# The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis

*Menachem Elon*

The synthesis of Jewish and democratic values is a central topic of discussion in many and varied spheres of Jewish life. It is a subject whose entire scope covers much more than legal aspects, as it is an issue burdened also with significant political, ideological, cultural, social and religious overtones. Our Jewish Sages have an important saying: *tafasta merubeh, lo tafasta*—if you attempt to accomplish too much, you will end up accomplishing nothing at all. This article hopes to acquaint the reader with how the Israeli legal system and courts have faced the various aspects of this issue.

"The Values of the State of Israel as a Jewish and Democratic State"

*The Origin of the Expression*

The expression "the values of the State of Israel as a Jewish and democratic state" is found in the Basic Law: Human Dignity and Liberty, which became law in the State of Israel as of March 1992. The section of the statute defining its purpose reads:[1]

> The objective of this Basic Law is to protect human dignity and liberty in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state.

A similar section can be found in the Basic Law: Freedom of vocation, also from 1992.[2]

This concept originated in the Israeli Declaration of Independence which, as stated in the early decisions of the Supreme Court, expresses "the vision and credo of the nation."[3] Indeed, from an ideological and theoretical point of view, this concept has been a subject of discussion within Jewish society since the advent of the Emancipation, after which the Jewish community as a whole could no longer be characterized as a religiously-observant society. By virtue of the enactment of these Basic Laws, which protects life, bodily integrity and dignity, property, personal freedom, right to travel, privacy and freedom of vocation, this *vision* now has *binding legal force*.

The legislative history of the Basic Law: Human Dignity and Freedom sheds light on the particular significance with which the Knesset viewed this anchoring of the values of the State of Israel as a Jewish and democratic state. The Basic Law originated as a private bill introduced by MK Amnon Rubinstein, the "purpose" section of which contained no reference to these dual values, and the "balancing" section (section 8) of which mentioned only the phrase "democratic state," leaving out any reference to a "Jewish state." Only in the Legislative Committee of the Knesset, prior to the second and third readings of the bill, was the expression "the values of a Jewish and democratic state" introduced into the bill, in order to reach—in the words of MK Uriel Linn, the Chairman of the Committee—"a broad consensus."[4]

*The Values of the Jewish Heritage and the National Awakening*

This kind of expression is unique to the Israeli legal system, and it has no parallel in any other Western democratic legal system. One does not refer to "the values of an *American* and democratic state," or "the values of a *French* and democratic state," or "the values of a *Canadian* and democratic state." The laws of these countries speak of "freedom-loving" democracies, not of French or Canadian values. By contrast, in the State of Israel, the term "Jewish" expresses the very nature of the State.

The reason for the unique situation in Israel is embedded in the history of the Jewish Nation, which for close to 3,000 years created and developed a legal system that governed the lives of the Jewish people when they had a sovereign state of their own—a relatively short period—and during the nearly two thousand years they lived in the Diaspora without political independence. During most of this period, until the "Emancipation" at the end of the 18th century, the Jewish communities throughout the Diaspora retained internal autonomy, including autonomous courts which operated in accordance with the Jewish legal system.

Two factors account for the unparalleled development of an autonomous Jewish law in the absence of sovereignty for so many years. One is internal, based on the nature and quality of Jewish law and on the place of that law in the spiritual and cultural life of the Jewish people. The second factor is external—the general legal and political consensus that prevailed during the course of political history until the 18th century, with respect to the concepts of governmental and judicial power, and the existence of various bodies with their own judicial systems.[5] The fact that the Jewish people lived throughout this entire period according to its national law—Jewish law—brought about a continuous development of that law so as to satisfy the ever-changing needs of the people. This enormous creativity, which finds its expression in the Biblical exegesis, the Jerusalem and Babylonian

*Talmudim,* and mainly in over 300,000 *Responsa* (legal opinions given by the Jewish authorities and courts in actual problems from the 7th century onwards) is apparent in all the areas of Jewish law—civil, criminal, and public-administrative law—and includes such basic rights as personal freedom, human dignity, mobility, privacy, and freedom of speech.[6]

The question of the recourse to Jewish law for the interpretation of the law of the State of Israel today—with regard to the civil, criminal and constitutional law contained in the *Halakhah*[7]—has nothing to do with the relationship between religion and state, notwithstanding the nature of Jewish law as a national-religious creation. There are two reasons for this. First, the Jewish legal system itself makes a fundamental distinction between that portion of the law that concerns the relation between man and God *(isurah)* and subjects dealing with the relation between man and his fellow man and between the individual and the public authority. These include, for the most part, questions that come under the rubric of *mamonah* (monetary law)—and not *isurah.* The methods of creation and development as to these questions are much more numerous than those in the category of *isurah.*

The second reason is that when we deal with the problem of the recourse to Jewish law to help interpret a statute of the Knesset, we refer to Jewish Law as the *national law of the Jewish people,* the law that governed the life of the Jewish people throughout history.

Certainly, there are differences of opinion as to the appropriate interpretation of the term "Jewish," just as there will be differences of opinion as to the appropriate interpretation of the term "democratic." But there should be no doubt that the expression "the values of a Jewish state" must be interpreted, in the first instance, in accordance with the comments of the Chairman of the Legislative Committee of the Knesset at the bill's second and third reading: "The law provides . . . that we are required to follow the values of the heritage of the Jewish people (*moreshet yisra'el*) and of Judaism."[8] Similarly, there is no doubt that the term "Jewish" includes the values of the period of National Awakening, as expressed by the Zionist movement, which led to the establishment of the State of Israel, which in turn enacted these Basic Laws.[9]

### *The Synthesis Required by this Dual-Value Objective*

The "purpose" section of the new Basic Laws entails a substantial and even revolutionary change in the approach to statutory construction. Previously, the courts viewed basic rights from the vantage point of a freedom-loving democracy. The courts were not *required* to apply the values of the State of Israel as a Jewish state, although some judges, particularly those on the Supreme Court, voluntarily did so, reflecting the statement of principles in the Israeli Declaration of Independence.

Since the enactment of the Basic Laws, this dual-value objective is one which the courts *must* attempt to reach in interpreting and giving content to these two Basic Laws. This requirement also applies to the "balancing" section, which permits the limitation of a basic right. One of the conditions set forth in this balancing section is that the limiting statute must reflect the values of the State of Israel: the values of a Jewish and democratic state. Moreover, the limitation must be for a proper purpose and only to the extent necessary.[10]

It goes without saying that the Court, in determining the essence of a basic right, must examine the sources which express the Jewish values and those of a freedom-loving democracy. Out of such an examination, the Court must arrive at a synthesis of the two systems. As was stated in the *Kestenbaum* case[11]: "One will throw light on the other and supplement the other, and both will become one in our hands." But the question arises: what is the nature of the values that make up this dual-value objective—the values of a Jewish and democratic state?

## *The* Halakhah: *A Mighty Symphony of Many Different Notes*

Before responding to this question with some examples, I would like to expand on the meaning of "the values of a Jewish state." As mentioned previously, the term "Jewish values" refers, first and foremost, to the basic principles, thinking, laws and discussions contained in the vast legal heritage of Judaism. These constitute a national Jewish creation, developed over generations and varied social and historical backgrounds by ongoing debates in thought and practice, as has been the tradition of the Jewish heritage from ancient times. In examining the values of the State of Israel as a Jewish state, we must take note of what I have said a number of times concerning the proper approach to the sources of Jewish heritage:

> It is well known that Jewish thought, throughout the generations, including even the *Halakhic* system itself, is replete with differing views and conflicting approaches. All views and opinions have contributed to the depth and richness of Jewish thought throughout the generations. Nevertheless, the scholar and researcher must distinguish between statements made for a particular time only and statements intended for all times, and between statements reflecting the accepted view and those expressing aberrant views. Out of this vast and rich treasure, the researcher must extract the ample material which meets the needs of his time; and the new applications will then themselves be added to the storehouse of Jewish thought and the Jewish heritage. Such an approach and the making of such distinctions are essential to Jewish thought and to the *Halakhah*—as they are, because of their very nature, to every philosophical and theoretical system.[12]

These remarks are especially significant when we must now interpret basic principles to achieve the dual-value goal of a Jewish and democratic state.

Jehiel Michel Epstein, the author of the important codificatory work *Arokh ha-Shulhan,* has described the *Halakhah* in the following felicitous metaphor:[13]

> All the different points of view among the *tannaim,* the *amoraim,* the *geonim,* and the later authorities are, for those who truly understand, the words of the living God. All have a place in the *Halakhah,* and this indeed is the glory of our holy and pure Torah. The entire Torah is described (in the Bible] as a song (*shirah*),[14] and the beauty of a song is enhanced when the voices that sing it do not sound alike. This is the essence of its pleasantness. One who travels the "sea of the Talmud" will hear a variety of pleasant sounds from all of the different voices.

The *Halakhah* is a mighty symphony[15] made up of many different notes; therein lies its greatness and beauty. In every generation, it needs a great *conductor,* blessed with inspiration and vision, who can find the interpretation of its many individual notes that will please the ear and respond to the needs of the contemporary audience.

### *The Dual-Value Objective as the Basic Infrastructure of the Israeli Legal System*

It is important to emphasize that the "values of the State of Israel as a Jewish and democratic state" has significance beyond the interpretation of the basic principles of the Basic Laws. As said in the *Shefer* case:[16]

This examination of the values of the State of Israel as a Jewish and democratic state and the proper approach to the synthesis of these values is of great significance. The basic rights, the provisions and guidelines found in the *Basic Law: Human Dignity and Liberty,* reflect not only upon themselves but upon the entire legal system in Israel, for they embody the basic values of the Israeli jurisprudential approach with all that that implies. . . . In light of the legal importance and standing of the *Basic Law: Human Dignity and Liberty,* the provisions of this law are not simply the *basic values* of Israeli jurisprudence, but also embody the basic infrastructure of the Israeli legal system whose rules and laws will be interpreted in accordance with the purpose set out in this Basic Law, i.e., to embody the values of a Jewish and democratic state.

## Methods of Synthesis

### *Two Categories of Subject Matter*

How does this synthesis actually work and how does "one [system] shed light on the other and supplement the other?" There are many methods of reaching synthesis, and it is worthwhile to note some examples. However,

before surveying detailed examples of synthesis found between the values of a Jewish and democratic state, it is appropriate for us first to mention how synthesis operates in two categories of subject matter.

The first category is that class of legal principles that might be value-based but that do not have any sensitive-ideological "baggage" (for example, "good-faith" and "the public order" in the law of contracts; principles related to pre-trial detention and the admissibility in criminal law of evidence obtained illegally). The principal difficulty in finding a synthesis in this category of cases is ignorance of the sources and content at Jewish law, not the presence of value-based ideological differences of opinion. For this class of issues, one finds synthesis by thoroughly examining the issue in both sets of sources. This entails learning the topic from within Jewish law, in the wide sense of the term, from all its periods, and likewise, studying the issue as addressed in the sources of Western democratic thought. This method will find itself appropriate for each and every legal principle in civil, criminal and administrative-constitutional law, but in general, will not lend itself to finding a solution to what are *a priori* conflicts of *ideological values*, nor to questions regarding the relationship between the three branches of government.

The second category includes those ideological matters and values, such as the relationship between religion and state, freedom of religion and freedom from religion, for which the way to find synthesis is, first and foremost, *via* judicial restraint, re-evaluation of the principle of standing (that is, the right to petition the High Court of Justice without a direct personal interest), etc. Methods of attaining synthesis for this second category will be dealt with in the "Synthesis in Legal-Ideological Issues" section of this chapter.

Clearly, certain topics may belong to both categories to a certain extent. Examples include the limits of freedom of expression and the dignity of man. Likewise, it goes without saying that, for all issues, the knowledge of the topic and one's intimacy with it will play an important role in finding an appropriate solution.

### *Examples from the First Category*

We shall begin our survey with topics from the first category, the principal and more important one, in order to demonstrate how various decisions of the Israeli Supreme Court have found a synthesis of the Jewish and Western democratic legal and philosophic traditions.

### *The Concept of Democracy*

*The Principle of Majority Rule*. An instructive example of synthesis of Jewish and democratic values lies in the very values themselves. The concept

of democracy as a concept of public law, that a decision of the majority obligates the minority, is not found in the teachings of the Talmudic Sages. The biblical statement "follow the majority"[17] refers to a judicial majority—namely, a majority of judges—and to the concept of presumptions, not to the idea of democracy.

The connection to democracy arose with the rise of the *Kehillah* (the Jewish community) in the 10th century. Prior thereto, leadership by a single individual was the practice, originally by a king, and later by a president (*nasi*) in the land of Israel, and by an Exilarch (*resh galuta*) in Babylonia. From the 10th century, and until the advent of the Emancipation, Jewish communities enjoyed juridical autonomy much as other national and social minorities did, in exchange for a heavy communal tax burden.[18] It was at that time that the concept of representative leadership arose. The *Halakhic* authorities of the time debated the question of majority rule in communal affairs. One great scholar, *Rabbenu Tam*,[19] held that the majority could not bind the minority.[20] (This was, in fact, the view accepted by European corporate law in the Middle Ages.) However, the view of most *Halakhic* authorities was that the biblical command "follow the majority" also applied to public affairs, and this view prevailed. As Asheri[21] said, "If a few individuals could veto an enactment, the community would never be able to legislate,"[22] and "there could never be a communal enactment, for when would a community ever agree unanimously on anything?"[23] The principle of majority rule was also arrived at by equating the public with the court,[24] so that majority rule was applied, not only to the judicial function, but also to communal legislation and other public affairs.

*The Fundamental Rights of the Minority*. But Jewish law went beyond the democratic principle of majority rule. Like current Western democracies, it also protected the basic rights of minorities. A good example is provided by an enactment in the community of Mainz in the 12th century, according to which every resident had to pay a fixed amount in taxes, even if the individual was prepared to take an oath that he was impoverished and could not pay the tax. Three *Halakhic* authorities of Mainz (the Jewish High Court of Justice of those days in Germany) held this enactment to be invalid, declaring: "Does the fact that they are the majority give them a license to be robbers!"[25]

It is noteworthy that this statement originally appeared in the *Talmud*,[26] but in relation to a different matter. In that particular case, the public used a path through the property of an individual, and the rule was stated that they could continue to do so. The question was then raised in the *Talmud*: "May the public rob an individual of his property?" In the case brought before the *Halakhic* authorities in Mainz, no actual property was involved. The statement was used by the rabbis of Mainz as a basis for formulating the concept that a majority—even a democratic majority—may not steal

from an individual, not only in the *literal* sense, but also in the sense of infringing a basic right. About a hundred years later, *Rashba*[27] *used* the same *rationale* to invalidate an enactment that required an individual to pay tax on property located in a different community, thus forcing him to pay *double taxes*.[28] The basic concept of protecting minority rights was accepted and applied in many other cases.

*The Composition of the Majority: The Principle of Equality*. As to the question of what constitutes a majority, Jewish law exhibits an interesting development. An enactment adopted in the 12th century in the communities of France and Germany reads: "If the townspeople wish to adopt an enactment for the poor or any other enactment, and a majority of the *upright citizens* consent, the others may not nullify the enactment."[29] The majority is thus made up of the "upright citizens"—those who are scholars, or have a high social and economic standing. A similar rule was established by the Catholic church, a short time later: corporate law, then applicable in Europe, was that the majority could not bind the minority, yet the Fourth Lateran Council of 1215 established that local governors were to be chosen by "the greater or most sound part" (*maior vel sanior pars*) of the population, a formula similar to "a majority of the upright citizens." We find a similar characterization of what constitutes a majority in many *Responsa* in Spain and Germany.[30]

There was much debate beginning in the 15th Century in *Halakhic* literature, mainly in the extensive *Responsa* of the Spanish exiles who reached the Ottoman lands concerning the demand to give equal voting rights and an equal voice to all residents. The background to these demands was the social and cultural tension between the exiles and the existing communities. There were at least five positions taken. At one end was the view of Samuel de Medina (*Maharashdam*) of 16th-century Salonika, who sought to maintain the existing rule.[31] At the other end, Elijah Mizrahi, a leading authority in 16th-century Constantinople, stated: "It makes no difference whether the majority consists of the wealthy, the poor, the scholarly, or the unlettered, because the entire community is denominated a court in dealing with matters of communal interest. Even if all the scholars and all the wealthy are in the minority, the matter is governed by the majority and not by them."[32] Between these opinions were the intermediate views of Joseph Trani (*Maharit*), Isaac Adarbi, Abraham di Boton, Solomon ha-Kohen (*Maharshakh*) and many others who distinguished between financial matters and communal administration and appointments.[33] An examination of the creative devices of Jewish law in developing the existing law to respond to the needs of the time and the social climate is indeed enlightening. Such adjustments were accomplished in various ways: interpretation of existing sources; reliance on basic legal principles (such as: "Its [the Torah's] ways are pleasant ways and all its paths are peaceful"[34]); reliance

on custom and legislation; as well as turning to *aggadah* and legal philosophy. This last method was especially instrumental in solving many difficult legal problems.[35]

*Summary*. To the question: what is the synthesis of the values of a Jewish state with regard to the nature of democracy?, the answer is clear. The Jewish heritage, from the 10th century onward, developed the concept of majority rule. In addition, in the 12th century, at the latest, the principle of minority rights—that the majority cannot rule solely on the basis of power—was accepted. As we have seen, there were various views on the question of equality. Arriving at a synthesis of the values of a Western democracy and of a Jewish state, as provided in the first section of the *Basic Law: Human Dignity and Liberty* requires us to follow the ruling of Elijah Mizrahi, who advocated complete equality in constituting a majority.[36] To arrive at such a synthesis, a judge who deals with questions of democracy, the rights of minorities and equality of citizens must thoroughly examine the values of a Jewish state, namely, the legal analysis contained in the above-mentioned *Responsa,* and the historical situation which produced the demand for equality, as is reflected in the *Responsa* themselves and in other historical sources.

### *Women's Rights*

In the above-mentioned instance, Jewish values were used to develop rights and guarantees hundreds of years earlier than by their Western democratic counterparts. In other instances, though, Jewish values have been influenced by democratic values. That is the case in the next example, which involves women's rights.

*The Role of Women in Public Life and Their Right to Vote and to Be Elected to Public Positions*. Under Jewish law, women are entitled to the same rights as men with regard to such matters as personal liberty, privacy, bodily integrity, and freedom of thought and of speech.[37] In addition, women have served in public positions as prophets, judges and queens.[38] But these were isolated phenomena, and the guiding rule which became accepted in Jewish tradition was that "a woman's dignity is in her home."[39] Historically, in a number of areas in the sphere of public life, women have not been accorded the same rights as men.

In the early part of this century, when institutions of self-government were being formed within the developing Jewish community in the land of Israel, and when some democratic countries had not yet given women the right to vote, *Halakhic* authorities debated whether women should be granted the rights to vote and to be elected as representatives. Three different approaches were taken by the leading *Halakhic* authorities. The first approach, taken by Rabbi Avraham Yitzhak ha-Kohen Kook, the Chief

Ashkenazic Rabbi of Israel, and concurred in by many other leading scholars, including Yisrael Meir ha-Kohen of Radin, known as the *Hafetz Hayyim* (lit. "eager for life"), and Hayyim Ozer Grodzinski, denied women both the right to vote and the right to be elected. A second approach, which permitted a woman to vote but not to serve as a public official, was taken by Rabbi David Hoffman, the head of the rabbinical seminary in Berlin. The third approach adopted by many *Halakhic* authorities, led by Rabbi Ben Zion Uziel, the Chief Sephardic Rabbi of Israel, permitted a woman both to vote and to serve as a representative. These rabbis pointed to the fact that today, women are as educated and as knowledgeable as men to conduct negotiations, to engage in commerce and to manage public affairs, and that, in fact, many women nowadays fill important public positions.[40]

*The Shakdiel Case: The Functions of Religious Councils in Israel*. Ultimately, as we all know, it was the third view that prevailed. Today, throughout the State of Israel, women both vote in elections and are elected to public office, even in religious circles. Interestingly, though, the right of a woman to serve on a religious council in Israel was not accepted until very recently.[41] This question arose before the Israeli Supreme Court in the *Shakdiel* case,[42] in which the Court ruled that Leah Shakdiel had the right to serve on the religious council according to the Woman's Equal Rights Law, and even according to the *Halakhah,* as it is accepted today.

Members of religious councils are appointed by local municipalities and represent the various political parties. Their function is to deal with the administrative matter of providing religious services in the community, and not to decide *Halakhic* questions. If a *Halakhic* question arises, it is the responsibility of the local rabbinate—and not the religious council—to resolve it. Accordingly, the Supreme Court of Israel held, in a later decision of several years ago, that one may not be disqualified from serving on a religious council based on his or her personal views on matters of religion—whether they be of the Orthodox, Conservative or Reform movements.[43]

Although the decision in *Shakdiel* did not rest on the Basic Law, which had not yet been adopted, the conclusion I reached in the decision was based on finding a synthesis of Jewish and democratic values, by means of reliance on those *Halakhic* decisions which parallelled contemporary democratic values. Thus, we see that the democratic principle of equality and the right of everyone to fully participate in communal affairs has influenced the development of Jewish law in this important area of women's rights.

*The Role of Women in Learning and Teaching Torah*. Incidentally, I might add, the *Shakdiel* case also pointed to another area in Jewish law in which Jewish values have been influenced by democratic values. I am referring to the role of women as students and teachers of the Torah. Traditionally, women have been exempted from the study of Torah, and for many years

girls and women were taught only those laws which directly applied to them.[44] Nowadays, though, the position of the *Halakhic* authorities on this question has changed dramatically. Even the *Hafetz Hayyim*—who, as mentioned above, took the view that women should not vote or be elected—ruled that today, when women "learn how to write and speak the vernacular, it is certainly a great *mizvah* to teach them the Pentateuch, and also the Prophets and Hagiographa and the ethical teachings of the Sages."[45] More recently, many *Halakhic* authorities have urged that girls be given "an intensive education that includes the sources of the Oral Law," reasoning that "when women engage in every field of endeavor, Torah should not be the one area in which they are denied an education."[46] Based on these arguments, the Special Tribunal[47] in the *Nagar* case[48] expressed the view that, under Jewish law as it has developed, both parents have equal rights to determine the education of their children. In doing so, it questioned the decision of the district rabbinical court, which stated that, under Jewish law, the father has the sole right to determine the nature of their education. The Special Tribunal expressed its confidence that the Rabbinical Court of Appeals would also disagree with the decision of the district rabbinical court.

Thus, we see once more how democratic values have had an influence on Jewish values in the area of women's rights. As might be expected, a long series of decisions by the Supreme Court of Israel has dealt with these and other matters relating to the rights of women in the State of Israel.

### *Imprisonment for Debt*

There are instances in which Jewish law has taken two disparate positions on an issue in different periods, and there is room, under democratic principles, to choose either position. A good example is the question of imprisonment for debt when the debtor has assets, but refuses to pay. Original Jewish law absolutely prohibited infringing on the freedom of the debtor even in such a case. The only remedy for the creditor was to proceed against the debtor's property, this in contrast to all other ancient legal systems, which permitted the creditor to enslave the debtor and his family, to sell them as slaves and sometimes even to take their lives. Over the course of time, when deceivers multiplied, and in order to promote commerce and foster the giving of credit, the view was accepted in Jewish law that the original rule was to be applied only to debtors who were too poor to repay their debts. However, debtors who concealed their assets and refused to pay could be imprisoned for a period of time.[49]

This subject was dealt with by Israel's Knesset in two stages. In 1957, the government proposed to completely abolish imprisonment for debt even for those who had property but refused to pay, this being the original ap-

proach of Jewish law. The majority of the Knesset did not accept this approach. Many argued that modern conditions required that imprisonment be an available sanction to assure the payment of debts in these cases.[50] This view was accepted in 1967 in the Execution of Judgments Law, based on Jewish law as it crystallized in later years.[51] Subsequently, upon observing that the execution authorities were not careful in applying the law and were imprisoning even those who were too poor to repay their debts, the Supreme Court invalidated the regulation which was the basis for such imprisonment.[52] Here, too, there was broad reliance on the sources of Jewish law, and a synthesis of Jewish and democratic values was reached."

*Pre-Trial Detention*

Sometimes the Israeli Supreme Court has achieved a synthesis by choosing from among different and conflicting democratic values that value which coincides with the Jewish value. An example of this is the question of pre-trial detention of a defendant in a criminal case on the sole grounds of the gravity of the crime involved.

Section 5 of the *Basic Law: Human Dignity and Liberty* mentions pre-trial detention as one of the situations in which an individual's personal freedom is limited. In the *Suissa* case,[54] I contended that this section supports my abiding view that a defendant should not be detained pending trial on the sole ground of the gravity of the crime. In my view, pre-trial detention is warranted only if his release would pose a danger to public safety and security, or could result in the obstruction of justice or the fleeing of the defendant. I so concluded in a long series of cases, on the grounds that it was a *possible* interpretation of the Penal Law and was a *necessary* outcome of an examination of the sources of the Jewish heritage, which maintains that a person, whose innocence is presumed, should not be imprisoned unless one of these situations exists. My colleague Justice Barak was of the opinion that a defendant may be detained on the sole grounds of the gravity of the crime, even if there is no danger to public safety, in order to "promote public confidence in the effectiveness of the criminal justice system."Apparently, Justice Barak believed that his approach is faithful to the values of a democratic state. However, a synthesis of Jewish and democratic values requires that we prefer the result that reflects the values of the State of Israel as a Jewish state, and that we interpret the democratic viewpoint in that light.

This approach is necessary and proper for two reasons. First, in this way we find a synthesis on this question between Jewish values and those of a number of democratic legal systems which, like Jewish law, do not imprison a defendant pending trial, except for the crimes of murder, treason and the like, or when his release would pose a danger to public safety or

could result in the obstruction of justice. Second, even if there were no democratic legal systems that agreed with the approach of Jewish law, it is proper that regarding such a fundamental question of human freedom (with which the Basic Law explicitly deals) that we characterize the democratic viewpoint in the light of Jewish values, *for the values of* a *Jewish* state are *mentioned first in the statute*, prior to the reference to the values of a democratic state. I might add that my approach to pre-trial detention has now been accepted by a majority of the Supreme Court, including Justice Barak, and a statute has been enacted on this subject that adopts my view.[55]

*Zionist Values: The Law of Return*

As mentioned previously, the term"values of a Jewish state"includes the values which became especially significant during the period of National Awakening which brought about the establishment of the Jewish state. These are the values of Zionism and its many offshoots, such as the provision in the *Law of Return* that all Jews have the *right* to immigrate to Israel, the importance of the Hebrew language, the national anthem and flag.

The approach which prefers the result that arises from the State of Israel as a Jewish state, and which requires that the democratic values be interpreted in that light, may be applied to those values that reflect the Zionist philosophy. An example of this is the provision in the *Law of Return*[56] which states: "Every Jew has the right to immigrate to the Land of Israel." One who advocates the primacy of Israel as a democratic state may raise the argument that this provision contradicts democratic values, as it favors Jews over all others. The proper answer to this argument is that, in regard to this question, we give priority to the Jewish values over the democratic values, for this is the *raison d'Ítre* of the Jewish state. As David Ben Gurion, one of the founders of the State of Israel and its first Prime Minister, stated shortly after the establishment of the State:[57]

> The State of Israel differs from other countries in both the factors that brought it about, and in its goals. It was established only two years ago, but its roots go back to ancient times, and it is nourished by immemorial springs. Its rule is confined to its inhabitants, but its gates are open to all Jews, wherever they may be. It is a Jewish state not only because most of its inhabitants are Jews. It is a state for Jews all over, for all Jews who want to join it.

Ben Gurion continued:

> The *Law of Return is* a foundation stone for the laws of the State of Israel. It reflects the central goal of our state—the in-gathering of the exiles. This law establishes that it is not the Jewish state that confers on a Jew of another land the right to settle in it, but that right is part of the natural heritage of every Jew, if only he desires to join in the settlement of the land.

In the State of Israel, Jews have no superior rights over non-Jews. The State of Israel is based on complete equality of rights and obligations of all its citizens. This was established in the Declaration of Independence, which states: "The State of Israel will maintain complete social and political equality for all its citizens without regard to differences in religion, ethnic origin or gender." However, it is not the State which confers on the Jews of the Diaspora the right to return. This right predates the State of Israel. It is this right which built the State. It is based on the unbroken historical connection between the people and the homeland.

In the *Ben Shalom* case,[58] I discussed in great detail the religious, national and historical factors which led to the establishment of the State of Israel. These factors are reflected in Section 7A of the *Basic Law: The Knesset,* which provides that a party may not participate in Knesset elections "if its goals and actions explicitly or implicitly negate the existence of the State of Israel as the state of the Jewish people."

## Basic Rights and Basic Responsibilities— A Factor in Reaching a Synthesis

### *The Creation of Man in the Image of God as the Basis of Human Rights*

As part of the task of finding a synthesis of the values of a Jewish state and the values of a democratic state regarding the rights delineated in the Basic Laws, we must define the concept of human rights itself and carefully examine its sources. According to the Jewish view, "human *rights*" is only one side of the coin. The other side, *and the primary one*, is reflected in the term "human *responsibilities*," which provides the support for "human rights." Thus, in finding the synthesis we seek, we must first consider this fundamental outlook of Judaism and study the interconnection between "human rights" and "human responsibilities."

According to Judaism, the basis for human rights in all of its manifestations is the creation of man in the image of God. However, this very concept that spawned human *rights* also spawned human *responsibilities*. Just as human freedom and dignity are *rights*, so are they *responsibilities.* In other words, the prohibition against violating a person's dignity and freedom is not only a right of that person, but also his responsibility. Man is commanded and obligated not to violate his *own* human dignity and liberty, as he is commanded to preserve the image of God in *himself*.

Human rights in Western democracies are based on the concept of the autonomy of the individual and his right to self-determination. However, Western democratic thought does concede that human rights are not absolute. It is accepted in Western democracies that the exercise of a human

right may be limited when it conflicts with other rights. When such a conflict occurs, it is necessary to balance the rights of *A* against the rights of *B*, or the rights of the individual against the rights of society. In such legal systems, it is this need to "balance" rights that gives rise to the responsibility not to injure someone else, and the responsibility to help protect society. Thus, an individual's right or a state's interest may impose an obligation upon another individual. This explains, for example, American statutes and decisions prohibiting assisting a suicide on the grounds of the "compelling *state interest*" to preserve human life and preventing suicide.[59] In Jewish law, there is no need to balance between *rights* and *interests*. The very same basic principle that man was created in God's image gives rise to man's *right* to live and also his *responsibility* to live. Both the right and the responsibility serve to preserve the image of God in the human being. It may even be correct to say that first came the *responsibility* to save life, as Scripture states, "You shall *live* by them [my laws]"[60] and "you shall surely *preserve your lives*."[61] This responsibility gives rise to the rights to life and health and the like.

### *The* Guetta *Case*

An instructive example of this dual construction from a single source is found in the *Guetta* case.[62] The case concerned the conducting of a body search of an individual by the police in a corner of an alley to determine whether he was in possession of drugs. He was told to remove his clothes, so that the private parts of his body could be searched. After an analysis of the position of Jewish law on the subject of human dignity, and the humiliation involved in removing one's clothes in a public place, the Israeli Supreme Court concluded:

> The infringement of "human dignity" signifies the humiliation or denigration of the *image of God in man*. . . . The *Halakhah* strenuously objects to humiliation or denigration of the image of God that is in man, which occurs when there is a body search of an individual and he is required to undress in public. Moreover, a person should not be humiliated and denigrated in public even to prevent the transgression of a *Halakhic* prohibition. (As stated, there is unanimity on this in the case of a rabbinic prohibition, and according to some, it applies even in the case of a Biblical prohibition.)
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> Humiliation and denigration of a person is permitted only for an appropriate purpose, such as the prevention or discovery of a criminal act, and then only to the extent necessary for that purpose. It all depends on the particular circumstances and such factors as the purpose of the search, the nature of the crime that the individual is suspected of having committed, whether it is an emergency situation, the justification for the search, the manner and place of the search, *etc*.

Subsequently, the decision concluded that even had the individual consented to the search, it would still have been a violation of human dignity.

He himself must preserve his own dignity, and we must do so even if he does not. The court stated:

> [E]ven when the individual consents, not everything is permitted. Inasmuch as the infringement of an individual's human dignity and privacy is involved, the search must be conducted with a great deal of propriety, even when there is consent, so as not to trample upon the dignity and privacy of the individual, to the extent possible consistent with the purpose of the search. This conclusion arises from the sources of the Jewish heritage discussed above. The basic foundation for the meta-principal of human dignity is that man was created in God's image, and therefore, each person is commanded to guard even his own dignity, as infringement of one's own dignity is a denigration of the image of God. . . .
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> The essence of the matter is, as Ben Azzai said, "Know *whom* you are denigrating; God made him in His own image."[63] And there is no difference between the denigration of God's image in a fellow human and the denigration of God's image in oneself. Thus, even when consent is given, we may not, for example, carry out such a humiliating act in public, as we must protect the basic right to dignity and privacy . . .
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> When consent is given to a search, we may conduct the search of the individual's body (both internal and external). But, we are still obligated as human beings to preserve the dignity of the individual being searched, *as well as our own dignity*. In this way, we will find the proper balance that reflects the values of the State of Israel as a Jewish and democratic state, for an act that has an appropriate purpose but may not be carried out in a manner that goes beyond what is necessary.

### *The Relationship between Parents and Children*

We find another example of the interaction of rights and responsibilities in the relationship between parents and children in *Nagar*:[64]

> The right granted in section 15 [of the *Capacity and Guardianship Law*] ("the guardianship of parents encompasses the *responsibility* and the *right* to care for the needs of the child, including his education") is only the right to fulfill the responsibilities enumerated there.
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> We have also spoken[65] of the basic human right, which needs no explanation, that a child "belongs" to his parents who have given birth to him, and that parents "belong" to their children. I put the word "belongs" in quotation marks, because we do not speak here of ownership of property, but of a relationship in the sense of a natural tie, as to which the usual legal concept of ownership is, on the one hand pale and feeble, and on the other hand, offends our sensibilities.
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> The profound significance of this natural tie is particularly reflected in Jewish law. The legal term "right" in its usual and accepted meaning is not applicable to the relation of parents and children. As Samuel de Medina (*Maharashdam*), a leading authority in Salonika in the sixteenth century, wrote:
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> 'One who carefully studies the sources, and traces their roots in the Talmud and the codes, and is not misled by habit and convention will recognize the truth: the principle is that the "right" which the sages referred to in speaking of

> the relation of a daughter to a mother is the "*right" of the daughter* and *not the "right" of the mother*. The same as to a son. They spoke of *the "right" of the son.'*[66]
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> For this reason, the implementation of these "rights" of the parents is subordinate to the principle of the welfare of the child, which is the over-arching principle which guides the entire subject of parent-child relations in Jewish law.

Here, we see the interaction of rights and responsibilities which is nourished by and is subject to an over-arching principle.

*"My Servants, and not the Servants of Servants"*

The approach to rights and responsibilities in the scale of values of Judaism is aptly expressed in a dictum which became a fundamental principle in the Jewish law of human freedom. As stated by Rav, the leading *Amora*[67] in Babylon in the 3rd century: "A laborer may leave his work even in the middle of the day (being paid, of course, only for the work that he has done) . . . as it is written 'For it is to Me that the Israelites are servants; they are My servants [whom I have freed from the land of Egypt].' They are My servants—not the servant of servants."[68]

Servitude to God means that there is to be no servitude to another human being. According to biblical law, there are only two exceptions to this rule:

1. As a punishment for stealing, when the robber is unable to restore what he has stolen or its value.[69]
2. When one voluntarily enters into servitude because of dire poverty.

In both situations, the servitude is limited to a maximum of six years.[70]

Philo described the quality of this servitude as being "slavery in name, and contractual in substance"[71] According to the *Talmud*, "whoever acquires a Hebrew slave has really acquired a master over himself."[72]

The period of servitude, under these conditions and limitations, was in essence a method of rehabilitating the criminal and the needy. Jewish law regarded this method as superior to imprisoning the robber, and leaving the needy homeless on the street. However, should such an individual choose to remain under the control of his master beyond this period, he commits a sin by consenting to become a true slave and warrants punishment.[73] As the Jerusalem *Talmud* states, enslavement to another person is a form of idol worship, as it accepts the yoke of another human being and casts aside the yoke of Heaven.[74]

The prohibition of slavery is the inevitable consequence of the Ten Commandments: "I am the Lord Your God who has taken you out of the Land of Egypt, out of the house of bondage. You shall have no other Gods before me."[75] This commandment mandates that man be free and may not become enslaved either to an idol or to another person—man may serve only

the Creator of the world, who redeemed the Jews from slavery in Egypt. The service of God stands against and negates the enslavement of one person by another—"They are My servants and not the servant of servants," and even work for a day against the will of the laborer is a form of slavery. The laborer can therefore leave his work even in the middle of the day. Both the employer and the laborer are the servants of God, and no person can be the slave of another person because the other is also himself a servant of God. The safeguard and source of freedom is the equality of all people before God; for man was created in the image of God. This concept places an *obligation* on one to be free; and when he fails to fulfill this obligation, and surrenders his freedom, he is to be punished. The obligation to be free carries with it the privilege of freedom and the unrelenting opposition to any form of being a slave to another person.

As we have seen, the Hebrew slave was in essence a long-term contractual worker. The purpose of this arrangement was the rehabilitation of the criminal and the homeless. In an early period, this legal institution was discontinued.[76] This is consistent with the great emphasis Jewish law places on human freedom, as reflected, for example, in the law governing creditor-debtor relations. Creditors were forbidden from entering the debtor's home to seize his pledge. The Bible states:[77] "You must remain outside while the man to whom you made the loan brings the pledge out to you, and if he is a needy man, you shall not go to sleep in his pledge. You must return the pledge to him at sundown that he may sleep in his own clothes and bless you; and it will be to your merit before the Lord your God." And certainly it was forbidden for the creditor to enslave or imprison the debtor.[78]

### *Public Officials—"Servants of the People"*

The dictum, "they are My servants and not the servant of servants" has continued to provide a source for the principle of human freedom in Jewish thought. Also, the term "servitude" continues to have numerous implications in Jewish law. There is, for example, the servitude of those who hold positions of authority in public life.

This fundamental principle—that "government was instituted solely to serve the people, and has no inherent prerogatives" has been reflected from ancient times in Jewish thinking. The basic guideline for those put in positions of authority over the public is "Beforehand you were independent; from now on, you are a servant of the people."[79] The *Talmud* states: "Do you think that you are being given power? you are being given servitude,"[80] and *Rashi* explains: "whoever assumes a position of authority becomes a slave to others, as the yoke of the people is put upon him."[81] Consequently, *Halakhic* authorities severely criticized those who "take upon themselves a

public position in order to personally benefit from it"[82] and those public officials who "lord it over the people."

> Until one becomes a public official one is independent; when one takes office, one serves the people; the people do not serve him or her. He assumes his position to benefit the people, not to benefit himself. The chosen leader must minister to the needs of the people; he, the leader, must not take advantage of and domineer over them.
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> We must bear in mind, when exercising the judicial function, that this authority is really servitude to the law, its purpose and spirit, and its directives and limitations.[83]

*The Limits of Self-Realization: Rights Balanced by Responsibilities*

The fundamental principle contained in the dictum "they are My servants, and not the servants of the servants," and the concept of human freedom which it affirms, is aptly expressed in the minds of the poet and philosopher, Yehuda Halevi:

> The slaves to time are the servants of servants.
> The servant of God—he alone is free.
> When, therefore, each person seeks his portion
> My soul seeks my portion in God.[84]

These are some examples denoting the Jewish view of human freedom, as developed over the course of history. The fundamental and momentous dictum "They are My servants and not the servant of servants" has become the rallying cry of all those who fought against the despotism of the privileged few—on account of wealth or other reasons—over the people who struggled for their liberty and the right to express themselves freely. Thus, we read in the *Responsum* of Rabbi Isaac Adarbi of 16th-century Salonika, concerning the complaint of the poor against the seven plutocrats who took control over the affairs of their community:[85] "They [the poor] object to being considered slaves, who may not express their views before the above mentioned seven men of wealth. For Scripture states: 'They are My servants, and not the servant of servants.'"

Human freedom is an obligation placed on all those created in the image of God. Anyone who gives up his freedom and accepts servitude to another person is compared to one who worships an idol—another human being. Inasmuch as freedom is an obligation, it carries with it the right not to be subservient to another person. The essence of freedom, according to Judaism, is that no person is inferior to anyone else. The foundation of freedom is that all human beings—whoever they may be—are the servants of God. The source of freedom is that man was created in the image of God. Servitude to God contradicts servitude to a fellow man. These doc-

trines are not only basic to the man of faith, but also provide the underlying principles in the struggle for human freedom. Its implications are truly significant when we attempt to reach the synthesis of Jewish and democratic values.

*The Limits of Self-Realization*

Indeed, there are those who live by their abiding and sincere religious beliefs. Others have some doubts as to their faith, and there are those who have no religious belief at all. And it is true that the *source* of the principle that man was created in the image of God is the belief in God. But the outcome of this principle itself—the existence of rights along with responsibilities—with its various consequences, stands by itself, separate and apart from religious beliefs. Should we not give thought to one or another of the theories which time has produced, and ponder the nature of Western democracy with its emphasis upon self-realization? Contemporary thinkers and writers have agonized over the painful and difficult problems that have arisen due to the pursuit of self-realization in its Western democratic guise. Freedom of opportunity is an important and excellent principle, but we should bear in mind that people have different starting-points. Only those whose situation in life makes it possible will have all opportunities open to them. The result is a society of abundance and a society of poverty that exist side-by-side, with the by-products of crime and violence. What are the limits of self-realization, and what are the harmful effects of unlimited self-realization on the family and on society? Has the balance been kept between the needs of the "I" and the responsibilities to the other? Has the precept of "Love your neighbor as yourself,"[86] which means, according to Hillel, "what is hateful to you, do not do to your neighbor,"[87] and is the foundation-stone for mutual responsibility and a constructive society, not been eroded before our own eyes as a result of the excessive pursuit of "self-realization"? These and similar questions deserve to be addressed and carefully considered.

As we have stated,[88] the values of the National Awakening and Zionist movement, which led to the establishment of the State of Israel and the enactment of the *Basic Law: Human Dignity and Liberty*, should also be considered "Jewish values." One of the most important values of the National Awakening movement found its expression in the *Kibbutz* movement. *Kibbutzim* played a vital role in transforming the barren areas in the Land of Israel to fertile farmlands. They also were instrumental in introducing Zionist society to the principle of collective responsibility and accountability for one's fellow. This principle has its origins in the extensive *Halakhic* and ethical literature contained in the Jewish heritage from time immemorial. One illustrative example is the verse in *Leviticus* 19:16, "Do not stand idly

by the blood of your fellow," from which our Sages derived the principle that one who sees his fellow drowning in the sea is required to rescue him. If such a person fails to rescue his fellow—in a situation where he would not be putting his own life in any danger—he violates a negative commandment of the Torah. Except in situations involving automobile accidents, this law is without parallel as a *legal* principle in most common law legal systems; it is considered merely a *moral* imperative—the "Good Samaritan." This is also the basis of the Talmudic principle that "the giving of charity may be *compelled*."[89] It is considered an obligation, not merely an act of kindness, to provide material and personal assistance to one's fellow in appropriate circumstances. The ideals of the *Kibbutz* movement are a remarkable example of collective responsibility, of human rights intertwined with individual obligations. To my great regret, this important social-ethical phenomenon is gradually decreasing in importance, and there is indeed reason to fear that it may further diminish in significance. In today's democracy, individual autonomy is replacing collective responsibility. This is a negative development that has grave consequences for the well-being of contemporary communal life.

### *The Proper Interpretation of the Values*

Some years ago, before the enactment of the Basic Laws, and prior to the appearance of the phrase "the values of the State of Israel as a Jewish and democratic state," and the need to find a synthesis of these values, the late Professor G. Proccacia discussed the importance and the functions of the basic values in legal systems in general and in that of the State of Israel in particular. He said:[90]

> Everything that is written by the judges of Israel about the flexibility of basic values is written in an optimistic spirit which emphasizes the capability of the legal method to develop by itself and to produce suitable responses to the ever-changing needs of society. The things that are written are true, but in our opinion they lack a *caveat,* that the quality of basic values to adapt their content to changes in the life of society contains within it a danger that the change will not always move in the direction of progress and the strengthening of human rights. And as a consequence of regression in the life of society, these basic values may be adjusted to the detrimental views of a given society which is in the midst of an ideological retreat.
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> This is not merely a theoretical danger: We are not lacking examples in the legal history of nations, where the regression of which we are speaking did indeed take place in fact. . . .
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> Only a continuous and uncompromising stand on the *eternal ethical values of humanity* can prevent the decline of society. . . .
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> *"But if these do not exist,"* as Learned Hand said, "*It is not in the power of a constitution, the laws or the courts to save them.*"

These words are correct and have been confirmed many times over the course of human history, and they obligate us to exercise extreme caution in striking the proper balance between the dynamics of the needs of the present and the values of ethics, justice and equity of mankind that are the treasures of the past. A safeguard for arriving at this proper balance is exemplified in the Israeli legal system, whose basic values of human rights according to the *Basic Law: Human Dignity and Liberty* are the values of a Jewish and democratic state, which operate according to the needs of the present but whose roots are planted in the values of human rights in Jewish thought *(Weltanschauung)* from ancient times. And take note—Israel is described *first* as a Jewish state and only *afterwards* as a democratic state; the roots that have been tested in study and application for many generations constitute the adequate insurance and safeguard to satisfy the needs of the present and to face the future.

We must be extremely careful in applying basic values according to the contemporary theory in fashion at the moment, which alone cannot safeguard the values of justice and equity that we seek to accomplish. Unfortunately, modern history is replete with examples of this failing. I recall the many good people, among the idealists in my own country and elsewhere, who were carried away by the idea of freedom, justice and international brotherhood as exemplified in the communist "people's democracies," whose leader was seen as the "light unto the nations" until it was seen in the course of time how terribly dark was that light and how evil was that regime. We should not be blinded by uncontrolled enthusiasm for different ideologies. We should restrain our enthusiasm and examine them in the light of the sources of the Jewish heritage which have nourished the civilized nations of our day.

*Summary—Greatness and Modesty*

The *Mishnah* states:[91]

> The creation of humankind started with the creation of a single individual, to teach that whoever removes one single soul from this world is regarded as if he had caused the whole world to perish; and whoever keeps one single soul alive in this world is regarded as having preserved the whole world. And to preserve peace—that one person should not say to another "my father is greater than your father." And that the sectarians should not say "there are many domains in heaven." And to reveal the greatness of God: when a person mints many coins with a single imprint, they are all similar to each other, but God imprints all human beings with the stamp of Adam, the first human being, yet not one of them is similar to another. Therefore, every person must say: *"the world was created for me."*

These are inspiring words. *But it is not the full picture.* This we learn from the following Psalm:[92]

> When I behold Your heavens, the work of Your fingers, the moon and the stars that You set in place, what is man that You have been mindful of him, mortal man that You have taken note of him, that You have made him little less than divine, and adorned him with glory and majesty? You have made him master over Your handiwork, laying the world at his feet.

On the one hand, man was crowned with glory and honor, the world is under his feet and subject to his dominion. On the other hand, what is man that he should be remembered by God, and what is he that he should be recalled? He certainly is not God, but he is a "little less than divine." He not only has rights. He also has responsibilities. Perhaps one should say: He not only has responsibilities. He also has rights. This is the principle of the personal autonomy of the human being, his self-realization: the height of greatness and the height of humility and modesty. It is the combination of the two that makes up the human being.

Rabbi Samson Raphael Hirsch[93] made the following instructive comments on the-above verses from Psalms:

> This is to teach a person the import of his title "human"—the idea "that You [God] think of him," the sublime and redeeming concept of responsibility and the life task that was given to him by God. . . . Only that which helps him in the accomplishment of his task, is given to him as a right to pursue and strive for. God is the source of his duty and its purpose and the basis for his right . . .
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> To what incomparable heights has God raised the person, who has the title "human," . . . to be servant of God! . . . The virtuous human being stands *higher than the stars in the heaven, as a free and aware servant,* the only being who has been called upon to fulfill his task out of a free and moral choice. By means of this free and moral choice, which he undertakes in full awareness, he is—after God himself—the only being that has complete freedom, the sole creation in the world that is a free and moral being that is aware of his importance, who is raised almost to the level of the Divine, crowned with "honor and glory."

This perspective—with its dual concept of responsibilities and rights, freedom and service, greatness and humility—arises out of the belief in the creation of the human being in the image of God. This dual concept became an organic part of the Jewish value system, which constitutes a foundation for the achievement of the synthesis of Jewish and democratic values—the task that we are directed to fulfill by the *Basic Law: Human Dignity and Liberty* and the *Basic Law: Freedom of Vocation.*

### Jewish Law and Israel's National Legal and Cultural Identity

The education that many Israeli jurists lack in Jewish law does indeed pose an objective difficulty that must be confronted when striving for the synthesis of Jewish and democratic values. However, this difficulty cannot lead us to ignore the duty imposed by legislation of the new Basic Laws.

Furthermore, the legislation of the new Basic Laws marks a turning point in the attitude of the Israeli legislator to Jewish law, and strengthens the legislative trend evident since the enactment in 1980 of the *Foundations of Law Act, 5740—1980,* which states:

1) COMPLEMENTARY LEGAL SOURCES. Where a court finds that a legal issue requiring decision cannot be resolved by reference to legislation or judicial precedent, or by means of analogy, it shall reach its decision in the light of the principles of freedom, justice, equity and peace of the Jewish heritage (*moreshet Yisrael*).
2) REPEAL OF ARTICLE 46 OF THE PALESTINE ORDER IN COUNCIL, AND SAVING CLAUSE.

    a) Article 46 of the Palestine Order in Council, 1922–1947, is repealed.
    b) The provision of subsection (a) shall not impair the effectiveness of the law that was accepted in this country before the effective date of this statute.

The intention of this legislation was to enrich the Israeli legal system, to give it independence from foreign and British law, and to let it reflect the common legal culture of its citizens, a common culture that the Jewish Israeli citizen has been a part of for over 3,000 years.

Additionally, the law served to make possible that the legal system of the Jewish state will become a part of the historical legal culture of the Jewish nation. In this connection, I wrote:[94]

> Basing the Israeli legal system on principles derived from traditional Jewish law, just as it is important for the secular legal system, so too is it important for Jewish law, in terms of returning it to the world of practical action and thereby returning it to the day-to-day world. But, despite this importance, the continued vitality of the traditional Jewish legal system is guaranteed, even if the Israeli legal system will not integrate traditional Jewish principles. The sources and principles of Jewish law are learned by, and found in the meditations of, thousands and thousands of students, young and old, daily and hourly. The teachings of Rabbi Akiva and Rabbi Ishmael and the investigations of Abaye and Rava; the decisions of the *Rif* and the *Rambam,* of Rabbenu Yosef Karo and Rabbi Moshe Isserliss, the explanations of *Rashi* and the Tosafists, of the *Rambam* and the *Meiri;* the responsa and analysis of the *Rashba* and the *Ritva,* of the *Nodah BeYehudah* and the *Hatam Sofer;* the innovations of the *Maharsha,* the *Pnei Yehoshuah,* the *Vilna Gaon* and the *Chazon Ish.* All these and others are "living" and "learning" today like they have been over hundreds of years. Even after Jewish law no longer functioned in everyday life because of historical occurrences, both external and internal, from the end of the eighteenth century, hundreds of thousands of children and adults continued to study and analyze Jewish law until today, and the teachings of the Rabbis and Sages remain in their mouths and hearts. This is a singular phenomenon which did not occur in any other legal system. Additionally, it is accepted that the teachings of the recent Sages, even when exceptionally innovative, only supplement, and do not eclipse, the teachings of older Sages. The *Nodah Ben Yehudah* of the eighteenth century does not overshadow the *Rashbah* of the thirteenth century, and the *Haram Sofer* of

> the nineteenth century does not overwhelm the *Ritvah* of the fourteenth century, and, certainly, none of them dominate the teachings of Rabbi Akiva of the second century or Rava of the fourth century. The words of Torah of all of them are learned from generation to generation, with devotion and intensity equal to when they were first written. Thus, the traditional Jewish legal system is guaranteed a vital, continued existence.
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> The phenomenon of continuity and succession, of present creation on the substructure of the past, is similar to the entirety of Jewish cultural creativity. And there is no greater example of this than the rebirth of the Hebrew language in our time. That rebirth is a result of tireless work that brought about the creation of idiom and style, words and phrases, mainly found and taken from the earlier treasure houses of our languages—the sources of talmudic and post-talmudic law, poetry and philosophical writing, through the generations. The effort has two goals: on the one hand, to fashion a language for the modem needs of a nation and, on the other hand, to preserve the continuity of a "holy language" thousands of years old. And this continuity renders modern Hebrew an integral part of the use and development of Hebrew over the generations.
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> Seemingly, there is room to reflect on the chances of integrating the Israeli legal system and the historical Jewish legal system, and consequently one must reflect on the place of the Israeli legal system in the Jewish historical creation, over the generations.

The *Foundations of Law Act, 5740–1980,* responding to these reflections, established the principles of Jewish heritage as the "complementary sources of law" of the Israeli legal system, to give hope and possibility to enable this integration.

Another important reason I cited for the *Foundations of Law Act* was its necessity for enabling the Israeli legal system to take solid root and not capriciously pick and choose from incompatible foreign legal systems. I stated this expressly in my opinions, when I dealt with the requirement for the balance in the appropriate development of fundamental principles of the Israeli legal system—a balance involving the use of principles of the Jewish heritage, such as righteousness, justice, freedom and peace. It was intended that that balance, as enacted in the *Foundations of Law Act,* was to be applied in the modem Israeli legal system according to modern needs.[95] I stated elsewhere:[96]

> One of the big problems of our legal system, it seems to me, is a paucity of roots on the one hand, and too many branches on the other hand. The Israeli legal system has too many branches in that both the legislator and the High Court look at many different legal systems—the legislator gathers materials for his work and the judge takes bricks for his building. This multiplicity is beneficial if [it] is done properly and with a balancing of considerations. On the other hand, our system lacks roots. It is young in age—only forty years old—and lacks a mother from which to nurse and a father to look to for guidance. It is customary in the world of law that all legal systems have their own legal theory that mainly finds expression in the legal literature and the case precedent to which a judge turns in times of need and when he desires; in times of need—to define funda-

> mental concepts and settle contradictions and internal questions; when he desires—to draw inspiration for fundamental and basic concepts which are the soul of the entire legal system. Under pressure of time and circumstances, we began the creation of an Israeli literature at the same time as we established an independent legal system, and we all understand that "a pit cannot be filled from its own digging."[97] As a result, there is no harmony between the different layers of the legal system; in fact, disharmony exists. There are those who hoped that the Foundations of Law statute of 1980, and the fundamentals of freedom, righteousness, justice, and peace of the Jewish heritage would fill the gap and provide the necessary and proper base. But this has not been recognized in all areas. There are many reasons for this phenomenon, and some maintain that most of them are not judicial. Remember this: a multiplicity of branches is no substitute for a thickening of roots, even though both add beauty.
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> Dedication to the fundamentals of justice, righteousness, freedom, and peace of Jewish heritage is sufficient to guarantee correct and proper "legal development"; it is vital to the Israeli legal system to thicken its roots growing with multiplying its branches. Establishing the legal authority of a political agreement based on the fundamentals of Jewish traditions, based on the Foundations of Law Statute, serves as an instructive example of the legal development of the Israeli legal system.

The above statement was made in the *Jerczewski* case in connection with the *Foundations of Law Act,* enacted in 1980. As mentioned before, that law prescribed the obligation to turn to Jewish heritage in the event of a *lacuna,* when an answer cannot be found in the existing legislation guiding the legal system, in precedent, or in analogy. It goes without saying that all the more so is this position correct and vital today, after the Basic Laws created a *general obligation* to turn to Jewish law—not only in cases of *lacuna*—in order to anchor in the Israeli law the values of a Jewish and democratic state.

## Euthanasia: Synthesis of Jewish and Democratic Values

In 1993, the Israeli Supreme Court ruled on the legality of euthanasia. That decision, the *Shefer* case,[98] compared the Jewish view of the subject to those of the Western democracies of the United States and the Netherlands. The decision was very long and detailed, so I will here only summarize the most relevant portions.

### *The* Shefer *Case—Jewish Values*

Yael Shefer was an infant who had been diagnosed as suffering from the genetic and fatal Tay-Sachs disease. She submitted, *via* her mother as natural guardian, a petition requesting the court to order that should her health worsen, she not be administered intravenous medications and other treatments that could prolong her life. The district court denied the request, and the case was then appealed to the Supreme Court.

When Yael was about three years old she died from her disease. Thus, the case technically became moot, but the Court, nevertheless, dealt with the issues so that its decision might be applied to future cases.

The Court established that the underlying foundation for the right to human dignity and liberty—set forth in the Basic Law dealing with the subject—rested in Jewish law, on the fact that man was created in the image of God. The Court stated:[99]

> The foundation of the world view of Judaism is the concept of the creation of man in the image of God.[100] This is how the Torah begins, and from it the *Halakhah* derives fundamental principles concerning the worth of every human being—whoever he may be—and the right of every person to equal and loving treatment.
>
> The general principle that must guide the Court is that we are not authorized or allowed to differentiate on the basis of the "worth" of an individual—whether poor or rich, physically healthy or disabled, psychologically strong or mentally ill. *All human beings,* created in the image of God, *are equal in value.*

The basic justification for the doctor's invasion of the patient's body when necessary for treatment, according to the Jewish view, is not the patient's consent. For such consent has no legal effect, since under Jewish law a person is forbidden to wound himself and may not consent to another person doing so. Permission to perform surgery to cure a sick person is based on the biblical command: "Love your neighbor as yourself," [101] and the act of healing another person is an act of love. Paradoxically, the source for *limiting treatment* against the patient's will in some circumstances is *also* "Love your neighbor as yourself," since, as expressed by Hillel, "what is hateful to you, do not do to your neighbor."[102]

The *Shefer* case stressed that the value of human life cannot be measured, and that each second of a human life is unique and as valuable as many long years. As a 15th century *Responsum* put it: "Even if an endangered person will only live . . . for one moment and will then die, we violate the Sabbath for him for that one moment."[103]

The *Shefer* case pointed out, however, that there is also another fundamental principle that follows from the right to human dignity: the prevention of pain and suffering. Thus, the extent of pain and suffering of the patient must be taken into account, and treatment that would not cure the patient but would only add to his suffering may not be undertaken without the patient's consent, even though his life might thereby be prolonged for a short period of time.

Today, life can be prolonged by various medical treatments. Yet, such prolongation of life may bring with it physical and mental pain. How should we deal with a patient whose life can be prolonged by being attached to a machine, but whose continued existence will be accompanied by much pain and suffering?

*Active Euthanasia and Passive Euthanasia*

In answer to this question, we noted that Jewish law has drawn a sharp line between "active euthanasia" and "passive euthanasia." Active euthanasia—the administering of drugs or treatment that speeds up the dying process, either by the doctor directly or by the physician assisting the patient to commit suicide—is completely forbidden by Jewish law. *The patient's consent is irrelevant.* On the other hand, many leading authorities in Jewish law have allowed passive euthanasia, which is known in Jewish sources as "removing an impediment" to death. Passive euthanasia consists of withholding life-saving treatment, such as refraining from attaching a respirator to a patient or disconnecting an already-attached respirator. If the patient is suffering and there is no hope for his recovery, Jewish law generally permits passive euthanasia, allowing the patient to die naturally due his illness. However, Jewish law does insist that the natural needs of the patient be satisfied, and that food and oxygen may not be withdrawn from a dying patient.

With regard to active euthanasia, the Israeli Supreme Court pointed out that the patient's consent to die does not always reflect an autonomous decision free of other considerations. At times, such "mercy killing" represents mercy for the relatives and society, and not necessarily for the patient. Such an act can destroy the trust between doctors and patients. Moreover, allowing active euthanasia may lead to the "slippery slope"—whereby those who are severely mentally or physically deficient may become prime candidates for "mercy killing," and the progression may then be extended to those who are somewhat less impaired.

*Western Democratic Values*

After presenting in detail the attitude of Jewish law,[104] the decision surveyed the situation in the United States and the Netherlands. In the United States, it is accepted that the patient has a right to refuse treatment. However, this right is relative and is limited by four interests deemed "compelling state interests": the preservation of human life, the prevention of suicide, the maintenance of the integrity of the medical profession, and the protection of innocent third parties who are dependent on the patient.[105]

The Netherlands is the only Western democracy that openly and legally practices active euthanasia. Initially, the Dutch courts and the Royal Society for the Advancement of Medicine drafted specific guidelines which, if met, would allow the acquittal of a doctor who committed an active mercy killing, despite the illegality of the act. At the beginning of 1993, the Dutch Parliament adopted a statute permitting active euthanasia under the above conditions.[106]

The specific decision in *Shefer* was to sustain the lower court's denial of the request that life-prolonging treatment not be given to Yael. The court found that Yael, at the time of the request, although unconscious, was not suffering from pain. She was quiet and did not cry except when she was hungry or required routine medical care. Her dignity was completely preserved.

*Two Recent Decisions of the United States Supreme Court*

Since *Shefer,* two recent cases on euthanasia have been decided by the United States Supreme Court, both of which appear, at first glance, to be entirely consonant with *Shefer.* In both cases, the Supreme Court upheld state statutes that prohibited active euthanasia. But the *rationale* of the American Court was quite different, and the difference in reasoning might ultimately lead to a different result in a subsequent case.

In *Shefer,* the Israeli Supreme Court was called upon to decide the issue as the highest court of general jurisdiction. Our decision was grounded on the *Basic Law: Human Dignity and Liberty,* which had recently been enacted by the Knesset. Although the decision was on appeal from a lower court, we had the authority to make whatever ruling we deemed appropriate under the circumstances.

By contrast, the two cases decided by the United States Supreme Court came before the Court on petitions for writs of *certiorari* to review decisions of state courts. In such cases, it is the highest state court that has the general authority to decide the case, and the review of the Supreme Court is limited to the question of whether the state court's decision violated some provision of the United States Constitution. It was in that context that the Supreme Court was called upon to decide the two recent cases on the subject of euthanasia.

In *Vacco* v. *Quill,*[107] a New York statute that imposed criminal penalties on anyone who "aids another person to commit suicide"[108] was challenged under the Equal Protection Clause of the United States Constitution. The argument made was that the New York law "does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths,"[109] and as such denied the citizens of New York *"the equal protection of the law*." While New York law permits a competent person to refuse life-sustaining medical treatment, it does not allow physician-assisted suicide and, it was argued, these two methods of ending one's life are essentially the same. Rejecting this argument, the Supreme Court pointed to the fundamental distinction between active and passive euthanasia: "[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease . . . , but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication."[110]

In the companion case of *Washington* v. *Glucksberg,*[111] a statute of the State of Washington imposing criminal penalties on anyone who knowingly "causes or aids another person to attempt suicide"[112] was alleged to violate the due process clause of the Fourteenth Amendment. It was argued that the Fourteenth Amendment creates a "liberty interest . . . which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[113] As in *Vacco*, the Court rejected this argument and upheld the statute in question.

*The Similarities Between the American and Israeli Decisions*

In his opinion for the United States Supreme Court, Justice Rehnquist began by pointing out that, "for over 700 years, the Anglo-American Common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[114] In light of this history, he reasoned "that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[115] Moreover, he found that Washington's ban on assisted suicide was "rationally related to legitimate government interests."[116] He determined that "Washington has an 'unqualified interest in the preservation of human life'," an interest in protecting the integrity and ethics of the medical profession, and an interest in protecting vulnerable groups—such as the poor, the elderly and the disabled.[117] Finally, he reasoned that the state may legitimately fear "that permitting assisted suicide will start it down the path of voluntary and perhaps even involuntary euthanasia."[118] Thus, the challenge to the Washington statute was rejected and the statute upheld.

*The Distinctions Between the Opinions of the Two Courts*

So far, one might argue, the decisions of the United States Supreme Court appear to be quite similar to the decision of the Israeli Supreme Court in *Shefer.* But there are important differences. First, as mentioned above, the United States Supreme Court did not hand down a broad ruling dealing with all aspects of the question of euthanasia. Rather, it only dealt with a narrow issue: whether the two state statutes involved violated various provisions of the United States Constitution. Although finding that these statutes did not violate the Constitution, the Court was not called upon to—and did not—make a broad pronouncement that active euthanasia is forbidden. Indeed, in their concurring opinions, four members of the Court—Justices O'Connor,[119] Ginsburg,[120] Breyer,[121] and Stevens[122]—indicated that in some circumstances, such as when a person is terminally ill, is suffering great pain and is of sound mind, one may have a constitutional right to be assisted in ending his life, so that in such circumstances, the statutes pro-

hibiting assisted suicide might well be unconstitutional. They concurred in the Court's decision only because the New York and Washington statutes were being directly attacked, and, as Justice O'Connor stated, the Court's ruling did not decide the "narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death,"[123] or, as Justice Stevens wrote, the case "does not foreclose the possibility that some applications of the statute might well be invalid."[124] And Justice Souter, in his concurring opinion, stated that he did not "'decide for all time that respondents' claim should not be recognized," but merely felt that the Court should temporarily "stay its hand to allow reasonable legislative consideration."[125]

Thus, it appears that a majority of the Justices explicitly indicated that, under certain circumstances, they would recognize a constitutionally-protected right to assisted suicide. Even the other four Justices did not totally foreclose this possibility. And the implication of the majority opinion is that if a state decided to enact a law permitting active euthanasia, such a law might well be upheld by the Court. The dissenting opinions made this even clearer.

Thus, it seems that the effect of the United States Supreme Court's decision was to take the issue of assisted suicide out of the area of Federal law and put it into the arena of State law. The issue may now be dealt with by the relevant states' authorities. The constitution, legislature and judicial bodies of each state will determine the outcome and, of course, public opinion will have a great influence on the law that will be adopted in each state.

I might add that the Fourteenth Amendment itself protects the right to "life, liberty and property." The discussion in *Vacco* and *Glucksberg* focused on the protection of an individual's liberty right. I think, though, that one could also argue that the constitutional protection of "life" might well require the invalidation of a law authorizing active euthanasia. I am not sure that the United States Supreme Court would be prepared to base its ruling directly on the principle that man was created in the image of God. However, the underlying value of the sacredness of human life can be understood even in secular terms, and it is certainly conceivable that the Supreme Court might ground its decision on such a principle in an appropriate case.

In sum, it is entirely possible that, despite the United States Supreme Court's decisions in the two recent cases we have just discussed, active euthanasia could be legalized in the United States. Such a result would be completely contrary to the position of Israeli law as decided in *Shefer*. As I explained in *Shefer*:[126]

> The synthesis of the Jewish and the democratic systems requires the acceptance of what is common in both, *i.e.*, the prohibition of active euthanasia and the

absolute negation of the law that allows active euthanasia. Moreover, even if *the majority* of democratic legal systems in certain circumstances allowed active euthanasia, *i.*e., hastening death "with one's own hands," the synthesis would find expression in the common ground between Jewish law and that singular legal system, in any democratic state that can be found, which forbids active euthanasia.

Furthermore, even if no democratic legal system could in fact be found which forbade active euthanasia, since active euthanasia negates the essence of the State of Israel as a *Jewish* state, as seen above, the synthesis of the two systems—"the values of a Jewish and democratic state"—requires the conclusion reached by the values of a Jewish state *as interpreted according to Jewish law.*

Thus, we see how the synthesis of Jewish law and the values of a democracy can lead to a conclusion different from the one we might have reached had we applied democratic values alone.

## The Synthesis of Freedom of Speech and the Press, and Human Dignity and Privacy

The synthesis of Jewish and democratic values required by the Basic Laws has important implications for the resolution of the tension between two fundamental values: freedom of the press and the right of each individual to maintain his dignity and privacy.

### *New York Times v. Sullivan*

In this landmark case,[127] decided by the United States Supreme Court over thirty years ago, it was held that a newspaper is not liable for damages for publishing false information about a public official unless it can be proved "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[128] In handing down this ruling, the Supreme Court argued that it was required to safeguard the freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution. The *Sullivan* case has been accepted as settled law in America and even expanded to famous people; the law in Israel is quite different.

### *Naiman v. Central Elections Committee*

Freedom of speech and freedom of the press are important values, which form an essential part of the Jewish heritage. In the case of *Naiman I*,[129] the Supreme Court of Israel discussed at length the place of freedom of thought and of speech in the Jewish heritage. It pointed to the prophecies of the prophets of Israel, which have been and still are the prototype for sharp and uncompromising criticism of governments that abuse their power and

of individuals or communities that act corruptly, and noted that Jewish law has always insisted that minority views be preserved and taught, since at some point the minority view might prevail and govern actual practice. However, Jewish law also insists on the preservation of an individual's right to dignity and privacy.

*Israel Electric Company, Ltd. v. Ha-Aretz Newspaper, Ltd.*

About twenty years ago, the Israeli Supreme Court had the occasion to deal with a case similar to *New York Times* v. *Sullivan.* In the case of *Israel Electric Company, Ltd.* v. *Ha-Aretz Newspaper, Ltd.*,[130] the court was presented with the question of whether damages could be assessed against a newspaper which published information about the Israel Electric Company which turned out to be false. At the first hearing of the case before a panel of three Supreme Court justices, Justice Shamgar, speaking for the majority of the Court, applied the principles of *Sullivan,* and ruled that the Electric Company could not be held liable. When the case was reheard before a panel of five judges, the opposite result was reached. President Landau, in a detailed opinion, concluded that, as important as the principle of freedom of speech may be, it does not override a person's right to his good reputation. As he put it: "What is at stake here is the citizen's *freedom* as opposed to his *right,* that is to say, *his freedom* to say what he wishes and to hear what others wish to say, as opposed to his *right* not to have his honor and good name impugned. If there is indeed any place for grading the two *vis-‡-vis* each other, *I would place the right above the freedom.*" Of course, as President Landau pointed out, the Israeli statute provides affirmative defenses, such as the defense of fair criticism in defamation cases, but he found that the elements of these various defenses had not been proved in the case at hand. President Landau, in his opinion, also noted that a person's right to a good reputation is grounded in the sources of Jewish law.[131]

Justice Etzioni joined in the majority opinion, and also wrote a separate opinion in which he pointed to several sources in Jewish law which require the result reached by the majority.[132] Thus, he cited the well-known maxim from the Book of Ecclesiastes, *tov shem mi-shemen tov*, "a good name is better than fragrant oil,"[133] and a passage from the Code of Maimonides.[134] Justice Etzioni made it clear that individuals and the press have the right to criticize public figures, but such criticism must remain within the accepted bounds of fairness.

*The Prohibition of Defamation Law*

The Jewish law on this subject has special importance in light of the fact that the Israeli law includes the *Prohibition of Defamation* Law, which is

based on Jewish law sources. I had the following to say on this subject in the case of *Avneri* v. *Shapiro*:[135]

> An important source for the interpretation of the *Prohibition of Defamation Law*—including Section 7, which provides for the grant of temporary or permanent injunctive relief—is Jewish law. We reach this conclusion, first and foremost, by examining the legislative history of this law. The explanatory notes that accompanied the . . . Defamation Bill, 1962, discuss the prohibition of *leshon ha-ra* (defamation, lit. "language of evil") in Jewish law, including the scope of the prohibition and its civil and criminal sanctions. [References are made to] Biblical verses and talmudic and post-talmudic sources, including the book *Hafetz Hayyim.* A subsequent version of the bill, proposed a year later, continued to rely on Jewish law. Particularly instructive are the comments of the Minister of Justice regarding the central problem of striking the proper balance between the prohibition of defamation, on the one hand, and freedom of public debate, on the other . . . The Minister observed:
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> "Ancient Jewish law, too, did not tolerate defamation. In chapter 19 of Leviticus, the precept '*Do not go about as a talebearer among your countrymen*' (verse 16) is immediately followed by the precept '*Reprove your kinsman*' (verse 17). The first precept became the foundation in Jewish law for the prohibition of defamation, and the second became the foundation for the freedom of public debate. There is no need in this House to belabor the fact that sharp public debate has freely taken place among the Jewish people since the beginning of Jewish history. The prohibition of defamation has not prevented free debate, inasmuch as freedom of debate does not necessitate freedom to defame.
>
> These principles are undisputed. Any disagreement concerns the balance to be struck between the two principles—where to set the boundary between them. In the Defamation Bill, which I now have the honor to present on behalf of the Government, we have attempted to draw the correct boundary line."

### *The Basic Law: Human Dignity and Liberty—Its Legislative History*

The decisions in these cases were handed down before the enactment of the *Basic Law: Human Dignity and Liberty.* Now that this Basic Law has come into force, there is an even stronger reason for rejecting the American view, as embodied in the *Sullivan* case, and accepting the view of Jewish law that a person's right to his good reputation must take precedence.

Of course, the general principle of human dignity also includes the preservation of one's good reputation. However, the principle of freedom of speech, which should also have been included within the principle of human dignity, was rejected for inclusion in the Basic Laws. This is evident from the legislative history of the Basic Laws. Several years ago, a proposed Basic Law on the subject of freedom of the press and freedom of speech was introduced into the Knesset. However, various members of the Knesset voiced objections to including these rights in a Basic Law, since they were already dealt with in an ordinary statute and in decisions of the Supreme Court, as we have stated. Accordingly, the proposed Basic Law on

these subjects was never enacted into law. Thus, the legislative history makes it clear that the Knesset's intention was that the right to preserve one's good name and reputation, as set forth in the *Prohibition of Defamation Law,* be embodied in the *Basic Law: Human Dignity and Liberty,* as stated above. As such, the right to preserve one's good name and reputation takes precedence over the right to free speech, which the Knesset refused to embody in a Basic Law.

Since the preservation of one's good name and reputation is a fundamental principle of Jewish law, it is clear that the Basic Law which protects this right must be interpreted against the background of Jewish law, where it is accorded great importance. As Supreme Court Justice Haim Cohn has stated: "In the eyes of our Sages, there could be no greater violation of human dignity than to defame a person and thereby cause him great embarrassment. The 'crown of a good name' that a person wears has primacy even over the crowns of Torah, priesthood and royalty."[136] The overriding significance of this right in Jewish law is another reason which requires us to reject the conclusion of Sullivan, which indicates that freedom of the press is a more important value than preserving one's reputation.[137]

*Dignity and Privacy*

I might add that a recent, tragic event reinforces the view of Jewish law that freedom of the press must give way to an individual's right to dignity and privacy. I am referring to the untimely death of Princess Diana in a traffic accident. I do not wish to get involved in the question of which people and what factors are responsible for Princess Diana's death, but it is clear that press photographers—commonly known as *paparazzi*—trailed her closely wherever she went, even to the extent of pursuing her car with motorcycles traveling at high speeds. Certainly, Diana had been a public figure, but everyone—even a public dignitary—is entitled to some measure of privacy and dignity. The circumstances surrounding Diana's tragic death should cause us all to re-examine the seemingly unbridled freedom that we extend to the press, at the cost of preserving an individual's reputation, dignity and privacy.

In this connection, I would like to point to the American case of *Gallela* v. *Onassis*,[138] decided about 25 years ago by the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit. This case also involved attempts by a photographer to shadow a public figure—Jacqueline Onassis, the widow of President Kennedy. And, interestingly, one of the claims made in the *Gallela* case is that the photographer chased cars carrying Mrs. Onassis and her son John at "dangerous" speeds.

The District Court in this case established the important principle that "there is no general constitutional right to . . . harass or unceasingly shadow or distress public figures." Although it recognized that "Mrs. Onassis is a public figure, whose life has included events of great public concern," it concluded that "information about her comings and goings . . . and other minutiae" do not "enable the members of society to cope with the exigencies of their period." Rather, the court reasoned that such information "merely satisfies curiosity," and that when *the right of privacy is balanced against the right to freedom of speech* in such a case, the right to privacy has primacy. The District Court accordingly enjoined Mr. Gallela from approaching within specified distances of Mrs. Onassis and her children. Although these distances were modified on appeal, the Second Circuit endorsed the basic principle that "unwarranted and unreasonable" harassment by a photographer of a public figure is not protected by the First Amendment.

*The Right of Privacy: The Basic Law and Jewish Law*

In conclusion, it should be pointed out that the right of privacy is specifically mentioned in Section 7 of the *Basic Law: Human Dignity and Liberty.* This right is thus accorded particular significance, and it should therefore have priority over the right to freedom of expression.

The right to human dignity and privacy has found particular expression in the sources of Jewish law. As said in the *Vaknin* case:[139]

> The Jewish legal sources very early recognized that the right of privacy was worthy of protection. The right to privacy is rooted in Scripture, and in the course of time this right was refined and crystallized into a legal right enforceable by civil and criminal penalties. The right to privacy was developed by interpretation of early sources as well as by adoption of legislation enacted when deemed necessary to reinforce and enhance the right.
>
> The protection of privacy took specific form in the protection of confidential communications, including correspondence and reading another's mail, and in protecting private life against unwarranted intrusion. One is not permitted to infringe privacy by entering the premises of another, or even by looking from outside the premises. The use of technical devices to eavesdrop on activities taking place on another's premises is clearly prohibited, even if the listening device is off the target premises. However, private premises cannot serve as a "city of refuge" for transgression and accomplishment of unlawful purposes. Thus, alongside the recognition of the right of privacy and its protection through appropriate sanctions, principles were established to protect society against the misuse of this right. . . . The explanatory notes to the *Protection of Privacy Bill,* Introduction (p. 206) contain substantially the same language. Various Jewish legal sources on the protection of privacy were quoted and discussed in the Knesset debates on the bill.

Our Sages have stated that the verse prohibiting *leshon ha-ra* appears next to the verse "you shall not stand idly by the blood of your fellow,"[140]

precisely because the grave sin of *leshon ha-ra* can lead to bloodshed. Perhaps the approach of Jewish law to this important issue can provide some guidance to Western democracies.

## Synthesis in Legal-Ideological Issues

The task of finding a synthesis of the values of the State of Israel as a Jewish and democratic state becomes much more difficult and complicated when we deal with legal-ideological issues.[141] These matters cannot be solved by a purely theoretical synthesis, but require an actual, practical synthesis usually involving compromise. In such cases, the courts should exercise judicial restraint and not intervene unless there is a grave danger to fundamental rights.

### *The* Bar-Ilan Street *Case*

*The Facts, the Interlocutory Order, and the Decision of the Court.* An illustrative example is the well-known Bar-Ilan Street case.[142] This street in Jerusalem contains many synagogues and yeshivot, and virtually all of the people who live along Bar-Ilan Street are Haredim—strictly Orthodox Jews. Those who live along the street are strongly offended when they observe cars being driven through their neighborhood on the Sabbath and on Jewish holidays—especially during the times of prayer. There is a parallel route that can be used to bypass Bar-Ilan Street and, should Bar-Ilan Street be closed, the alternate route takes only a minute-and-a-half—or at most two minutes—longer.

On July 7, 1996, the National Director of Traffic, after conferring with Yizhak Levi, Minister of Transport, decided that Bar-Ilan Street should be closed to traffic on *Sabbaths* and Jewish holidays during the hours of prayer—that is, on Fridays and the eves of holidays, from 6:30 p.m. to 9:00 p.m.; and on *Sabbaths* and Jewish holidays, from 7:30 a.m. to 11:30 a.m. and from 5:00 p.m. to 8:30 p.m.—for a trial period of four months. In reaching his determination, the Minister of Transport relied, *inter alia,* on the recommendation of a public committee appointed by the Mayor of Jerusalem, and composed of representatives of each affected group. A petition to review the Minister's decision was brought before the High Court of Justice, and on July 18, 1996, a panel of the Court, consisting of President Aharon Barak and Justices Matza and Dorner, decided to issue an interlocutory order providing that the street should not be closed.

On August 15, 1996, oral arguments were held before a panel of seven judges. In the meantime, additional petitioners and respondents had joined the proceedings. The Court suggested that the Minister of Transport set up a public committee whose goal would be to reach a consensus regarding religious-secular issues relating to transport on the *Sabbath* in Jerusalem

and elsewhere. Accordingly, the proceedings were not terminated; rather, they were postponed for two months. Justice Tal issued a dissenting opinion, stating that it was appropriate to rescind the interlocutory order and reinstate the order of the Minister of Transport providing that Bar-Ilan Street should be closed during the specified times for a four-month period. A committee was appointed on August 27, 1996, and it issued its report on November 4, 1996. The Minister of Transport decided that the recommendations of the committee justified the closing of Bar-Ilan Street during the hours of prayer, as previously recommended by the committee appointed two years earlier by the Mayor of Jerusalem (mentioned above). On January 12, 1997, the Supreme Court resumed its deliberations on the petition, and three months later—on April 13, 1997—it handed down its decision, which included three different opinions.

In the view of President Barak, Deputy President Shlomo Levin and Justice Eliyahu Matza, the interlocutory orders should be made final, that is, the closing of the street should be rescinded. However, they also ruled that the Minister of Transport has the right, after further deliberations, to make a new determination regarding the closing of the street during the hours specified, provided he also takes into account the interests of the secular residents of the neighborhoods adjacent to Bar-Ilan Street, and of those who wish to visit them on the *Sabbath.* In the view of Justices Theodore Orr, Mishael Cheshin and Dalia Dorner, the interlocutory orders should be made final, and the decision of the Minister of Transport rescinded, even if it is established that the rights of the secular residents have not been violated. Justice Zvi Tal's view was that the petitions should be entirely rejected, except for the petition brought by the Committee for the Preservation of the Rights of the Religious and *Haredi* Communities, which requested that the Minister of Transport be instructed to close Bar-Ilan Street from the beginning of *Sabbaths* and holidays until their conclusion. In order to make the opinion of Barak, Levin, and Matza into a majority, Justice Tal joined the determination reached by President Barak in his opinion "solely for pragmatic reasons."

After this decision was handed down, the Minister of Transport decided to close Bar-Ilan Street for the hours specified in his earlier determination, with provisions taking into account the concerns of the secular residents. Some of the petitioners sought further relief against this determination of the Minister of Transport, but during the oral arguments they withdrew their petitions, reserving their rights to renew them at a future date. Since the acceptance of the last proposal of the Minister of Transport, and up to the present, each *Sabbath* has been quiet, without any violence. During the nine-month period in which the Supreme Court rescinded the order of the Minister of Transport to close the street during the hours of prayer, each *Sabbath* was accompanied by violence, police activity, arrests of children and adults, etc.

*Two Former Decisions of the Supreme Court.* The Bar-Ilan Street case raises many problems. First and foremost, we must ask whether it was proper for the Supreme Court to interfere with a governmental decision regarding the closing of the street, which was based on the suggestions of two public committees, and which did not lack common sense. This is particularly puzzling in view of the fact that the Supreme Court had previously issued two decisions ruling that streets should be closed on Sabbaths and holidays. One of them involved street closings in Jerusalem limited to the hours of prayer,[143] while the second ruling approved the closing of Ha-Shomer Street in B'nai Brak for the entire day.[144] In the first decision, which was handed down over thirty years ago, the Court ruled that portions of two important and central streets in Jerusalem—King George Street and Shmu'el ha-Nagid Street—should be closed during the hours of prayer at the Yeshurun Synagogue. The late President Agranat gave the following reasons for his decision:[145]

> We do not find the reasons advanced by the second respondent to be improper. The legislative purpose in enacting paragraph 70(l) of the Ordinance—which also was the basis of the decision of the Minister of Transport to promulgate Regulation 37(a)—was to grant the Central Traffic Authority the jurisdiction to regulate vehicular traffic. It may limit traffic or it may prohibit it entirely, taking into account the interests of drivers and pedestrians to use the streets for their various interests, along with the legitimate concerns of other members of the public, including those of residents of the affected streets and others who use them for various purposes. As the State's Attorney argued, whenever possible, the Central Traffic Authority must try to balance these interests. There is no question that in giving weight to the factor that vehicular traffic on the specified streets on Jewish holidays and *Sabbaths* interferes with the worshippers gathering at the Yeshurun Synagogue and makes it difficult for them to pray peacefully, the second respondent took into account an interest of a religious nature. But this is not improper, just as it would not have been improper if he had taken into account a cultural, commercial, health or other similar interest which affects a significant part of the community. For example, if there were a hospital on a street where the vehicular traffic caused undue noise, and the second respondent found it appropriate to prohibit vehicular traffic on the street during particular hours or at all times, we would find no problem with his actions, provided he arranged for a suitable alternative, allowing drivers to reach their destinations. In the instant case, the second respondent took into account the significant interference to the large number of worshippers, on the one hand, and the fact that drivers who regularly use the specified streets will now have to take a detour which is only 300 meters longer, on the other hand. Under these circumstances, we believe that the goal of balancing the conflicting interests has been achieved, and that the order does not sufficiently infringe the rights of the second petitioner to require us to invalidate it.
>
> It goes without saying that the order in question *does not involve religious compulsion of any sort.* The order does not require the second respondent *to do any act which is contrary to his religious beliefs.*

The Court added that each case of this type must be judged in light of its circumstances, and that the problems presented are "matters of degree."

The cases of the closing of King George Street in Jerusalem and Ha-Shomer Street in B'nai Brak established that the balancing and weighing of the conflicting interests by the administrative agency is within the area of reasonableness, and the Court should not interfere with such a determination. This conclusion was reinforced in the *Bar-Ilan Street* case by the comments in the opinion that the observance of the *Sabbath* is a basic value of Judaism which clearly expresses the message of Judaism, and that the insult to the feelings of the *Haredi* community resulting from cars being driven in the heart of the neighborhood is a serious and grave injury.[146] This has special importance in light of the provision of the Basic Law that the values of the State of Israel are those "of a Jewish and democratic state."

The fact that the decision of the majority of the Court in practice allowed the street to be closed during the hours of prayer, only demonstrates that it was inappropriate to begin with to have interfered with the decision of the Minister of Transport. The concern expressed by the Court that the residents of the street who do not observe the *Sabbath* be able to drive on the *Sabbath* even during the hours of prayer could have been dealt with immediately, without having to rescind the decision of the Minister of Transport. I might add that subsequent to the Court's final decision, only about three people have applied for permits to drive on Bar-Ilan Street on the *Sabbath.* As might be expected, these permits were granted.

This example points to the difficult task and tremendous responsibility shouldered by the Court, which is charged with the task of preserving the values of the State of Israel as a Jewish and democratic state, as well as adhering to the policy of judicial restraint.

### *Prayers at the Western Wall and the Temple Mount: The Principle of Status Quo Ante*

*Last year, on the eve of the fast day known as Tish'a B'Av*, a group of men and women reading the Book of Lamentations and reciting the prayers mourning the Destruction of Jerusalem near the *Kotel* (Western Wall) were forced to leave the area. This event was very disturbing, and I hope that a way will be found to arrive at an understanding through consensus. What I do wish to point out, however, is that a related matter, and other similar problems, have already been dealt with by the Supreme Court of Israel.

*The Temple Mount*. A few days after the liberation of the Temple Mount during the Six-Day War, the Government of Israel, for political and security reasons, and in order to preserve public order, decided to provide for the continued surveillance of the area, and to permit the Moslems to retain their presence on the Temple Mount and to pray there. In order to avoid

conflicts with the Moslems, the Government of Israel decided not to allow prayer services by Jews (even by a single individual!) on the Temple Mount. From time to time, petitions have been brought to the Supreme Court challenging this action by the Israeli government, but the Court has refused to interfere with this governmental decision. In 1968, the Israeli Supreme Court, in an opinion by President Agranat, decided to reject the claims asserted based on the principle, applicable to all holy places, that the *status quo ante* must be preserved.[147]

*The Case of the Women at the Kotel* (Neshot ha-Kotel). Several years ago, the Supreme Court[148] dealt with the rights of two groups of women who attempted to organize their own public prayer services, including the reading of the Torah (by one group) and other non-traditional elements (as far as prayer by women is concerned), at the *Kotel.* These prayer services, which were held on several occasions, resulted each time in violent attacks by others—especially women—praying at the *Kotel.* The police were forced to intervene to preserve order, in accordance with the *Regulations Concerning Jewish Holy Places,* which prohibit "any religious ceremony not in accordance with the customs of the place, which offends the feelings of those who pray there."

In the *Neshot ha-Kotel* case, the Court upheld the right of every group in the State of Israel to pray in accordance with their own customs and beliefs, and no one has the right to interfere.[149] The Court concluded, however, that when the prayer services take place in the area of the *Kotel,* or any other recognized holy place in the Old City of Jerusalem or elsewhere, the rule of *status quo ante* applies. In addition to the case mentioned above regarding the right of Jews to worship on the Temple Mount, the Court cited precedents involving the Church of the Holy Sepulcher and other churches in the Old City of Jerusalem.[150] In each one of these cases, the Court decided to maintain the existing customs in these holy places, based on the principle of *status quo ante.* In the case involving the women who wished to pray in a *minyan* at the *Kotel,* the Court again applied this principle and ruled that, since the custom has been that this type of prayer is not allowed at the *Kotel,* the Court would maintain the *status quo ante* and would not require the authorities to accede to the women's request. The Court explained its ruling as follows:[151]

> In the case at hand, the potential conflict is not only between the freedom of religion of the petitioners, on the one hand, and the interest in preserving the public order, on the other. There is also the potential conflict between petitioners' freedom of religion, on the one hand, and the religious freedom of other worshippers [at the *Kotel*], on the other. In such a case, the legal principle that must be applied . . . is that which tries to find *the broadest common denominator that will apply to all the worshippers*. In instances where there is a conflict between worshippers in holy places, we have no choice but to find a common

> denominator for all the worshippers. This is the case even though, as a result, the religious freedom of some worshippers must be compromised to some extent in order to allow for the religious freedom of others. Because of the nature of holy places and the particular respect that they engender, worship at these places must be conducted quietly and respectfully, without quarrels and altercations, thus enabling each person to worship his Creator without interfering with his fellow's religious freedom. This objective can be achieved only by finding a common denominator for all the worshippers.

Although the Court rejected the women's petitions in this instance, it recommended that a special committee be appointed to deal with this and other matters and recommend a solution that would be accepted by the various groups.

Let us hope that this unfortunate controversy, along with other serious religious problems that have arisen between Jew and Jew, can be settled amicably in the future.

*Compelling Compromise—The Synthesis*

The double mention of the word "justice" in the biblical verse "Justice, justice shall you pursue"[152] was interpreted in the *Talmud* as follows: "One [mention of justice] refers to [a decision based on] *law* and the other to *compromise.*"[153] The *Talmud* continues by giving the following example:

*The Heights of Bet Horon*

> How so? When two boats sailing on a river meet, if both attempt to pass simultaneously, both will sink; but if one makes way for the other, both can pass. Similarly, when two camels meet each other on the heights of *Bet Horon,* if both proceed on their course, they will both fall, but if one makes way for the other [by going back until there is enough room to move to the side], they can pass [safely].
>
> How should they act? If one is carrying a load, and the other is not, the one without the load should give way to the other. If one is nearer than the other, the nearer one should give way to the farther. If both are equally near or far, place a compromise before them whereby payment is to be made for the privilege of going first.

It is worthwhile mentioning what exactly are the heights of Bet Horon, geographically. Bet Horon is located in the mountains of Western Samaria, on the border of the territory of the tribe of Ephraim, and close to the territory of the tribe of Benjamin. It lies between two settlements, Upper Bet Horon, atop the mountain, and Lower Bet Horon, in the foothills. Both settlements are mentioned as early as in the Book of Joshua,[154] and were the sites of a significant battle in the wars of Joshua. They are also well-known as sites of historic military events as recently as during Israel's Six

Day War in 1967. Ma'alot [Heights of] Bet Horon, as the name implies, was a path on the mountain with a steep drop on each side. In ancient times, the path was extremely narrow, and two camels could not pass each other without the danger that one might fall into the abyss. As a result, it was necessary for the two camel-drivers to reach a compromise, as the *Talmud* explains.

### *The Comment by the* Neziv

There is a fascinating comment on this passage by Naftali Zevi Judah Berlin, known as *Neziv,* one of the great *Halakhic* scholars of the late 19th and early 20th centuries. He stated:[155]

> If the law cannot bring about peace, there *must* be a compromise. This is what is taught in Tractate *Sanhedrin*: "Justice, justice shall you pursue"—one [mention of justice] refers to [a decision based on] law, and the other to compromise.
>
> The verse refers to a situation where a compromise is imposed and it is impossible to decide the case on the basis of the law. . . . Under the law, both may proceed and both will perish, or one of them will overcome the other and be saved at the other's expense.
>
> But this is not a judgment of *peace.* This is why there is a *mandate* not to apply strict law, but to *force a compromise.*

Law that does not bring about peace is not proper and desirable law, for the very definition and essence of law is to produce a judgment that resolves a dispute peaceably (*mishpat shalom*). Pursuit of justice in such a case requires the *compulsion* of a peaceful result by way of "'compromise." Since the result of insisting on legal rights is strife and contentiousness between the parties, a peaceful "compromise" is *compelled.* This is an excellent example of the application of law and justice in a way that brings peace.

The *Neziv* continues as follows:

> It would seem that this is what our Sages, of blessed memory. meant when they stated[156] that the Temple was destroyed because they grounded their statements on the law of the Torah. This means that they did not want to forego their rights under strict law. Thus, they did not arrive at a peaceful solution, and did not see any necessity to compromise.
>
> The same can be said regarding every dispute between factions of the public. We cannot hope that one party will impose its views on the other party, based on Torah law, and that thereby the controversy will subside. Thus, the good and proper approach is that each of the parties appoint two representatives, with everyone recognizing that each party must compromise its own position so as to reach agreement with the other party.[157] In this way, even the party's own position will be preserved. And this is the approach of the Almighty.

And he adds: "Whenever my eyes observe a dispute among the Jewish communities, a fire burns within me; accordingly, I cannot be silent until I have spoken on the subject."

In sum: The strict law is represented by the principle, the right and the obligation. The depth of the law, as the *Neziv* puts it, is the combination of law and justice. Compromise is the synthesis of law and justice. Based on these concepts, we must render a decision in order that each party may maintain its position, individually and jointly. This applies in every case, including the *Bar-Ilan* Street case.

### *The Comments of the* Neziv *Viewed in the Light of Their Historical Background*

It seems to me that the important, profound and candid explanation of Naftali Zevi Judah Berlin points to his own time, the period of the great tension of the *Haskalah.* It is my practice to explain the decisions of the *Halakhic* authorities according to the law contained in the world of the *Halakhah* and in light of the historical background in which they were written. The Yeshiva of Volozhin produced great Torah scholars and *Halakhic* authorities, and the leaders of the *Haskalah* movement absorbed its spirit and atmosphere. For example, Hayyim Nahman Bialik, our national poet, who studied at Volozhin, composed well-known poems, such as *Ha-Matmid.*

Indeed, there is nothing new under the sun in the Jewish world. There has only been a slight change in geography. The case in the *Talmud* dealt with the heights of Bet Horon on the way to Jerusalem. The problem of two thousand years ago has re-appeared in a different guise in a street *in the midst* of Jerusalem. Incidentally, I have just quoted from Rabbi Naftali Zevi Judah Berlin, who was the father of Rabbi Meir Berlin, later known as Bar-Ilan, after whom the street is named. Thus, the heights of Bet-Horon have become the heights of Bar-Ilan.

The means of transportation have also changed. The camels of that time have become the automobiles of today. Sometimes, I wish that we would use more camels today, and thereby prevent the constant deaths and injuries on our highways.

There has also been a slight change in the nature of the problem. The heights of Bet-Horon was a narrow passage for camels in the geographical sense; the heights of Bar-Ilan is a narrow passage in the ideological sense. But both have produced much strife and extremism on both sides. Law alone is not sufficient here. What is needed is the imposition of a compromise that can bring about peace.

## Conclusion—A Continuing Debate: The Hazon Ish and Ben-Gurion

To my deep regret, the knowledge of the Jewish heritage has progressively diminished among many Jews, young and old. This disturbing phenomenon is a very significant factor in the estrangements and splits that we see today. In the early days of the State of Israel, the interesting Talmu-

dic passage regarding the heights of Bet Horon was the subject of conversation between David Ben-Gurion, one of the great founders of the State of Israel, and the *Hazon Ish,* R. Yeshayahu Karelitz, the leading *Halakhic* authority of the period. Of course, mention was made of the rule that the unloaded camel must give way to the camel that is carrying a load. Ben Gurion and the *Hazon Ish* differed over which of them represented the camel carrying the load, which represents the burden of the heritage of the generations and the national vision. This is a legitimate and appropriate dispute. We should only be privileged to see the continuation of such a discussion today. Only in this way can the proper synthesis be found between the values of the State of Israel as a Jewish and democratic state.

## Notes

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1. In the Basic Law as enacted in 1992, this section was designated as Section 1. In 1994, the Basic Law was amended by adding an additional section entitled "Basic Principles." That added section was designated Section 1, and the "purpose" section was redesignated as Section 1A. This amendment and redesignation was done in a way which raised questions with which I have dealt in M. Elon "The Basic Laws: Their Enactment, Interpretation and Expectations," 12 *Mehkerei Mishpat* (Bar-Ilan Law Studies) (1995) pp. 253, 289–295 (Hebrew).
2. In the *Basic Law: Freedom of Vocation* the stated purpose of the statute is "to protect freedom of vocation."
3. *Ziv v. Acting Commissioner of the Tel Aviv Municipal Area, I* P.D. 85, 89 (1948). See also *Naiman* v. *Chairman, Central Elections Committee,* 39(ii) P.D. 225, 294 (1985) (hereinafter *Naiman I); Naiman v. Chairman, Central Elections Committee,* 42(iv) P.D. 177, 189 (1989) (hereinafter *Naiman II); M.* Elon, "Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Personal Freedom," 17 *Iyunei Mishpat (Tel Aviv University Law Review)* (1992) pp. 659, 663 et seq. (Hebrew).
4. For a general discussion, see Elon, loc.cit. n. 3 at pp. 665–666.
5. See M. Elon, *Jewish Law (Ha-Mishpat Ha-Ivri) History Sources, Principles,* Vol. 1, (Philadelphia, Jerusalem 1994) pp. 1–39. This is the four volume English translation of M. Elon, *Ha-Mishpat Ha-Ivri,* 3rd ed. (Jerusalem, 1988).
6. With the Emancipation, and as a consequence of it, the abrogation of Jewish juridical autonomy, Jewish civil law ceased to govern daily life. As a result, a number of problems have arisen in certain legal areas that must be, and can be, grappled with by means of research and decision-making.
7. The generic Hebrew term for the entire body of Jewish law, religious as well as civil.
8. 125 *Divrei Knesset* (DK) 3782–83 (5752–1992), quoted in Elon, loc.cit n. 3, p. 668.
9. See Elon, loc.cit. n.1 at pp. 260–261, See also *infra* section 3.2.5 and section 4.6 from n. 87.
10. Section 8 of the *Basic Law: Human Dignity and Freedom;* section 4 of the *Basic Law: Freedom of Vocation*.
11. Decision of Justice Elon, *Gemilut Hesed Shel Emet Burial Society of Jerusalem* v. *Kestenbaum*, 46(ii) P.D. 464, 511 (1992).

12. *Naiman I,* supra n. 3, at pp. 293–294. See also Elon, loc.cit n. 3, at p. 669; Elon, op.cit. n. 5, at p. 260.
13. *Arokh ha-Shulhan, Choshen Mishpat*, Introduction.
14. *Deuteronomy* 31:19.
15. Epstein's description of the "song," in the Bible can best be described as a "symphony."
16. The unanimous opinion, written by Justice Elon, in *Shefer* v. *State Of Israel*, 48(i) P.D. 87, 105 (1993), was translated by Prof. B. Auerbach for the "Proceedings of the First International Colloquium on Medicine, Ethics and Jewish Law," Shaare Zedek Medical Center, Jerusalem 1996, (Dr. Falk Schlessinger Institute). This article's references to the decision are made to the Hebrew original.
17. *Exodus* 23:2.
18. See Elon, op.cit. n. 5, pp. 6–10.
19. 12th century, Germany.
20. See *Mordekhai, Bava Kamma,* #179, *Bava Batra,* #480, Resp. *Maharakh* of Rothenburg, ed., *Cremona,* #230; *Hagahot Maimuniyyot, Shofetim,* #10.
21. 13th century, Rabenu Asher ben Yechiel, Germany-Spain.
22. Resp. *Asheri* 6:5.
23. Resp. *Asheri* 6:7.
24. See Elon, op.cit. n. 5, pp. 699–707.
25. Resp. *Maharakh Or Zaru'a* #222, quoted in Elon, op.cit. n. 5, pp. 763–765.
26. *Babylonian Talmud (TB) Bava Batra* 100a.
27. Rabbi Shlomo ben Abraham Aderet, a Spanish *halakhic* authority.
28. Resp. *Rashba,* V, #178; I,#788, discussed in Elon, op.cit. n. 5, pp. 766–768.
29. See Elon, "Demokratia, Zehut Yesod u-Minhal Takin bi-Fesikatam Shel Hakhmei ha-Mizrah be-Motza'ei Gerush Sefarad" [Fundamental Rights and Orderly Administration in the Decisions of the Halakhic Authorities of the East Following the Expulsion of the Jews from Spain], 18–19 *Shenaton ha-Mishpat ha-Ivri (Annual of the Institute for Research in Jewish Law,* Hebrew University of Jerusalem) (1992–94) pp. 9, 16–17 (Hebrew).
30. Elon, loc.cit. n. 29, at p. 17.
31. Resp. *Maharashdam, Orach Haim,* #37; *Choshen Mishpat,* #421, quoted in Elon, op.cit. n 5, p. 724.
32. Resp. *Elijah Mizrahi* #53 (Jerusalem, Darom 1938) pp. 145–46, quoted in part in Elon, op. cit. n. 5. pp. 700–701, 724.
33. See Elon, op.cit. n. 5, pp. 724–725.
34. *Proverbs* 3:17; see Elon, op.cit. n. 5, pp. 387–390.
35. See Elon, op.cit. n. 5, pp. 94–104. For a general discussion of the creative methods used to develop Jewish law, see ibid. at pp. 228 et seq. For a detailed discussion of the nature of the majority, the developments which took place in this area of the law, and the historical background for the changes that took place, see Elon, loc.cit n. 29, at pp. 18–43. For a discussion of the quorum needed to conduct public business, see ibid. at pp. 43–46.
36. See *supra* n. 31 "The *Zemah Zedek,* R. Menahem Mendel Krochmal, of 17th-century Moravia, took a middle position. On the one hand, he argued in favor of enfranchising the poor, but he also ruled that any legislation had to be approved by those possessing the majority of wealth. See Elon, loc.cit. n. 29, at pp. 39–42.
37. See Elon, "Women in Israel: Tradition and Transition," Caroline and Joseph S. Gruss Lecture in Talmudic Civil Law, New York University School of Law, pp. 1–9 (forthcoming).
38. See, e.g., sources cited in *Nagar* v. *Nagar,* 38(i) P.D. 365, 404 (1984). decision written by Justice Elon; Elon, op.cit. n. 5 p. 1798 n. 151. See also *Shakdiel* case, *infra* n. 40.
39. *Psalms* 45:14.
40. For a more detailed discussion of these three approaches, see decision of the Court, written by Justice Elon, *Shakdiel* v. *Minister of Religions, 42(ii)* P.D. 221, 246–271 (1988).
41. It should be noted that in Israel—as in many other democratic countries, such as England—there is no separation between church and state. Therefore, the institution of

a religious council, which oversees the provision of religious services to Jews, exists in the State of Israel. Similarly, there is an official state rabbinate, whose functionaries are paid by the government, and religious education is also funded by the Israeli government (along with secular education).

42. *Shakdiel, supra* n. 40.
43. *Hoffman* v. *Jerusalem Municipal Council,* 48(i) P.D. 678 (1994).
44. See *Nagar, supra* n. *38,* at p. 403, quoted in Elon, op.cit. n. 5, pp. 1795–1799.
45. *Likkutei Halakhot Shel ha-Hafez Hayyim* [Collected Rulings of the Hafez Hayyim], Sotah #21, quoted in Elon, op.cit. n. 5 p. 1799.
46. Remarks of Rabbi Aharon Lichtenstein, in "Be'ayot Yesod be-Hinnukhah Shel ha-Ishah" [Fundamental Problems Concerning the Education of Women), in *Ha-Ishah ve Hinnukhah* [Women and their Education] (Kefar Saba 1980) pp. 158–59 (Hebrew), translated and quoted in Elon, op.cit. n. 5, p. 1801.
47. The Special Tribunal, convened because the case involved the question of whether or not the underlying matter was within the exclusive jurisdiction of a religious court, was composed of two Supreme Court justices and one member of the Rabbinical Court of Appeals. The court's opinion was written by Justice Elon and concurred in by Justice Meir Shamgar, the President of the Supreme Court, and by Rabbi Yosef Kapakh of the Rabbinical Court of Appeals. Both Justice Shamgar and Rabbi Kapakh wrote concurring opinions, with some additional comments.
48. *Nagar* v. *Nagar,* 38(i) P.D. 365 (1984).
49. See Elon, *Herut ha-Perat be-Darkhei Geviyyat Hov ba-Mishpat ha-Ivri* [Individual Freedom and the Methods of Enforcing Payments of Debts in Jewish Law] (Jerusalem, 1964) pp. 133 ff. (Hebrew).
50. See Elon, op.cit. n. 5, p. 1635.
51. See ibid. at pp. 1638–39.
52. *Perach* v. *Minister of Justice,* 47(iv) P.D. 715 (1993), written by Justice Elon.
53. There are many other such examples in the decisions of the Supreme Court and in the corpus of Jewish law.
54. *Suissa* v. *State of Israel,* 46(iii) P.D. 338 (1992).
55. See *Ganimat* v. *State of Israel,* 49(iii) P.D. 355 (1995); *Ganimat v. State of Israel* (rehearing), 49(iv) P.D. 589 (1995); Criminal Procedure Law (Enforcement Authority—Detentions), 5756—1996. See also Elon, "Criminal law in a Jewish and Democratic State," 13 *Mehkerei Mishpat* (1996) pp. 27, 46–51.
56. Section 1 of the *Law of Return*, 1950.
57. 6 DK 2035 (1950).
58. *Ben Shalom* v. *Central Elections Committee,* 43(iv) P.D. 221 (1989).
59. See *infra* Section 6 for more on euthanasia and suicide.
60. *Leviticus* 18:5.
61. *Deuteronomy* 4:15. For further discussion, see the *Shefer* case, *infra* Section 6.
62. *State of Israel* v. *Guetta,* 46(v) P.D. 704 (1992), decision written by Justice Elon.
63. Genesis *Rabbah 24:7.*
64. Nagar, *supra* n. *38* at pp. 393–394.
65. *Anonymous* v. *Attorney General,* 32(iii) P.D. 421, 429–30 (1977).
66. Resp. *Maharashdam, Even Ha-Ezer,* #123.
67. Talmudic sage of the post-Mishnaic period.
68. *Bava Kamma* 116b; *Bava Metzia* 10a; *ibid*. 77b.; *Maimonides Mishne Torah(MT) Hilckhot Schirut* 9:4.
69. *Exodus* 22:2.
70. *Leviticus* 25:39.
71. Philo. *On The Commandments,* II, pp. 81. For more details see M. Elon, *Freedom of the Debtor's Person in Jewish Law,* (Jerusalem, 1964) pp. 1–10 (Hebrew).
72. *Kiddushin* 20a. For example, should a master have but a single pillow, he must surender it for the use of his Hebrew slave.
73. *Exodus* 21:5–6.
74. *Jer. Talmud Kiddushin* 1:2.

75. *Exodus* 20:2–3.
76. The *Halakhic* authorities determined that the practice was to be observed only during the times that legal effect was given to the jubilee year. Scholars disagree exactly when this happened, but all agree that this institution has not been in effect for some two thousand years.
77. *Deuteronomy* 24:11–13.
78. For more details, see A Elon, op.cit. n. 71. at pp. 1–37, 111–237; Perach, op.cit. n. 52.
79. *Sifrei,* Finkelstein edition (1929). *Deuteronomy* I, *Piska* 16, p. 26.
80. *TB, Horayot* 10a-b.
81. *Rashi, Horayot* 10b sv. *Avdut.*
82. *Pesikta Rabbati,* 22, *Parsha Teninuta,* Ish-Shalom ed. p. 111.
83. *Dekel* v. *Minister of Finance,* 45(i) P.D. 28 (1990) 34, decision written by Justice Elon; *Jerczewski* v. *Prime Minister,* 45(i) P.D. 749 (1990) 820, decision written by Justice Elon; M. Elon, loc.cit. n. 3, at p. 683.
84. The last line of this poem is taken from *Ecclesiastes* 3:24. The poem itself is quoted from Y. Zemora, *Complete Poems of Yehuda HaLevi.* Vol. II (Jerusalem, 1946) book 5, p. 209 (Hebrew).
85. Responsa *Divre Rivot,* 224.
86. Leviticus 19:18.
87. *TB Shabbat* 31a.
88. See *supra,* section 2.2.
89. See TB *Ketubbot* 49b; *Bava Batra* 8b; *MT Mattenot Aniyyim* 7:10.
90. Proccacia, *"He'arot bi-Devar Shinnui Tokhnam Shel Erkhei ha-Yesod ba-Mishpat"* [Comments on the Change in Content of the Basic Legal Values], 15 *Iyyunei Mishpat* 377, 378 (1990) (Hebrew).
91. *MT Sanhedrin* 4:5.
92. *Psalms* 8:4–7.
93. Leading proponent of Orthodox Judaism in 19th century Germany.
94. See *Jerczewski, supra* n. 83 at pp. 832, 833.
95. See *Jerczewski, supra* n. 83, at p. 783; *Hendeles* v. *Bank Kupat Am,* P.D. 35(ii) 785, 794–795 (1981).
96. M. Elon, "Opening Remarks," 19 *Mishpatim* (1990) pp. 543–544 (Hebrew).
97. *TB Berachot* 3b.
98. *Supra* n. 16.
99. *Supra* n. 16, at p. 116.
100. *Genesis* 1:27.
101. *Leviticus* 19:18.
102. *TB Shabbat* 31a.
103. Resp. *Tashbez,* I. #54, quoted in *Shefer,* supra n.16, at p.126.
104. Shefer, *supra* n. 16, at pp. 106–145.
105. For a detailed description of the legal situation in the United States, see Shefer, *supra* n. 16, pp. 145–159.
106. For a description of the legal situation in the Netherlands, and the consequences of the recognition of active euthanasia there, see Shefer, *supra* n. 16, at pp. 159–160.
107. 117 S. Ct. 2293 (1997).
108. N.Y. Penal Law ß 125.15.
109. 117 S. Ct. at 2297.
110. Ibid., at p. 2298.
111. 117 S. Ct. 2258 (1997).
112. Wash. Rev. Code ß 9A.36.060(l) (1994).
113. 117 S. CL, at pp. 2261–62.
114. Ibid., at p. 2263.
115. Ibid., at p. 2271.
116. Ibid.
117. Ibid., at pp. 2272–74.
118. Ibid., at p. 2274.

119. Ibid., at p. 2303.
120. Ibid., at p. 2310.
121. Ibid., at pp. 2310–12.
122. Ibid., at pp. 2304–10.
123. Ibid., at p. 2303. Justice Ginsburg stated that she concurred in the Court's opinion substantially for the reasons set forth in Justice O'Connor's concurring opinion.
124. Ibid., at p. 2304.
125. Ibid., at p. 2293.
126. *Supra* n. 16, at pp. 167–68.
127. *New York Times* v. Sullivan, 376 U.S. 254 (1964).
128. Id. at pp. 279–80.
129. See decision of Justice Elon, *loc.cit*. n. 3
130. 31(ii) P.D. 281 (1977), reversed on rehearing, 32(iii) P.D. 337 (1978).
131. See 32(iii) P.D. at p. 344, where President Landau quoted the Talmudic saying that "whoever shames his fellow in public is considered as having shed blood."
132. Id at p. 355.
133. *Ecclesiastes* 7:1.
134. *MT De'ot* 7:2, 6.
135. 42(iv) P.D. 20 (1988).
136. See H. H. Cohn, *Ha-Mishpat* (The Law) (1991) p. 517 (Hebrew).
137. It also has been argued that *Sullivan* "grew out of the peculiar struggle in the U.S. of the 1960s between the liberal northern press and the southern juries," a matter, of course, which is entirely irrelevant in the context of Israeli law. See D. Kretzmer, "Intent in Criminal Libel," 21 *Israel L Rev.* (1986) pp. 591, 602 n. 25.
138. 487 F.2d 986 (2d Cir. 1973). I would like to thank Professor Burt Neuborne for bringing this case to my attention.
139. *Military Court of Appeals* v. *Vaknin,* 42(iii) P.D. 837, 857–861 (1988), written by Justice Elon.
140. *Leviticus* 19:16.
141. The second category of subject matter mentioned in section 3, *supra*.
142. *Horev* v. *Minister of Transportation* (not yet published).
143. *League Against Religious Compulsion* v. *Jerusalem Municipal Council*, 16(iv) P.D. 2665 (1962).
144. *Barukh* v. *Road Transport Controller*, 32(ii) P.D. 160 (1978).
145. 16(iv) P.D. at p. 2668.
146. See President Barak's opinion, *supra* n. 142.
147. *National Circle* v. *Minister of Police,* 24(ii) P.D. 141 (1968).
148. *Hoffman* v. *Official in Charge of the Kotel,* 48(ii) P.D. 265 (1994), written by Justice Elon. This decision has come to be commonly referred to as the *Neshot Ha-Kotel* case.
149. Ibid, at 340, quoting *Peretz* v. *Local Council of Kfar Shmaryahu,* 16 P.D. 2101, 2113 (1962).
150. A number of Christian sects have claimed various rights in connection with these churches, and several cases involving the rights of these sects have come before the Supreme Court, both in the time of the British Mandate and since the establishment of the State of Israel. See, e.g., *Coptic Orthodox Muteran in Jerusalem* v. *Minister of Police, 2*5(i) P.D. 225 (1970); *Coptic Orthodox Muteran of the Holy Seat in Jerusalem and the Near East* v. *Government of Israel,* 33(i) P.D. 225 (1977).
151. *Hoffman, supra* n. 148, at pp. 342–43.
152. *Deuteronomy* 16:20.
153. *TB Sanhedrin* 32b.
154. *Joshua* 16:3–5,18:13–14.
155. Resp. *Meshiv Davar,* III, #10.
156. *TB Bava Mezi'a* 88a.
157. It is interesting to note that the *Neziv* proposed the establishment of a committee to deal with the question and hinted at the conclusions that the committee should reach. This has become the accepted practice in Israel today in dealing with analogous problems.