent the authority from conducting this experiment. The results of the experiment could also be weighed by the public committee.

The Tzameret Committee

In the wake of our proposal, on August 27, 1996 the Minister of Transportation appointed a public committee charged with making recommendations regarding motor traffic on the Sabbath. The committee was chaired by Dr. T. Tzameret. Its members were Prof. G. Golan, Rabbi T. Weinmann, Mr. U. Chason, Rabbi S. Yakobovitz, Rabbi She'ar Yashuv Cohen, Prof. E. Shweid, Prof. D. Shferber. In its letters of appointment, the Committee was requested to establish

recommendations regarding traffic on the Sabbath on Bar-Ilan Street in Jerusalem, in Jerusalem in general, and its environs. The recommendations are to reflect a social consensus between various segments of the population. This consensus is to be based on patience, tolerance and on a long-term understanding of the population structure of Jerusalem and its environs.

34. The Tzameret Committee deliberated for approximately nine weeks. It heard the testimony of dozens of witnesses, including public servants, experts in geography, economics, urban planning, sociology, political science and public administration, politicians, public figures and ordinary citizens. The Committee also studied the written requests of citizens not summoned to testify before it.

35. The Committee's recommendations address four matters: the creation of a "social covenant" between the religious and the secular, the economic, demographic, cultural and social development of Jerusalem, the regulation of the street closures nationwide on the Sabbath and holidays, and the closure of Bar-Ilan Street on the Sabbath and holidays.

Regarding the social covenant, seven of the eight Committee members recommended that a council, consisting of twenty-three public figures and spiritual leaders from all walks of life, be established to engage in an ongoing dialogue on religious-secular relations. "All of this with a view to the gradual improvement of religious-secular relations based on mutual respect, understanding and agreement."

With respect to Jerusalem's development, seven of the eight Committee members recommended intensifying research regarding Jerusalem, its development and its population, in order to collect data which could serve as a basis for formulating policy. Likewise, the seven members also suggested the restriction of subsidized building in Jerusalem, the building of additional public structures and the planning of new suburbs, with an eye to the lifestyles, character, and needs of the various sectors of the population. The Committee unanimously recommended extending the municipal boundaries of Jerusalem to the west and south, so that suburbs such as Mevasseret Tzion, Motza Elit, Ramat Rachel, Mt. Eitan and the Arazim valley would be included within Jerusalem. The Committee

further recommended encouraging economic, public and spiritual activities within the Jerusalem area. In addition, six of the Committee members proposed “the promotion of cultural activity geared towards various populations, provided that such activities do not involve the public desecration of the Sabbath.” One of the members opposed this recommendation and another abstained.

36. As for the matter of closing roads nationwide, the Committee recommended that Israeli roads be classified into six categories:

(1) Local streets—streets used exclusively for access to adjacent land and not for thorough traffic;

(2) Internal Thorough Streets—streets, mainly serving the needs of local residents, which concentrate and divert traffic from internal streets to collector or arterial thoroughfares;

(3) Main Thorough Streets—streets which concentrate traffic from internal thorough streets to main traffic arteries;

(4) Arterial Thoroughfare (with direct access to adjacent lands)—streets, used for transit between various neighborhoods, which concentrate traffic from the categories listed above;

(5) Arterial Thoroughfare (without direct access to adjacent land users)—street, which are used for through traffic only, which concentrate traffic from the thoroughfares listed above;

(6) Intercity Highway.

The Committee recommended that the Municipal Authority, in its capacity as the Traffic Authority, be exclusively authorized to deliberate and decide whether a Main Thorough Street or an Arterial Thoroughfare (with direct access to adjacent land users), should be closed. Such requests would be considered if a large majority of the adult population (75% - 80%) in the area through which the street passes requested such a closure, and if reasonable alternate routes could be found. The Committee further suggested that any decision of the Municipal Authority to close a street should be submitted to the Central Authority, who would examine the decision based on professional considerations. The Committee recommended that only the Central Authority be authorized to close Arterial Thoroughfares (without direct access to adjacent land users) and Intercity Highways, and only then under exceptional circumstances. Moreover, the Committee proposed that an appeals board be established in order to adjudicate objections raised against the Central Authority’s decisions.

37. With respect to Bar-Ilan Street’s closure, five of the Committee members recommended that “in consideration of the needs of the Ultra-Orthodox population, we recommend adopting the Sturm Committee’s decision to close Bar-Ilan Street on the Sabbath and festivals during prayer times, provided that arrangements are made for the secular public in accordance with its needs within the framework of the current *status quo*.” In a personal letter, which forms part of the report, the Committee’s Chairman noted that the recommendation that the road be closed during prayer times is a conditional one—the condition being that “there be an organized transportation alternative on the Sabbaths in Jerusalem, an arrangement that had existed in Jerusalem for many years.” Two additional Committee members (Prof. Shweid and Prof. Golan) clarified that they agreed to closing the road with the understanding that transportation arrangements for the secular public would be based on the *status quo*, under which taxis had been permitted to operate. Prof. Shweber expressed reservations regarding these understandings, and emphasized that his intention was not to permit public transportation on the Sabbath, but rather to continue allowing private transportation. Rabbi Shear Yashuv Cohen, who refrained from voting, claimed that the reference to the *status quo* was intended to prevent deterioration in the position of the secular population rather than permit the desecration of the Sabbath.

The Decision of the Minister of Transportation

38. The recommendations of the Tzameret Committee were submitted to the Minister of Transportation. In accordance with section 42 of the Basic Law: The Government, the Minister decided to assume the authority of the Traffic Controller in the matter of Bar-Ilan Street. On November 7, 1996, the Minister submitted an affidavit to this Court, detailing his stance.

39. The Minister of Transportation adopted the Tzameret Committee’s recommendations regarding the establishment of a public council. This Council would be responsible for conflict resolution between different

sectors of the Jewish population. The Minister of Transportation brought this proposal to the Prime Minister and requested that he recommend to the President that such a council be established.

With respect to Jerusalem's development, the Minister of Transportation stated that the committee's recommendations were not within his authority, but suggested to the Prime Minister that these recommendations be submitted to the Minister's Committee for Jerusalem.

40. In the matter of closing roads nationwide, the Minister of Transportation decided that professionals employed by his Ministry would assess recommendations of this nature. If the professionals suggested that the recommendations be implemented, and if the Minister decided to adopt them, appropriate legislative amendments would be necessary.

41. Regarding Bar-Ilan Street, the Minister of Transportation felt that implementing the Tzameret Committee's recommendations would essentially entail closing the road. This position took into account its classification as an Arterial Thoroughfare (with direct access to adjacent lands), the existence of reasonable alternatives, and the fact that an overwhelming majority of the population had expressed its desire that the road be closed. The Minister also expressed his view regarding the condition on which the road closing was to be premised, namely "that arrangements are made for the secular public in accordance with its needs within the framework of the current *status quo*." The Minister regarded this condition as being "vague and lacking substantial factual basis." He noted the various interpretations given by different Committee members. Dr. Tzameret, Prof. Schweid and Prof. Golan felt that this paragraph referred to the implementation of public transportation on the Sabbath. Prof. Shwerber interpreted the paragraph as referring to the individual's right to violate the Sabbath within the framework of the existing *status quo*. Consequently, the Minister concluded that the majority of the Committee did not suggest making the street closure contingent on the establishment of alternate transportation routes.

Regarding the paragraph's factual basis, the Minister noted that the three Committee members in question could not point to any agreements that would confirm their respective interpretations. The Minister further noted that the Traffic Controller had informed him that, in the past, licenses had not been distributed for taxis to operate on Sabbaths and festivals. From this he deduced that, in permitting organized transportation, he would be changing the *status quo* rather than continuing it. The Minister of Transportation concluded that he had not been presented with a recommendation that reflected a "a social consensus between the various segments of the public regarding Sabbath traffic."

The Minister of Transportation also consulted with the Traffic Controller. The Traffic Controller recommended that the Minister adopt the Tzameret Committee's recommendation that Bar-Ilan Street be closed during prayer times, on the condition that Golda Meir Boulevard and the other entrances to the city remain open during the Sabbath and festivals, as well as that Jaffa Street be open to private vehicles. It was on the basis of these conditions that the Minister of Transport decided that Bar-Ilan Street would be closed to traffic on Sabbaths and festivals during prayer times, as per the Sturm Committee's recommendations. Closing times would be for one hour and forty-five minutes after the beginning of the Sabbath, one hour and forty-five minutes prior to the end of the Sabbath and between 7.30 and 11.30 a.m. during the Sabbath day. In addition, the Minister of Transportation decided that, for as long as Bar-Ilan Street was closed, Golda Meir Boulevard and the entrances to Jerusalem would remain open. Similarly, the lanes on Jaffa Street normally reserved for public transportation would be opened to private vehicles.

The Continuation of the Hearing

42. Oral arguments resumed upon receipt of the Minister's response. The Minister of Transportation emphasized that his decision was not for a trial period, but reflected a final position. The Minister asserted that he had balanced the conflicting interests and decided that, in view of the serious harm to the interests of the Ultra-Orthodox sector on the one hand, and the existence of reasonable transportation alternatives on the other, it was reasonable to partially close Bar-Ilan Street to traffic on the Sabbath and on festivals. However, he noted, should there be any change in the circumstances, the Minister would obviously reconsider his decision. Moreover, the Minister asserted that his decision was influenced by the Sturm and Tzameret Committees' recommendations and by the opinions of various rabbis, committees and other interested parties. In this context, it was stressed that there were over one hundred synagogues within the ten surrounding neighborhoods immediately adjacent to Bar-Ilan Street. Indeed, local residents often crossed Bar-Ilan Street when going from one neighborhood to another, both for purposes of prayer and study. This having been said, the Minister was careful to stress that he had not been influenced by the violent demonstrations, though he contended that this violence was proof of the intensity of the

feelings of the Ultra-Orthodox community. According to the Minister, violence must be dealt with by the police, and it would not lead him to change his mind. Needless to say, if one of the responsible bodies, such as the municipality or the police, were to approach him, he would be prepared to consult with them in that regard.

The Minister highlighted that he had not been approached by any secular residents who would be harmed by his decision. He reiterated that “so long as Bar-Ilan Street is closed, the adjacent roads ... would remain open.” Furthermore, he clarified that, in deciding these matters, the more important and central the road, the stricter and more exacting would be the standards for its closing. In any event, the factors to be taken into account were the degree of harm to the feelings of the public, the balance between the various populations living adjacent to the road, and the nature of the alternatives available. In addition, the Minister notified the Court that the establishment of a public body that would function as an appeals board was presently under discussion. Practically speaking, he asserted, such a body had functioned in the Bar-Ilan case.

The Committee of Tel-Arza and Bar-Ilan Street Neighborhoods reiterated its position that Bar-Ilan Street ought to be completely closed on Sabbaths and festivals. It asserted that there were no more than fifty secular residents in the neighborhood, making Bar-Ilan Street a uniquely Ultra-Orthodox neighborhood. Similarly, the Association for the Rights of the Religious Community in Israel also asserted that Bar-Ilan Street ought to be absolutely closed to traffic on Sabbaths and festivals.

43. For their part, petitioners in 5090, 5025, and 5016/96 repeated their position that Bar-Ilan Street’s closure is unreasonable. They emphasized the absence of criteria for closing streets to traffic and argued that a precedent would be set for closing additional arterial roads if the Court was to approve the Minister’s decision to close the Bar-Ilan Street. They further emphasized that, in the past, the closure of Yehezkel Street had been justified by the fact that Bar-Ilan Street provided an alternative route. Now, however, there are requests to close Bar-Ilan Street, claiming that other roads can serve as alternatives. In the future, these roads would also be closed. In this context, it was argued that if the feelings of the Ultra-Orthodox warranted the closing of Bar-Ilan Street, why did respecting these feelings not also warrant the closing of alternative roads as well? The petitioners emphasized that, while the secular petitioners were always ready to compromise, the Ultra-Orthodox were not prepared for any compromise, nor were they ready to renounce any of their past victories. It was further emphasized that there were many secular citizens who refrained from using Bar-Ilan Street on the Sabbath, due to the Ultra-Orthodox violence on the street.

44. In response to these comments, my colleague, Justice Tal, inquired as to whether the petitioners were prepared for a compromise in which Bar-Ilan Street would be closed to traffic on the Sabbath, as per the Minister of Transportation’s decision and, in exchange, a street that is currently closed on Sabbath would be reopened. Justice Tal made particular reference to Yam Suf Street. The panel joined Justice Tal in this suggestion. The Minister informed us that he would conduct a hearing regarding the proposal with the representatives of the City of Jerusalem.

45. In his response, the Minister informed us that the compromise proposal had been seriously considered and that he had inquired with the Mayor of Jerusalem regarding the possibility of reopening Yam Suf Street to traffic on the Sabbath. After consulting with the representatives of the City Council and with the Director of the Traffic Section and Engineering Services, the Mayor of Jerusalem decided that it is appropriate to preserve the *status quo* on Yam Suf Street. He reasoned that there is no traffic-related connection between closing Bar-Ilan Street, as per the Sturm Committee’s recommendation, and reopening that particular segment of Yam Suf Street, which had already been closed to traffic on Sabbaths and holidays for a year and three months. Professionals working in the Transportation Ministry agree that there is no significant traffic-related connection between closing Bar-Ilan Street and reopening a segment of Yam Suf Street. The Minister of Transportation also agrees with this position. The Minister of Transportation noted that additional attempts had been made to find a solution acceptable to all sides, but that these efforts had been unsuccessful.

The General Normative Framework

46. Our point of departure is section 70(1) of the Traffic Ordinance [Revised Version], which confers upon the Minister of Transportation the authority to regulate traffic and establish rules regarding the use of the roads. With this authority, the Minister enacted Regulation 17 of the Traffic Regulations-1961:

17. (a) The Central Traffic Authority is permitted to direct the Local Traffic Authority regarding the determination of traffic arrangements, their alteration, termination, and maintenance.
- (b) Where instructions as stated in subsection (a) are given, and the Local Traffic Authority does not

comply therewith, the Central Traffic Authority may set out such traffic arrangements, which shall be regarded as if though they had been established, indicated, activated or terminated by the Local Traffic Authority.

The “Central Traffic Authority” is the Traffic Controller or the body upon which the authority of the Controller is conferred. For our purposes, the Central Traffic Authority is the Minister of Transportation, in view of his use of section 42 of the Basic Law: The Government, by which he assumed the Traffic Controller’s authority with respect to Bar-Ilan Street.

47. Regulation 17 of the Traffic Regulations endows the Traffic Controller with the administrative authority to direct the manner in which traffic arrangements are to be set up. This authority, like any administrative power, must be exercised in accordance with the rules of administrative discretion and procedure. The rules of administrative discretion, for their part, deal with the factors that the administrative authorities are permitted to take into account and any balancing between them. The rules of administrative procedure determine the methods through which administrative discretion is to be exercised. *See* 2 I. Zamir, *The Administrative Authority* [91], at 673. These two sets of rules were developed by the High Court of Justice and are based on the fundamental principles of our legal system. They have been entrenched in our Basic Laws. In accordance with the theory of administrative discretion, the administrative authority is only permitted to take relevant considerations into account. Furthermore, the administrative authority must find the appropriate balance between these relevant considerations. The balance must be reasonable, as must the decision. The exercise of administrative discretion must be based on a principled, fair and systematic examination of the factual foundation underlying the matter in question. Were the requirements of these two sets of rules satisfied in the case at bar?

Laws of Administrative Discretion—Relevance

48. According to our administrative law, an administrative authority is only permitted to consider relevant considerations. Irrelevant or foreign considerations are proscribed. *See* H CJ 953/87 *Poraz v. Mayor of Tel-Aviv/Jaffa Mayor* [4], at 324. In the case at bar, the Minister of Transportation considered the affront to the religious sensibilities and observant way of life of the Ultra-Orthodox population living around Bar-Ilan Street. Is this a relevant or a foreign consideration? The question of whether religious considerations and offense to religious sensibilities may be taken into account has been discussed at length in our case law. *See* 1 A. Rubinstein, *The Constitutional Law of the State of Israel* 214 (1997) [92]. Sometimes, the answer was in the affirmative and, at other times, it was in the negative. *See* H CJ 105/54 *Lazerovitz v. Food Products Comproller, Jerusalem* [5].

Clearly, the determining factor is the language of the law conferring the authority, and the purpose for which the authority is conferred. As a general interpretative guideline, subject to specific legislative provision, it may be said that considerations that take religious sensibilities into account are precluded if religious coercion is the final goal of such considerations. In contrast, religious sensibilities may be taken into account if they are intended to give expression to religious needs. *See* H CJ 3972/93 *Meatrael Ltd v. Prime Minister* [6], at 507. Indeed, religious coercion is said to run contrary to the right to freedom of religion and human dignity. Consideration of religious needs is, however, consistent with freedom of religion and human dignity. Thus, for example, when exercising discretionary powers to institute daylight savings time, it is permitted to take religious needs into account. I discussed this point in H CJ 217/8 *Segel v. Minister of the Interior* [7], at 439:

Changing the clock touches on and affects the lifestyle of the Israeli population. As such, even times of prayer and the observance of religious commandments are relevant matters. Just as the Minister of the Interior is permitted to take the industrial and agricultural needs of farmers, adults, and youth into account, he is also permitted to consider the interests of the religious and secular populations.

Similarly, in the exercise of discretion to prohibit the performance of a play, the fact that the performance offends the audience’s religious sensibilities may be considered. This was indeed the ruling in H CJ 351/72 *Keinan v. Film and Play Review Board for Films* [8], at 814, as per Justice Landau:

According to the law of the State of Israel, even a playwright is not exempt from the duty not to grossly offend his fellow’s religious sensibilities. This obligation is a direct product of the duty of mutual tolerance between free citizens with differing views, without which a pluralistic society such as ours could not function. This principle is important to the extent that it can prevail over the basic right of freedom of expression.

In another case, dealing with the Review Board's authority to prohibit the screening of a film that offended the religious sensibilities of the public, HCJ 806/88 *Universal City Studio Inc. v. Film and Play Censorship Board* [9], at 37, I wrote:

In a long line of cases, this Court has recognized offense against another's feelings—such as feelings of religion or mourning—as justifying the exercise of the authority of the Review Board for the purpose of restricting the freedom of expression. The public's feelings are values which the Film and Play Review Board, acting in its capacity to censor films, must take into account. An infringement on such feelings may justify limiting the freedom of expression.

One case, HCJ230/73 *S.T.M. v. Mayor of Jerusalem—Mr. Teddy Kollek* [10], at 121, discussed whether an administrative authority was entitled to refuse to issue a license that was required by the Licensing of Businesses Law-1968. The reason offered for the refusal was that opening the business in question would offend the local residents' sensibilities. The Court upheld the refusal to grant the license. Justice Y. Cohen considered injury to the public's religious feelings as a consideration relating to "public security," and, as such, to be legitimate:

Even in its narrow sense, this provision justifies the refusal to issue a license for a business, which, by its very nature, offends the feelings of the residents of the area in which the business is to be opened. As such, there is a real danger of a concrete violation of the public peace. If, for example, someone requested to open a night club in the heart of Mea Shearim, or a pub in the center of a religious Muslim neighborhood, the Licensing Authority would be justified in refusing to issue a license.

In yet another case, the Court held that religious feelings may be taken into account when authority is exercised to limit the freedom of worship. *See* HCJ 7128/96 *The Temple Mount Faithful v. Government of Israel* [11]. That matter was succinctly summarized by Justice Berenson:

Consideration of religious feelings, close to the hearts of numerous segments of the population, is not an invalid consideration *per se*, provided that the use of the statutory authority is not a guise for attaining a purely religious objective. Where it is possible to pursue a course of action in one of two ways—either by ignoring religious considerations, or by taking them into account without imposing a large burden the public—the second route is preferable. In HCJ 98/54, a directive issued by the Food Controller was struck down by reason of it being an attempt—motivated by exclusively religious considerations—to prevent pig farming in Israel, under the guise of food control. This having been said, in the same ruling, it was explained that the directive would not have been defective had the Controller taken into account religious needs in a manner incidental to his authority to regulate food consumption. "Quite the opposite, there would have conceivably been a serious problem in his behavior had he ignored these considerations." *Crim. A 217/58 Izramax Ltd. v. The State of Israel* [11], at 362.

Our conclusion is that the consideration of religious feelings, if this does not amount to religious coercion, is deemed to be a legitimate exercise of administrative authority. HCJ 612/81 *Shabbo v. Minister of Finance* [13], at 301. Taking into account religious considerations may form part of a statute's general goal. Obviously, aside from this general goal, there may be a more specific goal, under which religious considerations are deemed illegitimate. *See* HCJ 953/87 *supra*. [4]. This approach was reinforced by the adoption of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. Both of these Basic Laws stipulate that their purpose is "to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." *See* section 1 of the Basic Law: Human Dignity and Liberty and section 2 of the Basic Law: Freedom of Occupation. Consideration of religious feelings was recognized in the past as being commensurate with the values of the State of Israel as a democratic state. The validity of this consideration is now further reinforced by the values of the State of Israel as a Jewish state. Indeed, the Jewish and democratic values of the state are inseparable, as both are endowed with constitutional status. Both serve as tools for the legislative interpretation of laws. *See* *Crim. FH 2316/95 Ganimat v. The State of Israel* [14]. Thus, on the interpretative level, every effort must be made to ensure the synthesis and accommodation of these two aspects. *See* CA 506/88 *Yael Shefer v. The State of Israel* [15].

The Law of Administrative Discretion: Balancing and Reasonableness

49. As we have seen, provided no religious coercion is involved, offense against the religious feelings and lifestyle of an individual or group is a relevant factor in the exercise of administrative authority. Nonetheless, it cannot be forgotten that considering the religious feelings of a particular individuals is liable to violate the rights and feelings of another person. Thus, whether religious sensibilities are offended is a factor that cannot be considered in isolation.

Rather, this must invariably be weighed against other factors, related to both the individual and the public at large. A reasonable balance must be struck between the conflicting considerations. If the balance is appropriate, it leads to the conclusion that the decision is reasonable. See H CJ *Ganor v. The Attorney-General*, at 513-14 [16]. Indeed, a decision's reasonableness is assessed by balancing between competing values, according to their respective weight. This is the balancing doctrine as practiced in our public law. It is employed where an authority considers conflicting values and interests. It has been practiced by this Court in most instances where the exercise of discretionary power infringes the rights of either the individual or society.

Even so, there are some interests against which there can be no balancing. For example, when the State of Israel's very existence was placed on the scales, this Court refused to weigh between that interest and competing interests. IA 1/65 *Yardor v. Chairman of Central Elections Committee* [17]. Indeed, the Court regarded preserving the State of Israel's existence as a "constitutional given" not to be weighed against the right to elect and be elected. Nonetheless, this case was clearly exceptional and was even the subject of criticism. See IA 2/84 *Neiman v. Chairman of the Central Elections Committee* [18], at 304. Thus, this Court refused to extend the scope of this exception to cases other than those involving preserving the democratic nature of the state. *Neiman* [18]. I am prepared to assume, without ruling on the matter, that there are other values or interests to which the balancing doctrine is not applicable. This having been said, the accepted approach in our public law is the following: where a conflict arises between an individual right and a public right, the Court balances between the two. See *Neiman* [18], at 308; CA 294/91 *Jerusalem Burial Society v. Kastenbaum* [19], at 521; CA 105/92 *Re'em Engineers v. Municipality of Nazareth-Ilith* [20], at 207. This case involves balancing between conflicting interests and values. This is a process of "placing competing values on the scale and, having weighed them, deciding which value is to be preferred. See H CJ 73/53 *Kol Ha'Am Company v. Minister of the Interior* [21], at 879. This was the Court's approach regarding the conflict between freedom of expression and preserving public peace, H CJ 153/83 *Levy v. Southern District Police Commander* [22], in the clash between freedom of movement and public security, H CJ 448/85 *Dahar v. Minister of the Interior* [23], and in the clash between other conflicting values and interests that constitute fundamental values of our legal system. See 2 A. Barak, *Interpretation in Law* 679 (1993) [93]. Indeed, our constitutional jurisprudential theory is not based on an "all or nothing" approach but rather on a "give and take" approach, involving balancing between different values. H CJ 148/79 *Saar v. Minister of the Interior* [24], at 178. As I stated in CA 105/92 *supra*. [20], at 205:

A social value, such as freedom of expression, does not have "absolute weight." The weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict.

50. This Court adopted a similar approach with regard to the balance between religious feelings and the freedom of expression, see H CJ 351/72 *supra*. [8]; H CJ 806/88 *supra*. [9]. It also adopted this approach with regard to the relationship between religious sensibilities related to the observance of the Sabbath and a specific public interest—for example, the regular supply of petrol. In that latter instance, the Court stated that a solution must be found which "on the one hand, would not ignore the religious sensibilities, sacred to the local residents and, at the same time, which would guarantee the supply of vital services to the public." Crim. A 217/68 *supra*. [12], at 364. This Court adopted a similar approach regarding the relationship between religious feelings and the freedom of occupation. In this context, my colleague Justice Cheshin wrote in *Meatrael* [6], at 507:

The considerations of man, *qua* man, are most legitimate. Such is the nature of democracy, in which the individual's welfare and ability to flourish are of paramount importance. Where various segments of the population battle each other and the interests at stake are intertwined, the matter of setting priorities is self-evident. Weighing the interests inevitably leads to the need to decide between values, each pulling in its own direction. In balancing these interests we shall find it possible—and indeed our duty—to consider individual interests, or those of different sectors of the population, provided that we do not coerce the other into observing religious commandments. Religious commandments, *qua* religious commandments, shall not be imposed upon those who are not observant of them.

It therefore follows that religious feelings are a public interest to be taken into account. Nonetheless, their weight is not "absolute." Instead, they must be balanced "horizontally" against other values that also constitute a public interest and balanced "vertically" against other human rights. As Justice Zamir explained, in H CJ 7128/96 *supra*. [11], at 521:

Religious feelings are not extended absolute protection. There is no law that provides absolute protection to any right or value. All rights and values, be they what they may, are relative. Necessarily, the protection they are allotted is also relative. This equally applies to the protection extended to religious feelings.

Furthermore, just as consideration of religious sensibilities is not an “absolute,” but rather “relative,” value that must be balanced against other rights, values and interests, so too, the right to freedom of movement is not “absolute.” It too must be balanced against other rights, values and interests. It is common knowledge that there are roads and streets closed to traffic, either partially or totally. Roads are replete with road-signs and symbols that regulate the flow of traffic on the roads and streets. Thus, freedom of movement is a relative right and the law does not protect its full scope. Compare H CJ399/85 *Kahane v. The Broadcasting Authority* [25], at 283; H CJ 806/88 *supra* [9], at 33. In fact, the vast majority of human rights are relative, and may be infringed in order to realize interests which society considers worthy. See H CJ 153/87 *Shakdiel v. Minister of Religious Affairs* [26]; H CJ 2481/93 *Dayan v. Jerusalem District Commander* [27], at 473. The reason for this is that human rights in general, and the right to freedom of movement in particular, are not the rights of an isolated individual, living on a desert island. Instead, they are the rights of individuals living in society. They deal with the individual in his relationships with others, and presume the existence of a state that must realize social and national goals. Hence, every democratic society, sensitive to human rights, recognizes the need to restrict them in order to preserve its capacity to protect human rights. For both human rights and the restrictions imposed on them stem from the same source, and reflect the same values. Even so, there are restrictions on the extent to which human rights may be limited. These limitations are based on the need to protect human rights. See CA 6821/93 *United Mizrahi Bank v. Migdal* [28], at 444.

51. The balancing of conflicting interests and values, including values related to religious feelings and religious lifestyle, ought to be principled, or definitional. The balancing ought to be based on a generalization that also allows for the resolution of future cases. In the balancing process a “rational principle” ought to be formulated. H CJ 73/53, *supra*. [21], at 881 (Agranat, P.). The balancing must reflect a “substantive criteria, which is neither paternalistic nor accidental, the nature or direction of which cannot be assessed.” See FH 9/77 *Israel Electric Company v. “Ha’Aretz” Newspaper Publications* [29], at 361. (Shamgar, J.)

52. As the balancing between conflicting values and interests is not conducted with scientific tools, the weight that must attach to the various interests and values is, by definition, not exact. Thus, there are certain situations where there are different ways of balancing between the conflicting interests and values, and there is more than one reasonable decision. A “zone of reasonableness” is created, within which a number of different decisions will be considered reasonable. See H CJ 389/80 *Dapei Zahav v. Broadcasting Authority* [30]; H CJ *Lugassy v. Minister of Communications* [31], at 454; H CJ 341/80 *Moshav Beit Oved v. Traffic Controller* [32], at 354; H CJ 910/86 *Ressler v. Minister of Defense* [33]. Any alternative within the “zone of reasonableness” is considered reasonable. In such situations, the choice between the various alternatives will be made by the relevant authority. It is endowed with the authority to select the alternative that appears appropriate, from among the different alternatives. As I mentioned in H CJ 953/89 *Indoor v. Mayor of Jerusalem* [34], at 694:

Applying the general normative criterion “near certainty of serious injury” to the circumstances of a concrete case may, quite naturally, give rise to difficult cases. One mayor may decide that there is near certainty of serious injury. Another mayor, using the same criterion, may decide the injury is not serious or that possibility of its occurrence does not reach “near certainty.” There may be a variety of possibilities, all included within the parameters of reasonableness, which reflect the legal exercise of the said criterion. The choice between these alternatives will be made by the competent authority—not the Court.

And so, when the authority in question is the legislature—the Knesset—the choice between alternatives found within the “parameter of reasonableness” is left to the legislature’s discretion. The choice is in the legislature’s hands and not the Court’s. Similarly, when the authority in question is the executive branch, the choice between the alternatives within the parameters of reasonableness rests with the executive, not the Court. This conclusion is derived from the principle of separation of powers. Indeed, while the Court is responsible for maintaining this separation, it is not charged with selecting the particular legal alternative within the “zone of reasonableness.” In consequence, it does not ask itself which of the legal alternatives it would have chosen had it been empowered to do so. To the extent that each of the alternatives is legal, it is irrelevant that the Court may have chosen a different alternative were it vested with the requisite authority. *Ressler* [33], at 506. A decision made by the executive branch may be declared illegal if it falls outside the zone of reasonableness. Every decision within the zone, however, is legal and the Court will not strike it down. The area of this zone is to be determined by the Court.

53. “Balance” is a metaphorical concept. When a judge balances between conflicting values, he operates on the normative level. The concept of “balancing” is premised on the notion that:

not all principles are of identical significance in society’s eyes. Thus, in the absence of legislative direction, the Court must assess the relative social importance of the different values. Just as there is no person without

a shadow, so too, there is no principle without weight. Balance on the basis of weight necessarily implies a social assessment of the relative importance of the different principles.

H CJ 14/86 *Laor v. The Film and Play Review Board* [35], at 434. Hence, “weight” attaches to social norms, reflecting their relative social importance. The “weighing” process is a normative act, intended to endow the various data with a place within the legal system and establish their social value, within the overall fabric of social values.” H CJ 6163/92 *Eizenberg v. Minister of Construction and Housing* [36]. To this end, Justice Shamgar was correct, in FH 9/77 *supra*. [29], at 361, in pointing out that:

The process of placing competing values on the balancing scales describes the interpretative starting point, but does not establish criterion or value weights to assist in performing the interpretative task.

It follows that a standard for balancing between the need to preserve freedom of movement and the need to protect religious sensibilities must be found.

The Balancing Standard

54. In the wake of the adoption of the Basic Laws regarding human rights, the accepted criteria for balancing is the standard stipulated in the limitation clause of sec.8 of the Basic Law: Human Dignity and Liberty:

There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than that is required.

For our purposes, the relevant question is whether the order issued by the Traffic Controller, by virtue of which Bar-Ilan Street was partially closed to traffic on Sabbath eve and day, is commensurate with the values of the State of Israel, whether it was enacted for a proper purpose and whether the infringement of the freedom of movement does not exceed that which is required. We are permitted to employ this standard even though the order in question was issued under the authority of the Traffic Ordinance [Revised Version]-1961, which is protected by the rule upholding the validity of laws in effect prior to the adoption of the Basic Law. *See* Basic Law: Human Dignity and Liberty, § 10. Even so, all statutes must be interpreted in the spirit of the Basic Law, as I noted in FH Cr. 2316/95 *supra*. [14], at 653:

The Basic Law’s constitutional status is projected on all areas of Israeli law. It does not overlook existing legislation, which is also a part of the law of the State of Israel. The constitutional aura projected by the Basic Law influences all areas of the Israeli Law, necessarily affecting the old law as well. Admittedly, the validity of existing law is retained, as the Basic Law’s aura is projected less intensely on these, as compared to the new law. Thus, while the latter may be struck down if it contradicts a provision of the Basic Law, it cannot be invalidated. However, while the old law is constitutionally protected from being struck down, it is nonetheless not immune from being interpreted anew. There is no distinction between old and new law with respect to the interpretative influence of the Basic Law. Any administrative discretion conferred by existing law must be exercised in the spirit of the Basic Law.

Justice Dorner elucidated this point, in H CJ 4541/94 *Miller v. Minister of Defense* [37], at 138, regarding the interpretation of administrative authority:

The limitation clause applies exclusively to powers grounded in laws adopted subsequent to the Basic Law’s enactment. However, by implication, it is appropriate to also apply its principles to the authorities’ duties by virtue of section 11 of the Basic Law, which also applies to powers anchored in pre-existing laws.

Ever since the Knesset enacted the Basic Laws, the interpretation of legislation does not depend on whether the relevant legislation precedes or antecedes the Basic Laws. Likewise, whether the violation relates to rights “covered” by the two Basic Laws or not is equally irrelevant. A natural connection exists between the constitutional limitation clause and all public law, including human rights not literally “covered” by the Basic Laws. This is because it has always been our position that legislation includes both general and specific purposes. *See* H CJ 953/87 *supra*. [4]; H CJ 693/91 *Efrat v. Population Registrar* [38]. The general purposes are the values of the State of Israel as a Jewish and democratic state; the specific purposes refer to the specific “proper purpose” specified by the limitation clause. The principle of proportionality, as provided for in the Basic Law, is another expression of the reasonableness standard according to which we generally interpret any piece of legislation. Even previous law must—and has always been—interpreted by the standards of the limitation clause.

We shall now consider the general principles mentioned in the limitation clause. We will then proceed to examine their practical application to the order to partially close Bar-Ilan Street, issued by the Minister of Transportation in his capacity as Traffic Controller.

The Values of the State of Israel

55. The values of the State of Israel are its values as a “Jewish and democratic state.” See the Basic Law: Human Dignity and Liberty, §1. It appears beyond dispute that consideration of religious sensibilities is commensurate with the values of the State of Israel as a Jewish state. Indeed, a Jewish state is sensitive to the religious feelings of every one of its citizens. This is true, *a fortiori*, when these feelings are connected to the Sabbath itself. Sabbath observance is a central value in Judaism. The fourth of the Ten Commandments, the Sabbath constitutes an original and significant Jewish contribution to the culture of mankind. See 31 The Jewish Encyclopedia, [107], under The Sabbath, at 422. It is a cornerstone of the Jewish tradition and a symbol, an expression of the Jewish message and the character of the Jewish people. Deprive Judaism of the Sabbath, and you have deprived it of its soul, for the Sabbath comprises the very essence of the Judaism’s nature. Over the generations, throughout its blood-soaked history, our nation has sacrificed many of its children in the name of the Sabbath.

56. Is it consistent with democratic values to restrict human rights for the purpose of protecting religious feelings?

The answer to this question is quite complex. Taking into account human feelings, including religious feelings, as grounds for restricting human rights is particularly problematic under the democratic conception See R. Cohen-Almagor, *Limitations of Tolerance and Freedom—Liberal Theory and the Struggle Against Kahanism* (1994). In HCJ 230/73 *supra*. [10], at 119, Justice Etzioni correctly referred to this matter as “a minefield,” emphasizing that:

The concept of “public feelings” has broad connotations and the subject itself is particularly sensitive.

Thus, democracy finds itself in a dilemma when broaching the issue of whether the desire to protect human feelings can justify infringing on human rights. Indeed, democratic considerations seem to pull in opposite directions. On the one hand, protecting human feelings is natural to the democratic system, for society exists in order to give expression to these. This is the principle of tolerance, a basic tenet of democratic theory, vital to a pluralistic democracy. It therefore “constitutes a social objective in its own right, its realization incumbent upon any democratic society.” CA 294/91 [19]. I dwelt on this point in CA 105/92 *supra*. [20], at 211, stating:

Tolerance is a central value in the public order. A democratic society seeking to fully maximize the wants of each individual will end up unable to satisfy even the minority of those aspirations. Ordered communal life is naturally premised on mutual forbearance and mutual tolerance.

In HCJ 257/89 *Hoffman v. Appointee over the Western Wall* [39], at 354, President Shamgar adopted a similar view, holding:

The sons and daughters of a free society, in which human dignity is a hallowed value, are all called upon to respect the individual’s personal religious feelings and his human dignity. This must be based on tolerance and the understanding that personal religious feelings and their expression vary from one individual to another.

An enlightened society also respects the beliefs and views of those who devotedly and passionately identify with what may not necessarily be the opinions shared by the average citizen. In that sense, understanding the other is more important than self-understanding. Thus, although the imperative “know thyself,” which is borrowed from a cultural tradition not our own, merits respect, it cannot replace tolerance, as expressed in Hillel’s famous maxim in the Talmud: “Do not unto the other that which is hateful unto you.” Tolerance is not a mere slogan for the appropriation of rights, but rather a criterion for recognizing the rights of others.

In HCJ 806/88 *supra*. [9], at 30, President Shamgar, addressing the tension between freedom of expression and offense against the listener’s feelings, wrote:

Tolerance must not give license to offend the religious sensibilities of the other. It can even be said that a serious violation of religious feelings is the antithesis of tolerance, for the tolerance is intended to nurture

and promote freedom of expression, rather than to violate and suppress religious feelings. Mutual tolerance between people with different values and beliefs is a basic cornerstone on which a free democratic society is premised.

Indeed, a democratic society is one which takes into account each and every individual's feelings. Democratic values give expression to "an individual's personal-emotional feelings and human dignity." CA 294/91 *supra*. [19], at 481 (Shamgar, P.). Furthermore, a democratic society is prepared to recognize that rights—such as freedom of expression or worship—must be restricted when allowing them to be fully realized would harm human life or physical integrity. Thus, for instance, we recognize the possibility of limiting the freedom to protest if it is nearly certain that allowing the demonstration to occur threatens physical harm, either to participants or to bystanders. *See* HCJ 153/83 *supra*. [22]. A democratic society, which is prepared to restrict rights in order to prevent physical injury, must be equally sensitive to the potential need for restricting rights in order to prevent emotional harm, which, at times, may be even more severe than physical injury. A democratic society seeking to protect life, physical integrity and property, must also strive to protect feelings.

57. On the other hand, a democratic system prioritizes human rights above all else. Democracy is not merely formal democracy—the "rule book conception," according to which decisions are left to majority will. Rather, democracy is substantive—the "rights conception," according to which the majority is precluded from infringing on human rights. *See* R.M. Dworkin, *A Matter of Principle* 11 (1985) [104]. Thus, substantive democracy's need to protect and preserve human rights gives rise to a familiar dilemma, namely, whether it is at all possible to infringe on human rights in order to consider human feelings, themselves being harmed by the exercise of particular human rights. Indeed, the exercise of a right, by its very nature, risks offending another's feelings. However, recognizing offensiveness as grounds for restricting human rights may pave the way for undermining human rights entirely. Consequently, a democratic society must be most careful in recognizing the legitimacy of infringing on human rights for the purpose of protecting feelings. I noted this in, HCJ 953/89 *supra*, [34], at 690, a case dealing with the possibility of restricting freedom of expression in order to protect the feelings of a segment of the population:

If we were to restrict freedom of expression each time that feelings were hurt, freedom of expression would eventually disappear. Expression, by its very nature, risks offending. This being the case, if every offended feeling were to justify infringing on freedom of expression, in the end the latter would lose all meaning.

Clearly, communal life in a democratic society, by its very nature, requires some openness to offense in order to realize human rights. The principle of tolerance, by virtue of which consideration for feelings arises, itself gives rise to the requirement that one whose feelings are offended be tolerant. "This is the other side of mutual tolerance, necessary in a pluralistic society." HCJ 549/75 *Noah Films v. The Film and Play Review Board* at 764 [40] (Vitkon, J.). Indeed, "[t]olerance and patience are not one-way norms, but broad, multi-dimensional imperatives..." *Hoffman* [39], at 364 (Shamgar, P.). I insisted on this point, with regard to freedom of expression and offensiveness, in HCJ 806/88 *supra*. [9], at 38, noting:

A democratic society, by virtue of its very nature and substance, is premised on tolerance for differing opinions. A pluralistic, tolerant society is the singular force permitting communal life and co-existence. Hence, each and every member of society accepts the "risk" of their feelings being somewhat offended as a result of the free exchange of ideas. In effect, a society based on social pluralism must allow for the free exchange of ideas even if this risks offending those who may not agree with certain views. The regime's very foundation, as a democratic regime, requires a certain exposure to the risk that some members of the public may be offended.

As to the exercise of freedom of expression which infringes upon religious sensibilities, I stated, in HCJ 806/88 *supra*. [9], at 39:

It is only natural that religious conceptions are intrinsically related to individual consciousness. Indeed, feelings are liable to be hurt since a contradictory religious world-view is not merely an intellectual position with which one happens to disagree. Thus, the atheist is likely to offend the believer. Proponents of opposing religious views are likely to offend one another. This is a fact of life that a democratic society must accept. It is particularly differences of this nature that unite us around what we have in common. As this the only way that proponents of differing religious views can co-exist, suppressing the offensive is not the solution... Nor is suppressing all opposing views the solution. Doing so would only serve to stifle the human spirit.

And so, in a democratic and pluralistic society such as our own, there is no choice but to “absorb” offensiveness. In a democratic society, endeavoring to foster tolerance, there is no substitute for tolerance, even in the face of that which offends, as a means for preserving human rights. “The regime’s very substance, as a democratic regime, requires a certain exposure to the risk that some members of the public may be offended.” H CJ 806/88 *supra*. [9], at 38. This is the law regarding offensiveness in general, and regarding religious feelings in particular.

58. How can a democratic society escape this dilemma? How do we resolve the complications flowing from the fact that tolerance, which underlies the democratic conception, simultaneously justifies both protecting rights and infringing them? It appears to me that the answer lies in our duty to recognize a certain “threshold of tolerance” regarding hurt feelings, which every member of a democratic society accepts as part of the social contract upon which democracy is predicated. This being the case, only when an offense exceeds this “threshold of tolerance” will restricting human rights in a democratic society be justified. As I noted in H CJ 953/89 *supra*. [34], at 690:

A democratic society, striving to protect both freedom of expression and the public’s feelings, must establish a “threshold of tolerance.” Only offense that exceeds this threshold can justify infringing the freedom of expression.

This case dealt with the relationship between freedom of expression and offense to the public’s feelings. A similar approach should be adopted with respect to infringements of other human rights. Clearly, the “threshold of tolerance” is not uniform, but rather a function of the right and infringement in question, as Justice Zamir stated in H CJ 7128/96 *supra*. [11], at 521:

The threshold of tolerance for feelings, is neither set nor identical in every situation. The threshold depends, *inter alia*, on the identity of the conflicting right. For instance, the threshold may vary depending on whether the right in question is a basic right, such as freedom of expression, or a material, financial interest. Thus, while the threshold can be quite high if protecting feelings requires infringing the freedom of expression, it may be lower regarding infringements on property. In effect, the threshold shall be set in accordance with the balance between clashing interests in the circumstances, reflecting the relative weight, that is to say the social importance, of the interests in question.

And so, it is possible to infringe human rights for the purpose of protecting feelings—particularly religious feelings and lifestyle—in a society with democratic values, provided that the harm exceeds the threshold of tolerance accepted in that society. Quite naturally, the “threshold of tolerance” varies from one democratic society to the next. This being the case, while it is possible to learn from the experiences of other democracies, the utility of such comparisons is rather limited. Thus, for instance, the stricter the separation between religion and state under a given system, and the more that the rights are set out in more “absolute” terms, the more likely that such a system will prefer human rights to human feelings. Conversely, the more permeable the boundaries between religion and state, and the more a legal culture is predicated on a “relative” conception of human rights, the greater significance it will attach to feelings as a proper ground for limiting human rights.

Our society is unique. Consequently, the solutions that we must seek are undoubtedly equally unique, or “Israeli-style,” to use Justice Cheshin’s turn of phrase in *Meatrael* [6], at 506, regarding the separation between religion and state in Israel. Similarly, addressing the relationship between store closures on the Sabbath, because of offense to religious sensibilities, and the harm to public order that such causes, Justice Berenson wrote in Crim. A 217/68 *supra*. [12], at 364:

I do not know how these matters are resolved in other countries. It is, however, reasonable to assume that each country seeks a solution suitable to its own needs that, on the one hand, is not estranged from the religious values to which its citizens adhere yet, at the same time, promises to provide the necessary services that the public requires.

And so, in setting the “threshold of tolerance,” it is incumbent upon us to consider the substance of the right being infringed, the degree of offensiveness and the probability of the harm. Let us now turn to these principles.

The Right’s Substance

59. How does the substance of the right influence the possibility of infringing it in order to protect religious feelings? Would it not be accurate to assert that all rights are of equal status? The accepted approach—in Israel and

abroad—regarding the protection of human rights is that not all rights are of equal status. Is the right to human dignity not different from the right to property? Even within the confines of a given right, various levels of protection may be allotted. Thus, for instance, the protection offered political expression is superior to that allotted commercial expression. *See* HCJ 606/93 *Kiddum Yezumot (1981) v. Broadcasting Authority* [41], at 24.

60. This being the case, our concern is with a complicated matter, best left to evolve according to our own legal system's experience. For the purposes of this petition, it is sufficient that we establish that freedom of movement—the right being violated—is one of the most basic rights. This is true in Israel and in other legal systems as well. Discussing the “citizen and foreigner's freedom of movement,” Justice Silberg stated, in HCJ 111/53 *Kaufman v. Minister of the Interior* [42], at 536, that this right is:

A natural right, recognized as self-evident in every country boasting a democratic regime.

These words ring especially true with regard to freedom of movement inside the country itself. Indeed, the freedom to travel within the country's borders is generally understood as being of greater constitutional import than the freedom to travel abroad. *See Dahar* [23], at 708. Freedom of movement within the country's borders is usually placed on a constitutional plane similar to that of freedom of expression. Hence, for example, in *Dahar* [23], Deputy President Ben-Porat perceived freedom of movement and freedom of expression as “rights of equal value and weight.” *Id.*

The Extent of the Harm to Feelings

61. As we have seen, a democracy recognizes the possibility of restricting human rights to prevent harm to human feelings. This having been said, not every hurt feeling justifies violating rights; such harm must be tantamount to a severe offense to human feelings. What intensity of harm will justify an infringement on rights will vary from one right to another. Thus, only severe, serious, and grave offense to another's feelings can justify the infringement of a basic human right, such as freedom of expression. These cases shall be so exceptional that they shake the foundations of mutual tolerance. *See* A. Barak, *Freedom of Expression and its Limitations*, 40 HaPraklit 5, 18 (1991-1993) [100].

This was our approach to infringements on the freedom of artistic expression. *See* HCJ *supra*. [8], at 16; HCJ 243/81 *Yeki Yosha. v. The Film and Play Review Board* [44]; HCJ 14/86 *supra*. [35]; HCJ 806/88 *supra*. [9]; HCJ 953/89 *supra*. [34]. This is the law regarding the tension between the freedom of worship of one faith and between offending members of a different stream of belief. HCJ 7128/96 *supra*. [11]. I believe this approach should apply to the matter here—the balance between freedom of movement within the state and protecting religious sensibilities. As we have seen, substantively, freedom of movement resembles freedom of expression. These rights may be called “superior;” they are granted a “consecrated a place of honor in the temple of basic human rights.” *See* HCJ 153/83 *supra*. [22], at 398). Freedom of expression may be infringed to prevent severe, grave and serious harm to human feelings, including religious sensibilities; similarly, it is possible to restrict freedom of movement under such conditions. “The nature of the harm” in question in both instances must be identical. Restricting freedom of movement is only possible when the harm to religious feelings and lifestyle is severe, grave and serious.

62. The severity of the affront to religious feelings is measured by its scope and its depth, as Justice Zamir said in HCJ 7128/96 *supra*. [11], at 524-25:

The severity of the offensiveness is measured on two levels: its scope and its depth. First, the harm must be broad. It is therefore insufficient that one person or a small group with minority extreme opinions is offended.

Likewise, negligible harm, even if it continues over many years, is insufficient. Both conditions need to be fulfilled: only harm to the religious feelings of a given group that is both broad and deep shall be said to exceed the threshold of tolerance in a manner that may justify restricting another group's freedom of religious worship.

The Probability of the Harm

63. At times, the severe, grave and serious harm to feelings has already occurred; other times, it is a risk that has yet to materialize. When the latter is the case, does the risk always justify infringing a protected human right? The answer is no. The central status that democracy extends to human rights leads us to conclude that only a very high probability that feelings will be offended will justify infringing on a right. At times, it is held that there must

be a “reasonable probability” of the risk materializing. *See* Crim. A 126/62 *Disentzik v. Attorney-General* [45]; *Neiman* [18], at 311. In other cases, the risk must be “real and serious.” *See Dahar* [23]. The requisite degree of probability varies from right to right, from case to case, as I noted in HCJ 153/83 *supra*. [22], at 401-02:

The variety of potential situations necessitates a multi-shaded balancing approach. We must refrain from adopting a single standard for all matters. The reason for this is that conflicting interests are not always of identical normative import and the problems that arise from the different clashes themselves, vary.

In *Neiman* [18], at 311, I further noted:

In determining which standard of probability should be adopted, an inclusive and universal measure is inappropriate. The matter depends on the magnitude of the various conflicting rights in a given context. The question is always whether the harm’s significance, together with the probability of it materializing, justifies infringing on a citizen’s right.

With respect to anything relating to freedom of expression, our approach is that a mere possibility, or even a reasonable possibility, for that matter, is insufficient for the purpose of violating the public interest. The probability of the harm materializing must be nearly certain or proximately certain. *See* HCJ 73/53 *supra*. [21]; HCJ14/86 *supra*. [35]; HCJ 806/88 *supra*. [9]; HCJ 680/88 *Schnitzer v. Chief Military Censor* [46]. The probability test resembles the standard adopted by this Court regarding violations of freedom of worship and freedom of conscience. *See* HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Commander* [47], at 456; HCJ 2725/93 *Salomon v. Jerusalem District Commander* [48]; HCJ 7128/96 *supra*. [11]. In light of the close link between freedom of movement within the country and freedom of expression and worship, it seems to me that this probability requirement must also apply to infringements on freedom of movement within the state. It shall be noted that the “actual and serious suspicion” standard was adopted with regards to violations of freedom of movement outside the country’s borders. *Dahar* [23], at 708. This having been said, in that same case, Deputy President Ben-Porat emphasized the difference between freedom of movement inside and outside the state’s borders, and narrowed the “actual and serious suspicion” test so that it applied exclusively to traffic crossing the state’s borders. “Internal” traffic should be subject to the near certainty test.

A “Proper Purpose”

64. As we have seen, human rights are not to be infringed, save restrictions that are prescribed by statute and enacted for a proper purpose, as per article 8 of the Basic Law: Human Dignity and Liberty. The issue of whether a given purpose is deemed to be proper is ascertained on two levels: the first examines the purpose’s content; the second examines its necessity. On the first level, a given purpose is deemed to be proper if it reflects a social objective, which is sensitive to human rights. Likewise, a purpose is said to be proper if it is intended to fulfill general social goals, such as a broad social policy or preserving the public interest. *See Bank Mizrahi* [28], at 434. On the second plane, a purpose is deemed reasonable if the need to fulfill it is important to society and to the state’s values. The degree of importance is likely to vary according to the substance of the right that is violated. Thus, for instance, American law distinguishes between three levels of rights. To this effect, freedom of speech, voting rights, freedom of movement and the right to equality are found at the highest level. As these rights are deemed fundamental, only a purpose endeavoring to fulfill a compelling state interest, pressing public necessity, or substantial state interest shall properly infringe them. A lower standard is required with respect to other rights. *See* 3 A. Barak *Interpretation in Law: Constitutional Interpretation* [93], at 522. For its part, Canadian law requires that the highest standard be applied to all matters involving human rights. We need not take a stance regarding whether Israeli law should distinguish between different levels of scrutiny. Suffice it to say that, as in foreign law, infringements on freedom of movement—a freedom at the pinnacle of human rights in Israel—requires the highest of standards.

The “Least Restrictive Means”

65. Human rights may be infringed only if the means used do not exceed the necessary. While the “proper purpose” test examines the objective, the “least restrictive means” standard examines the means employed for achieving the purpose. It is a proportionality test, employed in Israel for examining administrative and constitutional discretion. *See* HCJ 5510/92 *Turkeman v. Minister of Defense* [49]; HCJ 987/94 *Euronet Kavie Zahav (1992) Ltd. v. Minister of Communications* [50]; HCJ 3477/95 *Ben-Attiyah v. Minister of Education, Culture, and Sport* [51]; *See also* Z. Segal, *Grounds for Disproportionality in Administrative Law*, 39 HaPraklit 507 (1990-91) [101]; I. Zamir, *Israeli Administrative Law as Compared to Germany’s*, 2 Mishpat U’Memshal 109 (1994-95) [102].

In HCJ 3477/95 *supra*. [51], at 11-12, I noted that the issue raised by the “proportionality” test is:

Whether the means employed correspond to the objective they seek to realize. Proportionality implies that the means need to befit the goal that is pursued. The principle of proportionality comes to protect the individual from the regime and to prevent excessive infringements on individual freedom. As such, the means that the regime employs must be carefully selected in order to bring about the purpose’s realization.

66. In Israel as in foreign law, the proportionality test is three- pronged. *See* HCJ 3477/95 *supra*. [51], at 12; *Bank Mizrahi supra*. [28], at 436. The first prong requires a rational connection between the means and objective. Thus, the means employed must be precisely “cut out” to fulfill the desired goal and rationally lead to its fulfillment—“the rational connection test.” The second prong prescribes that the means in question infringe on the individual as little as possible. This is to say that the means are said to be proper only if it is not possible to achieve the objective in a different fashion, whereby the infringement would be minimized—“the least restrictive means test.” The third prong provides that the means selected are inappropriate if the infringement on individual rights is not related to the benefits said to flow from the desired objective—the “restricted proportionality test.” As Professor Zamir, *see* Zamir *supra*. [102], at 131, explained:

The third prong refers to the proportionality itself. According to this prong, it is insufficient that the authority select appropriate and moderate means. Instead, the authority must weigh the public benefits of achieving the goal against the harm caused the citizen by the means’ application. The relationship between the benefit and the harm, and indeed between the means and objective, must be proportional.

67. Considering the feelings of one segment of the population may harm other segments. For our purposes, considering the religious sensibilities of Ultra-Orthodox Jews living in the neighborhood of Bar-Ilan Street infringes the freedom of movement of others. The proportionality test provides that infringements on the rights and interests of citizens seeking to travel on Bar-Ilan Street on the Sabbath must be proportional. In other words, the rights of these individuals are not to be infringed beyond what is necessary to safeguard the religious feelings of other individuals. The question of determining the appropriate means—and when infringing on human rights surpasses the necessary means—is examined according to the three-pronged test.

Summarizing the Normative Framework

68. To summarize: consideration of feelings, including religious sensibilities, as proper grounds for infringing on human rights is most problematic from the point of view of a democracy. Democracy finds itself trapped in an internal conflict, which it must naturally address with great care. The Israeli solution is the following: considering feelings as grounds for restricting human rights is only permissible when the following three conditions are met. First, taking feelings into account conforms to the specific objective underlying the legislation. Second, it is permitted to take religious feelings into account only if doing so does not involve any religious coercion. Third, religious feelings may only be considered when the harm to these is so severe that it is said to exceed the proper threshold of tolerance. This threshold shall vary from right to right. Freedom of movement, specifically, can be restricted if such harm surpasses the threshold of tolerance. Several conditions must be met for this to be true. First, the harm to religious feelings and the observant lifestyle must be severe, grave and serious; second, the probability that the harm will materialize must be nearly certain; third, a substantial social interest must underlie the protection of religious feelings; fourth, the extent of the harm to freedom of movement must not exceed the necessary. This is to say that the least restrictive means are to be selected from amongst the available options.

Having set out this general normative framework, let us now examine the specific case at bar.

From the General to the Particular

69. Bar-Ilan Street’s partial closure is based on three pieces of legislation. The basic authority to regulate traffic is set out in section 70(1) of the Traffic Ordinance [Revised Version], which empowers the Minister of Transportation to enact regulations for:

Traffic arrangements, and rules for the use of roads by vehicles, pedestrians and others

The Traffic Regulations were enacted by virtue of this authorization. Regulation 17(a) provides:

The Central Traffic Authority is permitted to direct the Local Traffic Authority regarding the determination

of traffic arrangements, their alteration, termination, and maintenance.

As we have seen, the Minister of Transportation, under section 42 of the Basic Law: The Government, assumed the powers of the Traffic Controller. The Minister's powers cannot exceed those of the Traffic Controller. In his capacity as Traffic Controller, the Minister of Transportation instructed the Local Traffic Authority to close parts of Bar-Ilan Street to traffic on Sabbaths and Jewish holidays during prayer times in order to safeguard the religious sensibilities of the Ultra-Orthodox residents in the area. The order in question was handed down subsequent to the Minister of Transportation's determination that there is an alternate road to Bar-Ilan Street.

The Issue of Authority

70. Our starting point is that the Traffic Controller is, in principle, empowered to order that a street be closed to traffic on Sabbaths and Jewish holidays. With respect to local streets situated in Ultra-Orthodox neighborhoods this is undisputed. In principle, the Traffic Ordinance [Revised Version] does not distinguish between various sorts of streets, roads or drives, in all that concerns the Traffic Controller's authority to regulate traffic therein. As such, the type of road does not affect the authority to order its closure *per se*, it only influences the exercise of discretion regarding its potential closure.

The Issue of Discretion

71. Did the Minister of Transportation in his capacity as Traffic Controller properly exercise his authority? Our analysis begins with the fact that the Traffic Controller must take into account traffic considerations. It is incumbent on the Controller to ensure that residents be able to reach their homes and be able to travel from point A to point B in a given neighborhood. Moreover, he must ensure that inter-city roads and city entrances remain open to traffic. Were it to become clear that no proper alternate route to Bar-Ilan Street is available, it would not be possible to close it off to traffic on Sabbaths and Jewish holidays, regardless of the harm caused to religious feelings and lifestyle.

72. However, rather than weighing traffic considerations, the Minister of Transportation, in his capacity as Traffic Controller, considered the residents' religious feelings. Was he permitted to do so? Clearly, religious matters cannot be the dominant consideration for, as we have seen, the dominant considerations must be traffic-related. However, in view of my assumption that the alternate route is reasonable from a traffic perspective, does it then become possible to take into account secondary considerations, such as those related to safeguarding religious feelings and lifestyle? The answer is in the affirmative. Although traffic related considerations are central, they are not absolute. To this effect, the Court has held that free competition, for instance, was a secondary consideration that could properly be taken into account. *See H.C.J. 1064/94 Computest Rishon Le Tzion (1986) v. Minister of Transportation* [52]. Thus, the issue boils down to the following questions: is the religious factor a relevant secondary consideration? If so, what is its weight? Can it exceed the inconvenience associated with rerouting traffic and the two extra minutes that doing so requires? Is this factor sufficiently weighty so as to outweigh the traffic difficulties caused the secular residents in the area, whose freedom to travel is restricted? The answer, needless to say, is far from simple. It is incumbent on us to examine the rights and interests struggling for primacy. Subsequently, we shall proceed to examine whether, under the circumstances, the Minister is authorized to weigh all these rights and interests. Finally, we shall examine whether the weight that the Minister attached to them was appropriate and whether his decision is within the zone of reasonableness.

The Interests and Values Struggling for Primacy

73. Which interests and values clash in the case at bar? On the one hand, we have society's interest in preventing offense to the sensibilities of the local religious population. The population in question, residing immediately around Bar-Ilan Street, is Ultra-Orthodox. Seven synagogues are found along Bar-Ilan Street. The area boasts over one hundred synagogues and institutions for Torah study. On the Sabbath, the neighborhood residents customarily attend synagogue, Torah lessons, visit rabbis, family and friends who live in the adjacent Ultra-Orthodox neighborhoods. To these residents, the desecration of the Sabbath on Bar-Ilan Street is offensive and infringes their observant lifestyle. Indeed, from their perspective, the offense is both bitter and severe. This is the interest in question on one side of the issue. This having been said, let it be emphasized that I am not convinced that Sabbath traffic on Bar-Ilan Street infringes the freedom of religion of the residents. These residents are free to observe the religious commandments. Sabbath traffic does not serve to deny them this freedom. *Compare H.C.J. 287/69 Miron v. Minister of Labour* [53], at 349. Even so, traffic on the Sabbath does harm the residents' religious feelings and their observant lifestyle.

74. On the other hand, we have freedom of movement, to which each citizen is entitled. Freedom of movement is a basic right, guaranteed to each and every Israeli. *See Dahar* [23], at 708; H CJ 72/87 *Atamalla v. Northern Command* [54]; Crim. Motion 6654/93 *Binkin v. The State of Israel* [55]. It is entrenched in the Basic Law: Human Dignity and Liberty. It is derived from the principle of human dignity, which is enshrined in our constitution. *Compare Elfassy 6 BferGE* (1957) [90]. The individual's freedom to travel "flows from man's intrinsic freedom as such, and from the state's democratic character." H CJ 3914/92 *Lev v. The Tel-Aviv/Jaffa District Rabbinical Court* [56], at 506. Each individual in Israel is granted the constitutional right to travel freely. "This constitutional right is self-sufficient, and can even be implied from human dignity and liberty." H CJ 2481/93 *supra*. [27], at 472. The significance of freedom of movement is the freedom to travel freely on streets and roads. H CJ 148/79 *supra*. [24]. It is the freedom to "come and go"—"*la liberté d'aller et de venire*." And so, closing Bar-Ilan Street to traffic on the Sabbath—either a full or partial closure—infringes the public's constitutional right to freedom of movement. Moreover, preventing the free-flow of traffic on city streets injures the public interest in the free-flow of traffic. As Justice Berenson noted in Crim. A 217/68 *supra*. [12], at 363:

The use of private vehicles is increasingly indispensable to the economy and to satisfying collective and individual social and cultural needs. This is particularly true on the Sabbath and holidays, when public transportation is generally unavailable.

Beyond this, closing Bar-Ilan Street to traffic on the Sabbath both inconveniences and financially harms those members of the public wishing to travel along Bar-Ilan Street on the Sabbath. It harms secular Israelis seeking to use Bar-Ilan Street as a traffic artery connecting various Jerusalem neighborhoods. It particularly harms the secular residents residing in Ultra-Orthodox neighborhoods surrounding Bar-Ilan Street. For them, Bar-Ilan Street serves as a traffic artery permitting them to access their lands directly. Closing Bar-Ilan will compel these members of the public to walk from one end of Bar-Ilan Street to the other—a distance of one kilometer and two-hundred meters—in order to reach their homes. Their family and guests will be forced to do the same. Surely, in the end, part of the secular public will revolt against what they perceive as religious coercion. Truth be told, in the *League* [1] case, Deputy President Agranat pointed out that the order to close a segment of a street to traffic on the Sabbath "in no way...constitutes religious coercion whatsoever, as the order did not compel petitioner number two to act in a way that runs counter to his views regarding religion." *Id.*, at 2668; *Baruch* [2], at 165. To my mind, however, this matter is far from simple. Be that as it may, *see* 1 Rubinstein *supra*. [92], at 177, note 14, the subjective sensation that one is being religiously coerced is clearly discernable among some members of the public who are prevented from circulating on Bar-Ilan Street during the hours that it is closed to traffic.

75. Employing legal concepts, how are we to characterize the clashing interests here? We have already seen that freedom of movement on the Sabbath is a constitutional right, which is infringed by street closures on that day. How is the interest infringing on this right to be characterized? It does not have the status of a human right. As noted, the offense to religious sensibilities and the observant lifestyle caused by motor traffic on the Sabbath does not infringe the freedom of religion of the observant public. We are not dealing with a horizontal clash between two conflicting human rights. However, the interests of the observant residents in safeguarding their sensibilities and way of life forms part of the public interest in preserving the public peace and public order. *See* H CJ 230/73 *supra*. [10], at 121.

In CA 105/92 *supra*. [20], at 205, I highlighted this public interest:

The public interest, with which the various human rights often clash, is varied. The expression "public interest" encompasses and includes a rainbow of public interests, with which organized society is concerned. As such, public security and welfare are both included, as is the public trust in public authorities. Similarly, the public interest in the recognition of individual rights and the preservation and promotion of tolerance, among citizens and the authorities and the citizens, is included. The rule of law, the independence of the judiciary and the separation of powers are all clearly public interests.

Likewise, in H CJ 14/86 *supra*. [35], at 430, regarding the need to balance between freedom of expression and public order, I noted:

Public order is a broad concept that is not easily defined, and whose meaning varies depending on the context. In this context, threats to the state's existence, its democratic regime, as well as public welfare, morality, religious sensibilities, a person's right to reputation, and the need to guarantee fair legal proceedings are all included under the rubric of public order.

It appears, therefore, that taking into account religious sensibilities and the observant lifestyle forms part of both the public interest and public order. *See also* HCJ 806/88 *supra*. [9[]], at 29. At the same time, however, the need to preserve the free flow of traffic on Sabbaths and to allow members of the public—whether the public at large or local residents—to travel freely constitutes part of the public interest and of the public order. As such, both clashing interests can be described as falling under the rubric of the "public interest."

The Relevance of the Clashing Interests

76. Is the Minister of Transportation authorized to weigh all clashing interests and values? More specifically, is the religious factor—as part of the public interest—a relevant consideration in the context of the Traffic Controller's exercise of discretion? As we have seen, offending feelings in general, and religious sensibilities in particular, is a relevant consideration, provided that it does not constitute religious coercion. This is generally the case. Is this consideration relevant with regard to the Traffic Controller's authority? In my view, the answer is in the affirmative. The approach which perceives the religious factor as a "general consideration" which may be taken into account is equally applicable with regard to the Traffic Controller's authority to close Bar-Ilan Street. In exercising this authority, the Traffic Controller must consider the interests of all those who use the street, and who are affected by its closure. This includes the religious interests of those affected by regulations respecting Bar-Ilan Street.

In the *League* [1] case, which dealt with a street closure for the purpose of preventing disturbances to prayers in a nearby synagogue, Acting President Agranat wrote:

There can be no doubt that the respondent was taking into account a religious interest in considering the fact that motor traffic on the streets, on festivals and Sabbaths, disturbs the concentration of the worshippers of the Yeshurun synagogue, preventing them from praying comfortably. There is no fault in that—just as there is no fault in considering cultural, commercial, or health interests, provided that they affect a significant part of the public.

Id. at 2668. In a similar vein, in *Baruch* [2], at 163-65, Acting President Landau noted:

The petitioners' submission that the respondent exceeded his authority, as per the Traffic Ordinance and Traffic Regulations, by taking into account the religious public's sensibilities is not convincing...

Ensuring the Sabbath rest, in accordance with the lifestyle of the interested public, is within the Traffic Controller's authority to regulate road-traffic

For our purposes, just as motor traffic along Jerusalem's King George Street disrupts prayers at the Yeshurun synagogue, vehicles on the segment of HaShomer street, in the heart of Bnei' Brak, also disturb the Sabbath rest of the local residents in that clearly Ultra-Orthodox area. Safeguarding this interest is not tantamount to religious coercion. Instead, it is merely extending protection to the observant lifestyle.

Hence, the Traffic Controller—for our purposes, the Minister of Transportation—was authorized to take into account the offense to religious sensibilities and the observant lifestyle of the local residents, living around Bar-Ilan Street, as a relevant consideration in exercising his discretion with respect to the partial closing of that street to traffic on Sabbaths and holidays. The key question, however, is how to balance between the relevant religious consideration and the other conflicting considerations. It is to this issue that we now turn.

The Balance Between the Relevant Considerations

77. The key issue in the petition at bar relates to the balance between the freedom of movement and the religious consideration, as well as all other relevant considerations. It is incumbent on the Minister of Transportation to balance safeguarding the religious sensibilities of the local residents against the right of each member of the public to travel on Bar-Ilan Street every day of the week, as well as the public interest in keeping the street open year-round. Acting President Agranat emphasized this point in *League* [1] at 2668, noting:

The legislature's objective was to empower the Central Traffic Authority to regulate traffic on city streets...to this end, the vehicles' proprietors' and pedestrians' interest in using public roads for their various needs as well as the legitimate needs of other segments of the public, particularly those residing in the houses adjacent to public roads and those using them were considered. As the District Attorney has

argued, the problem to which the Central Traffic Authority must consider in such circumstances is the need to strike a proper balance between these interests.

The Central Traffic Authority is under a duty to address every concrete case in light of the particular circumstances, taking into account all the interests that the street's closure may affect. In the end, the problem is one of measure and degree.

In a similar vein, Acting President Landau emphasized the need to balance between conflicting interests in *Baruch* [2], at 165:

It is necessary to strike a balance between the conflicting interests; this is a matter of measure and degree. It is but one manifestation of the endless problem of how to reconcile two "camps"—the secular and the Ultra-Orthodox—so that they live in peace in mutual respect, so that neither seeks to "conquer" the other or "triumph" at the other's expense.

Our case also presents the same balancing conundrum, which arises between conflicting values and interests. No one has so argued that the public interest in preventing traffic from circulating on Bar-Ilan Street on the Sabbath is "existential," and that other interests cannot be weighed against it. Similarly, the view that the public interest in the free-flow of traffic on Bar-Ilan Street on Sabbaths is "existential" and cannot be balanced must equally be rejected.

78. As noted, the proper balance is arrived at through examination of the limitation clause of the Basic Law: Human Dignity and Liberty. The State of Israel's values as a Jewish state require us to consider religious sensibilities, and indeed attach significant weight to this factor. The essence of the problem is in the State of Israel's values as a democratic state. We have seen that, in this context, it is proper to take into account the religious feelings of the religious public residing around Bar-Ilan Street, if the Sabbath traffic arrangements aimed at safeguarding these constitute a substantial social need, if allowing traffic to travel on the Sabbath and festivals offends religious feelings in a manner that is severe, grave and serious, and if the probability of this harm materializing is nearly certain. Then and only then does it become possible to say that the harm to religious sensibilities and the observant lifestyle of the Ultra-Orthodox residing around Bar-Ilan Street exceeds the threshold of tolerance which is acceptable in a democratic society. Is this the case here?

79. To my mind, the harm to the Ultra-Orthodox public's religious feelings ensuing from the free-flow of traffic on the Sabbath in the heart of their neighborhood is severe, grave and serious. Indeed, to the religious Jew, the Sabbath is not merely a list of the permitted and the forbidden. Rather, the observant Jew perceives the Sabbath as a normative framework, intended to create a particular atmosphere. Our Rabbis, of blessed memory, described this special atmosphere as the additional soul which man is granted upon the entrance of the Sabbath, which leaves him as it exits. Babylonian Talmud, Tractate Beitza 16a, [110]. This rest is intended to bring the routine of daily life to a halt, and relieve man of daily worries. This rest seeks to permit a person to fully dedicate himself to his family and to his most cherished values. Moreover, rather than merely a private or family affair, the Sabbath is a community matter. Thus, an observant community's expectation is that the Sabbath rest is not restricted to the private domain of its members, but that it will envelop the public realm as well. With the coming of the Sabbath comes rest, not only to one's backyard but throughout the neighborhood. The hustle and bustle of daily life is replaced by prayer, family walks and the like. A crowded street that traverses the heart of the neighborhood, with the sounds of honking and engines, stands in stark contrast to the Sabbath atmosphere, as the majority of the local residents understand it. In effect, severe, grave and serious harm to a religious Jew observing the Sabbath ensues upon encountering traffic on one's way to synagogue or to a Torah institute. As usual, the burden of proving the severity of the harm is on the person claiming to have been injured. In the case at bar, this has not been the subject of dispute and was proven in the various affidavits submitted to the Court.

80. It should be emphasized that the excessive harm to religious feelings here is a result of the fact that Bar-Ilan Street is situated in the heart of the Ultra-Orthodox neighborhoods. Prior the Six Day War, Bar-Ilan Street was found at the periphery of the religious neighborhoods. Traffic on the Sabbath traveled along the neighborhood's periphery, so that even if religious feelings happened to be offended once in a while, the offense was negligible. The uniqueness of our case is a function of Bar-Ilan's location in the heart of the Ultra-Orthodox neighborhoods, so that traffic on Sabbaths causes severe harm to religious feelings. This is also the difference between Bar-Ilan Street and other surrounding streets. While these other streets are also situated next to religious neighborhoods, their location is peripheral and they will therefore remain open to traffic on Sabbaths. The Ultra-Orthodox are offended on those streets also. However that harm cannot be said to surpass the threshold of tolerance expected in a

democratic society.

81. The near certainty test is met in this case. Indeed, the severe, grave and serious harm to the religious feelings of the local residents caused by the Sabbath traffic is not a question of probability. It is proven fact. In dealing with the probability of religious feelings being offended as a result of a certain film being screened, in HCJ 806/88 *supra*. [9], at 41, Justice Goldberg wrote:

The clash between two basic values requires an estimation of the "relative social importance of the various principles" an examination of the probability, force, extent and scope of the harm that one principle causes the other.

The probability test, which ascertains the likelihood of harm, is outside the scope of examination in this instance. There is a need to consider to the probability of the harm as long as we are incapable of establishing the facts. In such cases, it is incumbent on us to estimate the risk of the harm. As such, we accept the "near certainty" test as the proper test respecting the Film and Play Review Board's authority. In such circumstances, we must estimate the risk that a particular film will endanger the public welfare and whether the level of risk is one of "near certainty."

However, when we can determine ourselves whether a given film offends religious sensibilities or denigrates a person's reputation, it is not necessary to estimate the likelihood of harm. In such instances, our eyes are capable of seeing and our ears of hearing whether harm of this nature is in fact present.

This is the law in this matter. Beyond "near certainty," absolute certainty was unequivocally proven. It was proven that the religious feelings and lifestyle of the local Ultra-Orthodox residents are in fact severely, gravely, and seriously offended by reason of traffic going through their neighborhood on Sabbaths and festivals.

82. Freedom of movement is not to be restricted absent a "proper purpose." A purpose is said to be proper if its content and the need it addresses are proper. In my opinion, in terms of content, safeguarding religious feelings and the observant lifestyle constitutes a proper purpose. That conclusion is dictated by the State of Israel's values as a Jewish and democratic state. It is also prescribed by the special purpose underlying the Traffic Controller's authority—the religious factor—which although not the sole, or even dominant, objective, is a proper secondary purpose. The most difficult question is whether the need to realize this secondary objective is a "significant social matter." Mr. Langer, the Acting National Traffic Controller, was initially convinced that the social need to close Bar-Ilan Street on the Sabbath was not significant. It seems to me that, according to an objective standard, the case is borderline. Under these circumstances, there is no basis for interference with the assessment of the Traffic Controller. In effect, had Mr. Langer not changed his original position, there would be no reason to question his decision. Neither is his change of heart, in my view, to be deemed erroneous. Thus, both decisions—whether forbidding traffic along Bar-Ilan Street on Sabbaths or then allowing it—appear to me to be within the zone of reasonableness regarding the need to close the street.

83. Freedom of movement—the right infringed by Bar-Ilan's closure on Sabbaths—must not be restricted beyond what is strictly necessary. Is this condition met in this instance? This matter is difficult to resolve. This having been said, it appears to me that Bar-Ilan Street's absolute closure throughout the Sabbath, from beginning to end, is excessive. As the harm to religious feelings and lifestyle is inflicted during prayer times, closing the street beyond those times would infringe the freedom of movement more than is necessary. Indeed, it is incumbent on the authorities to opt for the least restrictive means at their disposal. For our purposes, the least restrictive means would be a partial closure, during prayer times, at which time religious feelings are most offended, rather than imposing an absolute closure. This is undoubtedly the case from the perspective of the secular residents, who would be unable to reach their homes throughout the Sabbath, were an absolute closure to be imposed.

This having been said, is closing the street to traffic only during prayer hours excessive? To this end, we must distinguish between harm to the interests and values of those secular individuals residing outside the Ultra-Orthodox neighborhoods crossed by Bar-Ilan Street, and the harm caused the interests and values of their counterparts, residing within these neighborhoods. This distinction is vital in light of Bar-Ilan Street's role as a traffic artery connecting neighborhoods and its providing access to the property of the local residents.

84. The harm caused to the secular members of the public, residing outside the Ultra-Orthodox neighborhoods serviced by Bar-Ilan Street, who seek to exercise their freedom of movement and right to travel from one end of the city to the other, is not excessive. As pointed out, all that is required of them is a detour, taking no more than two

extra minutes. While this is an infringement on their freedom of movement, it is not excessive due to the three following conditions. First, the alternative routes are open to traffic on Sabbaths. Second, Bar-Ilan Street itself is open to traffic on Sabbath, save prayer times. If, in practice, it will not be possible to travel on Bar-Ilan Street at times other than during prayers, the harm to the secular public shall be deemed excessive. Consequently, if the violence on Bar-Ilan Street on Sabbaths will continue during the times that traffic is permitted, this will excessively burden the secular residents' freedom of movement. Third, Bar-Ilan Street is open to security and emergency vehicles even during the hours that it is closed to traffic. Bar-Ilan Street serves as a traffic artery leading to Hadassa Hospital, located on Mount Scopus. The two extra minutes it takes to arrive through the alternate route are crucial when it comes to saving human lives. The same applies to security vehicles, endeavoring to preserve the public peace. Such vehicles may freely travel along Bar-Ilan Street at all hours.

85. The matter is quite different with regard to the area's secular residents of Bar-Ilan Street, or those secular members of the public looking to visit family or religious friends living in Ultra-Orthodox neighborhoods. The partial closure of Bar-Ilan Street severely infringes their freedom of movement. The harm is grave as, prior to the closure, secular members of the public, as well as their family and guests, living in the Ultra-Orthodox neighborhoods were able to park their vehicles on Bar-Ilan Street and reach their residences on foot from there. This closure, however, will compel secular residents to park at the northern or southern end of Bar-Ilan Street, and to walk the length of Bar-Ilan. This walk, which is by no means short, does not constitute a reasonable alternative. The alternate routes of Route no. One and Route no. Four are intended to allow traffic to flow from one end of the city to the other. What, however, will become of the secular residing in the Ultra-Orthodox neighborhoods themselves?

86. This question is by no means simple. Closing Bar-Ilan Street to traffic on the Sabbath causes severe harm to the secular residents living in neighborhoods around Bar-Ilan Street. They were also harmed in the past, when the neighborhood's inner streets were closed off, and now, unable to reach their homes, they suffer additional harm. This having been said, the harm in question is narrow in scope as they are perfectly able to travel along Bar-Ilan Street at all hours, save prayer times when the street is closed, including Fridays the Sabbath and holidays.

Is this infringement lawful? Can it not be said that the infringement on the secular residents' freedom of movement is excessive? Every effort should be made in order to minimize injury to these secular residents. Consequently, it is only appropriate to consider the possibility of granting special permission to the secular residents to use Bar-Ilan Street even when it is closed. Just as security and emergency vehicles are permitted to use the street on the Sabbath, the same possibility should be extended to local secular residents. Undoubtedly, this is the case regarding the physically challenged, *see* HCJ 5090/96, or those residents whose occupation requires it, such as petitioner number three.

87. In practice, to what degree would the secular residents living in Ultra-Orthodox neighborhoods around Bar-Ilan Street be harmed were the street to be partially closed? How many secular residents live in these neighborhoods and how will the street's partial closure harm them? The evidence before us does not provide a satisfactory answer to any of these questions. Mr. Langer did not examine this matter in drafting his order to partially close the street to traffic. Instead, he relied on the data collected by the Sturm Committee. While the report is in the Court's possession, we do not have the protocols of the Committee's discussions, nor is there any information regarding the local secular residents—if such information was ever presented to the Sturm Committee. In his decision, the Minister of Transportation relied on the Tzameret Committee's report, which also does not contain data regarding the secular residents. Responding to our inquiries on the matter, the state informed us that no data respecting the secular residents was in possession of the Minister of Transportation. It emphasized that at no time was the Minister approached by secular residents opposing Bar-Ilan's closure. The assumption, therefore, was that most local residents were Ultra-Orthodox. Regarding this issue, the petitions before us contradict each other. One petitioner stated before the Court that "there are still numerous secular residents living in the area, such as non-observant elderly couples who are regularly visited by their children on Sabbaths and holidays." *See supra* para. 15. In contrast, the petition of the Committee of Tel-Arza and Bar-Ilan Street Neighborhoods stated that "nearly one hundred percent" of the those living around Bar-Ilan Street keep the Sabbath, and that there are less than fifty secular residents in the area.

The Law of Administrative Procedure: Gathering Data and Related Flaws

88. Case law provides that a government decision must be based on and supported by relevant facts. To this end, the authority must gather the relevant data and verify the fruits of its search with extreme care, as noted in HCJ 297/82 *Brenner v. Minister of the Interior* [57], at 48-49, by Acting President Shamgar:

The decision must always be the product of serious, fair and systematic research...

The decision-making process by the authority must be composed of a number of crucial basic stages. These include the gathering and summarizing of data, verifying the data's significance—which, in the event of alternative thesis, includes verifying the propositions and ramification of the conflicting thesis—and, finally, summarizing the reasoned decision. This process ensures that the relevant considerations are taken into account, that the arguments submitted are fairly examined, and that the resulting decision will withstand a legal and public critique.

89. What are the ramifications of the government authority's failure to perform a proper verification? The consequences are a function of the circumstances. Thus, not every violation of proper administrative procedure will result in the administrative decision being struck down. In H CJ 2911/94 *Baki v. Director General of the Ministry of the Interior* [58], at 304, Justice Zamir wrote:

We must draw a clear distinction between the rule binding the administrative authority and the remedy granted by the Court when that rule is transgressed. The rule is found on one plane and the remedy in another. After the fact, the Court will weigh different considerations than the factors the authority should have weighed.

In a similar vein, in H CJ 2918/93 *Municipality of Kiryat-Gat v. The State of Israel* [59], at 848, Justice Dorner pointed out:

It is necessary to distinguish between primary rules, guiding the administration's actions, and secondary rules, regulating the legal results of violating these primary rules and the remedies for such violations.

Indeed, not every flaw causes an administrative decision to be struck down. Generally, only a substantive violation leads to such a result. See H CJ 161/80 *San Tropez Hotel Ltd. v. Israel Lands Authority* [60], at 711; H CJ 465/93 *Tridet v. Local Council for Planning and Building, Herzliah* [61], at 635. The effect of a procedural flaw depends on two factors. First, we must ascertain whether the violation of administrative procedure influenced the decision's content. Second, we must assess what effect striking down the decision will have on individuals and society. See H CJ 400/89 *Levitt v. President of the Military Tribunal, Southern District* [62], at 711. Thus, Professor Zamir was correct to point out that:

Only a substantive violation of administrative procedure, infringing a legal principle or a human right, is enough to justify the decision's reversal.

The issue of whether the violation is substantive, which would justify the decision's reversal, is in every case determined by two considerations. First, whether the violation is likely to have influenced the decision, or, in other words, whether the decision would have been different in its absence. Second, what are the benefits to the parties and society if the decision is struck down.

II Zamir *supra*. [91], at 683-84.

90. As we have seen, the Minister of Transportation did not make an appropriate factual assessment of the impact of the closure on the secular residents living in the Bar-Ilan Street area. Instead, the Minister related to Bar-Ilan Street as a main traffic artery that did not provide direct access to adjacent land owners, whereas the street also provides direct access to adjacent lands. As a result, the concerns of secular residents living in Ultra-Orthodox neighborhoods who would be harmed by the street's closure on the Sabbath were not addressed. Let it be noted that the Sturm Committee encountered a similar problem regarding Sabbath and festival street closures in the Har-Nof neighborhood. From an administrative procedural perspective, the Committee acted properly. It called on the secular residents to provide information on their place of residence and mapped out their location. It also marked the roads and access-ways to remain open to the secular residents and their guests. The Minister of Transportation, for his part, did none of these things. Is this flaw substantive? From the perspective of the first consideration—namely, the flaw's influence on the decision's content—the flaw in question can surely be said to be substantive. As we have seen, the data regarding the secular residents living in the Ultra-Orthodox neighborhoods around Bar-Ilan Street is completely absent. The flaw is equally substantial from the perspective of the second consideration—the effect of striking down the decision, both generally and specifically. Indeed, striking down the Minister's decision will preclude the street's immediate closure. As a result, the severe, grave, and serious harm to the Ultra-Orthodox residents' religious sensibilities will persist. This however, is inevitable when the freedom of

movement is at play, prior to determining an appropriate and factually grounded balance between this right and between harm to religious feelings and lifestyle.

Additional Arguments

91. Various arguments were raised in written and oral submissions made before the Court. To the extent I have not addressed these arguments in my decision, they are rejected. These arguments do not affect the legal structure of this decision, and they failed to sway my opinion on the matter.

Conclusion

92. In all that relates to the use of Bar-Ilan Street as a main artery, serving to connect various Jerusalem neighborhoods, the Minister's decision is within the zone of reasonableness. In contrast, the Minister's decision is flawed in its failure to address the plight of the secular residents living in Ultra-Orthodox neighborhoods and, as such, must be struck down. There is no alternative save to declare the Minister's decision ordering the street's partial closure null and void. It will be incumbent on the Minister to reconsider his policy respecting Bar-Ilan Street's partial closure, bearing in mind that it is a traffic artery, providing direct access to the adjacent lands.

Additional Comments

The Tzameret Committee

93. While I did not address the Tzameret Committee's recommendations in my judgment, this in itself no way reflects my opinion regarding their importance. Indeed, the Committee's recommendations are most important, and my hope is that they will be seriously considered. The Tzameret Committee was set up as per the Court's suggestion, based on our understanding that the Sabbath traffic issues in Ultra-Orthodox neighborhoods can only be resolved by way of agreement and compromise. The problem is both sensitive and grave. It relates to the larger problem of Sabbath traffic in Jerusalem and to religious-secular relations in these matters. These problems, by their very nature, best lend themselves to a social rather than legal solution. Social consensus, based on compromise, is by far preferable to an imposed judicial decision, as President Shamgar noted in *Hoffman* [39], at 354-55, which dealt with prayer at the Western Wall:

All this leads us down the treacherous road of balancing between conflicting persuasions, convictions and opinions. In this context, it is far better to recall that the exclusive focus on the "miracle cures" that our generation expects to be handed down in Court, is not necessarily the appropriate solution or the desired cure for all our ills. These solutions are imposed and judicially ordered, rather than agreed upon in instances where experience seems to suggest that understanding and discussion between proponents of opposing viewpoints, although at first glance appearing more difficult, is far more fruitful.

While the Tzameret Committee operated precisely in this spirit, a compromise was not reached and a social covenant was not struck. Thus, we rule on the matter for lack of choice. This having been said, the Court cannot adopt the Tzameret Committee's views in our judicial decision. Our concern is with Bar-Ilan Street's closure to traffic on the Sabbath. Thus, while permitting public transportation on the Sabbath in a different place is likely to constitute a proper social balance, it is nonetheless irrelevant to reaching a judicial decision. Indeed, not all that is relevant in the social or political sphere is equally relevant in the legal sphere. For instance, the Court itself proposed that the problem of closing Bar-Ilan Street be resolved by opening Yam Suf Street, as a basis for agreement and compromise. While this suggestion may be an appropriate social compromise, it has no any bearing on a judicial ruling. As a social compromise was not successfully reached, our judicial ruling is inevitable. Such a ruling is anchored in relevant considerations exclusively. To this end, the Tzameret Committee's recommendations are merely of secondary import.

"The Slippery Slope"

94. The following argument was made before the Court: if Bar-Ilan Street is closed to traffic on Sabbaths, even partially, the domino effect will be powerful. Additional traffic arteries will be closed, as will main roads. The entrance to Jerusalem will soon follow suit, as will streets across Israel.

As a judge, it is not for me to provide a political response to these concerns. My response can only be legal, and it is the following: any decision to close a street, road, or city entrance to traffic will have to be analyzed on a case by case basis. Thus, the legality of a particular closure does not imply that a different street's closure is legal. We

judges are quite capable of distinguishing between different streets, between one closure and the next. In this vein, in HCJ 606/93 *supra*. [41], at 26, Justice Cheshin correctly noted:

One of our roles as judges—and a difficult one at that—is knowing how to distinguish between essence and periphery, between one case and another, between various nuances. The fact that a particular case is difficult does not justify that we refrain from attempting to distinguish it from other cases.

This is the law for our purposes. We are addressing the matter of Bar-Ilan Street, and that matter alone. I have concluded that there are reasonable alternatives to Bar-Ilan Street with regards to its use as a traffic route connecting various parts of the city—as opposed to its use as an access way to the homes of local secular residents.

What then will be the law when the issue of Sabbath traffic on a different traffic artery arises? Such a case shall be evaluated according to the same measure employed in the case at bar, no more and no less. I am not prepared to change the legal measure for future fears that have yet to materialize. Such fears are based on speculation. The “slippery slope” argument is a difficult one, which we must always address with a certain degree of skepticism. *See* F. Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1986) [107]. Thus, while it may very well be that the slippery slope is indeed quite perilous, the slippery slope argument is by far more dangerous.

The Lack of a Legal Standard

95. It has been argued that, because the Minister of Transportation failed to set forth a framework of criteria for the exercise of his discretion, that his decision is flawed. Indeed, it is unfortunate that he did not set out such criteria. It is appropriate that the government authorities set out criteria for the exercise of their discretion. *See* 2 Zamir *supra*. [91], at 780. These would provide the administrative authority with the opportunity to set proper policy in a conscious and carefully planned manner. Such criteria help prevent discrimination, allow for long-term planning, and subject the exercise of discretion to review. This having been said, I am not convinced that the lack of independent guidelines here is sufficient to invalidate the Minister’s decision. The closure of main traffic arteries is by no means a routine matter. Each case is evaluated individually, on its own merits. Even so, it is appropriate that the Minister of Transportation set guidelines in these matters.

96. The lack of independent guidelines was felt was in relation to the choice of alternatives to the closed route. Here, the Court was informed that there were alternate routes to Bar-Ilan Street, one of these being through Route no. Four, the other being Route no. One. Both these roads pass Ultra-Orthodox neighborhoods. We heard arguments asserting that there is no basis for preferring Bar-Ilan’s Ultra-Orthodox residents’ religious feelings and the observant lifestyle over those of their counterparts residing around Route no. One and Route no. Four. According to which criteria did the Minister exercise his discretion in this instance? Moreover, what will become of Bar-Ilan Street’s closure in the event that demands to close these two alternate roads on the Sabbath will arise? According to which criteria will the Minister of Transportation act under such circumstances? These are important questions indeed. In my view, the answer to them is to be found in the material before the Court. As to the first question, we emphasized the difference between streets that go through the heart of an Ultra-Orthodox neighborhood—where thousands of Ultra-Orthodox individuals reside on both sides of such streets—and roads that are found at the neighborhood’s periphery.

With respect to the second question, it is clear that, as soon as we consider the possibility of closing the alternate route, the issue of the original route’s closure resurfaces. Our concern is with complementary solutions. It is possible to partially close Bar-Ilan Street provided that an alternate route remains open to traffic on the Sabbath. However, the moment that the alternate route is closed to traffic on Sabbath, Bar-Ilan Street must be opened. This position is shared by the Minister of Transportation who noted:

For as long as the road is closed...Golda Meir Boulevard (Ramot Road) shall remain open, as will the entrances to the city.

See para. 25 of the Minister’s response brief. Let us add Route no. One to this statement. Clearly, it is best that the Minister prescribe a general formula for these purposes, which relates to all alternate routes. It is our hope that, in the future, this will be done.

97. Related to the issue of the proper legal standard is the question of how requests to close streets for religious reasons are to be dealt with. To this effect, the Tzameret Committee distinguished between various categories of roads. The Committee recommended that the authorized local and central bodies decide the matter. It also discussed

when a reasonable alternate route is required and when it is not. In addition, it proposed that an appeals board be set up, which would enable decisions about street closures to be appealed. In this regard, the Minister's decision was:

It is incumbent on the relevant actors to examine these recommendations in detail. If, subsequent to an examination of this nature, these professionals recommend that the recommendations be implemented, and in the event that I see fit to accept them, it will be necessary to change the law accordingly.

The matter, however, is left to the discretion of the Minister of Transportation. It is appropriate that these suggestions be positively weighed. Particularly important is the appeals board, which, if set up, will enable interested citizens to appeal decisions. Indeed, were such an appeals board in existence today, we would have perhaps learned the number of secular residents living in Ultra-Orthodox neighborhoods around Bar-Ilan. It is our hope that these issues will be decided speedily, allowing the Traffic Controller to decide afresh with respect to Sabbath street closures while also granting the right to appeal these decisions. Even so, it is clear that—from an administrative procedural perspective—the lack of this appeals mechanism will not influence the validity of the decisions.

98. It has been argued before the Court that the matter of Sabbath street closures must be regulated by statute. This approach is indeed proper. The subject matter is important and it is appropriate that it be enshrined in legislation. Moreover, it is also appropriate that the legislature prescribe primary arrangements and leave secondary determinations to administrative authorities.

While this is how a constitutional democracy operates, this is not the question placed before us. Our question is whether the existing legal regime, which endows the Traffic Controller with the authority to determine primary arrangements respecting the flow of traffic—such as the matter of Sabbath street closures—is illegal because the primary arrangements are not enshrined in legislation. This question is to be answered in the negative. We are not to substitute the desired law for the existing law. Many are the matters in our lives, which in the past were regulated by secondary legislation but were in fact worthy of being anchored in primary legislation. Suffice it to cite the matter of recruiting Yeshiva students to the army. It has been argued that this last issue is an important one which would best be anchored in primary legislation. With this the Court agreed. Nevertheless, we held that the lack of primary arrangements prescribed by statute does not invalidate the secondary legislation in this respect. *See Ressler* [33], at 501. This too is the law in the case at bar. While this is not desirable, it is nonetheless legal.

Violence

99. For a considerable amount of time now, Ultra-Orthodox factions have engaged in violent activities on Bar-Ilan Street. Stones were thrown at passing cars, and police intervention was required, Sabbath after Sabbath. There are those who believe that this violence has succeeded in bringing about a new perspective regarding freedom of movement on Bar-Ilan Street. This is to say that the street's partial closure will, to a certain extent, be tantamount to rewarding this violence, as Justice Landau so accurately described in *Baruch*, at 165 [2]:

In a law-abiding country such as ours, the physical pressure of illegal demonstrations and violent protests must never be allowed to impose solutions. Violence breeds violence and a country that allows such violence to succeed will destroy itself from within. I am fearful that this issue can serve as an obvious example of such destruction, for it gives the impression that the riots and demonstrations which took place pressured the government into searching for a new solution to the problem.

This having been said, the fact that it was the violence that pushed the matter to the fore, and that precipitated the matter's review, does not, in and of itself, provide sufficient reason to strike down the decision—provided that its content was not influenced by the violence. Justice Landau insisted on this point in *Baruch*, at 165 [2], holding:

How shall the Court, in hindsight, deal with the unfortunate fact that the administrative arrangement in question was reached only after violence? Certainly, no court would validate an invalid arrangement for fear that voiding it will result in renewed violence. Nor will it, on the other hand, strike down an arrangement, which appears both valid and appropriate, only because it was motivated by an attempt to find a deal with violence. The proper response to illegal activities is an appropriate police reaction, and the enforcement of the penal law.

Indeed, we must distinguish between this violence and the administrative authority exercised in its wake. All legal means must be employed to fight the violence, *see* H CJ 153/83 *supra*. [22], at 406, and every person's

freedom of movement must be protected. “Maintaining an arrangement does not imply surrender to those threatening to violate it. Rather, it is extending shelter and protection to the victims of such violence-mongers.” HCJ 166/71 *Halon v. Head of the Local Council of Ousfiah* [63], at 594. (Berenson, J.) Freedom of movement in Israel must not be allowed to fall prey to violence.

100. As for the exercise of administrative discretion, such discretion is deemed flawed when it is influenced by the violence on the street. *Compare* HCJ 549/75 *supra*. [40], at 764. The balances between the various relevant considerations must be struck on the basis of their respective weight. The violence on the street must not influence this weight. A government authority whose path is influenced by violence on the street is destined to falter. In this respect, Justice Silberg, in HCJ 155/60 *Elazar v. Mayor of Bat-Yam* [64], at 1512, correctly pointed out:

Today, there may be demonstrations and protests by various religious factions; tomorrow, the anti-religious sectors may be the ones accused of running amok and disturbing the peace... this phenomenon is a Sword of Damocles dangerously dangling over us, leading to the surrender of public institutions to the terror on the streets.

Justice Landau, in HCJ 512/81 *The Archeological Institute of Hebrew University, Jerusalem v. Minister of Education and Culture* [65], at 543, spoke in a similar spirit:

Tolerance and patience are indeed necessary, as is considering the feelings of the other side. This by no means implies that one should surrender to the pressure from illegal demonstrations and the violent behavior of extremist groups, seeking to impose their views and will on government authorities, whose authority they do not recognize.

This having been said, the proper exercise of discretion is not to be invalidated merely because violence raised an awareness of the problem. Such is the case here. I am convinced that the decision of the Minister of Transportation was taken with a proper understanding of freedom of movement and its influence on the Ultra-Orthodox public’s religious sensibilities. As such, his decision was not influenced by the violence, except for the fact that it was the violence which brought the matter to the Minister’s attention.

101. The Minister’s decision was to partially close Bar-Ilan Street on Sabbaths. We have seen that this decision strikes a proper balance between the conflicting considerations regarding the flow of traffic within the city. As noted, the full closure of the street would excessively infringe the freedom of movement. This being the case, the decision to close the street to traffic during certain hours is premised on the fact that it will be open for the remainder of the day. If the violence will continue, however, and if it will affect the free-flow of traffic during the hours when vehicles are permitted to travel, then secular residents will likely refrain from driving on Bar-Ilan for fear of being attacked. If this scenario materializes, the delicate balance struck shall be undermined. Under such circumstances, there will be no choice but to fully reopen Bar-Ilan to traffic on the Sabbath, with the police strictly enforcing the law.

Tolerance

102. Tolerance is among Israel’s values as a democratic state. It is by virtue of tolerance that rights may at times be infringed on in order to protect feelings, including religious sensibilities. Tolerance is also one of the State of Israel’s values as a Jewish state, as noted by Justice Elon, in *Neiman* [18], at 296:

This is the doctrine of government in our Jewish heritage—tolerance for all, of each and every group, to each opinion and each world-view. Tolerance and mutual understanding ensure that each individual and every group has a right to express its views.

Hence, tolerance serves as a measure for striking the proper balance between various clashing values, as I noted in CA 294/91 *supra*. [19], at 521:

Tolerance constitutes both an end and a means. It is in itself a social end, which every democratic society must aspire to fulfill. It equally serves as means, as a tool for balancing between social goals, and allowing for their reconciliation when they clash with each other.

How is one to be tolerant towards those who are not? In the petitions before us, we repeatedly heard the argument that the Ultra-Orthodox residents are not tolerant of their secular counterparts. They are not prepared for any compromise whatsoever, as tolerance would dictate. An example of their unwillingness to compromise is the

fact that they rejected the Court's proposal regarding the closure of Yam-Suf Street. It was argued that they view tolerance as a one-way street—to serve their interests, absent any compromise on their part.

103. It cannot be denied that these contentions do have a certain basis in the facts presented. The Ultra-Orthodox's refusal to compromise regarding Yam-Suf Street was a difficult blow. In truth, tolerance should be mutual, as President Shamgar wrote in *Hoffman* [39], at 354:

Tolerance and patience are not one-way norms, but broad, multi-dimensional imperatives...tolerance is not to be invoked only to collect rights, but rather, as a measure for recognizing one's fellow's entitlements...tolerance must be mutual. Shows of strength that surface from violent groups are not worthy of such tolerance.

What then is the law when certain groups in society are intolerant? Are they then unworthy of tolerance? To my mind, it is incumbent upon us to be consistent in our understanding of democracy. According to the democratic perspective, the tolerance that guides society's members is tolerance of everyone—even towards intolerance, as I wrote in H.C.J. 399/85 *supra*. [25], at pp. 276-277:

The democratic regime is based on tolerance...tolerance of our fellows' deeds and views. This includes tolerance of those who are themselves intolerant. Tolerance is the force that unites us and permits co-existence in a pluralistic society such as ours.

It is incumbent upon us to be tolerant even of those who are intolerant of us, due to the fact that we cannot afford to be otherwise. Because if we are not tolerant of the intolerant we shall undermine the very basis of our collective existence, premised on a variety of opinions and views, including those that we disagree with, and including the view that tolerance is not mutual.

Judicial Review

104. The Minister of Transportation was faced with a difficult situation, which can legally be dealt with several ways. Thus, he would have been authorized to decide to continue with the status quo. In other words, Bar-Ilan Street would have remained open to traffic. This would have been a proper decision, striking an appropriate balance between the various considerations to be taken into account. This, however, was not the Minister's decision. Instead, he opted for a partial closure of the street on Sabbaths. He was authorized to do so in all that regards the use of Bar-Ilan as a traffic artery without direct access to adjacent land users. His decision to this effect is within the zone of reasonableness. Under these circumstances, there isn't any place for the High Court's intervention. In fact, the question is not how the Court would act, if it were in the Traffic Controller's place, but rather if the latter acted as a reasonable Traffic Controller would have. My answer to this question is in the affirmative. This, however, is not the case with respect to the use of Bar-Ilan Street as a traffic artery which also provides access to adjacent land users. In this respect, the administrative process was flawed and the decision adopted deviated from the realm of reasonableness. In this regard, the Court has no choice but to intervene.

A Final Word

105. Long have I traveled down the treacherous road that is Bar-Ilan. The case before us is by no means simple. From a legal perspective, it is most difficult. A constitutional democracy will hesitate before it infringes human rights in order to safeguard feelings. A delicate balance between conflicting considerations is required, and this balance is not in the least bit simple. The case before us is difficult from a social perspective. Attempts to reach an agreement and to strike a compromise have all failed. This being the case, the solution must be found in a judicial ruling, which is quite unfortunate. Nevertheless, in President Landau's words in *Dawikat* [3], at 4 "as judges, this is our role and our duty."

The Result

106. The final result is as follows: a reasonable alternative to Bar-Ilan Street was found in all that concerns travel arrangements from one end of the city to the other. Under these circumstances, the partial closure of the street during prayer times on the Sabbath, as per the Minister's decision, strikes an appropriate balance between freedom

of movement and the Ultra-Orthodox local residents' religious sensibilities and observant lifestyle.

Consequently, I would have rejected the petition and revoked the *order nisi* had the matter of the local secular residents and their families not arisen. Clearly, this presumes that three conditions are met. First, the alternative routes must be open on the Sabbath. Second, Bar-Ilan Street must remain open to traffic on the Sabbath during the hours when traffic is permitted, and the free-flow of traffic must not be hampered by violence. Third, Bar-Ilan Street should remain open to emergency and security vehicles even during prayer times.

The factual situation, however, is quite different. There is a problem with the traffic arrangements regarding the local secular residents, living around Bar-Ilan Street—they, their family and loved-ones, and all secular residents who visit their religious friends on the Sabbath. The interests of these individuals were not taken into account. Nor was a proper factual basis prepared. In this respect, the Minister of Transportation's decision was made in violation of proper administrative procedure, as it failed to distinguish between the different sectors of the population residing in the areas in question. Thus, Bar-Ilan Street was partially closed to all traffic on the Sabbath. Under these circumstances, I suggest that the Court reject the petition in HCJ 5434/96 and make the *orders nisi* in HCJ 5016/96, 5025/96 and 5090/96 absolute, so as to strike down the Minister's decision to partially close Bar-Ilan Street and return the matter to him. In his new decision, the Minister will take into account the interests of the local secular residents and their guests, as this judgment instructs. These

interests will be considered in accordance with an appropriate factual basis, according to the conditions set out in this judgment.

Under the circumstances, no order for costs shall be made.

Justice T. Or

The Minister of Transportation decided to close a section of Jerusalem's Bar-Ilan Street, measuring 1.2 km., to motor traffic during prayer times on Sabbaths and Jewish holidays. Was this decision lawful? This is the issue in the petitions before us.

Opening Comments

1. My judgment was written prior to having had the opportunity to examine the judgment of my colleague, the President. As the President elaborated on the relevant facts and procedures, I will not revisit them. Initially, I only addressed those facts that were relevant to my position. However, after reading the President's judgment, I felt it necessary to add three additional brief comments for the purpose of clarifying my position.

2. To be quite frank, I would have preferred it had the various parties in the case at bar come to an arrangement, one that could have spared the involvement of this Court. This was the reason for our recommendation that a committee be set up in order to help the parties strike a compromise. To my dismay, these efforts were fruitless. As such, we must deal with a matter which is the subject of fierce public controversy. Whichever way we decide, there will be those who will not be satisfied, and who will regard our decision as harmful. No verdict is capable of satisfying everyone. To the extent that we discharge our judicial duty to review the Minister of Transportation's decision in accordance with the legal criteria used for assessing the legality of administrative decisions, criticism is to be expected from one side or the other. As has become the norm, the criticism will be of the result reached by the Court, or by any one of the presiding judges. With the exception of a precious few, not many will be particularly interested in the legal reasoning underlying any of the opinions. We have grown accustomed to the fact that the rulings of this Court have sensitive political or social ramifications.

Even so, despite our awareness of these implications, we are not at liberty to refrain from deciding matters that demand the attention of this Court. As difficult as the task before us may be, and despite the criticism of those whose claims will be rejected, we have no alternative but to discharge our duty and rule according to the law applicable to the facts of the case, each judge according to his ability, understanding and conscience.

This having been said, let us proceed to the matter at bar.

Bar-Ilan Street