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**Between Three Branches of Government:
The Balance of Rights in Matters of Religion in Israel**

Shimon Shetreet

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Professor **Shimon Shetreet** specializes in public law and the judicial system at the Hebrew University of Jerusalem's Faculty of Law, and is a former Member of Knesset and Government Minister.

About the Research

The study analyzes the balance of protection of civil rights in matters of religion, and weighs the varying contributions made by the three branches of government: the legislative branch, the judicial branch, and the executive branch. Based on the conclusions of the study, the judicial branch has made a positive contribution, whereas the contributions made by the legislative and executive branches have been of a less positive nature.

For the most part, parliamentary legislation has served to restrict civil rights related to matters of religion, both in terms of the Knesset's legislative initiatives and its responses to rulings handed down by the courts. This negative trend is primarily noticeable in the Basic Law: Human Dignity and Liberty, and the Basic Law: Freedom of Occupation, both passed in 1992, as well as the Law of Alternative Civil Burial, passed in 1996.

Throughout the incumbency of most of Israel's governments, the executive branch has also made a negative contribution to the balance of civil rights related to matters of religion.

Of all the three branches, the Supreme Court has played the most prominent positive role in enhancing civil rights in matters of religion. Its rulings are the product of a social process that has effected changes in various modes of public behavior.

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Introduction

This study analyzes the balance of protection of civil rights in matters of religion, and considers the varying contributions of all government bodies. This issue, and the conclusions that derive from it, affect Israel's character as a Jewish and democratic state. The second and third chapters of the study are devoted to an analysis of the legal aspects of defining the State of Israel as a Jewish and democratic state, including a discussion of the contrasting ideological perspectives of various segments of Israeli society. These perspectives form the roots of the basic legal formulas that will be presented.

Analysis of the long-term performance of the three branches of government, and in-depth investigation of the body of laws passed by the legislative branch, the rulings handed down by the judicial branch, and execution and enforcement of the law by the executive branch—including administration, bureaucracy, and policy—lead one to conclude that the executive and the legislative branches in Israel have made a relatively negative contribution on a wide variety of issues, while the judicial branch has made a positive contribution. This conclusion arises from a review of government actions regarding issues related to religion, including Sabbath; kashrut (Jewish dietary laws); burial, marriage, and divorce; and the status of non-Orthodox Jews.

Parliamentary legislation has limited civil rights in matters of religion on a long series of issues, both in terms of the Knesset's legislative initiatives and its responses to rulings handed down by the courts. Recently, there has been a discernible shift in this trend by means of several laws, most conspicuously the Basic Law: Human Dignity and Liberty, and the Basic Law: Freedom of Occupation, both of which were passed in 1992, as well as the Law of Alternative Civil Burial, passed in 1996. The new Basic Laws constitute a fundamental shift in the protection of civil rights in Israel, and have serious ramifications for the protection of civil rights in matters of religion. While the right to freedom of religion and conscience was not explicitly enumerated in

the Basic Laws, in the view of the courts and of legal scholars, this right, among others, is inferentially guaranteed in the Basic Law: Human Dignity and Liberty.

Aside from brief periods in the tenure of most of Israel's governments, the executive branch has also made a negative contribution to the balance of civil rights in matters of religion. The approach adopted by this branch is reflected in the way it has chosen to set and execute policy. At times, influenced by the social and political climate, the executive branch adopts a policy of non-enforcement that enhances civil rights in matters of religion, such as on issues of closing places of business on the Sabbath, although there has been a slight setback of late in this area. However, the more common phenomenon is that of a refusal to comply with court rulings that would enhance civil rights in matters of religion. This trend toward noncompliance, which fails to recognize the supremacy of the general judicial system, is common within the religious judicial system as well as within those state authorities that are controlled by the religious political establishment. Although this phenomenon is not unique to court rulings on religious affairs, in other contexts it does not reflect a consistent, deliberate trend, as is the case in issues that pertain to religious affairs.

While the legislative branch and the executive branch have for the most part had a negative influence on civil rights in matters of religion, this is not the situation in the judicial branch, particularly in the Supreme Court. Of the three branches of government, the judicial branch's Supreme Court is noteworthy for its positive contribution over the years toward enhancing civil rights in matters of religion. Its rulings are the product of a social process that has altered public behavioral norms—in various realms. In the wake of these changes in society, several lawsuits and petitions were brought before the Supreme Court, whose rulings on these claims provided judicial backing to developments that had enhanced the status of civil rights. Thus, for instance, the Supreme Court ruled that state-supported television could operate on the Sabbath, overturned a municipal bylaw that forbade screening films on the Sabbath, and recognized the right to secular burial—years before the Knesset passed legislation which secured that right. Furthermore, the Supreme Court recognized secular marriages of Israeli residents that were performed abroad, and non-Orthodox conversions carried out abroad. These are only a few examples of High Court rulings that enhanced civil rights in matters of religion.

The process of enhancement of civil rights by means of court rulings was gradual. It began with social developments that eventually led to judicial petitions and lawsuits, which resulted in rulings that provided protection of civil rights. These rulings gave judicial sanction to social developments. This dynamic process applies both to legal proceedings brought before the High Court of Justice and judicial decisions adopted by the courts, including the Supreme Court, in civil or criminal proceedings.

Rulings issued by the Supreme Court, which have contributed to enhancement of civil rights in matters of religion, have generally provoked a reciprocal reaction by the government, which would usually initiate legislation, and by the Knesset, which would pass said legislation. Sometimes, the parliamentary legislation would result in a reversal of court rulings that had previously enhanced civil rights. At other times, the Knesset passed legislation that empowered government authorities to nullify any of the civil rights enhancements brought about by the rulings of the Supreme Court, but in actual practice, the prevailing social climate and public pressure were such that a full reversal of the court's rulings was impossible. This was the case when the courts struck down a municipal bylaw that forbade the screening of movies on the Sabbath. The Knesset reacted by passing legislation to close the loophole, but in actual practice, the courts' invalidation of the bylaw was not adopted by the various local authorities, even in the wake of an amendment to the Municipalities Ordinance (No. 40) of 1990, which authorized them to regulate business hours on the Sabbath for reasons pertaining to tradition and religion. Sometimes—but not often—legislation actually enhanced the civil rights situation, as was the case with the Knesset's passage of legislation on the rights of reputed spouses, which even further extended the rights provided by the judicial rulings.

The conclusions of the study lead to three primary recommendations. The first recommendation is for a compromise to be worked out vis-à-vis the approach of the State of Israel as a democratic, Jewish state: Israel is not an halachic or religious state, nor is it an absolutely secular state; it is a traditional-Jewish state. This perspective must constitute the basis for a socio-political consciousness as well as a legal-constitutional foundation that will guide the courts in their decisions on religious matters. The second recommendation is that protection of the status and autonomy of the judicial system be anchored in a constitution. The third recommendation is that there is a need to formulate

various legal and judicial mechanisms in order to ensure the enforcement of Supreme Court rulings.

As part of our study of the function of the three branches of government as regards their protection of civil rights in matters of religion, we will investigate the role played by the Knesset, the government, and the courts on several issues including marriage, kashrut, burial, conversion, and the right of immigration to Israel.

I The Balance of Protection of Rights in Matters of Religion

1. The right of marriage

Based upon the status quo agreement, the Israeli lawmaker regulated—at the behest of the elected government—the issue of Jewish marriages in Israel. The arrangement was included in the Rabbinical Courts' Jurisdiction (Marriage and Divorce) Law, 1953.¹ Section 2 of the law states that marriage and divorce of Jews in Israel will be carried out in accordance with the laws of the Torah. This was the basis for the government-initiated passage of a legal arrangement by which Jews would only be able to be married in a religious ceremony. A similar legal situation was established for other religious communities.

The decision by the government and the legislature to institute an exclusive arrangement of religious marriage harmed the right of marriage in two fundamental ways: first, the right to inter-religious marriage was limited only to those instances in which the two religions were willing to recognize said marriages. Second, the right of marriage was restricted by the limitations of the religious law. One example is the prohibition by Jewish law of marriage between a cohen (member of the priestly caste) and a divorcee, or a cohen and a convert.²

Note: Unless otherwise noted, all references cited in footnotes refer to Hebrew-language publications.

¹ 7 L.S.I. 139.

² A. Rubinstein, *The Constitutional Law in Israel*, 1997, Vol. 1, p. 196.

The legislature's decision to institute religious marriage is also liable to be perceived as harming freedom of religion—one of the main elements of which is freedom from religion—due to the requirement to avail oneself of a religious authority in order to create that most quintessential of intimate connections—the bonds of marriage.³

The attitude of the judicial branch to the issue of marriage contrasts with that of the legislative and executive branches. The Supreme Court played a role in developing legal institutions as a means of bypassing the restrictions of religious law, and did what it could to ease the burden of those individuals who cannot or do not want to be married in accordance with religious law. The legal institutions included recognition of registration of civil marriages performed abroad, and recognition of private marriages of individuals who, according to Jewish law, are forbidden from marrying one another.

The first instance of the Supreme Court's recognition of civil marriages of Jews abroad occurred in the *Funk-Schlesinger* case. In this ruling, the High Court of Justice required the Ministry of Interior to register as married all Israelis who were married in civil ceremonies conducted abroad.⁴ (The High Court of Justice ruled that examination of the validity of a civil marriage was not in the purview of a population registry clerk, and that it was sufficient for the couple to produce *prima facie* proof of the registration.) A marriage certificate from a foreign country constituted such proof. Later, the Supreme Court agreed to grant alimony to a woman who had been married in a civil ceremony, by making use of a legal construction that piggybacked the religious law onto the civil law. Based on this method, the court reached the conclusion that according to private international law (known in the United States as conflict of laws), the couple had been married. Once this was legally determined, the court applied the Jewish law to the matter of alimony.⁵ Through these critically important laws, the Supreme Court authorized marriages and divorces outside of Israel. Furthermore, according to present-day practices, there is no necessity to travel abroad—one can get married by messenger, in what is popularly known as a “Mexican marriage” or

³ P. Shifman, *Civil Marriage in Israel: The Case for Reform*, 1995, p. 5, as well as S. Shetreet, “Freedom of Conscience and Religion” in *Mishpatim*, May 1972, Vol. 3, p. 467.

⁴ H.C. 143/62 *Funk-Schlesinger v. Minister of Interior*, (1963) 17(1) P.D. 225.

⁵ C.A. 566/81 *Shmuel v. Shmuel*, (1985) 39 (4) P.D. 399.

a “Paraguayan marriage,” in which the couple receives the desired marriage certificate by mail, without any requirement to make a personal appearance in another country.

Another means of bypassing the requirement to be married in a religious service was determined by the Supreme Court in the *Segev* case.⁶ According to Jewish law, the marriage of a cohen with a convert, a widow, or a divorcee is forbidden *a priori*, although it is valid *post-factum*. In such cases, the rabbinical courts refuse to marry the couple. Their dilemma can be resolved by private marriage. The High Court of Justice upheld private marriages in all respects pertaining to couples whose marriage is forbidden by Halachah (Jewish law). Conversely, it should be noted that the High Court of Justice refused to offer aid to couples who are halachically marriageable but who chose to marry in a private ceremony. The High Court felt that this would constitute an uncalled-for bypass of the religious-marriage arrangement, and was therefore opposed to public policy.

While the Supreme Court has played a unique and critical role in the drive for recognition of civil marriage and private marriage, the situation is different when it comes to recognition of the legal status and rights of couples that are known in public as “reputed spouses.” In this matter, an interesting process may be discerned: recognition of the status of “reputed spouses” was pioneered by the legislature, whereupon the Supreme Court has concluded the process and further expanded the rights of “reputed spouses.”

The process whereby the legislative branch recognized reputed spouses began with the Fallen Soldiers’ Families (Pensions and Rehabilitation) Law, 1950,⁷ in which the term “wife” is defined as including a woman who lived with the man in question, who is described as “his reputed wife”). Similar descriptions are found in additional social laws, as well. At a later date, section 55 of the Succession Law, 1965,⁸ was adopted, recognizing the inheritance rights of a woman who lives with a man as a family, in the same household. All of this proves that the legislature made a positive contribution by initiating the process of granting recognition to the phenomenon of “reputed spouses.”

⁶ H.C. 130/66 *Segev v. Rabbinical Court*, (1967) 21(2) P.D. 505.

⁷ 4 L.S.I. 115, section on definition of family member.

⁸ 19 L.S.I. 58, at 66.

The Supreme Court concluded the process begun by the legislature, and expanded the rights of “reputed spouses” in several ways. First, the court ruled that a woman who is a “reputed spouse” can also be considered a wife.⁹ In so doing, the court invested the term with a liberal interpretation. Later, a majority opinion of the Supreme Court recognized the validity of a pre-nuptial agreement wherein it was agreed that the husband would pay alimony to a “reputed spouse.”¹⁰ In addition, the Supreme Court extended the principle of joint ownership of marital assets to include common-law spouses.¹¹

In summary, on the issue of the right to marriage, the legislature has generally adopted a position that is not supportive of civil rights in matters of religion. It was the Supreme Court that made an outstanding contribution toward enhancing the situation. One exception to the trend is the recognition of “reputed spouses.” In this matter, we find an example of fruitful and positive cooperation between the lawmakers and the Supreme Court, a cooperative effort that has contributed toward the enhancement of civil rights in matters of religious practice.

2. Persons forbidden to marry

In 1975, the then Attorney General, Professor Aharon Barak, looked into the legality of lists of individuals who in the view of the Chief Rabbinate were forbidden, according to Jewish law, to marry. In his legal opinion, Barak determined that the lists of persons forbidden to marry were compiled without any evidentiary foundation, and were therefore illegal. He concluded that compilation of the lists had to be regulated in such a way as to permit the right to be heard to individuals on the lists. He set up a bureaucratic mechanism by which the addition or deletion of names from the lists could be properly supervised.

⁹ C.A. 384/61 *State of Israel v. Pessler*, (1962) 16(1) *P.D.* 102.

¹⁰ C.A. 563/65 *Yaigar v. Plavitz*, (1996) 20(3) *P.D.* 245.

¹¹ C.A. 52/80 *Shachar v. Friedman*, (1984) 38(1) *P.D.* 443.

By calling attention to an illegal situation, the judicial branch made a positive contribution toward enhancing the rights of individuals forbidden to marry. Nevertheless, without actual implementation of the Attorney General's legal opinion by the executive branch, it would have been impossible to achieve any real enhancement in the situation of individuals forbidden to marry, or in the quality of their rights. Indeed, a State Comptroller's report from 1990¹² stated that Professor Barak's legal opinion had not been implemented, and that the lists of individuals forbidden to marry continued to exist in illegal fashion, without affording the individuals on the lists any right to be heard, and without proper supervision. The State Comptroller's report is proof that by adopting a laissez faire approach, the executive branch made a negative contribution to the quality of rights of individuals forbidden to marry.

The executive branch made an attempt in 1995 to enhance the situation (during this writer's tenure as Minister of Religious Affairs). At that time, new principles were drawn up for proper administration of the lists of individuals forbidden to marry. These principles were devised in coordination with the President of the High Rabbinical Court, Chief Rabbi Eliyahu Bakshi-Doron, and were based upon the legal opinion rendered by the Attorney General in 1975, as well as the regulations of the Protection of Privacy Law 1981.¹³ The process began with a classification of the existing lists by the director-general of the rabbinical courts, under the supervision of the President of the High Rabbinical Court. When the classification process was completed, the list of individuals forbidden to marry had been reduced from 5200 to approximately 200. Under the principal guideline by which the list is now administered, it contains the names of only those individuals against whom specific legal judgments have been handed down. Said individuals must also be informed of their inclusion on the list. The addition or deletion of a name from the list is carried out exclusively by the legal counsel of the Ministry of Religious Affairs and the director-general of the rabbinical courts, working in tandem.

Analysis of the issue of individuals forbidden to marry indicates that the judicial branch, and primarily the Attorney General, made positive contributions toward enhancing the rights of individuals forbidden to marry in Israel. Regretfully, however, with the change of government in 1996, there has been a regression in the position of the executive branch on this matter. The

¹² State Comptroller, *Annual Report for 1990*, No. 40.

¹³ 35 L.S.I. 136.

arrangement that was worked out, and which began to be executed by the Ministry of Religious Affairs, is not being properly executed at present. Nevertheless, it is worth noting one irreversible accomplishment: reduction of the number of names on the list of individuals forbidden to marry to only approximately 200.

3. Kashrut

On the issue of kashrut, various interrelationships between the legislative, executive and judicial branches may be found. In order to gain a proper perspective on the nature of these relationships, we will analyze two instances: the conferment of kashrut certificates, and restrictions on the import and sale of pork.

The first court ruling that considered the question of the Chief Rabbinate's authority to issue kashrut certificates was rendered in the *Marbek* case.¹⁴ The High Court of Justice ruled that the Chief Rabbinate was subject to the critical examination of the High Court of Justice¹⁵ and, furthermore, that the Chief Rabbinate had to confer a kashrut certificate solely on the basis of the "hard core" of halachic laws of kashrut. As such, the High Court of Justice sought to restrict the Chief Rabbinate's authority to base the award of a kashrut certificate on certain halachic policy considerations that were unrelated to the actual kashrut of the food.

Until 1983, the conferment of kashrut certificates was regulated in accordance with a ruling by the High Court of Justice; the primary legislation did not refer to this particular subject whatsoever. The change was initiated by the government, which submitted a bill with the object of regulating the conferment of kashrut certificates. In the wake of this initiative, the Knesset passed the Kashrut (Prohibition of Deceit) Law, 1983,¹⁶ which determines that the sole criteria for issuance of kashrut certificates will be the laws of kashrut.

¹⁴ H.C. 195/64 *Southern Corporation and Marbek v. Council of the Chief Rabbinate* (1964) 18(2) P.D. 324.

¹⁵ Regarding the evolution that took place in the status of the Chief Rabbinate, see below.

¹⁶ 37 L.S.I. 147.

These actions testify to the positive contributions made by the lawmakers and the government, which sought to restrict and limit the Chief Rabbinate's degree of discretion in issuing kashrut certificates. The High Court of Justice completed this positive trend by interpreting the Prohibition of Deceit in Kashrut Law in such a way as to prevent the rabbinate from weighing considerations that were extraneous to the "hard core" of the kashrut laws.¹⁷

Analysis of the subject of issuance of kashrut certificates leads one to conclude that enhancement of the quality of civil rights began with a High Court of Justice ruling on the subject in the 1960s; continued with the legislative initiative taken by the executive branch, and the ensuing passage of that legislation by the Knesset in 1983; and was finally completed through the High Court of Justice's interpretation of the law.

Regarding the second issue—restrictions on the import and sale of pork—it can be said that the matter does not hinge on issues of freedom of conscience and religion, but rather on questions of a national-cultural nature, a view that I myself held at the time.¹⁸ My approach was that one had to differentiate between religious norms, the enforcement of which harms the freedom of conscience and religion, and norms that may have originated in religion but which subsequently gained widespread national-cultural support, and whose enforcement is permissible and justifiable. This latter category includes the norm of forbidding the raising of pigs by Jews. The prohibition is not only a religious norm but a national-cultural norm as well, because for generations the pig symbolized hatred of Jews. Nevertheless, certain restrictions must be introduced into the primary legislation; amending the subsidiary legislation is insufficient.

In the 1950s, several municipal bylaws were passed by local government authorities, with the intention of placing restrictions on the sale of pork. The High Court of Justice struck down the municipal bylaws for two reasons: one, the justices could not find any judicial consent for a municipality to pass bylaws regulating the sale of a certain type of meat; two, the passage of the bylaws was in fact prompted by religious motivations, and was carried out under the guise of regulating the sale of meat. In the opinion of the justices, the question of regulating the sale of pork is a religious issue that is extraneous

¹⁷ H.C. 465/89 *Ruskin v. Jerusalem Religious Council* (1990) 44(2) P.D. 673.

¹⁸ See Shetreet, "Freedom of Conscience and Religion," *supra* n. 3.

to the framework of local affairs. The issue must be regulated by the Knesset, not a local authority.¹⁹ The High Court of Justice, therefore, contributed to the protection of rights by nullifying the secondary legislation that was founded upon religious considerations, and requiring the primary legislature to regulate the issue.

Indeed, in response to the instructions of the High Court of Justice, the lawmakers regulated the issue through the passage of the Local Authorities (Special Enablement) Law, 1956. This law empowered a local authority to adopt—within its area of jurisdiction—bylaws that would restrict or forbid the sale of pork and pork products intended for human consumption.²⁰ Through regulation of the issue in the law, the lawmakers seemingly acted in accordance with the High Court of Justice’s instructions, but the manner in which it dealt with the issue adversely affected the freedoms of conscience and religion of those individuals who consider it a religious restriction on their liberal way of life.

In 1992, the Basic Law: Freedom of Occupation was passed. The Knesset’s enactment of this Basic Law made a positive contribution toward enhancing civil rights in matters of religion in general, and restrictions placed for kashrut reasons in particular. The subject came up for judicial discussion in the *Mitral* case, in which a suit was brought by a meat importer who had been issued a permit to import non-kosher frozen meat. At the time, there was no relevant Knesset legislation on the books, and the issue was regulated by the Minister of Industry and Trade and the government, which used the Import-Export Ordinance to implement its decisions and policies. The High Court of Justice, responding to a petition brought by the *Mitral* company, determined that the government’s refusal to grant an import permit was inappropriate, since it stemmed from religious considerations that were extraneous to the Import-Export Ordinance. In passing, Justice Orr noted that any legislation stipulating that imported meat had to be kosher would restrict freedom of occupation, in contravention of the restriction clause in the Basic Law: Freedom of Occupation. This meant that such legislation could only be passed

¹⁹ H.C. 117/55; 72/55 *Siegfried Avraham Fraidi v. Tel Aviv-Jaffa Municipality and others, Shmuel Mendelsson v. Tel Aviv-Jaffa Municipality*, (1956) 10(2) P.D. 734.

²⁰ 11 L.S.I. 16, sec. 1.

in the Knesset by a 61-member majority, as stated in section 7 of the Basic Law.²¹

Pursuant to the court's decision in the first *Mitral* case, an amendment to the Basic Law: Freedom of Occupation was ratified on March 9, 1994. The new section 8 permits overriding the restriction clause of the Basic Law by law or according to law. Any contradictory law, however, has to contain the proviso that the law was adopted "in spite of that which is stated in the Basic Law: Freedom of Occupation." In addition, the contradictory law has to be passed by a majority of 61 members. In line with the amendment, the Knesset passed the Import of Frozen Meat Law, 1994.²² According to the law, an individual cannot import frozen meat unless he has received a kashrut certificate for this shipment from the Chief Rabbinate or its approved agent.

One may argue that the amendment to the Basic Law: Freedom of Occupation and the legislation of the Import of Frozen Meat Law are examples of the detriment caused by the legislative branch to the quality of civil rights in matters of religion in general, and the import and sale of non-kosher meat in particular. The amendment and, for all intents and purposes, the rewriting of the Basic Law: Freedom of Occupation, and the insertion of the legislative override, are not in themselves improper. The concept of a legislative override, which originated in Canada, is in itself legitimate. The question is only what use should be made of it. Simultaneously, one can say that the lawmaker only restored the situation to its previous state—before the passage of the Basic Law—and, as such, criticism of the Knesset should be somewhat muted.

The *Mitral* case once again came up before the High Court of Justice following the passage of the Import of Frozen Meat Law. The company again petitioned the High Court of Justice,²³ in light of the refusal of Israel's Chief Rabbinate to award it a kashrut certificate, as a prerequisite for receiving a permit to import frozen meat. The Rabbinate claimed that since the petitioner also imports non-kosher meat, it cannot be awarded a kashrut certificate for other meat that it imports, since it cannot be trusted regarding the kashrut of

²¹ H.C. 3872/93 *Mitral, Ltd. v. Prime Minister and Minister of Religious Affairs*, (1993) 47(5) P.D. 485.

²² S.H. no. 1456, p. 104.

²³ H.C. 5009/94 *Mitral, Ltd. v. Council of the Chief Rabbinate of Israel and the Minister of Trade and Industry* (1994) 48(5) P.D. 617.

the meat. Mitral countered that it was willing to promise the Rabbinate that the kosher meat would be imported in accordance with all of the directives of the Chief Rabbinate, and under its full supervision. The company argued that the Rabbinate's refusal was based upon extraneous considerations: the intent of the Rabbinate was to dictate to the petitioner that it should exclusively engage in the import of kosher meat.

The court accepted the petition. In its opinion, in light of the promises made by the petitioner and the facts of the case, there was no cause for concern that the meat that the petitioner wished to import would not be kosher upon arrival in Israel. The Rabbinate's refusal to issue the certificate constituted an attempt to dictate to the importer a mode of behavior in his other business dealings, even when they had no effect on the kashrut of the meat they wished to import. Such an attempt was, the court deemed, unacceptable. The court ordered the Rabbinate to grant the petitioner a kashrut certificate, enabling the petitioner to receive an import permit in accordance with the law.

It is clear that the executive branch, as well as the legislature, made a negative contribution on the issue of restrictions on import and sale of non-kosher meat due to general public considerations. The High Court of Justice is the only authority that made a positive contribution on this matter, although its ruling has been undermined several times by legislation bypassing the court.

4. Civil burial

Until the 1990s, the Minister of Religious Affairs and the Israel Lands Authority avoided processing requests for burial permits and allocation of land for civil burial. The executive branch made a negative contribution to the right of the citizen to alternative burial, invoking a *laissez faire* policy.

The change began with the High Court of Justice ruling in the *Minucha Nechona* case.²⁴ The objective of the association that brought the petition was to permit municipal secular burial. Both the Minister of Religious Affairs and the Israel Lands Authority (ILA) had been dragging their feet over handling applications for this purpose. Justice Shamgar, then president of the Supreme

²⁴ H.C. 397/88 *Minucha Nechona v. Minister of Religious Affairs* (not published).

Court, declared that the petitioner deserved to receive a burial license posthaste from the Minister of Religious Affairs, as well as land to be allocated by the ILA. At this point in time, Shamgar declined to intervene any further, since both the Minister of Religious Affairs and the ILA informed the High Court of Justice that they were prepared to satisfy the petitioner's requests on principle. The meaning of Justice Shamgar's declaration was recognition by the judiciary of the citizen's right to secular burial.

Between the years 1995 and 1996, the executive branch also exhibited a positive policy toward alternative burial. This was reflected in the issuance of public tenders and the granting of franchises to eight alternative burial societies, in accordance with the principles laid down by the High Court of Justice in the *Menucha Nechona* case, and according to a more extensive, comprehensive policy that was adopted for alternative civil burial in Israel.

The legislative branch also made a positive contribution with its passage of the Right to Alternative Civil Burial Law, 1996.²⁵ Section One of the law defines an "alternative civil cemetery" as a civil cemetery in which burial is conducted in accordance with the convictions of the individual. Section Two states that should an individual choose to do so, he has the right to be buried, in accordance with his own world view, in an alternative civil cemetery. Sections Four and Six authorize the Minister of Religious Affairs to apportion sites that will serve as alternative civil cemeteries in various regions of Israel, and to enact regulations for implementation of the law.²⁶

Until 1996, the subject of alternative civil burial constituted a good, albeit rare, example of successful cooperative efforts between the three branches that combined to effect an enhancement of the quality of the right to alternative burial: the High Court of Justice paved the way with its ruling; the Ministry of Religious Affairs then issued public tenders and awarded franchises; and the Knesset took up the challenge and made a positive contribution by legislating the right to civil burial in the Civil Alternative Burial Law, 1996.

²⁵ *S.H.* no. 1584, p. 249.

²⁶ Such regulations have not yet been implemented.

The situation altered following the 1996 elections. In light of a change in government policy, the executive branch is adopting a laissez faire attitude: the Minister of Religious Affairs is avoiding the enactment of regulations for implementation of the Alternate Civil Burial Law. In addition, the allocation of land for use as alternative civil cemeteries has become noticeably more strict. The upshot is a recurrence of the same old story: by adopting a policy of inaction, the executive branch is making a negative contribution.

5. The right to divorce

In the Rabbinical Courts' Jurisdiction (Marriage and Divorce) Law, 1953, the legislature adopted an arrangement of religious divorce that was based on the laws of the Torah.²⁷ According to the Torah, a couple can divorce if they so desire, but in the absence of an agreement between the sides, the spouse demanding a divorce must prove at least one of the pretexts for divorce that are recognized by Halachah. These grounds for divorce are characterized by the existence of blame in the actions or character of the spouse being sued for divorce.

The halachic approach to divorce on the basis of blame has distinct drawbacks. First, when the rupture between the spouses is irreparable, it is best to allow them to divorce without the need to assign blame, since there is no reason to protect the shell of a marriage that has been emptied of content. Second, in most instances, it is difficult to assign blame to only one of the spouses. Usually, both spouses have contributed, consciously or not, to the failure of the marriage. Moreover, ascertaining whether the spouse being sued for divorce is to blame comes with a heavy cost. Prying into the intimate details of a couple's relationship only increases the enmity between them, and leads to even a more painful and difficult divorce.²⁸

This helps us to understand Professor Pinhas Shifman's support for the "no-fault divorce" approach. Based on this approach, the prerequisite that entitles a spouse to demand a divorce is not proof of blame, but proof of

²⁷ Regarding the right to marriage, see above, pp. 13-16.

²⁸ P. Shifman, *Family Law in Israel*, 1995, pp. 422-423.

irreparable collapse of the marital relationship, and the absence of any possible restoration of domestic harmony.²⁹

In this context, it should be noted that under the existing regime of marital law in Israel, a situation may develop in which spouses that are married (to other spouses) can live a joint lifestyle: since the majority of the Jewish population is married according to Jewish law, delays and obstacles to divorce are created, which can lead to situations in which a couple that was married in accordance with Jewish law, and which may be registered as married according to the civil law, live jointly as “reputed spouses” with other spouses. In such a situation, the children of the couple, whose divorce is being denied or delayed, are liable to be defined as bastards according to Halachah.

The “no-fault divorce” approach is a relatively new concept in family law, and is derived from Western legal methods. In Israel, the legislature opted in favor of the halachic approach, which is based on assigning blame. The question that arose over the years was whether it was within the jurisdiction of the Supreme Court to marshal its judicial powers and fashion civil alternatives to the halachic approach, namely, a no-fault divorce approach that would find its way into Israeli law “through the back door.”

There is no unequivocal answer to this question. There have been instances in which the Supreme Court clearly hesitated to create alternatives to the *get* (Jewish divorce). This vacillation may be explained by the Supreme Court’s desire not to be seen as bypassing Jewish law and the rabbinical court system, which by Israeli law are responsible for arranging divorces between Jews. Conversely, there have been other instances in which the Supreme Court made a significant contribution toward the development of civil divorce alternatives.

Analysis of judicial rulings over the years indicates that the Supreme Court at times hesitated to back the right of divorce through civil alternatives. The issue of restraining orders provides one example:³⁰ in the early years of its judicial rulings, the Supreme Court made efforts to protect the right of the wife and children to reside in the apartment as part of the right to alimony, by issuing orders restraining the spouse from entering the apartment. The court’s willingness to issue restraining orders was quite far-reaching, to the extent that

²⁹ *Ibid.*, pp. 424-426.

³⁰ *Ibid.*, pp. 428-431.

the court ruled that a restraining order against a husband could be issued for reasons of emotional or mental duress, and not only when physical violence was at issue.³¹ The restraining order enabled a woman whose husband abused her to gain physical separation from him, even though he refused to grant her a *get*.

However, as time passed, there was a regression in the judicial rulings, and the Supreme Court began to limit the issuance of restraining orders to cases of extreme violence.³² This regression may be explained by the Supreme Court's concern that it was walking too fine a line, to the point that it was crossing over into the jurisdiction of the rabbinical court that, according to law, is responsible for the issue of divorce in Israel.³³

The subject of restraining orders provides a good example of the Supreme Court's hesitancy to step in and devise a formula for a civil *get*-alternative. At the same time, there are other instances in which the court made efforts to develop divorce alternatives when a *get* was not possible. In this manner, the Supreme Court contributed toward enhancement in the quality of the right to a divorce in Israel.

One possible *get* alternative is the dissolution of a shared residential apartment, in the same way that joint ownerships can be dissolved. The rabbinical courts were the first to adopt this method, which enables each of the spouses to demand the dissolution of the shared landed property—when the other spouse is not present—by means of its sale. This can in many instances constitute a *get* alternative, in such cases that the spouse refuses to grant a *get*. The rabbinical courts now seem to have backtracked on their creative initiative in this matter, and are in fact placing impediments on the realization of this *get* alternative, among other things, by means of writs of attachment on the

³¹ C.A. 458/79 *Nir v. Nir*, (1981) 35(1) *P.D.* 518.

³² C.A. 192/82 *Sdan v. Sdan*, (1982) 36(4) *P.D.* 169.

³³ The Prevention of Family Violence Law, 1991, *S.H.* no. 1352, p. 138, enables the issuance of restraining orders to prevent entry into residential apartment or harassment of family members. Prof. Shifman feels that the court will be inclined to toe the line of the narrow judicial rulings. See P. Shifman, *op.cit. supra* n. 3, p. 38.

apartment, as part of the court's efforts to restore domestic harmony, and prevent the sale of the apartment.³⁴

Another possible *get* alternative, of course, is the establishment of a new family without having acquired a *get*. In this direction, the Supreme Court has granted relatively broad recognition to the institution of "reputed spouses." One interesting trend that clearly indicates the court's recognition of said institution is the fact that the court upholds the woman's right to choose her family name as she sees fit, including the possibility of changing her family name to that of the man with whom she is living as a "reputed spouse."³⁵

One example of the positive contribution made by the Supreme Court can be found in its ruling that the wife's abandonment of the residence does not grant the husband who has remained in the apartment any protected tenant rights in accordance with section 33 of the Protected Tenants Law.³⁶ Another example of the Supreme Court's efforts to devise *get* alternatives is its judicial legislation regarding joint ownership of a couple's assets.

The doctrine of joint ownership is the result of the Supreme Court's efforts. Possession is established between the spouses by virtue of the shared effort of their life together, without any requirement to prove special intent to share in a specific asset. While the Supreme Court determined that the burden of proof is on the party claiming to have possession, it simultaneously eased the burden on the spouse claiming to have joint ownership, and tightened up the requirements on the spouse staking the contradictory claim. As a result, joint ownership became a welcome addition to judicial legislation. The advantage of possession is that each spouse has the ability to sue for a dissolution of the shared apartment jointly owned by the two spouses. In so doing, the couple is able to separate, even in the absence of a *get*.³⁷

³⁴ Shifman, *ibid.*, pp. 40-41.

³⁵ *Ibid.*, pp. 42-43. See also O. Kamir, "What's in a Woman's Name" in *Mishpatim*, (1996), Vol. 27(2), p. 327.

³⁶ C.A. 753/82 *Anonymous v. Anonymous*, (1983) 37(4) *P.D.* 626.

³⁷ P. Shifman, *op.cit. supra* n. 28, pp. 433-434.

The extensive body of judicial legislation on the issue of joint ownership provides a good example of the Supreme Court's positive contribution toward devising civil alternatives to divorce in the absence of a *get*. At the same time, the actions of the rabbinical court system and the legislative branch have in certain cases led to a regression from the judicial law and, regrettably, has adversely affected the spouse's ability to base his or her claim on joint ownership.

For example, in the *Bavli* case,³⁸ Supreme Court President Barak ruled that the rabbinical courts were obligated to consider civil joint ownership when the issue of property was factored into the decision in a divorce case. Nevertheless, in actual practice the rabbinical court bypasses the High Court of Justice ruling by referring the spouses to carry out a settlement among themselves on the division of their joint property. In so doing, the rabbinical court avoids having to invoke the principle of joint ownership, which contradicts the property arrangement as dictated by the laws of the Torah. In practice, this limits the ability of the spouse who wants the *get* to pressure for a final settlement—that spouse can no longer request a rabbinical court to dissolve the joint ownership of their apartment. In effect, the rabbinical courts' failure to enforce the High Court of Justice ruling adversely affects the quality of the right to divorce. The fact that the legislative branch and the executive branch have not responded to the non-enforcement of the High Court of Justice ruling by the rabbinical courts testifies to the negative contribution they have made on this issue.

The citizen's ability to stake a claim of joint ownership—as provided for by the Supreme Court—was further undermined by the legislature with the passage of the Spouses (Property Relations) Law, 1973.³⁹ This law provides one step forward but two steps backward. On the one hand, it provides a statutory framework for financial relations between spouses. On the other hand, the law sanctions an arrangement in which the resources may be divided only upon expiration of the marriage. This harms the ability of the spouse wanting a divorce to separate from his or her spouse, even in the absence of a *get*.

³⁸ H.C. 1000/92, *Bavli v. The Great Rabbinical Court*, (1994) 48(2) P.D. 221.

³⁹ 27 L.S.I. 313.

In the *Ya'akobi* case,⁴⁰ the Supreme Court attempted to interpret the Spouses (Property Relations) Law in such a way that it would offer relief to a spouse who is interested in a property arrangement prior to receiving a *get*. Justices Shamgar and Dorner ruled that joint ownership continued to apply as before, despite the passage of the new law. Justices Tal and Strassberg-Cohen both felt that joint ownership in its broad judicial definition ceased to apply following passage of the law, but both justices also recognized the possibility of proving joint ownership for specific assets. Justice Strassberg-Cohen went so far as to say that in her opinion, the final date for balancing the couple's resources could be moved ahead to the time at which relations between the couple deteriorated to an irreparable degree.⁴¹

The justices' deliberations over the *Ya'akobi* case, and the diverse solutions broached by the various justices, again underscore the central role played by the Supreme Court in interpreting the legislation in such a way as to enhance the quality of civil rights as much as possible.

To sum up our findings on the issue of the right to divorce, one could say that of all the branches of government, the Supreme Court provided the greatest help of all toward solving the problems created by the legislature when a religion-based arrangement for divorce was enacted by law. In some instances, the court was deterred from intruding on the authorities of the rabbinical court. This was the case with the issuance of restraining orders. In other instances, the Supreme Court developed civil alternatives to a *get*, thereby enhancing the quality of the right to divorce. The positive contribution it made was at times thwarted by the rabbinical system or the legislature. This was the case with the issue of joint ownership. All of the above reinforces our conclusion that the Supreme Court made a positive contribution to enhancing the quality of civil rights in matters of religious practice, while the executive branch and legislative branch both made negative contributions.

Nevertheless, it should be noted that legal scholars have expressed their disappointment with the stand taken by the Supreme Court for not having defended the right to divorce as staunchly as it has defended the right to marriage, whereas a genuinely liberal perspective would have dictated that the

⁴⁰ C.A. 1915/91 *Ya'akobi v. Ya'akobi*, (1995) 49(3) *P.D.* 529.

⁴¹ This formulation brings to mind the no-fault divorce approach, as described above.

devising of *get* alternatives by the court is no less important than its devising of marriage alternatives.⁴²

Regarding a related aspect of the right of marriage and divorce, it should be noted that in 1995, the Knesset legislated radical regulations to aid *agunot* (the halachic term for deserted wives) whose husbands refuse to grant them a Jewish divorce. Among other things, the regulations empower the authorities to restrict bank accounts and prevent the husband from leaving the country.⁴³ These regulations provided redress to the problems suffered by *agunot*, but since they require the harsh restrictions imposed by the religious courts, they in fact harm the rights of the individual.

6. Conversion

The issue of the validity of conversions was first addressed by the judicial branch in the *Miller* case,⁴⁴ in which the petitioner had completed the conversion process in the United States and received a conversion certificate from the Reform movement. The Minister of Interior decided that under the “nationality” entry on the petitioner’s Israeli identity card, the word “converted” would appear alongside the word “Jew.”

The High Court of Justice ruled that according to the Population Registry Law 1965,⁴⁵ data pertaining to national and religious affiliation must be recorded in accordance with the declaration made by the citizen himself, as determined by section 19b of the law. The registry clerk had no authority to add any data that is irrelevant to the subject at hand. The result was that the court ruled that the petitioner should be listed in the population registry as a Jew, without notation of the word “converted.”

⁴² P. Shifman, *op.cit. supra* n. 3, pp. 33-34.

⁴³ Rabbinical Courts Law (Implementation of Court Judgments of Divorce, Temporary Provisions) 1995, *S.H.* no. 1518, p. 194. Due to awareness of the severity of the restrictions, the law’s validity was limited to a four-year period.

⁴⁴ H.C. 230/86 *Miller v. Minister of Interior*, (1986) 40(4) *P.D.* 436.

⁴⁵ 19 L.S.I. 288.

Additional reinforcement of the *Miller* ruling came in the form of the High Court of Justice ruling on the case of *Shas Movement v. Director of the Population Registry Authority*.⁴⁶ Then President of the Supreme Court Shamgar ruled that the conversion of an immigrant would be recorded in the population registry in accordance with his or her own declaration. If needed, this declaration would be accompanied by a document or public certificate testifying to the conversion. According to President Shamgar, this declaration, when accompanied by a document testifying to a conversion performed in a Jewish community abroad, was sufficient to obligate the individual's registration as a Jew. It made no difference whether the community was Orthodox, Conservative, or Reform.

In the *Miller* case and the *Shas* case, the High Court of Justice took measures to afford civilian protection for non-Orthodox conversions performed abroad. This judicial ruling may make a positive contribution to the enhancement of civil rights in matters of religious practice in the State of Israel.

Subsequently, the High Court of Justice considered the validity of non-Orthodox conversions carried out in Israel. The question arose in 1993 in the *Pissaro* case,⁴⁷ and touched on the validity of Reform conversion performed in Israel as it pertained to the Population Registry Law and the Law of Return. The then Minister of Interior claimed that section 2 of the Religious Community Ordinance (Conversion) did not sanction recognition of non-Orthodox conversion performed in Israel. President Shamgar took the opposite approach, determining that there was no need to interpret the Ordinance as possessing general civil-legal impact. Shamgar argued that one could interpret the Ordinance as possessing impact solely within the jurisdictional limits of matters of individual status. According to Shamgar, in interpreting the Religious Community Ordinance (Conversion) one must also take into account the principles of equality and freedom of conscience and religion. Therefore, the Ordinance should be interpreted according to its narrow meaning, so that it does not rule out recognition of non-Orthodox conversion in Israel for the purpose of registration. Therefore, there is no

⁴⁶ H.C. 264/87 *Association of Torah-Observant Sephardim—Shas Movement v. Kahane—Director of the Interior Ministry Population Registry*, (1989) 43(2) P.D. 723.

⁴⁷ H.C. 1031/93 *Pissaro (Goldstein) v. Minister of the Interior*, (1995) 49(4) P.D. 661.

stipulation that the “head of the community” must give his approval to the conversion as a prerequisite for its investment with “legal impact.” In his judicial ruling, President Shamgar also referred to the Law of Return. He declared that the Religious Community Ordinance (Conversion) only applied to issues that fall within the jurisdiction of the rabbinical courts, and it thus goes without saying that the Ordinance has no bearing on the issue of the Law of Return.

Justice Barak (as he was then), who concurred with President Shamgar’s ruling, made it clear that in its decision on the *Pissaro* case, the court had simply recognized that conversions that have been performed in Israel solely to fulfill the requirements of the Law of Return or the population registry are not conditional upon the requirements of the Religious Community Ordinance (Conversion). Justice Barak emphasized that the court had not made any decision beyond that. In other words, the justices had not expressed any opinions vis-à-vis requisites of the conversion process in Israel that would qualify an individual for coverage under the Law of Return or declaration as a Jew in the population registry. Therefore, the court did not issue an order to recognize the petitioner as a Jew as called for in the Law of Return, nor was any directive given to register her as a Jew in the population registry.⁴⁸

The result is that while the *Pissaro* case determined what the Religious Community Ordinance (Conversion) “was not”—that its jurisdiction did not extend beyond matters of personal status—it did not determine what it “was.” It did not delineate the precise parameters of what constitutes conversion in Israel. The ruling made it clear that “what it was” had to be determined by the legislature. Nevertheless, Justice Barak noted in his ruling that if the

⁴⁸ Justice Zvi Tal, representing the minority opinion, determined that the Religious Community Ordinance (Conversion) can also influence civil issues unrelated to issues of personal status. Therefore, in his opinion the ordinance is also relevant to the Registry Law and the Law of Return. Since “the head of the religious community” is the Chief Rabbinate, only through its agreement can the act of conversion be recognized. It develops that according to Justice Tal, there is a substantive difference between conversion performed abroad (to which the *Miller* ruling and the *Shas* ruling refer) and conversion performed in Israel (in reference to which the Registry clerk must refuse to register an individual as a Jew on the basis of a conversion certificate issued in Israel, if he has a reasonable basis for assuming that the certificate was not issued by a body authorized to do so).

legislature chose not to have its own say in the matter, the court would have no choice but to make a judicial decision on the matter. By a majority opinion, then, the Supreme Court was seeking to simultaneously bolster freedom of religion and apply it to the different streams of Judaism. Nevertheless, the court preferred to leave the ideological questions to the legislature, while at the same time warning the Knesset that if it did not do so, the court would take the job upon itself.

Unmistakable signs of the *Pissaro* case could be discerned in the coalition agreement that was signed with the religious parties following the 1996 elections. The agreement included a commitment to prevent—by force of law—recognition of non-Orthodox conversions performed in Israel for the purpose of registration as a Jew.⁴⁹ In accordance with the agreement, the government initiated a conversion bill according to which only Orthodox conversions will be performed in Israel. The proposed conversion law passed the Knesset in a preliminary reading. This sparked a vigorous struggle by the Reform and Conservative movements, which enlisted highly influential leaders and institutions among diaspora Jewry, especially in the United States. These groups threatened to cut off monetary and political support for Israel and disrupt ties should the conversion law be passed. As these words are being written, the Ne’eman Committee is formulating a compromise agreement on the issue that would be acceptable to the three streams of Judaism.

From the discussion outlined above, one can see that while the High Court of Justice was interested in enhancing and expanding protection of freedom of religion—of all the different streams—the government and the Knesset made negative contributions on this matter. In my opinion, the Ne’eman Committee,⁵⁰ which was set up by the government to recommend ways of solving the issue, drafted a good, workable formula. The Committee decided in favor of setting up a conversion institute in which the non-Orthodox streams would also be represented, whereas the final conversion procedure would be performed in accordance with the practices of the Orthodox rabbinate—meaning that only one type of conversion would be performed. The Ne’eman Committee’s suggestions are acceptable to the non-Orthodox streams, and

⁴⁹ E. Don-Yehiya, *The Politics of Accommodation: Settling Conflicts of State and Religion in Israel*, 1997, p. 60.

⁵⁰ The Ne’eman Committee, *Report and Recommendations for Initiating Ideas and Proposals on the Issue of Religious Conversion in Israel*, 1998.

offer an appropriate solution to a complicated issue. We await the decision of the Knesset and the government on this issue.

7. Limits of the authorities of the Jewish religious system in the State of Israel

A. Status of the Chief Rabbinate

Until 1980, the status of the Chief Rabbinate was never regularized within an inclusive law. The legal underpinning of the Chief Rabbinate relied on a set of judicial laws and budgetary legislation, which did not delineate its specific authorities and modes of action. Each year, the Knesset would pass the annual Budget Law, through which funds would be allocated to underwrite the operations of the Chief Rabbinate and its associated bodies. The first judicial ruling that considered the status of the Chief Rabbinate was the *Marbek* case.⁵¹ The Supreme Court, sitting as the High Court of Justice, ruled that the Chief Rabbinate was subordinate to its own authority. It also ruled that the kashrut certificates should be issued solely on the basis of the “hard core” of kashrut laws in Halachah. In so doing, the High Court of Justice limited the discretion of the Chief Rabbinate.

In the next stage, the government initiated legislation to regularize the status of the Chief Rabbinate within a primary law. In the wake of this initiative, the Knesset passed the Chief Rabbinate of Israel Law, 1980,⁵² which regulates the status, authorities, and functions of the Chief Rabbinate. Furthermore, the law banning deceit in kashrut was passed in 1983. It determines that the award of kashrut certificates by the Chief Rabbinate must be carried out solely on the basis of the laws of kashrut. The court interpreted the law banning deceit in kashrut such that it forbids the Rabbinate from taking into account any considerations that are not based on the “hard core” of the kashrut laws.⁵³

⁵¹ See *supra* n. 14.

⁵² 34 L.S.I. 97.

⁵³ See the *Ruskin* and *Mitral* cases, *supra* nn. 17 and 21 respectively.

It would be fair to say that on the issue of the status of the Chief Rabbinate, the legislature made a positive contribution by underscoring the fact that the Chief Rabbinate is a public body that acts for the state and within the framework of its laws, as stated by the High Court of Justice in its verdict on the *Marbek* case.

The High Court of Justice completed its work by clarifying that the Chief Rabbinate is a public, administrative body that exists by virtue of the law of the state and which is funded by it, and is therefore subordinate and limited to the authorities invested in it by law.

B. Status of the religious court judges

Shortly after the establishment of the State of Israel, the government initiated legislation with the aim of regulating the function and status of religious court judges in the legal system. As a result of this initiative, the Knesset enacted the Religious Courts (Summons) Law, 1956.⁵⁴ However, this law has a weakness: aside from the specific authorities invested in the religious court judges by the law, it leaves their status as clergymen unclear.

This issue arose in the *Tzaban* case.⁵⁵ Justice Barak ruled that the status of a religious court judge is equivalent to that of a judge, and therefore the religious court judge (in this case, Rabbi Ovadiah Yosef) may not engage in politics. In its interpretation of the Religious Courts (Summons) Law as expressed in the *Tzaban* judgment, the High Court of Justice made it clear that religious court judges are considered by law as holding judicial positions, and the norms of the public judicial system therefore apply to them, including the same rules of ethics that apply to judges.

C. Status of the rabbinical courts

Existing legislation in Israel does not fully regulate the status and the authorities of the religious courts. The Rabbinical Courts' Jurisdiction (Marriage and Divorce) Law, 1953 regulates the authority of the rabbinical

⁵⁴ 10 L.S.I. 34.

⁵⁵ H.C. 732/84 *Tzaban v. Minister of Religious Affairs*, (1986) 40(4) P.D. 141.

courts only on issues of divorce and marriage. The Jewish Religious Services Law, 1971⁵⁶ and the Chief Rabbinate Regulation, 1980 do not address the issue. The deficiency of the existing legal arrangements is their lack of clarity as regards the status of the halachic bodies and the question of whether they are permitted and authorized to act in a capacity that extends beyond the powers determined in the framework of the legislation.

This question arose in 1972 in the *Hazani* case, the background of which was an halachic ruling that young women were forbidden to serve in the army or in National Service. At the time, a government committee was set up to explore the question of requiring young women to perform National Service. Minister Hazani, of the National Religious Party Knesset faction, served on the committee. Rabbi Rosenthal brought suit against Hazani in the regional rabbinical court for having acted in contravention of the halachic ruling. The regional rabbinical court refused to discuss the matter. Conversely, the High Rabbinical Court of Appeals determined that the rabbinical courts in Israel derive their authority from the Torah and its laws. According to the laws of the Torah, these courts have the authority to require any Jew to appear before them, even the king or sovereign. This meant that Minister Hazani's appearance before the rabbinical court was required not by force of the secular law, but by force of the Torah's laws, to which the rabbinical court considers itself obligated. The Attorney General held a variant opinion. As he saw it, since it was the state that granted the rabbinical courts their authority—in accordance with the law—the courts had to be restricted accordingly. The *Hazani* case and the issues it raised were not discussed before the High Court of Justice due to the dissolution of the government committee and diminished public interest in the affair. Nevertheless, it is clear that the question of the status of the rabbinical courts remains unresolved.

The question of the freedom of the rabbinical courts to act as a religious-spiritual authority above and beyond the powers vested in them by law was renewed in the *Katz* case,⁵⁷ which dealt with the question that although the

⁵⁶ 25 L.S.I. 125.

⁵⁷ H.C. 3269/95 *Katz v. Jerusalem Regional Rabbinical Court* (1996) 50(4) P.D. 590. The case involved the issue of a writ of denial by the rabbinical court against an individual who refused to have his civil matter be adjudicated by the rabbinical court in accordance with the terms of a complaint filed according to the Torah code.

Chief Rabbinate and its associated bodies recognize the State of Israel, they continue to view themselves as subordinate, first and foremost, to the laws of the Torah. Therefore, they consider the civilian-secular legal system of the state a “gentile legal system.” The specific issue in this case centered on whether the rabbinical court had the authority to issue a writ of denial against parties who refused to take part in its hearings, even though this authority is not specifically referred to in the laws of the state. The intention, of course, is to instances in which the rabbinical courts do not act by power of the authority invested in them by the law (such as marriage and divorce), since in these instances they are invested with genuine authority of enforcement through the Religious Courts (Summons) Law, 1956.⁵⁸

Justices Zamir and Dorner, expressing the majority opinion, ruled that since the rabbinical court exists by force of law and draws its authorities from the law, it can only exercise those authorities invested in it by law. According to the laws of the state, the rabbinical court does not have the authority to issue refusal orders. But what about the authorities of the court that derive from the laws of the Torah? Justice Zamir answered that the rabbinical court is not a private body, but a public body. Like every governmental institution, it is subordinate to the principle of legality. Therefore, it cannot harm the citizen, by way of ostracism and excommunication, without being authorized to do so by law. Said authorization is lacking in the case at hand. The learned Supreme Court justice also rejected a plea to regard the rabbinical court as a private court when it sits in arbitration on financial matters; even then, the rabbinical court is operating with the symbol of the state behind it, and it is therefore required to act in strict accordance with the principle of its own legality.⁵⁹

⁵⁸ See *supra* n. 54.

⁵⁹ Justice Zvi Tal was representing the minority opinion. According to his approach, by issuing writs of refusal, the rabbinical court was acting not as a governmental institution of the state, but as a rabbinical court considering a matter of Torah law. The question with which Justice Tal is grappling is whether the court is permitted to act beyond its authority as defined by the Rabbinical Courts’ Jurisdiction (Marriage and Divorce) Law, 1953. The justice answers this question in the affirmative. As he sees it, in order that the actions of the rabbinical court will be recognized and accepted by all, including the ultra-Orthodox, the rabbinical court must of necessity be considered a court in every respect, acting in accordance with Torah law, not only in matters of personal status. Otherwise, the rabbinical court

The main conclusion of these rulings is that the Supreme Court has played a critical role in clarifying the status of the rabbinical bodies in the State of Israel, and delineating their authorities. Since existing legislation regarding the authority of the Jewish religious judicial institutions to act as spiritual-religious authorities is not clear, the Supreme Court took up the task and resolved—by majority opinion—that the rabbinical courts constitute public-judicial bodies, whose authorities are subordinate to the law of the state, and exclusively so.

8. Sabbath

A. Opening of places of business on the Sabbath

Until 1990, section 249 (20) of the Municipalities Ordinance authorized the municipality to regulate the opening and closing of stores, workshops, cinemas, and other sites of public entertainment, and to determine closing and opening hours on days of rest. In accordance with this law, various municipal bylaws were adopted, regulating the opening and closing of businesses on the Sabbath, including the Jerusalem bylaw—Opening and Closing of Businesses, 1955—which forbids the opening of businesses on the Sabbath. In the *Kaplan* case,⁶⁰ the defendants were brought to trial for operating cinemas on the Sabbath, in contravention of the prohibition stated in section 3(d) of the Jerusalem bylaw Opening and Closing of Businesses, 1955. The defendants argued that the bylaw was enacted without legal authority, and was therefore null and void. Judge Ayala Procaccia accepted the argument: she determined that freedom on matters of religion and belief also includes the freedom not to

system would become a “particularistic” rabbinate, and it would lose its status in the halachic world and the religious world in Israel and abroad. According to the approach adopted by Justice Tal, the rabbinical courts were not established by the secular lawmakers, but rather were exploited by them as a tool for carrying out their policies. Following this logic, even in the absence of agreement to arbitration, the court needs a claim on financial matters just as in community matters deriving from Torah law, with all the attendant authorities, including the authority to issue writs of refusal.

⁶⁰ Cr.C. (Jerusalem District Court) *State of Israel v. Kaplan*, (1988) (B) P.M. 265.

believe. If the secondary legislature (the city council) wanted to restrict this basic freedom, it would first have to receive corroboratory consent in the primary law. In our case—the primary legislature (the Knesset) did not authorize the municipality—implicitly or inferentially—to enact secondary legislation that would determine how the population of the city observes the Sabbath. Section 249 (20) of the Municipalities Ordinance pertains only to regulation of the opening and closing of places of business, in order to realize objectives related to proper public order and urban life, but not to dictate any specific lifestyle to residents of the city. The bylaw was therefore ruled null and void.⁶¹

Two options stood before the legislature: to leave section 249 (20) of the Municipalities Ordinance as is, and thereby granting validity to the judicial ruling made by Judge Procaccia in the *Kaplan* case; or to amend section 249 of the Municipalities Ordinance such that it would authorize municipalities and local authorities to close businesses on the Sabbath. The choice taken by the legislature between the two options was influenced by the social-political climate that came into being after the *Kaplan* judgment was handed down. On March 11, 1990, the national unity government collapsed. On March 5, 1990, Shimon Peres made an attempt to set up a government to be headed by him, but the attempt failed, leading to the establishment in June 1990 of a Likud government headed by Yitzhak Shamir. This government relied on a coalition dependent on the votes of the religious parties. These circumstances led to the legislation in 1990 of an amendment to the Municipalities Ordinance (no. 40), 1991, that added subsection (21) to section 249 of the ordinance. According to this amendment, the municipality is empowered to exert its authority vis-à-vis the days of rest as specified in subsection (20), and in consideration of religious tradition. The amendment also added section 267a, according to which a court may order the owner of a business, who wishes to open his business on the Sabbath in contravention of the bylaw adopted by the municipality, not to open his business.

⁶¹ In addition, the learned judge notes that the bylaw is null and void due to a lack of reasonableness, since it did not properly balance the interests of the secular segments of the city's population.

With regard to the opening of businesses on the Sabbath, the legislature made a negative contribution by passing an amendment that bypassed the judicial ruling issued by Judge Procaccia. The executive branch made a positive contribution toward this issue. Due to public pressure, the authorities do not usually enforce bylaws that forbid the opening of businesses on the Sabbath. In so doing, the executive branch permits the citizenry to give substance to the Sabbath—every person in accordance with his own world view. The drawback of this situation is that observance or non-observance of the Sabbath becomes dependent on the composition and character of the local council coalition.⁶²

B. Transportation and gas stations on the Sabbath

At present, urban and interurban bus service is not available on the Sabbath, with the exception of Haifa and Eilat. Conversely, private transit and taxis are permitted. This arrangement constitutes an agreed-upon practice which is not anchored in law or legal ordinance. In spite of the absence of a legal basis for the arrangement, it is predominately effective due to the government's supervision of the transportation cooperatives.⁶³

The operation of gas stations on the Sabbath is regulated by means of an explicit ruling issued by the Supreme Court. In the *Isramax* case,⁶⁴ the court ruled that a local authority is not authorized by the primary law to close gas stations on the Sabbath. In so doing, the Supreme Court contributed toward strengthening the civil-cultural, and not simply the religious, character of the Sabbath.

C. Television on the Sabbath

On September 30, 1969, the management committee of the Israel Broadcasting Authority decided to transmit television broadcasts seven days a week, except for Yom Kippur. The decision was based on a government decision on this matter, and was subsequently approved by the plenum of the Israel Broadcasting Authority (IBA).

⁶² Don-Yehiya, *op.cit.*, *supra* n. 49.

⁶³ *Ibid.*

⁶⁴ H.C. 4648/95, *Isramax v. State of Israel* (not published).

At the end of October 1969, following the elections to the Seventh Knesset and on the eve of the establishment of the new government, the matter once again appeared on the agenda of the departing government. The government appealed to the IBA to suspend Sabbath broadcasting until the new government could have a chance to discuss the matter. The appeal was rejected by the IBA plenum on November 6, 1969. Instead, the plenum ratified two pertinent decisions: it expressed its support for television broadcasts seven days a week, and also decided by a majority vote not to respond to the government's recommendation to suspend television broadcasts on Friday night. Twelve members of the IBA plenum, including the Prime Minister, appealed the latter decision, basing their claim on section 12a of the Broadcasting Authority Law, 1965.⁶⁵ In accordance with this section, the Prime Minister decided to delay the execution of the plenum's decision regarding Sabbath broadcasts until the new government could decide on the matter.

This move by the Prime Minister prompted Adi Kaplan to petition the High Court of Justice, requesting that it issue an order nisi to enable Sabbath television broadcasts.⁶⁶ Justice Berenson accepted the petition, and ruled that the Prime Minister lacked the authority—according to section 12 of the Broadcasting Authority Law, 1965—to require the IBA plenum to adopt the government's recommendation. In so doing, the Supreme Court made a positive contribution that enabled television broadcasts on the Sabbath and holidays.

D. Closing of streets on the Sabbath

In 1961, the Minister of Transport enacted the Traffic Regulations, 1961, based on the Traffic Ordinance. The regulations authorized the Central Road Sign Authority to instruct local road sign authorities regarding the determination, modification, cancellation, or maintenance of traffic arrangements.

⁶⁵ 19 L.S.I. 103, at 105.

⁶⁶ H.C. 708/69 *Adi Kaplan v. Prime Minister and Broadcasting Authority*, (1969) 23(2) P.D. 394.

Local authorities made use of these regulations in neighborhoods with large religious populations in Jerusalem and Bene Beraq. For instance, the Jerusalem city council, acting as the local road sign authority, decided to close sections of King George and Shmuel Hanagid Streets on the Sabbath, whenever prayers were in progress at the Yeshurun Synagogue. The High Court of Justice rejected a petition that was submitted against this decision, concluding that the city council had struck a fair balance in making its decision to close the streets during services.⁶⁷ A similar ruling was issued regarding the closure of a section of Hashomer Street in Bene Beraq on the Sabbath and Jewish holidays.⁶⁸

The contention between the religious and secular publics regarding the closure of streets on the Sabbath becomes more acrimonious when the street under discussion has a mainly ultra-Orthodox population but serves as a main traffic artery through the city. One such example is Jerusalem's Bar-Ilan Street.⁶⁹

In the Bar-Ilan case, two committees recommended closing the road while the Sabbath and holiday prayer services are in progress. The first committee was headed by Elazar Shturm. Its recommendations regarding the closure of the street during prayer hours sparked fierce opposition from secular circles, which petitioned the High Court of Justice against implementation of the recommendations.⁷⁰ The High Court of Justice avoided making any decision on the matter, and recommended the appointment of a public committee to fully investigate the matter. The High Court of Justice suggested that the makeup of the committee reflect the variety of opinions and perspectives on religious-secular relations in Jerusalem and its environs. The committee's recommendations would be taken into consideration by the government authorities in formulating an overall policy on the transportation issue, including Bar-Ilan Street. A hearing on the petition was postponed for two months in order to permit the committee to complete its work. During this

⁶⁷ H.C. 174/62 *League for Prevention of Religious Coercion v. Jerusalem City Council*, (1962) 16(4) P.D. 2665.

⁶⁸ H.C. 531/77 *Baruch v. Traffic Commissioner of Tel Aviv and Central Districts—Central Road Sign Authority*, (1978) 32(2) P.D. 160.

⁶⁹ Don-Yehiya, *op.cit. supra* n. 49, pp. 50-51.

⁷⁰ H.C. 5016/96, 5025/96, 5090/96, 5434/96, *Horev and others v. Minister of Transport and others*, (1997) 51(4) P.D. 1.

period of time, the High Court of Justice issued an interim order that Bar-Ilan Street would continue to be open to traffic without limitation.

In the wake of the High Court of Justice's recommendation, the Minister of Transport appointed a second committee, headed by Tzvi Tzameret. This committee also recommended closing the road during hours of prayer, while ensuring a transit arrangement for the secular public in the framework of the existing status quo. In addition, the Tzameret committee recommended that an agreement be reached vis-à-vis the opening of other streets to traffic on the Sabbath. Based on the recommendations of the Shturm and Tzameret committees, the Minister of Transport decided to close Bar-Ilan Street during prayer hours on the Sabbath and holidays. During such times, the nearby Ramot Road, the entry road to Jerusalem, and Jaffa Road would remain open to traffic.

With the adoption of this decision by the Minister of Transport, the High Court of Justice continued hearings on the petitions. By a majority opinion, the court ruled that a reasonable alternative had been found for Bar-Ilan Street to allow for the proper flow of traffic from one end of the city to the other. Given the circumstances, the partial closure of Bar-Ilan Street during prayer hours, as called for in the Minister's decision, provided the proper balance between freedom of movement and the religious sensibilities and lifestyle of the ultra-Orthodox residents who live in the neighborhoods adjacent to Bar-Ilan Street.

Nevertheless, the Minister's decision in no way addressed the need to ensure the movement of the secular residents of these largely ultra-Orthodox neighborhoods. President Barak ruled that the Minister's decision, as it pertained to the secular residents, negated proper administrative procedure. Therefore, the High Court of Justice ruled by a majority opinion that the decision by the Minister of Transport to partially close Bar-Ilan Street would be nullified, and the matter would be referred back to him until a new decision could be adopted—one that would take into account the interests of the secular residents of the neighborhoods adjacent to Bar-Ilan Street, and their visitors.

Clearly, the issue of traffic arrangements on the Sabbath hinges on the character of the community and its particular traditions.⁷¹ It is the local

⁷¹ Don-Yehiya, *op.cit. supra* n. 49, p. 48.

authorities that make the decisions regarding the closure of streets on the Sabbath. The High Court of Justice is the authority that oversees these decisions. The Bar-Ilan case provides a good example of this: At first, the High Court of Justice preferred to refer the discussion to a public committee that would examine the Bar-Ilan problem in particular, and the issue of closing roads in Jerusalem in general. When the Minister of Transport made a decision that discriminated against the secular minority living alongside the road, the High Court of Justice intervened and nullified the Minister's decision. Only when a more balanced decision was adopted (closing the street only during prayer hours while creating an arrangement for the free passage of secular residents of the neighborhood) did the court see fit to approve it.

However, the resolution of the conflict proposed by the judiciary did not grant appropriate recognition to the transportation needs of secular residents of Jerusalem who do not live on Bar-Ilan Street itself but who use it as a main traffic artery within the city, as well as a main interurban traffic artery. As opposed to the judicial arena which, by necessity, had to take this consideration into account, the outcome strikes me as a suitable social compromise. Social compromises are engendered by communal processes that result in a broad agreement, and are not necessarily judicial. In the judicial procedure, the justices had to bestow much greater significance than was actually given to the fact that Bar-Ilan is a main urban and interurban traffic artery. Therefore, the solution should have factored in not only the legitimate sensibilities of the religious residents and the requirements of the secular residents of the immediate area; the court should also have considered the needs of residents of Israel for a main interurban traffic artery, as well as the need of the neighborhoods of northern Jerusalem for a main intra-urban traffic artery. It is worth noting that the justices' reasoning, which relies upon previous rulings made by the Supreme Court regarding use of an alternate route, did not have to do with a main traffic artery such as Bar-Ilan Street. As such, the Bar-Ilan case differs from the previous cases heard by the court.

Espousal of the proposed approach, which views the State of Israel as a democratic, traditional-Jewish country, would make it easier to accept cultural compromise as a justifiable constitutional-legal premise. This, in turn, would lead to judicial validation of the compromise solution.⁷²

⁷² For a discussion of the issue of a traditional Jewish state, see below, chap. 3.

9. Status of female members of public bodies concerned with religious affairs

Another example of the Supreme Court's contributions toward enhancing the quality of civil rights in matters of religious practice is the issue of the status of female members of public bodies concerned with matters of religion.

The legal arrangement as it now exists adversely affects the equal rights of women. The Equal Rights for Women Law states that "there will be one law for men and women in every judicial action." This principle is violated when religious laws of matrimony are made into state laws of matrimony, despite the lack of equality between men and women in this matter. Women serve as rabbinical pleaders (barristers), but do not serve as judges in the rabbinical courts. Until the 1990s, women were denied the right to serve on local rabbinical councils or in the elective body that selects the Chief Rabbis and the local rabbis.⁷³ The change came about as a consequence of the intervention of the High Court of Justice.

In the *Shakdiel* case,⁷⁴ in accordance with section 5 of the Jewish Religious Services Law, 1971, an interministerial committee claimed that throughout the years of Israel's existence as a state, women had never been candidates for membership on the religious councils due to the councils' close relationship with the rabbinate, and the halachic precepts affecting their operation. Their concern was that should the petitioner be allowed to take a seat on the religious council, this would disrupt the work of the council. Justice Elon reached the conclusion that the reason for the petitioner's disqualification was the fact that she was a woman, which contravened the principle of equality in Israel's legal system. Therefore, the decision by the ministerial committee was invalidated.

⁷³ B. Neuberger, *Religion and Democracy in Israel*, 1997, p. 33.

⁷⁴ H.C. 153/87 *Shakdiel v. Minister of Religious Affairs*, (1988) 42(2) P.D. 221.

A similar question was raised by the *Poraz* case:⁷⁵ Could a local authority which is one of the three bodies that make up the assembly that selects the city's rabbi be permitted not to choose a woman as a delegate to the elective assembly simply by virtue of her being a woman? Justice Barak determined that in its decision, the city council had disregarded the principle of equality. It had not assessed the full effect of the appointment of women to the elective assembly on the work of the rabbi of the city. Consequently, the authority's decision was struck down.

The Supreme Court played an important role in enhancing women's status vis-à-vis the roles they perform on bodies that furnish religious services to the public, in the selection of officials on religious councils, and in the elective assembly for rabbis. Yet this judicial ruling of the Supreme Court carries no weight, since the religious bodies have avoided complying with it. Nor has the executive branch made any effort to enforce the court's ruling on the matter. As a result, although the court has made a positive contribution toward enhancing the status of women on bodies that engage in religious affairs, there has been no noticeable practical improvement, due to the executive branch's failure, intentional or not, to implement the judicial rulings.

10. Status of non-Orthodox members of public bodies concerned with religious affairs

The exclusive recognition granted to the Orthodox rabbinate in Israel on matters of religion, and the avoidance of conferring recognition on non-Orthodox rabbis, adversely affects the democratic principle of equality of all religions and of all religious streams before the law. In Israel, non-Orthodox rabbis are not permitted by law to officiate at wedding ceremonies or to carry out conversions. To date, they have also been prevented from becoming members of the religious councils, even though the court has ruled that there is no legal justification for their disqualification from membership on religious councils. Furthermore, budgetary allocations made by the Ministry of Religious Affairs to Reform and Conservative Torah-culture projects is minuscule.

⁷⁵ H.C. 953/87 *Poraz v. Tel Aviv-Jaffa City Council*, (1988) 42(2) P.D. 309.

The issue of membership of the non-Orthodox on a religious council was taken up in the High Court of Justice's ruling on the *Hoffman* petition.⁷⁶ The petitioners claimed that the city council had deferred to an unreasonable degree the nomination of candidates for the religious council, and avoided declaring the petitioners as its candidates to the council due to the fact that they belong to non-Orthodox streams of Judaism. Before the petition could be addressed, the council held the elections. The court registrar, A. Eyal-Gabai, required the respondents to pay court costs, having determined that the council acted illegally. Nevertheless, new elections for the council were not held. This, then, constitutes an example of a negative contribution made by the executive branch to the quality of civil rights in matters of religious practice, in its disregard for the High Court of Justice ruling.

More recently, the Supreme Court has been characterized by greater determination to persuade the executive branch (primarily the Ministry of Religious Affairs) to comply with its judicial rulings, when they repeatedly engage in foot dragging and long delays in the seating of delegates from the non-Orthodox streams on religious councils. This occurred in the *Brenner* case, when the Supreme Court issued a binding injunction to seat the petitioner, Joyce Brenner, who is not Orthodox, on the Netanya religious council, as a replacement for another incumbent member of the council.⁷⁷ In response, after only one meeting in which Ms. Brenner participated, the religious council decided to set up a limited management committee. Only the latter committee holds any sessions, in effect locking out the female member of the religious council.

A petition was brought before the High Court of Justice by *the Movement for Progressive Judaism*,⁷⁸ the subject of which was an exhibition held as part of "Jewish Religious Services Week," which was organized by the Ministry of

⁷⁶ H.C. 4560/94 *Hoffman v. Ehud Olmert and Jerusalem City Council* (not yet published).

⁷⁷ H.C. 3551/97 *Joyce Gila Brenner v. Ministerial Committee According to the Jewish Religious Services Law* (1997) 51(5) P.D. 754, and see H.C. 7237/95 *Shosh Arar v. Minister of Religious Affairs* (1997) 51(1) P.D. 193.

⁷⁸ H.C. 650/88 *Movement for Progressive Judaism v. Minister of Religious Affairs*, (1988) 42(3) P.D. 377.

Religious Affairs and the Chief Rabbinate. The Movement for Progressive Judaism asked that it be permitted to have a booth at the exhibition. The relevant ministerial department turned down the application, arguing that Jewish services week was intended to display Jewish religious services as they are provided by bodies funded by the Ministry of Religious Affairs, under the supervision of the Chief Rabbinate. The Movement for Progressive Judaism does not fill these criteria. In light of this decision, the movement appealed to the High Court of Justice. President Shamgar ruled that freedom of conscience and religion required that governmental authorities treat all believers in the same degree, without differentiating between the different streams. Specifically regarding this case, the judge ruled that since the petition was brought only two days before the opening of the exhibition, there was no time for an investigation into the facts and the petition was therefore rejected.

This case constitutes an example of how, working alone, bureaucracy is liable to adversely affect the quality of civil rights in matters of religious practice. The denial of government aid to Reform and Conservative institutions in Israel causes harm not only to equality, but also to freedom of religion and ceremony; it is difficult to sustain these freedoms without budgets to construct houses of worship and furnish salaries for rabbis and cantors.

II Governmental Activity Trends and their Effect on Civil Rights in Matters of Religion — An Evaluation

In the previous chapter, we analyzed several fundamental issues related to the struggle over the Jewish democratic character of the state. We made an attempt to assess the contribution made by each branch of government toward several types of civil rights. This chapter will survey the situation, analyzing the contribution made by each branch of government to the quality of civil rights, and examine its pattern of activity and the background behind it.

1. Trends of governmental activity in the Knesset: legislation

For the most part, Knesset legislation has led to a decline in the quality of civil rights in matters of religious practice. This is true both in terms of legislation initiated by the Knesset and legislation enacted in response to rulings of the courts. This stems from the fact that the Knesset is largely motivated by political forces. Laws are frequently enacted due to pressure brought to bear by special interest groups that operate within the Israeli political system, even when their world views are not representative of mainstream Israeli society.

Some of the laws are rooted in the social agreement formulated by David Ben-Gurion, the first prime minister, on the eve of Israel's establishment. One, the Rabbinical Courts' Jurisdiction (Marriage and Divorce) Law, 1953, determines that marriage and divorce between Jews in Israel will be performed solely according to the laws of the Torah. While this law rules out the option of civil marriage and divorce in the State of Israel, and sets in place a religious arrangement that binds every citizen of the state—even those persons who are not interested or not able to be married in a religious ceremony—the law was

generally accepted by society, with the exception of the aspect of denying the right of marriage to individuals who are forbidden to marry on halachic grounds.

There are numerous examples of a regression in the quality of civil rights in matters of religious practice in the State of Israel caused by the Knesset, through the passage of laws that actually bypass favorable court rulings. In the High Court of Justice's *Fraidi* case, the court struck down municipal bylaws that restricted the sale of pork. The following year, the legislature restored the situation to its previous state with the Knesset passage of the Local Authorities (Special Enablement) Law, 1956.⁷⁹

Another example of a regression that was caused by the legislature is the issue of opening of cinemas and places of business on the Sabbath. After the *Kaplan* case resulted in the nullification of the bylaw in Jerusalem (Opening and Closing of Businesses), 1955, the legislature amended section 249 of the Municipalities Ordinance to authorize municipalities and local authorities to close places of business on the Sabbath. This response of the legislature stemmed from the fact that the Likud government that was established in June 1990 relied upon a coalition that was dependent on the votes of the religious parties.⁸⁰

Another example of how Knesset laws bypassed favorable rulings of the Supreme Court is the issue of conversion. In accordance with the coalition agreements made after the 1996 elections, the Knesset passed a preliminary reading of a proposed conversion law that determines that only Orthodox conversions may be performed in Israel.⁸¹

⁷⁹ See *supra* nn.19 and 20. See also Chapter Two, section 3, *infra*. As noted, aside from purely religious aspects, there are also Jewish national-cultural aspects to the issue of the sale of pork. My position is that it does not constitute an infringement on freedom of conscience, as the issue under discussion concerns a national-cultural norm. See S. Shetreet, *op.cit. supra* n. 3.

⁸⁰ See *supra* Chapter One, Section 8A, p. 38.

⁸¹ *Ibid.*, Section 6, p. 30.

In spite of the negative trend indicated by the Knesset legislation, there are some recent examples of legislation that makes a positive contribution, enhancing the quality of civil rights in matters of religious practice. One such example is the Right to Alternative Civil Burial Law, 1996, which took into account social developments in the issue of civil burial, and embodied the High Court of Justice ruling in the *Menucha Nechona* case in primary legislation.⁸²

The positive contribution of the legislature is significantly reflected in the passage of two new Basic Laws—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.⁸³ The uniqueness of these Basic Laws is in the legislation of certain human rights within a Basic Law, which places limits on future Knesset legislation by means of the law’s restrictive clause. As such, the Basic Law reduced the ability of religious factions in the coalition to push through laws bypassing the High Court of Justice. Even those rights that are not explicitly mentioned in the Basic Laws are safeguarded, due to the broad interpretation of the catch-all concept of “human dignity” in the Basic Laws. Religious freedom is also included in the category of human dignity. As stated by Justice Aharon Barak: “In the past, freedom of worship and religion did not enjoy a supralegal constitutional status. With the passage of the Basic Law: Human Dignity and Liberty, it includes implied recognition of human dignity.”⁸⁴

The solution to the dilemma faced by religious groups following the passage of the Basic Laws and its near-neutralization of any contradictory legislation, was found in the amendment to the Basic Law: Freedom of Occupation, in the *Mitral* case.⁸⁵ This amendment added section 8, which enables the legislature to pass a law that impairs rights that are accorded by the Basic Law: Freedom of Occupation, explicitly or implicitly, without conforming with the strictures of the restrictive clause. The law had to be passed by a majority of 61 Knesset

⁸² *Ibid.*, Section 4, p. 22.

⁸³ (1992) *S.H.* no. 1387, p. 114 and no. 1391, p. 150. Regarding the way in which the new Basic Laws are being passed and the model of split legislation, see below.

⁸⁴ A. Barak, *Interpretation in Law—Vol. 3: Constitutional Interpretation*, 1994, p. 225, and Hillel Somer, “The Non-Enumerated Rights: On the Scope of the Constitutional Revolution” in *Mishpatim* (1997), vol. 28, pp. 324-326.

⁸⁵ See Chapter One, Section 3, p. 21.

members, and had to contain this rider: “in spite of that which is stated in Basic Law: Freedom of Occupation.” This amendment led to the adoption of the Import of Frozen Meat Law, 1994.

Passage of the amendment to the Basic Law: Freedom of Occupation constitutes a step back from the passage of the two new Basic Laws. It resulted from the government’s desire to appease the religious elements in the Knesset. In addition, prior to the passage of the Basic Laws, there had been a general policy not to allow the import of non-kosher frozen meat, and the new legislation restored the status quo ante.

Ultra-Orthodox circles have dissociated themselves from all Basic Law legislation. They are disturbed by the passage of the Basic Laws and the implications of those laws, and are discomfited by references to the importance of rights guaranteed by the Basic Laws and their effect on existing arrangements in matters of religion. During political negotiations, these circles habitually seek commitments for legislation to nullify judicial decisions that are based on the existing law. In the *Velner* case, for instance, a coalition agreement was signed between the Labor party and the Shas movement, according to which the Labor faction in the Knesset would work for corrective legislation that would restore the legal situation to its previous status. This coalition demand came in response to the corpus of judicial rulings handed down by the High Court of Justice on matters of religion.⁸⁶

2. Effect of judicial rulings on civil rights in matters of religious practice

A. Judicial rulings of the Supreme Court

Analysis of the measure of protection of civil rights in matters of religious practice indicates that the judicial branch, and first and foremost the Supreme Court, has been the chief contributor over the years toward the enhancement of the quality of civil rights in matters of religious practice in the State of Israel.

⁸⁶ H.C. 5364/94 *Attorney Ze’ev Velner v. “The Alignment” The Labor Party*, (1995) 49(1) P.D. 758.

The judicial rulings of the Supreme Court, primarily in its capacity as the High Court of Justice, are the outgrowth of processes that have been underway in Israeli society over the years, which modified patterns of public behavior in various areas. In the wake of these changes in society, petitions were brought before the Supreme Court by public groups and private citizens. These petitioners have played an important role in enhancing civil rights in matters of religious practice, for it is due to their intervention that the various issues were brought before the High Court of Justice, providing the court an opportunity to give these positive social developments a judicial seal of approval. The dynamic process of providing judicial approval of social processes that enhance civil rights in matters of religious practice applies not only to the High Court of Justice but also to the judicial decisions handed down by the courts and the Supreme Court in civil and criminal actions.

There are numerous examples of favorable judicial rulings by the Supreme Court that have contributed toward enhancement of civil rights in matters of religious practice, in light of processes underway in Israeli society. For example, the court has recognized marriages of Israeli residents performed abroad as well as private ceremonies of individuals forbidden to marry;⁸⁷ the court ruled that issuance of kashrut certificates by the Chief Rabbinate would be carried out solely in accordance with the “hard core” of the halachic laws; and the court struck down municipal bylaws that forbade the sale of pork.⁸⁸ The Supreme Court also recognized the right to alternative burial, years before the Knesset set this right into law.⁸⁹ The Supreme Court was also responsible for clarifying that the Chief Rabbinate and its associated bodies, including religious court judges and rabbinical courts, are public bodies that are subject to the rule of law and the judicial review of the High Court of Justice.⁹⁰ In the *Kaplan* case, the Supreme Court ruled that public television could operate on the Sabbath.⁹¹ It developed that the Supreme Court also played a primary role in defending the status of female members of public religious bodies.⁹²

⁸⁷ See Chapter One, Section 2, p. 16.

⁸⁸ *Ibid.*, Section 3, p. 19.

⁸⁹ *Ibid.*, Section 4, p. 22.

⁹⁰ *Ibid.*, Section 7A-C, pp. 34-38.

⁹¹ *Ibid.*, Section 8C, p. 40.

⁹² *Ibid.*, Section 9, p. 45.

In spite of the generally positive trend whereby Supreme Court rulings enhanced the quality of civil rights in matters of religious practice, there are also cases in which the Supreme Court hesitated to intervene, preferring to leave the decision in the hands of other bodies. One example is the issue of conversion. When the question of recognition of Reform conversion performed in Israel was brought before the High Court of Justice, a majority of the justices preferred to defer the ideological task of determining the sum and substance of conversion in Israel.⁹³ Another example of the Supreme Court's hesitancy to rule on issues pertaining to rights in matters of religion is the Bar-Ilan Street case. As noted, the Supreme Court at first avoided ruling on the matter, instead recommending the establishment of a public committee to study the issue.⁹⁴

As a continuation of this trend, the Supreme Court also avoided handing down any clear decision on the issue of drafting yeshiva students, when the question again came up before it in 1997.⁹⁵ The Supreme Court justices determined that the present-day arrangement was unreasonable, but they avoided taking the next step of declaring the arrangement null and void. They sufficed by allotting the Knesset one year's time to enact appropriate legislation on this matter, in contrast to the existing situation in which draft exemptions for yeshiva students are regulated by an administrative decision made by the Defense Minister.

Many considered this decision a victory for the civil secular public, which seeks to nullify the wholesale IDF draft exemption that is granted to yeshiva students. In this author's opinion, however, the verdict in fact constitutes a regression in the degree of the Supreme Court's willingness to rule on controversial public issues, especially those that pertain to the dispute between the secular and ultra-Orthodox publics. The court is now more inclined to leave the decision to the government and the Knesset. My reservation has to do with the way the court handled the matter of the yeshiva student draft. After all, the exemption arrangement is not based on legislation that the Supreme Court should have struck down when it determined that the current arrangement was unreasonable; rather, it was based on an administrative

⁹³ *Ibid.*, Section 6, pp. 30-33.

⁹⁴ *Ibid.*, Section 8D, pp.41-44.

⁹⁵ H.C. 3267/97 *Rubinstein and others v. Minister of Defense* (1998) 52(5) P.D. 481.

arrangement that stemmed from a decision made by the Defense Minister. In this, it differs from the *Pisarro* case,⁹⁶ in which the Supreme Court chose not to nullify legislation, referring the matter to the Knesset. Here, the Supreme Court chose not to nullify the administrative decision of a minister, due to its unwillingness to intervene in a controversial issue.

In our opinion, the Supreme Court's hesitancy to rule on these matters stems from the realization that the issues are charged, socially as well as politically. Both the issue of non-Orthodox conversions conducted in Israel and the issue of the closure of Bar-Ilan Street touch on the character of Israel as a democratic state, on the one hand, and a Jewish state, on the other. These questions have strong political and social repercussions. The conversion issue has the additional aspect of addressing the unity of Judaism in the face of concerns regarding its fragmentation into three streams. Any decision by a court would be liable to be considered a political decision by various public groups. The court, wary of giving a mistaken impression, opted to keep its hands off the matter.

Yet the court had an additional concern: every judicial ruling that the Supreme Court would have handed down and the ultra-Orthodox religious public would have considered to harm its own interests, was liable to be bypassed through the passage of laws by the Knesset, under pressure from the religious factions. This would potentially encourage a renewed offensive against the Supreme Court, and weaken the power of the High Court of Justice among segments of the public. The justices may possibly have entertained an even more significant concern—the fear of general legislation to reduce the authority of the Supreme Court. Fearing that the religious public might feel the court was engaging in policy considerations that are unacceptable to that community, and out of an interest to forestall the weakening of its own authority through the enactment of laws bypassing the High Court of Justice, the Supreme Court tried to avoid making any decision on the matter.

⁹⁶ See *supra* n. 47.

B. Judicial rulings of lower courts on similar issues

Recently there have been several instances in which issues of religion and state were taken up by primary courts. One concerned a request to register a conversion in the population registry. In a hearing on the registration of a non-Orthodox conversion before the Supreme Court, the court—sitting as the High Court of Justice ruled that the Religious Community Ordinance (Conversion) applied only to issues of personal status, and not to the population registry, which is a civil matter.⁹⁷ As part of its decision, the Supreme Court granted a one-year extension to the Knesset to resolve its position on the issue and regulate the issue within primary legislation. This extension, issued in 1993, has been further extended, and the Ordinance has still not been amended.

Several months after the announcement of the Supreme Court's decision, a similar case was brought before the Tel Aviv District Court.⁹⁸ The question arose as to whether the District Court should grant a similar extension based on the judicial ruling of the Supreme Court, or whether it was free to rule independently without taking into account the extension granted by the High Court of Justice to the Knesset.

This question has two aspects, one theoretical and one pragmatic. On the theoretical level, the question is whether the District Court is qualified to weigh the same considerations as the Supreme Court, sitting as the High Court of Justice, as regards the interrelationship between the judicial branch and the legislative branch. On the one hand, when the District Court discusses an administrative issue, it serves as an administrative judicial body, and therefore it is appropriate that there be a connection between its judicial rulings and those of the Supreme Court. On the other hand, it is appropriate that considerations such as the interrelationship between the judicial branch and the legislative branch remain within the sole jurisdiction of the Supreme Court.

On the pragmatic level, the practical significance of each alternative should be examined. In practice, every decision of the District Court can be appealed to the Supreme Court. It is unreasonable for Supreme Court justices to disregard

⁹⁷ See *Pissaro*, *supra* n. 47.

⁹⁸ Originating motion 64/96 *Gigi v. Ministry of Interior*, heard by Judge Zeiler.

their own previous ruling vis-à-vis the extension granted to the Knesset on the same issue. The justices can be expected to take into account the extension granted to the Knesset to establish a lawful arrangement through the passage of legislation. In the event that the District Court was not authorized to weigh constitutional considerations such as the interrelationship between the branches of government, then the final outcome would not be affected; rather, it would only cause awkwardness and a redundant discussion of the issue. Since we know that these considerations will eventually be weighed by the Supreme Court as a court of appeals once the decision of the District Court is rendered, the judges of the primary court should be permitted to weigh all of the same considerations that are weighed by the Supreme Court.

In the *Gigi* case, the District Court preferred to disregard the continuance granted by the Supreme Court in the *Pisarro* case, and offered the prosecutor a legal aid device by ordering the registry clerk to immediately register the petitioner as a Jew. This verdict was only recently handed down, and it would be worthwhile to keep track of its progress in the appeals court, if an appeal is indeed submitted.

3. Trends of governmental activity in the executive branch: execution and enforcement of judicial rulings

Since the establishment of the state, the executive branch has in general made negative contributions toward the balance of civil rights in matters of religious practice in Israel. This is reflected in the areas of execution and enforcement, as well as in the area of policy-making. This may be explained by the fact that the executive branch is largely influenced by coalition governments that are themselves based on religious factions. The latter groups exploit the fact that they are in a position to tip the scales, in order to advance the interests they deem important.

One example of the negative contribution made by the executive branch involves the issue of civil burial. Although the High Court of Justice had recognized the right to civil burial, and although the Knesset passed legislation guaranteeing the right to alternative civil burial, no regulations were enacted for the implementation of the Civil Burial Law. In addition, restrictions have been placed on the allocation of land and money for the development of

alternative civil cemeteries. The executive branch has thereby prevented the enhancement of civil rights through its adoption of a laissez-faire attitude.

An especially negative contribution toward the quality of civil rights in matters of religious practice has been made by the various religious groups. These groups have a tendency to disregard judicial rulings of the High Court of Justice that are favorable to civil rights. The lack of enforcement of these judicial rulings adversely affects civil rights in matters of religious practice.⁹⁹ One example is the *Bavli*¹⁰⁰ ruling, which determined that the rabbinical courts are obligated to uphold the civil law of shared property. In actuality, the rabbinical courts have not implemented the *Bavli* ruling. The non-implementation of the High Court of Justice's judicial ruling on this matter has adversely affected the quality of the right to divorce.¹⁰¹

Another example of a blatant denial of the High Court of Justice's authority may be found in the actions of the Chief Rabbinate following the High Court's decision in 1994 to permit the Mitral company to import kosher meat, even though the company also imports non-kosher meat. The executive council of the Chief Rabbinate decided to disregard the High Court of Justice's judicial ruling, while defiantly stating its non-acceptance of the High Court's rulings on halachic matters.¹⁰²

In the *Ruskin* case, the High Court of Justice expressly ruled that a kashrut certificate may not be denied to a hotel simply because performances by a belly dancer are held there. Yet in actual fact, the High Court of Justice ruling is not being observed, and the rabbinate continues to base the issuance of kashrut certificates on several tangential factors: that the hotels not employ Jewish clerks on the Sabbath, or accept money on the Sabbath unless the transaction takes place behind a curtain; that music not be played on the Sabbath; that ballrooms not be rented to messianic Jews, and so forth. Since these rules violate the High Court of Justice's ruling and the law, the rabbinate sends its message indirectly: Banquet hall owners know that if a belly dancer performs, the kashrut supervisor will leave, and the following day the owner

⁹⁹ See Chapter One, Section 5, pp. 24-29.

¹⁰⁰ *Supra* n. 38.

¹⁰¹ *Ibid.*, see also B. Neuberger, *Religion and Democracy in Israel*, 1997, p. 28.

¹⁰² Neuberger, *ibid.*

will have to re-kosher the kitchen equipment and utensils because the kitchen was left without supervision.¹⁰³

In spite of the negative trends in terms of actions taken—or failure to take action—of the executive branch and its affiliated bodies, there are exceptions through which the executive branch made a positive contribution toward enhancement of civil rights in matters of religion. One example is the attempt in 1995 to formulate new principles for administering the lists of individuals forbidden to marry.¹⁰⁴ Another example is the non-enforcement of municipal bylaws forbidding the opening of businesses on the Sabbath. This positive example of non-enforcement can be accredited to the transition of the social climate to a policy of non-enforcement in those communities that have a secular majority among their population. This policy of beneficial non-enforcement was rendered null and void as a result of organizational changes within the Ministry of Labor and Social Affairs following the 1996 elections.

Nevertheless, the judicial rulings of the Supreme Court have tended to limit the extent of the constitutional protection of civil rights, including those rights that pertain to religious practice. The Supreme Court recently considered the question of the relationship between rights guaranteed by the Basic Law: Human Dignity and Liberty, and rights guaranteed by the Basic Law: Freedom of Occupation. The question arose in the course of a court hearing during the second round of the meat import case. After the amendment of the Basic Law: Freedom of Occupation following the Supreme Court's initial ruling in the *Mitral* case,¹⁰⁵ Mitral petitioned the Supreme Court against the validity of the Import of Frozen Meat Law, in 1994,¹⁰⁶ arguing that the law is null and void, as it adversely affects the company's right to freedom of occupation, in spite of the fact that the law was specifically legislated by the Knesset as an override, which can override even a Basic Law, in accordance with the wording of the Basic Law.¹⁰⁷ Since it was clear to the petitioner that the chances of the acceptance of its petition were low—insofar as it pertained to the Basic Law: Freedom of Occupation—due to the clear-cut language of the

¹⁰³ *Ibid.*, p. 27.

¹⁰⁴ See Chapter One, Section 2, p. 16.

¹⁰⁵ See *supra* n. 21.

¹⁰⁶ See *supra* n. 22.

¹⁰⁷ H.C. 4676/94 *Mitral, Ltd. v. Israel Knesset* (1996) 50(5) P.D. 15.

Basic Law, the petitioner questioned the validity of the Import of Frozen Meat Law, as regards the law's encroachment on the Basic Law: Human Dignity and Liberty. The petitioner argued that the Import of Frozen Meat Law adversely affected the right to freedom of religion and conscience and the right to equality, as determined by the Basic Law: Human Dignity and Liberty. Furthermore, the petitioner argued, the law harms its right to conduct business transactions.

The Supreme Court rejected this argument, without engaging in a profound analysis of the alleged damage to the basic rights guaranteed by the Basic Law: Human Dignity and Liberty. The High Court of Justice grounded its rejection of the petition by citing that the harm to the Law of Import of Frozen Meat was primarily against Freedom of Occupation, and that the harm to basic rights guaranteed by the Basic Law: Human Dignity and Liberty was secondary to the harm to Freedom of Occupation. In so doing, the Supreme Court for all intents and purposes restricted the scope of protection over human rights that are harmed for religious reasons, when this damage is compounded by the damage done to other rights.

III Means of Coping with Trends of Governmental Activity that Harm Civil Rights in Matters of Religious Practice

Based on the previous chapters in this study, both the legislative branch and the executive branch have all too frequently had a negative influence on civil rights in matters of religious practice. However, this is not so for the Supreme Court, which has been outstanding in its contribution toward the preservation and advancement of civil rights in matters of religious practice. Nevertheless, its actions have been limited by difficulties and obstacles placed in its path.

There are three levels at which changes need to be implemented, so as to facilitate the court's continued protection of civil rights in matters of religion and on other issues. At the *constitutional level*, the judicial branch lacks sufficient protection both on the substantive level and on the administrative and budgetary levels. At the *enforcement level*, enforcement and protection granted to the individual vis-à-vis noncompliance with the court's rulings must be clarified. At the *normative level*, greater clarity is required regarding the appropriate degree of intervention by the court on issues of religion and state. Here there is a need to provide the court with the interpretive tools required to resolve ideological disputes, with emphasis placed on the question of what are the constituent elements of a Jewish democratic state.

1. Coping at the constitutional level

In the past, prior to the passage of the Basic Laws, the political system was able to nullify a judicial ruling of the court either through legislation or through an implementation policy that avoided enforcement of the court's judicial rulings. The political system or groups interested in reversing a ruling of the judicial branch did not have to overcome the obstacles that are now

presented by the Basic Laws, which require a special legislative majority of 61 for the passage of restrictive legislation, a process that is itself open to subsequent constitutional review by the Supreme Court. Prior to the passage of the Basic Laws, the political system sufficed with the legislative procedure whereby court rulings could be nullified, as well as administrative procedures placed at the disposal of the executive branch, as a means of avoiding enforcement of the court's judicial rulings.

The political system and those groups that would like to have specific judicial rulings rendered null and void have now come to realize that these unique constitutional provisions make it harder for High Court of Justice rulings to be nullified, in what is known in political jargon as "High Court of Justice bypassing laws."

This realization by the political groups that wish to prevent further constitutional and judicial protection of civil rights led them to focus more attention on the workings of the Supreme Court itself. They were more inclined to intervene in the makeup of the court, the process whereby justices are appointed, and the scope of the judicial role as reflected in the court's rulings. At this point, proponents of the pre-Basic Law legal situation declared war, so to speak, on the Supreme Court. Before the 1996 elections, the leader of one important Israeli political party labeled the Supreme Court "a branch of Meretz," referring to the left-wing political party. Immediately after the elections, an all-out attack was launched, which included threats of personal harm against the President of the Supreme Court and its justices, demonstrations in front of the Supreme Court, and one instance in which demonstrators entered the courthouse in protest against its judicial policy. Meanwhile, another pattern of assault was aimed at the Supreme Court by critics who argue that the court should not be determining values. Similarly, proposals for a change in the selection process of Supreme Court justices were raised, including a proposal that the justices be appointed by the Knesset for a predetermined term. All of these proposals and reservations were intended to put pressure on the Supreme Court, so that it would place greater emphasis on religious considerations than it had until then.

The series of assaults adversely affected the independent status of the Supreme Court, primarily in its sitting as the High Court of Justice. Because of these attacks, democratic circles in Israel were hesitant to lodge criticism at the Supreme Court when it placed greater weight on religious considerations than it had in the past, out of a concern that they might be portrayed as having

joined the attack on the Supreme Court. The result is a lack of balance in the components of the system which has had an effect on how the courts mete out justice.¹⁰⁸

In light of these developments, the question of safeguarding the Basic Law: Judicature, and the passage of legislation to safeguard judicial independence have taken on a stronger dimension. Even without the above-described developments, there would be a need to safeguard the Basic Law: Judicature in order to protect the courts from the effects of ordinary legislation. This is a primary constitutional requirement that should be part of the constitution of every enlightened country.

The legal system is built on several basic values (not in order of priority): substantive justice and fairness, efficiency of adjudication, ready access to the judicial system both in terms of physical location and financial ability, public confidence in the court system, and the value of the principle of judicial independence.

All of the fundamental values that underlay the foundations of the judicial system are important. There is an interrelationship between them, and at times even tension. There is no doubt, for example, that an individual's conviction on the basis of evidence that turned out to be erroneous (as happened to Nasham Bangayev, who was convicted of murdering a beggar named Shalom Cohen; after three years, new evidence showed that Bangayev had not committed the murder) causes severe harm to the public's confidence in the courts. This is also the case regarding the heavy caseload that causes delay of justice and the years-long prolonging of cases in the courts. Delay of justice adversely affects the measure of trust placed by the public in the judicial system.

It is regrettable that at the height of a public debate on the status of the Supreme Court, an historic opportunity to safeguard the Basic Law: Judicature has been missed. This would have imbued the law with a normative status that would have been higher than that of ordinary legislation, safeguarding the status of judges and the jurisdiction of the courts, and granting constitutional protection to the judicial branch from attempts to curtail its jurisdiction or modify the selection procedures of its judges. Efforts must be made to form a

¹⁰⁸ S. Shetreet, *Justice in Israel: A Study of the Israeli Judiciary*, 1994, pp. 497-521.

broad national consensus for safeguarding the Basic Law: Judicature. It is highly important that the judicial branch be able to operate within a constitutionally stable framework, and that it not be dependent on or influenced by political and social circumstances.

Indeed, the court is faced not only with the specific circumstances of the individual case being heard, but also with more general considerations that take into account national and social circumstances and which affect judicial decisions in criminal, civil, and public law cases in which the legal dispute is between the citizen and the government.

The blatant attacks by various parties on the Supreme Court, which undermine the court's legitimacy, at times including exchange of pejorative phrases such as "a branch of Meretz," and even worse, such as "the Hater of Jews," generate a chilling effect on the status of judicial independence. It is incumbent upon the judicial community, the social and professional elite, and the political leadership to be aware of this chilling effect, and restrain the public expressions that lead to it. Throughout the judicial history of the State of Israel, there have been conflicts between political leaders and the heads of the judicial system. These disputes took place during the tenures of Ben-Gurion and Begin, on such issues as minimum sentences and the commutation of the Ben-Zion sentence.¹⁰⁹ Nevertheless, the attacks on the Supreme Court have recently assumed a tenor that is above and beyond what we have seen in the past.

The judicial system is one of the three constitutional branches of the state. It is critical that this branch be guaranteed the constitutional protection it requires to uphold its independent status. Given the judicial situation at present, the Basic Law: Judicature does not provide sufficient protection, and the situation leaves a lot to be desired. While the Basic Law: Judicature protects the judicial system from intervention by the executive branch, through the promulgation of emergency regulations,¹¹⁰ the law has the same legal standing as ordinary laws, and does not provide any protection whatsoever from interference by the legislative branch, that is to say, the Knesset, which is authorized to alter the status of the judicial branch by means of ordinary legislation, in accordance

¹⁰⁹ See Shetreet, *ibid.* on the section on clemency of Yehoshua Ben-Zion, pp. 373-374.

¹¹⁰ See Section 22 of Basic Law: Judicature (1984) 38 L.S.I. 101, at 105.

with the ordinary requirements of the legislative process, until an alternative approach is developed to address the problem of judicial independence in a new Basic Law.

Appropriate constitutional protection would require the safeguarding of several principles, in order to protect these basic norms:¹¹¹

The **first principle** is a ban on the establishment of special (*ad hoc*) courts to rule on disputes. Without this sort of protection, the entire judicial system can easily be bypassed. While section 1(c) of the Basic Law: Judicature includes this prohibition, it lacks any legislative safeguards (formal or substantive).

The **second principle** is a constitutional guarantee of the effective enforcement of judicial decisions. This is one of the most prominent weak points of the Israeli judicial system. While in the past there was a tradition of compliance with judicial decisions, this in itself is not sufficiently binding, especially in light of the fact that the instances in which it is not observed are growing more numerous, such as the *Bavli*¹¹² ruling cited above.

The **third principle** is the granting of administrative independence to the judicial branch, including the complete separation of judges and court officials of the judicial system, on the one hand, and civil servants, who constitute part of the executive branch, on the other, and the establishment of a hard and fast distinction between them.

The **fourth principle** is a prohibition on changing the conditions of tenure of judges. Although it is not desirable to grant the judges themselves full control over their own working conditions, as this situation may lead to anomalies, but, as things now stand, the legislative and executive branches could possibly make an attempt to alter judges' conditions of tenure and/or the manner in which they are appointed, and use this as a means of pressuring the judges to modify their policies, or as a means of displaying the displeasure of the legislature and executive branches with the judicial policy. This sort of pressure could even have an effect on concrete judicial decisions. Section 10 (b) of the Basic Law: Judicature prohibits the lowering of wages only for judges, but if wages are reduced and work conditions altered for a more

¹¹¹ S. Shetreet, *Justice in Israel*, 1994, pp. 516-519.

¹¹² See *supra* n. 38.

extended sector of the economy, this could lead to a resulting reduction in the judges' wages, and not only for purely economic reasons.

The **fifth principle** is that of the “neutral judge.” As opposed to the reactive principle that forbids bias in the Israeli judicial system, according to which a judge is disqualified only if there are concerns regarding possible bias or conflict of interest, the “neutral judge” is a proactive principle that requires the implementation of a prearranged program for the distribution of cases in the courts. This sort of system ensures fairness and neutrality *a priori* with respect to the makeup of the court.

It is obvious, then, that the State of Israel still has a way to go before it can declare full constitutional protection of the independent status of the judicial system.

2. The Jewish-traditional democratic state

The description of the State of Israel as a Jewish and democratic state initially appeared in the Basic Law: Freedom of Occupation and in the Basic Law: Human Dignity and Liberty,¹¹³ within the context of the attempt to extend the protection of individual rights in Israeli law.

The ideological beliefs of social groups in the State of Israel form the basis of the formulae and judicial processes that we have analyzed thus far. The object of this chapter is to examine the primary streams in Israeli society as they pertain to the issue of religion and state, while analyzing the legal aspects of Israel's definition as a Jewish and democratic state. From time to time, the court must discuss the question of the Jewish and democratic character of Israel, since decisions have to be made on questions that are directly related to the formula of how these two attributes interrelate. In order for the court to continue making its positive contribution to civil rights in matters of religious

¹¹³ The Declaration of Independence defined the state as Jewish, but did not explicitly say that it would be democratic as well. All it says in the third chapter of the declaration is that “complete equal social and political rights will be granted to all of its citizens without discrimination of religion, race or gender.”

practice, a clearer definition of the “Jewish” constituent element of the “Jewish democratic state” is required.

Generally speaking, on the question of attitude toward religion, the Israeli Jewish public is divided into four primary groups. Approximately 40 percent of the public describe themselves as completely secular. Approximately 12 percent describe themselves as religious. Four percent of the public describe themselves as ultra-Orthodox. The remaining 40 percent consider themselves traditional. The traditional Jew, like his religious colleagues, respects and upholds the Jewish tradition, but is opposed to religious coercion. He observes tradition out of a sense of obligation to the customs of his forefathers and the history of the Jewish people, but he does not adopt a rigid approach to observance. The traditional Jew may be described as a Jew who adopts conscious freedom of choice in the observance of Jewish law and religion, and allows himself certain freedoms that would not occur to the religious Jew. Picturesquely, he might be described as someone who on Sabbath morning goes to pray at the Orthodox synagogue, and in the afternoon drives by car to the soccer field. He keeps kosher in his home, builds a sukkah, and observes the customs of mourning as prescribed by Jewish law. This combination of tradition and freedom of choice within his traditional lifestyle also extends to the social-political level and it is clear that this also has repercussions at the legal level, as will be described below. To achieve social cohesion, it is necessary to find as wide a common denominator as possible between the different sectors in Jewish society.

On the social level, this objective can be achieved only through cooperation and partnership of the moderate elements of society—the liberal secular public, which recognizes Judaism’s important role in shaping the cultural face of the State of Israel—with the traditional and religious public which, while respecting Jewish tradition and maintaining a close cultural link with the Jewish historical heritage, also values democracy and civil rights.

There are additional ideologies espoused by other groups within the Jewish populace, which try to offer somewhat different responses to the question of the Jewish character of Israel today.¹¹⁴ The ultra-Orthodox public in Israel is composed of two camps: radical circles and mainstream ultra-Orthodox

¹¹⁴ See expanded discussion in S. Shetreet, *The Good Land: Between Power and Religion*, 1998, Chapter 13.

Judaism. The radical circles (the most prominent of which is the Neturei Karta community) refuse to reconcile themselves to the secular character of the State and with the fact that it itself is the product of human—rather than divine—endeavor. Immediately following the establishment of the State, these circles declared a boycott on participation in elections for the Knesset, receipt of funds from the state and its ancillary organizations, and all other contact with government and state institutions. As they see it, the State of Israel is a satanic act not simply because of its secular character, but primarily because by the mere fact of its existence, it is upsetting the “the Messiah’s timetable.” These extreme ultra-Orthodox groups think of Zionism in general and the State of Israel in particular as a blatant violation of the pledge of loyalty that Israel took on itself to await the end of days when the Messiah comes. These secular creations violate the unmistakably clear religious norms of Israel’s period in exile.¹¹⁵

Mainstream ultra-Orthodox Judaism considers the State of Israel to be a religiously neutral phenomenon that exists within the secular realm, a geopolitical event of the exile period. Israel’s coming into being is neither impure nor pure—it constitutes a purely historical phenomenon. The social group known as “ultra-Orthodox Judaism” is constructed of numerous subgroups that have varying attitudes toward the modern world, to the concepts of the Jewish people, Zionism, and the State of Israel. The common denominator between all the subgroups is the view of contemporary life in the State of Israel as exile in its metaphysical-theological meaning (“an exile of Israel in the Holy Land”). The essential part of the dispute with the State of Israel concerns the question of the secular nature of the country. The prevailing approach among most ultra-Orthodox circles in Israel recognizes the State of Israel *de facto*, but does not recognize the secular-Jewish state *de jure*. Representatives of the ultra-Orthodox sector cooperate with the state institutions on a qualified, pragmatic basis, but reject the national ideology and identification with it. The upshot is that any determinations made vis-à-vis the state and its actions occur on an *ad hoc* basis, as is the case regarding every other phenomenon pertaining to Israel: Should the state, its institutions, and its budgets support yeshivas and Torah institutions, they will be judged in a

¹¹⁵ A. Ravitzky, *Messianism, Zionism and Jewish Religious Radicalism*, 1993, p. 29.

positive light. But if they alienate themselves from the Torah world, they will be judged in a negative light.¹¹⁶

There is another stream in Israeli society that grounds its world view in the teachings of Rabbi Zvi Yehuda Hachohen Kook. This sector considers Zionism and the State of Israel through a messianic prism: Zionism represented “Atchalta D’Geulah” (beginning of the redemption), while the State of Israel already constitutes the middle of the redemption period. Moreover, this stream views Zionism and the State of Israel not only as mechanisms for national-political renewal, but an even more far-reaching religious-spiritual renewal. One example is the inclusion of the Hallel prayer—generally reserved for religious festivals—in services on Independence Day.

This stream confronts a secular-rejectionist reality. Its attitude toward this reality is complex: On the one hand, Rabbi Kook assigned an important role in the national renewal process to the secular forces. On the other hand, Rabbi Kook’s teachings did not leave any room for a secular-Jewish reality that would extend over time.

At present, much of the Jewish population in the State of Israel defines itself as completely secular. Indeed, the Zionist movement at its start defined itself as a secular socialist movement. It sought to mold a new Hebrew Jew, and rebelled against the diaspora. Rejection of the diaspora also included rejection of the religious life of the diaspora.¹¹⁷

The various currents of thought on the issue of religion and state help us to understand how we arrived at the status quo on matters of religion as it is now observed. Each of the streams had to make a compromise with the existing reality. When the socialist, secular, pioneering Zionist movement came into being and its members immigrated to Israel to fulfill the Zionist commandment of building up the land, it was a secular movement. Upon arrival in the Land of Israel at the beginning of the century, the leaders of the socialist Zionist movement found that they could not disassociate themselves from their religious background. First, the legal system that existed in Palestine during the Ottoman period, and later on during the British Mandate,

¹¹⁶ *Ibid.*, pp. 200-225, and also D. Schwartz, *The Theology of the Religious Zionist Movement*, 1996.

¹¹⁷ A. Shapira, *Land and Power*, 1992, p. 28.

was based on the judicial and religious identification of the individual. Based on his or her religious identification, the regime would enforce those laws that applied to his or her community, including personal status, marital, divorce, inheritance, and guardianship laws. Second, there were elected institutions that were recognized by the authorities, which were responsible for providing communal services to various population groups, on the basis of religious identification. “Knesset Israel” was one such institution.

The encounter between the secular socialist approach and the legal reality that relied upon parameters of religious identification compelled the leaders of the secular Zionist movement to adjust their attitude to the prevailing circumstances. They abandoned the conception based on absolute secularism and complete indifference to religion, replacing it with an attitude in which religion became a requisite component of how the Jewish settlement in Palestine identified itself prior to the establishment of the state, and in the everyday life of the Jewish state following its inception. Full recognition of this compromise was affirmed in the September 1947 letter—commonly known as the “status quo” letter—that was drafted by Ben-Gurion, Rabbi (Fishman) Maimon, and Yitzhak Greenbaum, acting for the Jewish Agency executive council, and which was addressed to Agudat Israel leaders and the World Agudat Israel organization. In the letter, Ben-Gurion committed to uphold Jewish tradition in the future state’s public life, including Sabbath observance, marriage in accordance with the laws of the Torah, kashrut, and educational autonomy for the religious public. Later on, a separate commitment granting draft exemptions to yeshiva students was added. (Initially, about 300 exemptions were granted.)

As Prof. Menachem Friedman has written, the status quo letter was conceived against the background of the arrival in Israel of a United Nations commission in June 1947, for the purpose of drawing up recommendations that would eventually include a call for the partition of Palestine and the establishment of a Jewish state. It was extremely important to Jewish Agency leaders, including David Ben-Gurion, to present the committee with a united stand that represented the entire Jewish settlement in Palestine. Their concern was that Orthodox circles would be opposed to the establishment of a secular Zionist state, so it was decided to adopt a compromise solution that would gain the political support of the ultra-Orthodox.

The spiritual leaders of the ultra-Orthodox community avoided publicly airing their own opinions regarding an halachic state, and even advised Agudat Israel to avoid any public expression of support or non-support, so that they would not be accused of sabotaging the establishment of the state, while at the same time preserving the influence they might be able to wield when the state came into being.

The arrangement that was affirmed by Ben-Gurion in the status quo letter on issues of religion and state also proved effective in legitimizing the religious-Zionist public's participation in the Zionist enterprise. This led to a robust alliance between the socialist Zionists and the moderate religious Zionists, who were led by Rabbi (Fishman) Maimon.¹¹⁸

The Zionist leadership hoped it would be able to use the Mizrachi movement as a means of bringing the religious public closer to the Zionist vision. Even if that at first meant the religious-Zionist vision, the assumption was that the religious would contribute to the Zionist effort, or at the very least not harm it by joining an anti-Zionist lobby that would weaken the movement's show of unity vis-à-vis the British government. Ben-Gurion did not separate religion from state. Some commentators believe he did not do so because he wanted to control religion and use it for his own needs. He believed that by funding it and integrating it into the secular system, he would be able to weaken the forces of religion in Israel and gain control over them.

¹¹⁸ For an analysis of the thesis of Prof. Friedman on the relationship between Ben Gurion and the Agudat Israel movement see, for example, M. Friedman, "The Status Quo History: Religion and State in Israel," in Filovski, Ed. *The Transition from Yishuv to State* (Haifa, Herzl Institute, 1991), pp. 48–79. See also on Agudat Israel and the Zionist movement: Y. Fund, *Separation or Participation: Agudat Israel, Zionism and the State of Israel* (Jerusalem, Magnes Press, 1999), N. Horowitz, "The Haredim and the Supreme Court: Breaking the Framework in Historical Perspectives," *Kivunim Hadashim*, Oct. 2001, pp. 22–78. This alliance between The Zionist Socialist Movement led for many years by Ben Gurion and the Religious Zionist Movement was preserved even after the establishment of the state, and what had been the Hapoel Mizrachi Movement evolved over the years into the National Religious Party, which maintained a well-known alliance with Mapai until 1977.

Thanks to Ben-Gurion's commitment to the Agudat Israel leaders, representatives of all the population sectors signed the Declaration of Independence, forming the national consensus that is considered one of the basic principles of the state. The Declaration of Independence refers to the Jewish character of the state, as well as the historic links of the State of Israel to the Jewish people, to Jewish history, and to the Jewish spiritual heritage.

The wording of the Declaration of Independence reflects the compromise formula on which its framers continued to work until moments before the declaration ceremony. The reference to "the Rock of Israel" was a compromise between the secular and the religious. At a meeting of the State Provisional Council that ended only one hour before the declaration ceremony, disagreement broke out yet again over the phrase "Out of faith in the Rock of Israel." Aharon Tzising, a member of the drafting committee, protested that this wording obligated the signatories to proclaim—against their wishes—their belief in God. David Zvi Pinkas defended the wording, arguing that it united the majority of the people of Israel around it. Ben-Gurion himself was in favor of the "Rock of Israel" version.

The final wording that was accepted was: "Out of faith in the Rock of Israel, we hereby affix our signatures as witnesses to this declaration, at the session of the temporary state council that took place in the homeland, in the city of Tel Aviv, this day, Sabbath eve, the fifth of Iyar 5708, May 14, 1948."¹¹⁹

Based on the commitment made by Ben-Gurion as a basis for the status quo, and in light of the general consensus, the Knesset enacted legislation after Israel's establishment that ensured that Jewish tradition would be observed in public life. Legislation was adopted on a series of issues, including laws that determine that marriage and divorce for Jews and members of other religions will be performed solely in accordance with religious law. Other legislation decreed that kashrut would be observed in the Israel Defense Forces and other government institutions. Subsequent laws forbade the raising of hogs, established the Sabbath as a day of rest for Jews, and set guidelines for the selection of Chief Rabbis and the establishment of religious councils to furnish religious services to the Jewish public. The system of governmental religious arrangements was based on a philosophy according to which the Jewish character of the state had to be maintained in the fields of kashrut, Sabbath,

¹¹⁹ Z. Sharf, *Three Days- 12, 13, 14 of May 1948*, 1965, pp. 214-226.

education, marriage and divorce, the rabbinate, and draft exemptions for yeshiva students.

This line of compromise continued over the years, and was eventually rooted in the body of legislation with the Foundations of Law Act, 1980.¹²⁰ This law determined that when the judiciary cannot reach a decision through interpretation, analogy or inference of the existing law, the court will invoke the legal “principles of freedom, justice, equity and peace of Israel’s heritage”. The wording of the phrase “heritage of Israel” constitutes a compromise solution between those who preferred a direct reference to Jewish law and those who categorically rejected any such reference. The phrase “heritage of Israel” refers to the sum total of Jewish cultural values, and not necessarily to their narrow halachic meaning. Section 1 of the Foundations of Law Act, 1980, was eventually passed with the following wording: “Should the court consider a legal question that requires resolution, and the solution is not to be found in the existing legislation, judicial precedent, or by means of analogy, the court will resolve the question in the light of the principles of freedom, justice, equity, and peace of Israel’s heritage.”

Interpretation of the term “heritage of Israel” was left to the judiciary. The issue arose in the *Handles* case.¹²¹ Justice Aharon Barak determined that it is permissible to refer to Jewish law in order to learn, as a sort of treasury of legal thought which might provide inspiration to the judges. The reference here is to “law” in its cultural rather than its normative meaning. In Justice Barak’s view, Jewish law does not constitute a system of justice that applies in Israel. Rather, it exists for the purpose of providing a comparative legal system. Conversely, Justice Elon, expressing the minority opinion, was of the opinion that the law refers to Jewish law in order to clear up any uncertainties as to its own content. Jewish law may not constitute a binding body of laws, but it can provide guidance to the court regarding the issue before it.

The process began in the First Knesset, which was designed to act as the Constituent Assembly that would draft a constitution, including a section on human rights. The idea was postponed, and in its place on June 13, 1950, the First Knesset adopted the “Harari decision” regarding the piecemeal creation of a constitution by means of Basic Laws. Opposition to the passage of a

¹²⁰ 34 L.S.I. 181.

¹²¹ C.A. 546/78, *Kupat Am Bank, Ltd. v. Handles*, (1980) 34(3) P.D. 57.

constitution came from the religious parties in the Knesset, which argued that the Torah is the sole constitution of the Jewish people, and that it could not be replaced by a secular constitution. The religious parties, it seems, were concerned that a constitution that was founded upon the democratic-liberal principles contained in the Declaration of Independence would undermine the legality of the religious marriage laws, and upset the delicate balance between religion and state.¹²²

When in the Fifth Knesset it became clear that there was little chance of a parliamentary initiative for a Basic Law that would address the issue of human rights, neither through the Knesset's Constitution, Law and Justice Committee, nor through the cabinet, MK Professor Hans Klinghoffer submitted a private bill called "Basic Law: The Declaration of Basic Human Rights." Along with political freedoms, the proposed law also included social rights, and determined that any limitation of these rights would be carried out only "subject to the conditions of democratic procedure." The proposed legislation was rejected by the government, most prominently so by Justice Minister Dov Yosef.

In the Seventh Knesset, a subcommittee headed by MK Binyamin Halevy, working in cooperation with the Minister of Justice, succeeded in drafting the "Basic Law: Civil Rights." In August 1972, the bill passed its first reading in the Knesset, but subsequently drew the criticism of jurists and public figures. They argued that as opposed to the bill previously submitted by MK Professor Klinghoffer, the proposed Basic Law: Civil Rights did nothing to restrain the legislature from subsequently neutralizing the freedoms guaranteed by the proposed Basic Law. The bill also stated that the equality clause and the prohibition against discrimination could not harm "any legal order stemming from the State of Israel's existence as a Jewish and democratic state." This version sparked a great deal of opposition. The Seventh Knesset completed its term without bringing the proposed law for a second or third reading.

In the Tenth Knesset, MK Professor Amnon Rubinstein initiated a bill that was submitted for a preliminary reading in June 1982. The proposed law is a word-for-word reiteration of the bill submitted by MK Professor Klinghoffer in the Fifth Knesset. The bill met almost no opposition as it passed through the early stages of discussion, and was brought up for a first reading in February

¹²² B. Neuberger, *Religion and Democracy in Israel*, 1997, p. 33.

1983, with the sole omission of the section pertaining to social-welfare rights. Eventually, the government expressed its opposition to the bill, claiming that it did not express the position of the government.

A genuine turnaround took place in the Twelfth Knesset. Justice Minister Dan Meridor submitted the proposed “Basic Law: Human Rights,” which did not include any provision that might qualify the rule of equality. It did bolster protection for the Basic Law, and included a provision for judicial review of any amendments to or restrictions of the Basic Law. It was proposed to leave the existing law as is, and to state that “the [Basic] Law does not apply to laws prohibiting or authorizing marriage and divorce.”

In November 1989, Agudat Israel resigned from the coalition. Prime Minister Yitzhak Shamir hinted that the Basic Law to which Agudat Israel was opposed would not be passed by the ministerial committee on legislative affairs. The religious and ultra-Orthodox factions did everything they could to thwart passage of this Basic Law and other similar laws.¹²³

In order to rescue the proposed bill of human rights, MK Professor Amnon Rubinstein proposed splitting it into two separate bills, each of which would guarantee a collection of basic rights. In accordance with this formula, the draft “Basic Law: Human Dignity and Liberty” was passed in a preliminary reading in April 1991, and the draft “Basic Law: Freedom of Occupation” was passed in May 1991. Passage of these bills was extraordinary not only because of past experience, but also because they were private bills that did not have the support of the government. The secret of their success had to do with the splitting of the original bill into different components, enabling Knesset members to relate to each subject separately and independently.

The primary concern voiced by the religious factions of the Knesset was that the bill would result in a change in the character of the state, since the body of Basic Laws—constituting a constitutional document—has the purpose of restricting the Knesset’s legislative powers. The political significance of this restriction is that the power of the religious factions in the Knesset to give and take would be limited, since the Basic Laws are likely to limit their ability to tip the status quo balance toward the religious side of the scale at the expense of individual rights.

¹²³ A. Rubinstein, *The Constitutional Law in Israel*, 1997, Vol. 2, pp. 910-914.

In order to deal with this exigency, a “preservation of the laws” section was added to the Basic Laws, according to which the Basic Law cannot adversely affect any law that was on the books prior to its enactment. Yet this did not quell the objections to the Basic Laws, as the religious factions feared the limitation of their ability to pass new laws that would reinforce the status of religion at the expense of individual rights. The compromise solution was to define the State of Israel as “Jewish and democratic” in the new Basic Laws. This description was adopted through a consensus agreement: the religious factions considered it a means of guaranteeing the state’s relationship to Judaism, whereas the secular left considered the definition a statement that ensured preservation of freedom of religion.

Aside from this, the Basic Laws correspond to the spirit of the ideals expressed in the Declaration of Independence, which determines the Jewish character of the state, while at the same time guaranteeing complete social and political equality. The “Jewish and democratic” compromise wording that appears in the new Basic Laws does not resolve the question of the relationship between the Jewish character of the state and its democratic character.¹²⁴ It does resolve if and when the status quo on religious affairs, as it has been maintained in recent years in the State of Israel, should be preserved.

It should be recalled that there are also differences of opinion and approach among various legal scholars as regards the extent of intervention by the courts, primarily the Supreme Court. For example, Professor Ruth Gavison believes that it is neither appropriate nor helpful to carry out an analysis of imported terms instead of a normative ideological-political inquiry, or an attempt to place empirical arguments within a context that can give them meaning. As she sees it, conceptual systems should help us speak with one another, but not more than that. As such, the conceptual discussion can serve to guide us only within the context of the basic terms; ideological issues must be solved at the political-social level.¹²⁵ Professor Ariel Rosen-Zvi also felt that the court had to avoid any attempt to resolve ideological debates, albeit for other reasons. He believed that whenever a situation arises in which there is no

¹²⁴ *Ibid.*, pp. 914-918.

¹²⁵ R. Gavison, “A Jewish and Democratic State, Political Identity, Ideology and Law” in *Iyunei Mishpat*, Vol. 19(3), 1995, p. 635.

way to avoid a head-on decision, the court is best off leaving the issue to be worked out at the socio-political level.¹²⁶

Discussion of what constitutes the Jewish component of the Jewish democratic state leads to inevitable demarcation and dissent among the different segments of the Jewish people.¹²⁷ Clearly, there is no one formula that all parties can agree upon; nor should this be considered a sought-after objective for the legislator or jurist. In many instances, it is impossible to settle ideological disagreements such that all sides are satisfied. At times, dissension across ideological-religious lines permeates the social-political strata, in much greater dimensions than their purely religious roots might indicate. Import of non-kosher meat to Israel or observance of kashrut restrictions can become sociological issues, which have of late been considered more of a “cultural war” than a debate on purely legal issues. These circumstances leave the court with only one choice, that of bridging the gap between the groups that are willing to accept reconciliation, by finding the common denominator that is acceptable to the majority.

As previously stated, this conclusion at the social-political level also has to have legal ramifications on the judicial level.¹²⁸ As such, a differentiation is required first and foremost between different societal norms: those that have not yet been adopted as positive norms by society, and for which there is no justification to compel their observance by the population at large; and positive societal norms that the state may force on the general population, such as the weekly day of rest, which has in fact been fixed in law by the Knesset in the Hours of Work and Rest Law, 1951.¹²⁹ Enforcement of this law can be judicially justified by the manner in which the Sabbath has taken root as a day in which the national economy grinds to a halt, in keeping with the widespread tradition of the Jewish nation, and as accepted by the bulk of Jewish society: a

¹²⁶ A. Rosen-Zvi, “A Jewish and Democratic State: Spiritual Parenthood, Alienation and Symbiosis. Can We Square the Circle?” in *Iyunei Mishpat*, Vol. 19(3), 1995, pp. 479-519, esp. p. 489.

¹²⁷ For a general review of other methods, see R. Gavison, “A Jewish and Democratic State,” pp. 631-682, as well as A. Rosen-Zvi, “A Jewish and Democratic State,” pp. 479-519.

¹²⁸ See expanded discussion in S. Shetreet, *The Good Land: Between Power and Religion*, 1998, chapter 35.

¹²⁹ 5 L.S.I. 125.

large part of the secular and traditional sectors, and of course the religious and ultra-Orthodox sectors.

Based on the approach that emphasizes traditionalism as the “Jewish” variable in the Jewish democratic formula, the 1977 law prohibiting the operation of “houses of entertainment” on the Ninth of Av (the day that both Temples were destroyed) can be justified, because the Ninth of Av is not only a religious day that commemorates the destruction of the Temple, but also a national memorial day to the end of Jewish statehood and sovereignty as well as the destruction of the Temple. Therefore, the legislation can be justifiably considered to reflect a national norm, and I have explicitly supported this approach in the past.¹³⁰ In this spirit, of maintaining our cultural heritage, state and governmental institutions can justifiably be compelled to add the Hebrew date to documents, in addition to the Gregorian date.

In order to answer the question regarding the extent of halachic interpretation, one needs to adopt the golden mean of Judaism as traditionalism. This interpretation does not espouse an excessively strict reading of Halachah, and can become a norm that is acceptable to the entire public, and therefore should not be considered to adversely affect freedom of religion and conscience. Nevertheless, nor is it excessively lenient, and it does not belittle or ridicule the traditional foundations and interpretations of Judaism. For example, it is not appropriate to do away with public kashrut observance in state and governmental institutions and IDF facilities, since this act would cause prodigious harm to the spirit and tradition of Judaism. The same would hold true if rabbis were compelled to perform marriage ceremonies in catering halls in which pork is served, or in which there is concern regarding a conflict with other halachic statutes, such as when the bride is considered impure and cannot be married.

On the other hand, based on the traditionalistic approach, it would also be inappropriate, as I see it, to rely on a maximalist, strictly Orthodox interpretation of Halachah—the version that includes not only the core of the concept but also the shell and everything in between. For example, the government cannot rule that managers of a restaurant that has requested a kashrut certificate must prove they are Sabbath- or mitzvah-observant. This sort of interpretation would also harm the freedom of religion and conscience

¹³⁰ See S. Shetreet, “Freedom of Conscience and Religion,” *op.cit. supra* n. 3.

of those who would consider themselves victims of religious discrimination, since in a distorted reality the entire Jewish public would be compelled to accept norms that are foreign to them. In my eyes, this would make such norms invalid.

What is needed is an approach that accepts Halachah and its precepts—such as the concept of kashrut—in its basic meaning; in other words, an interpretation that recognizes the cultural and religious importance of the halachic concept in its narrow definition, without spreading beyond those limits and adversely affecting the freedom of religion and conscience of all sectors of society. This kashrut is rooted in the tenets of Judaism, both in its traditional religious significance and its cultural significance. It is not a kashrut that is forced on anyone.

Following this approach, the principles of the status quo should be preserved in keeping with its dynamic development over the years, while maintaining the traditional-Jewish-Zionist character of the State of Israel. Similarly, the expression “Jewish and democratic state” as it appears in the new Basic Laws should be interpreted. This will help to catalyze the drafting of solutions at both the constitutional level and the judicial level. The passage of new laws to bypass High Court of Justice rulings, which would reinforce the status of religion in the country at the expense of individual rights, must be struck down by the court in accordance with the new Basic Laws. At the same time, new legislation on religious matters should maintain the close connection between Jewish culture and tradition, while simultaneously upholding freedom of choice and liberal democratic values.

In this respect, it would seem that the position adopted by Professor Barak supports our own view:¹³¹

“A Jewish state” is, then, the state of the Jewish people; “It is the natural right of the Jewish people to be like any other people, occupying its own sovereign state, by its own authority.” A state to which every Jew has the right to immigrate, and in which the ingathering of the exiles is one of the basic values. “A Jewish state” is a state whose own history is integrated and intertwined with the history of the Jewish people, whose language is Hebrew, where most of the

¹³¹ A. Barak, *Interpretation in Law—Vol. 3: Constitutional Interpretation*, 1994, p. 332.

holidays reflect the national renewal. “A Jewish state” is a state in which the settlement of Jews in its fields, cities and colonies is one of the primary concerns. “A Jewish state” is a state that commemorates the memory of the Jews that were annihilated in the Holocaust, and which is meant to constitute “a solution to the problem of the Jewish people, which lacks a homeland and independence, by means of renewing the Jewish state in the Land of Israel.” “A Jewish state” is a state that nurtures Jewish culture, Jewish education and love for the Jewish people. “A Jewish state” is “the realization of the generations-long yearning for the redemption of Israel.” “A Jewish state” is a country that espouses the values of freedom, justice, equity and peace that are part of the heritage of Israel. “A Jewish state” is a state whose values are drawn from its religious tradition, in which the Bible is the basis of its literature and the prophets of Israel are the foundations of its morality. “A Jewish state” is a state in which Jewish law plays an important role, and in which marriage and divorce of Jews is decided in accordance with the laws of the Torah. “A Jewish state” is a state in which the values of the Torah, the values of Jewish tradition and the values of Jewish law are among its most fundamental values.

3. Taking action at the judicial level to protect the individual from non-enforcement of judicial rulings

We must contend with the not-infrequent phenomenon whereby compliance with court rulings is repeatedly avoided or disregarded. Although this phenomenon has occurred with respect to matters of religion, it is prevalent in other contexts as well, and additional legal measures are required to raise the level of implementation of judicial rulings, and limit the flexibility with which the authorities now approach the matter of compliance with court rulings. It goes without saying that non-enforcement of judicial rulings is not restricted to cases that pertain solely to religious matters, but is prevalent in other fields as well, including security matters, a case in point being the Kafr Rabassia affair, in which the implementation of a Supreme Court ruling was thwarted.¹³²

¹³² H.C. 64/51 *Daoud v. Minister of Defense*, (1951) 5(2) P.D. 1117; H.C. 220/51 *Aslan and others v. the Military Governor of the Galilee*, (1951) 5(2) P.D. 1480.

The following are a few proposals for raising the level of compliance with judicial rulings, including those that pertain to religious matters. The discussion includes proposals for allotting a set amount of time for carrying out the court verdict, and proposals for creating legal structures beneficial to the citizen in case of delay, avoidance, or refusal to implement the judicial ruling. In addition, this chapter will consider the option of imposing personal compensatory damages against officeholders; invoking contempt of court charges against appointed and elected officials; and rescinding the validity of institutions that have refused to accept new members in spite of the judicial rulings of the courts. Finally, the possibility of self-implementation will be considered, as well as compliance by a third party as a means of implementing judicial rulings in cases of noncompliance.

A. Allotting a specific amount of time for implementation of judicial rulings

One of the means of guaranteeing the enforcement of judgments is for the court to be asked to exercise its discretion and order that action be taken within a given amount of time. This was so in the *Peranio* case, in which the petitioners lodged an appeal vis-à-vis the government's failure to adopt regulations to abate the air pollution caused by dust emitted by the Neshor plant. In the *Oppenheimer*¹³³ case, which was brought before the High Court of Justice four years after the passage of the Abatement of Nuisances Law, 1961¹³⁴ (which sought to limit air pollution), the court ordered the relevant cabinet ministers to enact regulations. However, these government officials dragged their feet on the matter for another seven years, until the handing down of the *Peranio* judgment. Following a lag of eleven years in enacting regulations to limit air pollution as required by the Abatement of Nuisances Law, 1961, Justice Vitkon ordered the respondents—that is, the relevant cabinet ministers—to enact regulations concerning air quality and dust emissions within six months, and to immediately put the regulations into effect

¹³³ H.C. 295/65 *Oppenheimer v. Ministers of Health and of Interior*, (1966) 20(1) P.D. 309.

¹³⁴ 15 L.S.I. 52.

at the Nesher plant.¹³⁵ Following this approach, the court is able to allot a given amount of time, in accordance with the specific circumstances of the case, for the implementation of a judgment.

B. Creating legal structures to benefit the citizen in case of delay, avoidance, or refusal to enforce a judicial ruling

One may infer from the Administrative Procedure Amendment (Statement of Reasons) Law, 1959, that appropriate judicial arrangements may be enforced in the instance of delay, avoidance, or refusal to implement judicial rulings. This law is the source of inspiration for the imposition of judicial constraints on a government authority or administrative body that postpones or avoids compliance with the instructions of the law. For example, the law set up an evidentiary legal structure according to which a public servant who declines to explain the instructions of the law will in every judicial procedure have to prove that any decision or action for which he did not provide a proper explanation were in fact carried out in accordance with the law.¹³⁶ This law is an example of the legislator's ability to defend the citizen while avoiding a distortion of justice by invoking sanctions to ensure compliance—all on the basis of judicial legal structures beneficial to the citizen.

C. Imposing personal compensatory damages against officeholders

There are several possible changes that would facilitate the task of enforcement and could even impel injured parties to petition the court with requests that it levy personal compensatory damages on officeholders who do not comply with court judgments. Another possible solution, which has already been implemented to some extent, is to award compensation to the injured party by order of the High Court of Justice in every instance of a violation. This judicial ruling is within the framework of the natural

¹³⁵ H.C. 372/71 *Peranio and others v. Minister of Health and others*, (1972) 26(1) P.D. 809.

¹³⁶ Administrative Procedure Amendment (Statement of Reasons) Law, 1959, sec. 6, 13 L.S.I. 7, at 8.

jurisdiction of the court.¹³⁷ Nevertheless, this solution, although extremely effective in most instances of violation of court orders, would not be particularly appropriate for the specific situation under discussion here, since the injured party in this instance expects operative redress, not compensation.

Alternatively, the court can enforce an indemnity on the liable party. The sum of the indemnity would be awarded in the event that the liable party violates the court order in the future. This practice would prevent violations of court orders by “recidivist” authorities. The advantage of this approach is that the sanction would not be conditional upon an additional petition by the injured party. Instead, all that would be needed is that while the initial order was being granted, the court would be asked to enforce the indemnity, or decide to do so on its own volition in light of familiarity with the relevant authority and the specific dispute before it.

D. Resorting to the remedy of contempt of court against appointed and elected officeholders

There are two main methods of enforcing judgments in Israel: one direct, and the other indirect. The first is carried out in accordance with the Execution Law, 1967,¹³⁸ which does not apply to the state. The importance of this mechanism is that it permits the implementation of a judgment without resorting to direct sanctions against the individual on whom the responsibility of compliance has been placed. The second way includes two enforcement options—civil contempt and criminal contempt. Regarding civil contempt, according to section 6 of the Contempt of Court Ordinance, an individual can be enjoined by means of a fine or imprisonment to obey any court order that orders the carrying out of an action or to refrain from carrying out an action. The objective of declaring civil contempt is to help the injured party who is being harmed by non-implementation of the order, by compelling the violator to comply with it. Section 6 keeps an eye on the future, rather than the past, and does not seek to retroactively punish the violator for his act.

¹³⁷ H.C. 101/74 *Construction and Development, Ltd. v. Minister of Defense*, (1974) 28(2) P.D. 449.

¹³⁸ 21 L.S.I. 41.

It should be noted that according to the Interpretation Ordinance (New Version),¹³⁹ the word “individual” also includes a group of individuals, meaning that the section also applies to enforcing a city council or religious council to comply with a court order. Section 6 applies to judgments handed down by the High Court of Justice, including temporary injunctions.¹⁴⁰ In order to determine whether to enjoin an order on an individual or on a group of individuals, the courts set down a number of principles. The first principle is that section 6 applies only when the court order can be enjoined. If matters have reached the point that they cannot be enjoined, then there is no room for charging civil contempt; in such a case, criminal contempt charges are required.

The second principle is that the party injured by the noncompliance with the judgment must explicitly request action in accordance with section 6 of the Contempt of Court Ordinance. In one instance in which petitioners asked the High Court of Justice for an order to force the Minister of Defense to uphold an earlier order issued by the court, without being asked to impose imprisonment or a fine on the Minister, the High Court of Justice turned down the request, and ruled that this was not an appropriate way to bring about compliance.¹⁴¹

The third principle is that contempt of court will apply only to an operative judgment. A declarative judgment of the High Court of Justice or any other court that does not constitute a genuine and explicit directive to take action or refrain from action cannot be considered grounds for contempt of court. If the High Court of Justice sufficed with issuing a declarative judgment, there is no possibility of enforcing compliance. A declarative order is one in which the court determines that a governmental authority is not permitted to carry out a certain act. This was the case when the High Court of Justice ruled that the Speaker of the Knesset did not have the jurisdiction to refrain from tabling MK Kahane’s legislature bill.¹⁴²

¹³⁹ 1 L.S.I. [N.V.] 5.

¹⁴⁰ R. Har Zahav, *The Law of Administrative Procedure in the High Court of Justice*, 1991, p. 123.

¹⁴¹ H.C. 238/51 *Hanna Daoud v. Minister of Defense*, (1951) 5(2) P.D. 1658.

¹⁴² H.C. 306/85 *Kahane v. Shlomo Hillel and others*, (1985) 39(4) P.D. 485.

The majority of court orders pertaining to the makeup of the religious councils are operative rather than declarative. This was true, for instance, in the *Hoffman* case¹⁴³ (in which voting for the Jerusalem and Tel Aviv city councils were judged to be null and void, and had to be held anew), in the *Shakdiel* case¹⁴⁴ (in which the court decided that the petitioner should be a member of the religious council, and that one of the four representatives appointed to the religious council by a ministerial committee would relinquish his seat on the council to make room for her), as well as the *Naot* case¹⁴⁵ (in which the court decided that on councils where disqualification clearly stemmed from considerations related to the “weltanschauung” of the candidates, the disqualified candidates will be declared the selected candidates).

The charge of civil contempt applies to government authorities. In several instances, the High Court of Justice determined that it would be legally possible to enjoin a government authority, but the court preferred not to do so for various reasons. In the *Melamed* case,¹⁴⁶ the High Court of Justice chose not to respond to a request made in accordance with section 6 against the head of a local authority, since the order had been carried out in the meantime. In the *Hagai Merom* case, the High Court of Justice rejected a petition to enjoin the mayor of Herzliya, Eli Landau, because it felt the decision not to comply with the order was reasonable, since the head of the regional office of the Ministry of Interior had changed his stand.¹⁴⁷ The erudite justices rejected the argument that noncompliance was prompted by religious, conscientious, or ethical motives.¹⁴⁸

As mentioned above, aside from civil contempt there is also criminal contempt. Section 287 of the Penal Code, 1977, states that “The violator of an order that was properly issued by the court or by an official or individual acting in an official and authorized capacity, for that matter, will be sentenced to two years’ imprisonment.” This regulation is meant to penalize the violator for his past actions, not to ensure his future compliance. The dispute in this instance is between the violator and the state, not between the violator and the

¹⁴³ See *supra* n. 76.

¹⁴⁴ See *supra* n. 74.

¹⁴⁵ H.C. 4733/94 *Prof. Yehudit Naot v. Municipality of Haifa* (1995) 49(5) P.D. 111.

¹⁴⁶ H.C. 436/88 *Melamed v. Yigal Yosef and others* (not published).

¹⁴⁷ H.C. 3723/90 *Hagai Merom v. Dr. Yosef Levi and others* (not published).

¹⁴⁸ E. Harnon, *Contempt of Court*, 1965, p. 297.

injured party. This regulation is to be used only in those instances in which implementation of the judgment is no longer possible.

It therefore seems that the party injured by the violation is dependent on the decision of the police whether to submit an indictment or not: he cannot lodge a private complaint based on section 287. At present, the Israel Police do not investigate instances of violation of court orders.

Another problem is liable to arise regarding use of section 287 vis-à-vis officeholders and official institutions. In principle, a corporation may be held criminally responsible,¹⁴⁹ but it is unclear how the court will rule when it has to decide whether a city council or religious council are subject to criminal judgment.

As for individuals who may be accused of having violated section 287, any citizen can be brought to trial, of course, except for the Minister of Religious Affairs who would have to have his immunity lifted before he can be brought to trial. For his part, the Minister would be able to claim that the actions took place in his official capacity as a Minister, and that he is therefore protected by substantive immunity. However, it seems that only in the most extraordinary circumstances would the Minister be able to prove that his office forced him into failing to comply with the court's decision.

A related judicial issue concerns the preclusion of judicial review even before a court order has been issued. The court cannot initiate judicial discussion of an issue of its own volition. This attribute of the court eliminates the possibility of advance judicial discussion of a certain issue. In so doing, the government essentially thwarts any judicial review of its actions. The great danger of this scenario is obvious: the executive branch will adopt a practice of staving off judicial resolution particularly in those instances where the legality of the authority's action is in doubt, and in which the executive branch fears that the court might very well disqualify its action. On several occasions in the history of the State of Israel, the executive branch prevented discussion of the validity of its actions due to concerns that they would not withstand judicial review.

¹⁴⁹ Cr.A. 3027/90 *Modi'im Construction and Development v. State of Israel*, (1991) 45(4) *P.D.* 364.

One instance of preventing a judicial decision, which had an especially sad outcome, was the deportation of Dr. Sovlan. Sovlan was an American Jew who had been convicted there of espionage, was released on bail pending the appeal, and fled to Israel with someone else's passport. Dr. Sovlan was arrested, and his attorney was informed that the matter would be taken up by the cabinet on July 1, 1962. Nevertheless, on June 29, 1962, the Minister of Interior signed a deportation order based on the authority vested in him by section 13 of the Entry into Israel Law, 1952.¹⁵⁰ The following day, Dr. Sovlan was put on a plane in which U.S. representatives were awaiting him. Dr. Sovlan tried to commit suicide on board the plane, which landed in London to enable him to receive medical attention. In London, he ended his life.¹⁵¹

The legality of the Minister of Interior's action is doubtful, and some commentators argued that the episode was an act of extradition disguised as a deportation. Such an act would be illegal in light of the restrictions imposed by the protocol for extradition, as determined by the Extradition Law, 1954.¹⁵² Yet the haste with which the government acted, as well as the misleading information given to Dr. Sovlan's attorney, prevented judicial review of the deportation order, essentially denying the court an opportunity to intervene in the affair. As a consequence of the affair and the storm that erupted in its wake, it was determined in section 21 of the Entry to Israel Regulations, 1974, that any person to whom a deportation order has been submitted will be deported no less than three days from the date of receiving the order, thereby assuring him an opportunity to petition the High Court of Justice.

A very similar episode took place in December 1988, when a Russian airplane with five Russian criminals on board landed in Israel. They had commandeered the plane and taken its passengers hostage. This time, the Minister of Interior employed the technique of issuing a removal order, in accordance with section 10 of the Entry into Israel Law. The five men were sent back to Russia the following day, after a written commitment from the

¹⁵⁰ 6 L.S.I. 159, at 161.

¹⁵¹ Y. Gutman, *Shake-up in the Shabak—The State Attorney versus the Government*, 1995, p. 142.

¹⁵² 8 L.S.I. 144. See S. Z. Feller, "The Soviet Kidnappers Affair—The Case of Dr. Sovlan—Second Edition," *Mishpatim* (1989-90), Vol. 19, p. 41.

Soviet authorities was received that the men would not be executed.¹⁵³ Removal orders do not require any waiting period prior to their implementation, a fact that was exploited by the Minister of Interior, who managed to end the affair before it could reach the High Court of Justice. In so doing, the Supreme Court's authority to rule on the legality of a camouflaged extradition was once again aborted.

Another instance in which the executive branch prevented any possibility of judicial review was the Hebron deportation affair, in which Dr. Hamada Natshe and Dr. Al-Haj Ahmed were deported in 1975. The two men were about to declare their candidacy in the mayoral elections in Hebron and El-Bireh, which were going to be held for the first time under Israeli rule. Dr. Natshe was a popular rival of the incumbent mayor of Hebron, Sheikh Ali Jabari, whose continued tenure in office was supported by the Israeli government. The deportation order was issued by the Minister of Defense, in accordance with the Defense (Emergency) Regulations, 1945, and was supported by evidence that linked the two men to hostile acts.

Dr. Natshe appealed to the High Court of Justice, requesting that it cancel the deportation order. The petition was submitted on Saturday, and Justice Etzioni, the duty justice, ordered a hearing of the arguments of both sides at his home at 4:00 p.m. the same day. Justice Etzioni was not asked to issue a temporary injunction, and a quarter of an hour before the scheduled hearing, the military government deported the two men to Lebanon. At the appointed hour of the hearing, representatives of the military government informed Justice Etzioni of the deportation, and the hearing was cancelled.

Prior to the deportation, security officials had consulted with the then Attorney General Professor Aharon Barak, who issued a legal opinion that the submission of the petition in itself, so long as a temporary injunction had not been issued, did not present an obstacle to the deportation. The reactions in the cabinet, the Knesset, and the media were especially harsh. The government placed most of the blame on the Attorney General's legal opinion. In an explanation provided one month later to Justice Etzioni, Professor Barak concurred with the principle that a deportation procedure should be suspended in the event that a petition has been filed against it. Nevertheless, he argued, in

¹⁵³ The guarantee was supplied through the intervention of a number of parties, including the author of this article, who was then a Member of Knesset.

this case delay of the deportation even by a few days would have led to a turbulent atmosphere due to the proximity to the mayoral elections. Barak later admitted that the deportation had been a mistake.¹⁵⁴

There is no doubt that the Attorney General's legal opinion was justified insofar as filing a petition does not impair the legality of the deportation, but on the level of principle, the flaws of the deportation are readily apparent. The timing of the deportation involved the evasion by the executive branch of subjecting a decision to the scrutiny of judicial review. This sort of move, which denies the possibility of judicial resolution by the judicial branch, constitutes a breach of the independent status of the judiciary, and more generally the principle of the rule of law. This is especially serious when the deportation was ordered on the basis of the Defense (Emergency) Regulations, an extreme move that involves a severe denial of civil rights.

The Al-Lagia Bedouin land case is another example of the lack of cooperation between the executive branch and the courts. In 1977, the Israel Lands Authority (ILA) moved to expropriate the land upon which about 30 Bedouin families were living, in order to establish a Bedouin town. The families appealed against the expropriation to the District Court, simultaneously petitioning the High Court of Justice to forbid any more work on the site. At the High Court of Justice hearing, an ILA representative guaranteed that no work would be carried out so long as the District Court case had not been resolved. Upon receipt of this assurance, the petition was cancelled. But the guarantee that was given at the court hearing was not honored, and the ILA renewed work on the site.

The petitioner reapplied to the High Court of Justice. At the next hearing, the court declared that this was the most flagrant instance ever of a government agency's violation of a guarantee given before the court, and ordered the Attorney General to draw up criminal charges against the official responsible for the contempt of court. For the first time in Israeli legal history, the court ordered the state to pay court expenses for both stages of the court hearings—the initial stage during which the injunction was issued, and the subsequent stage in which the injunction became an absolute court order.¹⁵⁵

¹⁵⁴ Y. Gutman, *Shake-up in the Shabak*, 1995, pp. 278-282.

¹⁵⁵ H.C. 217/79 *Saliman v. Israel Lands Authority*, (1979) 33(2) P.D. 250.

Intentional frustration of judicial rulings is not a frequent occurrence in Israel, but this handful of instances is sufficient to sound the alarm about the genuine possibility of exploiting the power of the executive branch to thwart judicial review of acts undertaken by the government.

Jurists in England determined that the claim that civil servants—including cabinet ministers—enjoy substantive immunity does not mean that judicial review cannot be exercised. This opinion was handed down in the case of a young man from Zaire who requested political asylum in England, and whose petition was rejected. The man appealed to the court, but the Home Secretary ordered its rejection even before the court hearing. The Appeals Court found the Minister guilty of contempt of court. The judges stressed that the Minister was personally accountable for the act of contempt—as an individual, not as a Minister. This was the first time in which a cabinet minister was convicted of contempt of court in England. Nonetheless, the judges refrained from imposing a punishment.¹⁵⁶

The House of Lords took up the matter in 1993, confirmed the precedent made by the Court of Appeals, and added another dimension to the ruling. Lord Wolf, the president of the Court of Appeals, determined that the Minister was responsible for the contempt of court in his official capacity as Minister, and not as a private individual. The judge ruled that, given this situation, as opposed to one in which the Minister is personally convicted of contempt, the court cannot declare any sanctions, such as imprisonment or fines, on the Minister. The court noted that the formal statement that the Minister had committed contempt of court constituted a sufficient and significant act of censure, and that it was up to Parliament to use the court's declarative statement to hold the Minister responsible.

Perhaps Israel should also adopt this approach, according to which the High Court of Justice's declarative statement that a violation has been committed would be sufficient, obviating the need to levy an actual punishment. Yet in respect of the continual trend toward noncompliance with judicial rulings in Israel, the declarative model might not be sufficient.

¹⁵⁶ *M. v. Home Office* [1993] 3W.L.R. 433 H.L.

E. Terminating the validity of noncompliant institutions

The idea behind the model of terminating an institution's validity is that a check-and-balance system is required as a counterweight to the principle of institutional perpetuity from which the administrative body now benefits. In other words, when administrative bodies violate a court order, in which a set amount of time has been allotted to comply with the order, there is a need to terminate the validity of these institutions. For instance, a religious council's refusal to uphold an operative court order may lead to termination of the council's validity.

F. Levy of personal expenses against recalcitrant officeholders

Another, less extreme, way of enforcing court orders is by imposing personal expenses against officeholders who have deferred implementation of court orders without justification. The Supreme Court has only recently begun to employ this tool, and even then with only the greatest caution. In a ruling against the head of the Jerusalem Religious Council, Rabbi Ralbag, the Supreme Court imposed personal expenses of NIS 30,000 for his having delayed the convening of the newly appointed religious council.¹⁵⁷ The delay stemmed from the appointment of a Conservative Jewish representative, Rabbi Bendel, an appointment forced on the council. In her decision to impose expenses, Justice Dorner ruled that there was no acceptable reason for the council head's delay in carrying out his legal obligation, and therefore it was right that he cover the expenses of the trial.

In a previous case, the Supreme Court rejected a petition to impose personal expenses against the mayor of Nesher, in spite of the fact that the mayor had illegally delayed the convening of the new religious council beyond the date determined by law.¹⁵⁸ The court explained its decision not to impose personal expenses on the mayor, claiming that he had rectified that which needed to be rectified and had convened the council immediately after the petition was submitted to the court, without causing any real damage to the petitioners.

¹⁵⁷ H.C. 415/99 *Meretz Faction in Jerusalem City Council v. Jerusalem Religious Council and Council Head, Rabbi Ralbag* (not published).

¹⁵⁸ H.C. 5140/97 *Yehiel Edri and others v. Interior Minister and Mayor of Nesher* (not published).

The court order in which expenses were imposed against Rabbi Ralbag, the head of the Jerusalem Religious Council, demonstrated in the clearest possible manner the very problematic aspect of imposing personal costs as a tool for enforcement. Convening of the new religious council—including the non-Orthodox members appointed in accordance with a Supreme Court ruling, in stark contradistinction to the stand of the religious council—turned Rabbi Ralbag’s case into the aegis for a political challenge to the Supreme Court. In the wake of the Supreme Court’s decision, the two Chief Rabbis dispatched a letter to the President of the Supreme Court, Professor Aharon Barak, in which they asked that the judgment against the head of the Jerusalem Religious Council be nullified. The Supreme Court turned down the request, and the order stood. In the ultra-Orthodox demonstration against the Supreme Court held shortly thereafter, the funds to cover the court fine were raised from the thousands of demonstrators—with 10 agorot coins—as a sign of protest against the decision. In this case, it is doubtful whether this manner of imposing expenses in fact achieved the goal sought by the Supreme Court.

G. Self-implementation

Self-implementation of a judgment by the court is another judicial practice that should be fixed in law. It confers legal authority on the court to grant practical validity to a court order that has been handed down but has not yet been implemented by the appropriate administrative authorities. Another way to change the existing law is to prescribe—by means of legislation—that a High Court of Justice decision to appoint an individual to a certain office is the legal equivalent of publishing a newly enacted law in the government legal registry. This sort of regulation would make the court independent of other parties as regards the implementation of judgments. For instance, in the event of noncompliance with a High Court of Justice ruling, the court registrar could legally and plausibly authorize the granting of a *get*, even in the presence of only one of the sides.

H. Implementation by another party

Another way to respond to the failure of administrative authorities and officeholders to carry out court orders is another amendment to the law. It would enable a senior officeholder to take action in place of a colleague who has demonstratively delayed or forestalled the implementation of said order.

As a point of interest, the existing law includes regulations that can be utilized in instances of noncompliance. According to section 10a of the Jewish Religious Services Law,¹⁵⁹ the Minister of Religious Affairs can appoint an individual to carry out a task that had been entrusted to a religious council in the event that the council has refused to do so. According to section 12a of the Law, the Minister is permitted to lodge a complaint against a local rabbi in the disciplinary court for rabbis. The Minister may exert this authority if and when local rabbis have refused to comply with rulings of the High Court of Justice. This issue took on added significance in the case of Dr. Joyce Brenner, a Reform Jewish woman who was appointed to a religious council. Religious Affairs Minister Eli Suissa preferred to resign several days before the end of his term of office rather than sign the High Court of Justice order. One should bear in mind the possibility of a minister choosing to temporarily concede his authority to the Prime Minister, who would play an *ad hoc* role in making the administrative decision even without the Minister's resignation.¹⁶⁰

¹⁵⁹ See *supra* n. 56.

¹⁶⁰ Regarding implementation by another party in the United States see: *Gilbert v. Johnson* 490 F. 2d 827 (1974).

Conclusion

Ever since the State of Israel was established, there has been an ongoing struggle over the character of the state between those forces which emphasize values of civil rights and those which view religion as the correct moral code, one that legitimizes the need to control public life. This writer believes that the key to a solution that will ensure a continued democratic Jewish lifestyle in Israel is a constitutional solution that would imbue traditional democratic content into the constitutional forms of “the Jewish and democratic state.”

The desire for such a formula reflects the realization that it is impossible to reach any settlement of the ideological disputes that would be agreeable to all, and that any solution must be based on a common denominator acceptable to the majority. This common denominator draws its inspiration from traditional Judaism, which respects religion and tradition but is committed to democracy and is opposed to religious coercion. Observance of tradition stems from a deep respect for the tradition and customs of our ancestors, not from any wish to base the constitution of the state on the foundations of religion. According to this approach, therefore, the sides should strive for a golden mean that would be acceptable to the vast majority of the public in the State of Israel. It would not interpret tradition to mean an overly strict set of religious precepts, but would embody an identification with the heritage of Israel, such that it could become a norm acceptable by the public, without harming freedom of religion and conscience.¹⁶¹

The differences of opinion as to the character of the state are reflected in the actions taken by the various branches, with each branch having made positive or negative contributions to the traditional Jewish democratic character of the state, and either upholding or harming civil rights. We have examined the

¹⁶¹ See *supra* Chapter Three, Section 2, pp.66-80.

trends of activity of the three branches, and have analyzed the balance of protection of civil rights in matters of religion as they pertain to the primary issues in the long struggle over the state's Jewish and democratic character.

On the issue of the right to marry, we saw that in terms of the liberal-democratic perspective, for the most part the legislature's contribution to the balance of protection of civil rights was negative. At the government's initiative, an exclusive arrangement of religious marriage was established, in accordance with the status quo that called for religious marriage. In so doing, this created a harsh reality mainly for those who are prevented or forbidden from marrying according to halachic law. One exception to this policy was the legislature's recognition of the institution of reputed spouses. The court contributed toward expanding individual freedom by creating legal institutions to bypass or mitigate the most acute problems caused by religious law, and also expanded the recognition of reputed spouses.

On the issue of persons forbidden to marry, the judicial system issued declarative criticism regarding the manner in which the lists were being managed by the executive branch, which resulted in a restriction of the basic right to marry. Although the executive branch adopted a policy of drastically reducing the list (from 5,200 persons forbidden to marry to 200), a regression has taken place in the enforcement of this policy by the executive branch.

On the issue of kashrut, there are varying responses by the branches of government to the issue of kashrut certificates and the prohibition of the import and sale of pork. In the field of kashrut certificates, the courts handed down an initial judicial ruling that contributed to an improvement of the situation. The legislature continued the trend with the passage of the Kashrut (Prohibition of Deceit) Law,¹⁶² which subsequently received broad interpretation by the judiciary. As for restriction of import and sale of pork, the executive branch adopted an approach that has broad public support due to the public's perception of pork as a symbol of hatred of Jews. There is a national dimension to this prohibition, extending beyond merely religious sensibilities. The judicial branch was consistent in its defense of civil rights, whereas the legislature joined forces with the executive branch to enact laws bypassing the

¹⁶² See *supra* n. 16.

High Court of Justice,¹⁶³ which led the judicial branch to reduce the degree of protection of civil rights relevant to this field.

On the issue of burial, the legislative branch remained silent for years, while the executive branch adopted a laissez faire approach regarding the establishment of frameworks that would ensure the right of proper burial to all citizens. The High Court of Justice helped to bring about a change in this situation when it declared that it is incumbent upon the government to realize this right. During 1995-96, there was also a notable change of policy by the executive branch, including the issuance of tenders and the granting of franchises.¹⁶⁴ The legislature also rose to the challenge, making a positive contribution by anchoring the right to civil burial in law. However, the positive policy of the executive branch has now regressed. In general though, the period of time under discussion has provided a positive example of ideological cooperation between the various branches of government to devise a solution to a serious dilemma.

On the subject of the right to divorce, the legislature extended religious law to apply to all citizens. The halachic law on divorce is incompatible with the concept of no-fault divorce that is popular in modern society and Western countries. The court extended the rights, albeit on a qualified basis, by creating *get* alternatives, including broader recognition of the institution of reputed spouses and the doctrine of joint ownership. In this matter, the Supreme Court ran into the sharp opposition of the rabbinical establishment, which took steps to bypass the judicial rulings of the Supreme Court. The Supreme Court elected to avoid any clash with the rabbinical court over their authority.

On the issue of conversion, judicial rulings helped to bolster protection of religious freedom by recognizing non-Orthodox conversions carried out abroad. On this issue, the legislature and the executive branch made a negative contribution. The Ne'eman Committee is making an attempt to deal with the issue of non-Orthodox conversion in Israel. We must wait and see the results of the committee's work.

¹⁶³ See the Import of Frozen Meat Law, *supra* n. 22 and the *Mitral* case, *supra* n. 23.

¹⁶⁴ See *supra*, Chapter One, pp. 22-23, nn. 24-26.

On the issue of powers of the religious authorities, the court has been making efforts to bring the status enjoyed by the religious authorities in line with that of other governmental authorities in Israel. This trend has been bolstered by the legislature's passage of laws that define the status of the Chief Rabbinate and of the rabbis of the religious courts. However, with regard to the status of the rabbinical courts, the legislature did not react to the failure of the rabbinical courts to subordinate themselves to High Court of Justice authority. This field is marked by the serious problem of noncompliance with court orders, for which an appropriate solution has as yet not been found.

On the issue of Sabbath, the judicial branch took measures to defend individual freedom by invalidating the restrictions imposed by local authorities vis-à-vis opening hours of businesses, public transportation, and operation of gas stations and television stations on the Sabbath. The legislative branch empowered the local authorities to close businesses on the Sabbath, but the executive branch failed to enforce municipal bylaws that shut down businesses on the Sabbath. There has been a recent change in this matter, with heightened enforcement of the Hours of Work and Rest Law, 1951, which forbids the employment of Jews on the Sabbath without a permit, even within the jurisdiction of the regional (rural) councils. As for the closure of streets on the Sabbath, the judicial branch tried to maintain a balance between the religious sensibilities of religious residents and the freedom of movement of secular residents. Recently, the executive branch has had to respond to increased pressure to close additional streets on the Sabbath. The Supreme Court is inclined toward a social compromise. However, this compromise is beginning to seem more like a concession to demands of the religious public than the proper implementation of judicial principles, as would be the case if the sides adopted a traditional Jewish democratic approach.

On the issue of the status of women on religious bodies and the status of non-Orthodox Jews on these bodies, the judicial branch has contributed toward a reinforcement of civil rights. The legislative branch enacted legislation that bolstered the status of women. However, in relation to the status of non-Orthodox Jews, the legislature remained silent. Generally speaking, the executive branch has refrained from implementing the courts' decisions.

In summary, the legislative branch and the executive branch have for the most part made a negative contribution to the balance of civil rights in matters of religion. On the other hand, the court did more to protect these rights, and in so doing made a positive contribution to the balance.

We have analyzed the contributions made by the various branches, as well as the factors that dictate their policies: the make-up of the Knesset and the architecture of Israel's coalition government necessitate the forging of compromises between the different elements of society, and especially between the traditional and secular majority and the strictly Orthodox segment of society.

The court, by its very nature, is the protector of civil rights. It has come out in defense of these rights in religious matters, as well. As part of this effort, the court decided to address several issues that the legislature chose to disregard. The court was also forced to consider the legal reality that derived from the forcing of religious norms on the general population by the legislature, for example, through the application of religious court authority on marriage and divorce.

The court is walking a thin line. It tries to avoid making decisions on politically and socially loaded issues. Whereas in the past the religious factions initiated legislation that either nullified or mitigated High Court of Justice rulings that they felt were not in the best interests of the religious public, now, following the ratification of new Basic Laws that also subjugate legislation to review by the court, elements within the ultra-Orthodox public have begun to realize that pressure must be brought to bear on the Supreme Court itself. This is achieved through attempts to influence the appointment of judges, and by exerting pressure and voicing criticism against the court so as to prevent it from making judicial rulings that uphold civil rights in matters of religion.

In many respects, the executive branch is especially vulnerable to the political influence of the religious factions, thanks to the structure of Israel's coalition government and political system, which places a significant measure of power in the hands of the religious parties, by virtue of their ability to tip the coalition scales.

As for the religious councils, the court had for a long while avoided the use of implementation remedies in the face of noncompliance with its judgments, which led to a delay of over ten years in the appointment of religious councils, for instance, in Haifa and Jerusalem. When the Supreme Court began the practice of enforcing its judgments, the ultra-Orthodox sector decided to take the campaign to the next level.

The struggle was waged on several levels simultaneously. First, at the constitutional level: through pressure exerted by the ultra-Orthodox parties, the Jewish Religious Services Law was amended. The amendment required members of the councils to declare their allegiance to the Chief Rabbinate, with the object of blocking the entry of Reform and Conservative Jews to the religious councils.¹⁶⁵ At the same time, the ultra-Orthodox escalated their public campaign, initiating a head-on collision with the Supreme Court. Aside from the acrimonious verbal assaults by ultra-Orthodox leaders,¹⁶⁶ harsh statements were for the first time voiced against the institution itself and its justices, especially Supreme Court President Barak, including “Deadly foes of Judaism” and “This is the beginning of war.”

The intensification of the struggle may be explained by the ultra-Orthodox sector’s realization that the Supreme Court has the power to hand down far-reaching court orders, as well as the power to enforce its rulings. For the ultra-Orthodox, this meant that they could no longer avoid implementation of court orders through delaying tactics and evasiveness, noncompliance, and even through the passage of retroactive legislation, since – following the passage of the Basic Laws of 1992 - this requires a special majority, as became clear in the instance of the Import of Frozen Meat Law after the *Mitral* case.

The increased power of the Supreme Court was achieved partially thanks to changes that took place in the attitude of Israeli society to actions taken by the ultra-Orthodox public. Following passage of the Basic Laws of 1992, the special majority now required makes it difficult to pass legislation that can nullify court orders. Moreover, the civil public in Israel made it clear that it

¹⁶⁵ Jewish Religious Services (Amendment No. 10) Law, 1999, *S.H.* no. 1703, p. 86. The law determines the obligation of members of the religious council to sign a declaration of loyalty, and also determines the obligation of its members to act in accordance with rulings of the local rabbinate and the Chief Rabbinate in every matter that is within the range of functions and power of the religious council.

¹⁶⁶ See Member of Knesset David Tal at session 217 of the Fourteenth Knesset on June 17, 1998; and Member of Knesset Nissim Dahan at session 174 of the Fourteenth Knesset on February 3, 1998 (Divrei HaKnesset, p. 8210 and p. 4838, respectively).

opposed the passage of retroactive legislation, as became evident in the struggle over the proposed Conversion Law.¹⁶⁷

The campaign by the ultra-Orthodox public against the Supreme Court was clearly aimed at undermining the court's authority to rule on issues of religion and state. This attitude was highlighted by the ultra-Orthodox ever-increasing unwillingness to accept the court's judicial authority over actions taken by religious institutions that are funded by the state and are subject to the general law, as well as the Supreme Court's review of rulings handed down by the rabbinical courts.

To support their case, leaders of the ultra-Orthodox sector point to the vehement criticism by Israeli academics of the attitudes of the Supreme Court and its increased involvement in affairs of religion and state. However, it is important to differentiate between legitimate criticism of the activist policies of the judiciary and the increased involvement of the Supreme Court in society, on the one hand, and the undermining of the Supreme Court's authority as a crucial institution in Israeli democracy, on the other.¹⁶⁸

Due to the court's exposure to ever greater pressure, a greater effort must be made to provide it with constitutional protection. This study proposes three chief recommendations. The first is at the constitutional level: securing the status of the judges and the courts, providing constitutional protection from attempts to curtail their authorities, and stepping up the effort to forge a national consensus around the Basic Law: Judicature.

The second recommendation is the creation of a constitutional formula that will inject traditional Jewish content into the "Jewish and democratic" mold provided by the Basic Laws. The formula should be devised by the moderate forces in Israel, and the court should be there to bridge the gap between those forces that are willing to compromise.

The third recommendation is to adopt measures at the judicial level in order to protect the individual from non-implementation of judicial rulings. The

¹⁶⁷ Proposed Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (Amendment) (Conversion), 1997, *H.H.* no. 2610, p. 300.

¹⁶⁸ R. Gavison, "Don't Get Sidetracked," in *Yedioth Ahronoth*, February 13, 1999, "24 Hours" weekend supplement, p. 5.

phenomenon by which the authorities do not comply with court orders is extremely grave, and needs to be addressed in the most serious manner.

In these pages, we have submitted various proposals to enhance the level of enforcement of judicial rulings handed down by the courts. They include granting the courts the discretion to allot set periods of time for the implementation of the judgment; legal structures that are beneficial to the citizen who has been harmed due to noncompliance with a future court order; levying personal compensatory damages against officeholders; resorting to the remedy of contempt of court against appointed and elected officials; termination of the validity of noncompliant institutions; imposing personal expenses against recalcitrant officeholders; self-implementation of judgments by the court; and/or implementation by means of another party.

We are now in the midst of a struggle over the preservation of the existing situation; aside from legal forces, social and political forces are also coming into play in this struggle. Until recently, the democratic public had never taken part in any real demonstration of support for the Supreme Court. However, in February 1999 a counter-demonstration was held as a response to the mass prayer gathering of the ultra-Orthodox sector. Since the new Basic Laws (Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation) have made it difficult to amend retroactive legislation that has the goal of reversing court orders, pressure on the court can be expected to continue. The struggle being waged in the democratic street will not wane, it will only grow stronger. Aside from the deployment of social and political forces by the two camps, greater efforts should be made to foster mutual dialogue between leaders of the two camps, with the goal of formulating a common infrastructure for cooperative life based on mutual respect. However, this sort of dialogue is only possible if a parallel, equivalent effort is made to preserve the balance. This effort should also extend to the struggle in the democratic street.

The two demonstrations, of the world of Torah and the ultra-Orthodox establishment, and of the “Rule of Law” gathering in Jerusalem’s Sacher Park, represent two systems—that of the civil rule of law and that of the rule of Halachah in the State of Israel. The struggle for a Jewish and democratic Israel has passed from the portals of the Supreme Court building in Givat Ram into the democratic street. The great challenge now is to preserve the balance that underpins the concept of the existence of democracy and rule of law in parallel with upholding the dignity of Jewish tradition and culture.

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Glossary

C.A.	Civil Appeal
Cr.A.	Criminal Appeal
H.C.	High Court of Justice
<i>Divrei HaKnesset</i>	Records of Knesset proceedings
<i>Hatza'ot Hok (H.H.)</i>	Legislative Bills
<i>Iyunei Mishpat</i>	Tel Aviv University Law Review
<i>Knesset</i>	Israel Legislative Assembly
Laws of the State of Israel (L.S.I.)	Authorized English translation of Israeli legislation
Laws of the State of Israel [New Version] (L.S.I.[N.V.])	Authorized English edition of revised text of pre-State legislation
<i>Mishpatim</i>	Student Law Review, Faculty of Law, Hebrew University of Jerusalem
<i>Piskei Din</i> (Judgments) (<i>P.D.</i>)	Law reports of the Supreme Court (1948-
<i>Psakim Mehoziim</i> (<i>P.M.</i>)	Law reports of the District Courts (1949-
<i>Sefer HaHukim</i> (<i>S.H.</i>)	Principal Legislation
Selected Judgments (S.J.)	English translation of Selected Judgments of the Supreme Court of Israel (1948-

