

Home

**The Library**

About Us

Bookstore

Contact Info

Feedback

Glossary

Israel & the States

Links

News

Publications

Search

Sponsorship

Virtual Israel Experience

© 2009 AICE

JEWISH VIRTUAL LIBRARY  
PUBLICATIONS

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

by Aharon Barak\*

(August 2009)

### The Importance of the Values of a Jewish and Democratic State

Despite a common misconception, Israel does have a formal constitution [\[1\]](#) as well as judicial review of constitutionality. [\[2\]](#) The Constitution is embodied in several documents called the [Basic Laws](#). Two of these basic laws – [Basic Law: Dignity and Liberty](#) [\[3\]](#) and [Basic Law: Freedom of Occupation](#) [\[4\]](#) – were constituted in 1992. Their main focus is human rights and they serve as the Israeli equivalent of the Bill of Rights

When the Basic-Law: Human Dignity and Liberty and the Basic-Law: Freedom of Occupation were constituted, new language was introduced into Israel's legal and social culture: [\[5\]](#)

“The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a [Jewish and democratic state](#).”

This expression's importance is two-fold. First, it determines the general purposes that lie beneath these two basic laws: To protect human dignity and liberty and the freedom of occupation, “in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic State.” [\[6\]](#) These values serve, therefore, as an interpretive criterion in determining to what extent the provisions of the Basic Law apply. For example, protection of property and privacy was intended “to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic State.” [\[7\]](#) There is, however more to the matter than this. It is only natural that the interpretive guideline of the values of the State of Israel as a Jewish and democratic state should not be restricted merely to the basic laws about human rights. It is inconceivable that for the purposes of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation The values of the State of Israel as a Jewish and democratic State must be recognized, whereas for other purposes, beyond the scope of the basic laws that refer to human rights, the values of the State of Israel would be different.

In fact, doing so would lead to differential constitutional interpretation. Purposive constitutional interpretation relates to provisions of the constitution as a unity. [\[8\]](#) If the values of the State of Israel as a Jewish and democratic state are enshrined in the basic laws that refer to human rights, they must also apply outside the scope of these basic laws in interpreting all of the provisions of the Israeli constitution and statutes. [\[9\]](#)

Second, the importance of the expression “the values of the State of Israel as a Jewish and Democratic State” goes beyond interpretive influence. The values of the State of Israel are not merely a criterion for interpreting our human rights, but they are also constitutional criteria for limitations on human rights. The limitation formula in the Basic Law: Human Dignity and Liberty (a similar one can be found in the Basic Law: Freedom of occupation) states:

“The rights under this Basic Law may only be affected by a law that is befitting the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive or by regulation enacted by virtue of express authorization in such law.” [\[10\]](#)

Within the framework of this clause, the values of the State of Israel serve as a criterion for the constitutionality of a statute that limits human rights enshrined in the Basic Laws. A statute that limits human rights is constitutional only if it meets several requirements. One of these requirements is that the statute befits

the values of the State of Israel as a Jewish and democratic state. Indeed, a statute that limits a protected human right will be unconstitutional, even if it is not excessive, if the limitation of the human right does not befit the values of the [State of Israel as a Jewish and democratic state](#). <sup>[11]</sup>

It follows that the importance of the values of the State of Israel as a Jewish and democratic state is two-fold. They constitute criteria for a purposive interpretation of the provisions of the Basic Laws. This purposive interpretation is what determines the extent to which the Basic Laws apply. All laws are interpreted in accordance with this interpretation. In addition, the values of the State of Israel as a Jewish and democratic state constitute an essential condition for the validity of a statute that limits a constitutional human right. It should be remembered that the normative status attributed to the values of the State of Israel as a Jewish and democratic state is not the same as the status of other values that constitute a part of the Israeli legal system. The normative status of the values of the State of Israel as a Jewish and democratic state is a constitutional supra-legislative normative status. Ordinary legislation that limits a constitutional human right will be declared unconstitutional if it does not befit the values of the State of Israel as a Jewish and democratic state. Therefore the expression ‘the values of the State of Israel as a Jewish and democratic State’ is of great legal importance. It has constitutional status. It is not merely a verbal formula that contains no normative message. This formula has an important normative significance. It influences both the determination of the scope of human rights and the protection given to them under Israeli law. <sup>[12]</sup> That is why it is so important to answer the questions: What are the values of the State of Israel as a Jewish and democratic state? How are they determined? What are their weights? And what is the relationship between the values of the State of Israel as a Jewish state and its values as a democratic state? <sup>[13]</sup>

### **A Solution Through Consensus**

The expression ‘the values of the State of Israel as a Jewish and democratic state’ is a vague expression. <sup>[14]</sup> The text does not supply an unambiguous answer. Determining the scope of this expression’s application will require a significant amount of ‘our’ attention in the future. When I say ‘our’ attention, I am referring to the whole of Israeli society, and not merely the legal profession. Indeed, the expression ‘the values of the State of Israel as a Jewish and democratic state’ in the Basic Laws reflects the uniqueness of the State of Israel and Israeli society. We are not like other people; we are not like other nations. We are a democracy, and our values are the values of every democracy. But we are also a Jewish State, and therefore our values are the values of a Jewish State. All of Israeli society will need to face this duality. Philosophers and researchers, rabbis and professors, *yeshiva* students and university students – all the strata of Israeli society – will need to ask themselves what are the values of the State of Israel as a Jewish and democratic state. We also expect the contribution of philosophers and researchers from around the world.

### **The values of the State of Israel as a Jewish State**

What are the values of the State of Israel as a Jewish state? Indeed, the values of the State of Israel as a Jewish state distinguish it from all other democratic states. There are many democratic states in the world, but only the State of Israel is a state that is not only democratic, but also Jewish. It is worth noting the words of [Israel’s Declaration of Independence](#):

In Israel arose the Jewish people, there their spiritual, religious, and political character was formed, there they lived as a state, there they created cultural assets for the nation and for all of humanity, and bequeathed the eternal book of books to the whole world. <sup>[15]</sup>

A “Jewish state” is, then, a state of the Jewish people. “The natural right of the Jewish people is to be independent in their own sovereign state.” <sup>[16]</sup> This is the state to which every Jew has the right to move and to become a citizen; the ingathering of exiles is one of its basic values. <sup>[17]</sup> A “Jewish state” is a state whose history is integrated and intertwined with the history of the Jewish people, whose main language is Hebrew, and whose holy days reflect the Jewish heritage. <sup>[18]</sup> A “Jewish state” is a state that perpetuates the memory of the Jews massacred in the [Holocaust](#), and that was designed to be “the solution to the Jewish problem, resulting from a lack of both a homeland and independence, by renewing the Jewish state in the land of Israel.” <sup>[19]</sup> A “Jewish state” is a state which cultivates Jewish culture and Jewish education. <sup>[20]</sup> A “Jewish state” is the “realization of the aspiration of generations for the redemption of Israel” <sup>[21]</sup> is a state in which the values of “freedom, justice, equity, and peace of Israel’s heritage,” <sup>[22]</sup> are its values. A “Jewish state” is a state whose values are also drawn from its religious tradition, a tradition in which the Bible is the most basic book, and the prophets of Israel are the foundations of its ethics. <sup>[23]</sup> A “Jewish state” is a state in which the values of the [Torah](#) of Israel, the values of the Jewish heritage, and the values of the [Halacha](#) (religious law) are among its most basic values. <sup>[24]</sup>

This interpretation of “the values of the State of Israel as a Jewish state,” leads to the conclusion that the values of the State of Israel have two primary aspects.

One is the Zionist aspect. The other is the aspect of heritage, or tradition. The Zionist aspect is expressed, for example, in the right of every Jew to move to Israel, and become an Israeli citizen – a right guaranteed in the [Law of Return](#) (1950).<sup>[25]</sup> The heritage aspect is expressed, for example, in the law which states that a gap (*lacunae*) in legislation, which cannot be filled by analogy,<sup>[26]</sup> must be completed according to the “principles of freedom, justice, equity, and peace of Israel's heritage.”<sup>[27]</sup> Indeed, it would be a one-dimensional vision if we were to only equate the values of the State of Israel as a Jewish State to the heritage-law aspect. Zionism, on the one hand, and Jewish heritage, on the other hand, has stamped their seal on the Jewish character of the state of Israel. It may be pointed out that there is a tight connection between the Zionist aspect and the heritage aspect. There is also a connection between these two and the values of the State of Israel as a democratic state. Nevertheless, an objective perspective must be based on the distinction between these various elements, even if the interpretive trend must synthesize them.

### **A Jewish State: The Heritage Aspect**

What are the values of the State of Israel as a Jewish state from the heritage aspect? We learn about these values from the “world of *Halacha*” (religious law). They include the values of the State of Israel as a Jewish state in various levels of abstraction; from a specific law on a certain issue to abstract values such as “love your neighbor as yourself”<sup>[28]</sup> or “do that which is honest and good.”<sup>[29]</sup> It contains particular and universal values; it contains values developed over generations throughout the history of the Jewish people.<sup>[30]</sup> There are values which compliment each other and values which contradict each other.

### **A Jewish State: The Zionist Aspect**

What are the values of the State of Israel as a Jewish State from the Zionist aspect? The world of Zionism views the state of Israel as a national home for the Jewish people; it is the Law of Return, that enables every Jew in the world to view Israel as his or her home;<sup>[31]</sup> it is the revival of the Hebrew language and the development of Hebrew culture;<sup>[32]</sup> all these and more make Israel a Jewish state, even for a non religious Jew.

### **The Values of Israel as a Democratic State**

The values of the State of Israel as a democratic state are the same values that, at any given time, reflect the basic perceptions of the modern democracy.<sup>[33]</sup> This democracy is built, in essence, on two foundations. First, it is a government of the people. A democratic regime is a one in which the people determine their own destiny. The people act through their representatives, and the representatives make decisions by a majority vote. Democracy, in this sense, identifies itself with majority rule. The other foundation upon which democracy is built is separation of powers,<sup>[34]</sup> the rule of law,<sup>[35]</sup> independence of the judiciary<sup>[36]</sup> and human rights.<sup>[37]</sup> Only a combination of these two foundations leads to true democracy. Indeed, a regime in which the majority deprives the minority of basic rights is a majoritarian regime, but it is not a democratic regime. Democracy cannot be established without human rights. Democracy is a delicate balance between majority rule and human rights.<sup>[38]</sup>

### **The Relationship Between the Various Components**

There may be tensions and contradictions between the values of Israel as a Jewish state and the values of Israel as a democratic state.<sup>[39]</sup> There may also be a contradiction between the values of Israel as a Jewish state, from the aspect of heritage, and the values of Israel as a Jewish state, from the Zionist aspect.<sup>[40]</sup> An appropriate analysis does not have to intensify these contradictions. On the contrary, a purposeful analysis, based on constitutional unity and normative harmony, aspires to find that which is unifying and common, while preventing contradictions and reducing points of friction. We must strive to find the common denominator and synthesis between the values of Israel as a Jewish state and the values of Israel as a democratic state.<sup>[41]</sup>

Indeed, we must search for an integration between the different values of the State of Israel – as a Jewish and democratic state – in an attempt to create a homogeneous and inclusive perception. This is possible. One does not have to come at the expense of the other. Through mutual concessions, it is possible to find the proper balance. Thus, for example, if within the world of *Halacha*, there is a stream of particularism and a stream of universalism, it would be appropriate for the interpreter to adopt the stream of universalism, since this stream is more easily integrated with the values of Israel as a democratic state.<sup>[42]</sup> Similarly, if from the perspective of democracy, there are various ways of viewing interpersonal relationships, it is appropriate to choose that approach that is similar to the values of Israel as a Jewish state.<sup>[43]</sup>

## The Failure of Completeness and Harmony – What Next?

The interpreter aims for completeness and harmony between the values of the State of Israel as a Jewish State and its values as a democratic state. We can expect there to be cases where this ambition will not be realized: the various attempts to find a common denominator are likely to fail; the values may be so diametrically opposed to one another that a synthesis between them is impossible, or becomes irrelevant for the solution of the problem that requires a decision.

What should the judge do in such a situation? This is a matter for judicial discretion. <sup>[44]</sup> In exercising this judicial discretion, judges may not toss a coin; they must act rationally; they must act objectively; they must choose the solution, which more than any other solution, is in accord with the general structure of the legal system; they must provide a solution that is in accord with the other purposes that underlie the [Basic Laws](#), according to which:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel. <sup>[45]</sup>

They must provide the solution that is consistent with our constitutional history; they must provide the solution that is consistent with the consensus of Israeli society; they must provide the solution that connects with the past and creates a basis for development in the future. All of these impose a heavy burden on the judiciary. They are accustomed to discharging it. They discharge it in other situations where they must exercise their discretion. They will discharge it also in this special situation.

## On Equality

One of the significant aspects of the values of Israel as a democratic state is the value of equality. <sup>[46]</sup> This was expressed in the Declaration of Independence, among other places, which states that "the State of Israel . . . will establish equal social and political rights for all its citizens without distinguishing on the basis of religion, race or gender." <sup>[47]</sup> Indeed, the state must honor each individual's basic right to equality. There is no democracy without equality.

All rights, upon which democracy is based, are built on equality. <sup>[48]</sup> Equality lies at the foundation of social existence. An individual integrates into the general fabric of society and plays his part in the construction of society with the knowledge that others are doing the same. The need to guarantee equality is natural to the human being. It is based on considerations of justice and decency. A person who asks for recognition of his rights must also acknowledge the right of others to receive similar recognition. Nothing is more destructive to society than the feeling of its sons and daughters that they are being treated in a discriminatory manner. The feeling of discrimination is one of the most difficult feelings. <sup>[49]</sup> It strikes at the uniting force within society and harms each person's right to self-determination.

Do the values of Israel as a Jewish state detract from the principle of equality? The answer is negative. As values of the State of Israel as a Jewish state are also values of a democratic state, they support the principle of equality. From the heritage aspect of the State of Israel, equality is a basic value. It is expressed in the imperative "you shall have only one law, the stranger shall be as a citizen" <sup>[50]</sup>. Justice Elon rightly stated:

The very foundation in the religious world is the idea that every person is created in the image of God ([Genesis](#) 1:27). Thus begins the [Jewish Bible](#), and from it Jewish law derives the basic principles with regard to the value of the human being – each person as he is – his equality and his love. <sup>[51]</sup>

This idea is also part of the Zionist aspect of the state. Israel is a Jewish state, because the Jewish people congregated there, and it is the solution to their problems. Every Jew has the right to move to Israel and to become a citizen. <sup>[52]</sup> This does not offend the essence of equality. <sup>[53]</sup> Thus, when the purpose underlying the foundation of the state is that it serve as a home for all Jews as Jews, the right of every Jew to move to Israel does not constitute discrimination against those who are not Jewish. Rather, it recognizes those differences demanded by equality. However, since the establishment of the state, it must treat its citizens equally. True, a special key to enter the home was given to the Jewish people. However, once the individual is inside the house, he enjoys the same rights as every other member of the house. There is no discrimination between the members of the house. <sup>[54]</sup>

[Zionism](#) was born to negate racism. It learned the extent to which racist treatment, dictated by religious or national belonging, can degrade human character. Thus Zionism is opposed to any patterns of discrimination on the basis of religion or nationality. Justice Barenson spoke on this subject when he said:

When we were exiled from our land and dispersed over the land, we were sacrificial lambs to the nations in which we lived, and in every generation we tasted the bitter taste of persecution, oppression and discrimination simply because we were Jews 'whose religion differs from that of

all other nations'. We learned from this bitter experience, which burrowed itself deep into our national and human consciousness, that it is appropriate to expect that we will not follow in the perverted ways of other nations, and in the renewal of our independence in the State of Israel, it is incumbent upon us to guard against any hint of discrimination or differential treatment against every law abiding non-Jew living among us and who wants to live among us in his own way, according to his own religion and beliefs. Hatred of strangers is a double curse: it slaughters the image of God of the one who hates and it thrusts evil on the one who is hated, through no fault of his own. We must act in a humane and patient manner towards all those who are created in the image of God and to uphold the broadest principle of equality of rights and obligations among all people. [\[55\]](#)

Thus, Zionism came to establish a Jewish state and it succeeded. There is no doubt that Israel is a Jewish state according to its heritage, symbols, holidays, language, culture and other indicators. Like other nation-states, Israel acknowledges that it must treat every person in its midst equally, even if he is part of a non-Jewish minority.

### Equality Without Regard for Religion, Race and Gender

Equality extends across all aspects of life within the state. Therefore, there must be equality between members of different nations, communities, races, parties, genders, ages, viewpoints and bodies. [\[56\]](#) It should be noted that this list is not exhaustive. I will focus on one aspect of equality – equality between Jews and Arabs. [\[57\]](#) This is discussed in the [Declaration of Independence](#) which states that the State of Israel will uphold equality between its citizens "without regard for religion, nationality, or gender." [\[58\]](#) Hence, every citizen, without regard for religion or nationality, is entitled to equality. A state may not discriminate between its citizens on the basis of religion or race. On this background, we must also understand the decision by the [Supreme Court](#) according to which the state must treat Jews and Arabs equally in the allocation of state lands. [\[59\]](#) This is an elementary demand of equality. An Arab seeking to acquire an apartment in Upper Nazareth from the state has a right to the same terms and conditions that the state offers to Jews. There is nothing special about this apartment that justifies different treatment to Jews and Arabs.

Zionism is not based on discrimination between Jews and Arabs. This is not how Zionism was viewed by the Declaration of Independence, which states that "all members of the Arab people who are residents of the State of Israel must maintain the peace and play their part in the construction of the state on the basis of full and equal citizenship." [\[60\]](#) This is not how Zionism was viewed by the Founding Fathers – [Herzl](#), [Jabotinsky](#), [Ben-Gurion](#), and others – who stressed time and time again that the state of the Jews is a state in which full equality between Jews and Arabs will prevail. [\[61\]](#) This is not how Zionism was viewed by the Supreme Court. From its very beginning, the Court stressed time and time again the equality between Israel's citizens on the basis of religion, nationality and gender. [\[62\]](#)

Therefore, the court's decision that the allocation of state lands to Jews and Arabs must be done on the basis of equality, is neither an anti-Zionist nor post-Zionist decision. It is a Zionist decision in the fullest sense of the word. It is the fulfillment of Zionism, which views Israel as a national home for Jews, inside whose walls equality prevails amongst all its residents. Thus, only in a national home built on the principles of equality, can the dignity of man stand the test of time. Only a state that treats all its members equally can be accepted into the family of nations supporting freedom. Only a society based on the foundations of equality can live in peace with itself.

---

\* President (ret.) of Israeli Supreme Court, Visiting Professor of law, Yale law School; Professor of law, Interdisciplinary Center (IDC)Herzliya, Israel.

[\[1\]](#) See CA 6821/93, United Mizrahi Bank Ltd v. Migdal Cooperative Village, PD 49(4), 221 (1995); HCJ 212/03 Herut National Movement v. Chairman of the Central Elections Committee of the Knesset, PD 57(1) 750 (2003). See also Daphna Barak-Erez, *From an Unwritten to a written Constitution: The Israeli Challenge in American Perspective*, COLUM. HUM. RTS. L. REV., 309 (1995); AHARON BARAK, THE JUDGE IN A DEMOCRACY 20 (2006); SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 42 (2006); Aharon Barak, *Human rights in Israel*, 39 ISR. L. REV. 12 (2006); Gidon Sapir, *The Israeli Constitutional Revolution - How Did it Happen?*, Bar Ilan Univ. Pub Law Working Paper No. 08-02 (2008) available at SSRN: <http://ssrn.com/abstract=1082230>; Amnon Rubinstein, *Israel's Partial Constitution*, in (this book).

[\[2\]](#) See *Mizrahi Bank*, *id*; HCJ 1715/97 Israel Investment Managers Association v. Finance Minister, PD 51(4) 367 (1997); HCJ 6055/95 Tzemah v. defense minister PD 53(5) 241 (1999); HCJ 1030/99 Oron v. Chairman of the Knesset, PD 56(3) 640 (2002); HCJ 7052/03 Adalah v. Minister of Interior [2006] (1) IsrLR 443. See also Aharon Barak, *The Constitutional Revolution- 12th Anniversary*, 1 LAW AND BUSINESS, 3 (2004) [Hebrew]; NAVOT, *id*, at 45.

[3] Basic Law: Human Dignity and Liberty, Sefer Ha-Chukkim (17 March 1992) at 150, available at: [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm)

[4] Basic Law: Freedom of Occupation, Sefer Ha-Chukkim (10 March 1994) at 90, available at: [http://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm)

[5] Sec. 1A Basic Law: Human Dignity and Liberty; Sec. 2 Basic Law: Freedom of Occupation. See also Amnon Rubinstein, *Can Israel be both Democratic and Jewish?*, (To be published by the Institute of History of the Polish Academy of Sciences, 2009) available at:

[http://amnonrubinstein.com/index.php?option=com\\_content&task=view&id=687&Itemid=101](http://amnonrubinstein.com/index.php?option=com_content&task=view&id=687&Itemid=101)

[6] Sec. 2 Basic Law: Freedom of Occupation.

[7] Sec. 1A Basic Law: Human Dignity and Liberty.

[8] See AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 370 (2005).

[9] See HCJ 6698/95 Ka'adan v. Israel Lands Authority, PD 54(1) 258 (2000); HCJ 2859/99 Mkarina v. Minister of Interior, PD 59 (6) 721 (2005).

[10] See Sec. 8 Basic Law: Human Dignity and Liberty; Sec. 4 Basic Law: Freedom of Occupation.

[11] See *Mizrahi Bank*, *supra* note 1 at 354; See HCJ 5026/04 Design 22 - Sark Dloks Furniture Ltd. v. Head Branch of permits work on Saturday - Division of Supervision Ministry of Labor and Social Affairs, PD 60(1) 38, 53 (2005).

[12] See *Mizrahi Bank*, *supra* note 1.

[13] See Asa Kasher, *Jewish and democratic state - philosophical sketch*, 19 THEORETICAL IN LAW 729 (1995) [Hebrew]; Asher Maoz, *values of the Jewish and democratic state*, 19 THEORETICAL IN LAW 547 (1995) [Hebrew]; Avigdor Lbontin, *Jewish and democratic state*, 19 Theoretical in Law 521 (1995) [Hebrew]; RUTH GABIZON, ISRAEL AS A JEWISH AND DEMOCRATIC STATE: TENSIONS AND RISKS (1999) [Hebrew].

[14] See Menachem Elon, *The Values of a Jewish and Democratic State - the Task of Reaching a Synthesis*, 3 HUM. RTS. REV. 36 (2002).

[15] Declaration of the Establishment of the State of Israel (14.5.1948) available at:

<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel>.

[16] *id.*

[17] See The Law of Return 5710 (1950) with the supplement of Citizenship Law, 5712 (1952). See also HCJ 72/62 Rufeisen v. Minister of Interior, PD 16 2428 (1962); Claude Klein, *The right of return in Israeli law*, 13 TEL AVIV U. STUD. L. 53 (1997); Mkarina, *supra* note 9, at 733; ALEXANDER YACOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS (2009).

[18] See EA 11280/02 Central Elections Committee of the Knesset v. Tibi, PD 57(4) 1, 22 (2003).

[19] Declaration of the Establishment of the State of Israel, *supra* note 15.

[20] See sec. 2 State Education Law, 5713 (1953).

[21] Declaration of the Establishment of the State of Israel, *supra* note 15.

[22] Sec. 1 Foundations of Law 5740 (1980).

[23] See HCJ 5016/96 Horev v. Minister of Transportation, PD 51(4) 1, 43 (1997); CrimA 10687/02 Hndiman Do it yourself, Ltd. v. State of Israel, PD 57(3) 1, 5 (2003).

[24] See CA 191/51 Skornik v. Skornik, PD 8(1) 141 (1954). On the role of Jewish law in the state of Israel see Menachem Elon, *Sources and nature of Jewish law and its application in the State of Israel*, 2 ISR. L. REV. 515 (1967); Menachem Elon, *Sources and nature of Jewish law and its application in the State of Israel part II*, 3 ISR. L. REV. 88 (1968); Izhak Englard, *Problem of Jewish law in a Jewish state*, 3 ISR. L. REV. 254 (1968); Menachem Elon, *Sources and nature of Jewish law and its application in the State of Israel part III*, 3 ISR. L. REV. 416 (1968); Menachem Elon, *Sources and nature of Jewish law and its application in the State of Israel part IV*, 4 ISR. L. REV. 80 (1969); Haim H Cohn, *Jewish law in Israel*, in JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD 124 (Bernard S. Jackson ed., 1980); Sinai Deutch, *Jewish law in the State of Israel*, 1 JUSTICE 21 (1994).

[25] See the sources that cited in *supra* note 17.

[26] See BARAK, PURPOSIVE INTERPRETATION IN LAW, *supra* note 8, at 66.

[27] Sec. 1 Foundations of Law 5740 (1980).

[28] Leviticus 19:18.

[29] Deuteronomy 6:18.

[30] See Menachem Elon, *Basics Law: The legislation and Interpretation- How and where?*, 12 STUDIES IN LAW 253 (1995) [Hebrew].

[31] See the sources that cited in *supra* note 17. See also EA 2 /88 Ben Shalom v. Central Elections Committee of the Knesset, PD 43(4) 221, 230 (1989).

[32] See Design, *supra* note 11, at 53-54.

[33] See ROBERT DAHL, ON DEMOCRACY (1998); BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 1, at 23.

[34] See BARAK, THE JUDGE IN A DEMOCRACY, *id*, at 35.

[35] See Joseph Raz, *The Rule of Law and its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979); Richard Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); DEMOCRACY AND THE RULE OF LAW (José María Maravall & Adam Przeworski eds., 2003); BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

[36] See JUDICIAL INDEPENDENCE, THE CONTEMPORARY DEBATE (Shimon Shetreet & J. Deschênes eds., 1985); MARTIN L FRIEDLAND, A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA (1995); Stephen Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996) ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION (2002); JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002).

[37] See BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 1, at 81. See also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); LOUIS HENKIN, THE AGE OF RIGHTS (1990); N. BOBBIO, THE AGE OF RIGHTS (1995); CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); Lorraine Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution*, 80 CAN. BAR REV. 699 (2001).

[38] On balancing see BARAK, THE JUDGE IN A DEMOCRACY, *id*, at 164.

[39] See AHARON BARAK, INTERPRETATION IN LAW, VOL. 3: CONSTITUTIONAL INTERPRETATION 323 (1994) [Hebrew]; Ruth Gabizon, *Jewish and democratic state: a political identity, ideology and Law*, 19 THEORETICAL IN LAW 631 (1995) [Hebrew]; GABIZON, ISRAEL AS A JEWISH AND DEMOCRATIC STATE: TENSIONS AND RISKS, *supra* note 13.; Elon, *The values of a Jewish and democratic state - the task of reaching a synthesis*, *supra* note 14; Rubinstein, *Can Israel be both Democratic and Jewish?*, *supra* note 5.

[40] See EA 2/84 Neiman v. Central Elections Committee of the Knesset, PD 39(2) 225, 293 (1985): "It is common knowledge that abundant differences of opinion and conflicting approaches mark also Jewish thought throughout the ages - even the Halacha system itself.... It goes without saying that all these views and approaches have contributed together to deepening and enriching Jewish thought at all times. But whoever embarks upon the quest for knowledge must distinguish between statements made for particular times and circumstances and statements made for all times, between a generally accepted view and an exceptional one, and the like distinctions and implications. From this vast and abundant treasure, it is possible to gather much that is significant for the requirements of one's own generation and age, so as to answer contemporary needs and at the same time replenish the treasure of Jewish thought and the heritage of Israel." (Judge Menachem Elon).

[41] See Tibi, *supra* note 18, at 19; Design, *supra* note 11, at 54: [T]he constitutional interpreter should make an effort to achieve an accord and harmony between the values of the State of Israel as a Jewish state and its values as a democratic state. Indeed, the expression 'the values of the State of Israel as a Jewish and democratic state' should be regarded as one idea that is comprised of two elements (Jewish and democratic). Between the two there should be a synthesis and compatibility. 'Judges, as faithful interpreters of the constitutional text, should do everything in order to achieve this synthesis'. The interpreter should find what is common to both and what unites them. (Judge Aharon Barak). See also CA 506/88 Shefer v. State of Israel, PD 48(1) 87, 167 (1994): "It is in the nature of such a synthesis that it seeks what is common to both systems, the Jewish and the democratic, the principles that are common to both, or at least that can be reconciled with them" (Judge Menachem Elon).

[42] See *Ka'adan*, *supra* note 9.

[43] See *Shefer*, *supra* note 41.

[44] On judicial discretion see AHARON BARAK, JUDICIAL DISCRETION (1989)

[45] See Sec. 1 Basic Law: Human Dignity and Liberty; Sec. 1 Basic Law: Freedom of Occupation.

[46] See HCJ 98/69 Bergman v. Minister of Finance, PD 23(1) 693 (1969); HCJ 114/78 Burkan v. Minister of Finance, PD 32(2) 800 (1979); HCJ 953/87 Poraz v. Mayor of Tel-Aviv-Jaffa, PD 42(2) 309 (1988); *Ka'adan*, *supra* note 9; HCJ 4112/99 Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv-Jaffa Municipality, PD 56(5) 393 (2002); *Adalah*, *supra* note 2, at 483. See also Itzhak Zamir & Moshe Sobel, *Equality before the Law*, 5 MISHPAT U MIMSHAL [Law and Government] 165 (1999) [Hebrew].

[47] Declaration of the Establishment of the State of Israel, *supra* note 15.

[48] See RONALD DWORKIN, SOVEREIGN VIRTUE - THE THEORY AND PRACTICE OF EQUALITY (2000).

[49] See *Poraz*, *supra* note 46, at 332; HCJ 7111/95 Local Government Centre v. Knesset, PD 50(3) 485, 503 (1996).

[50] Leviticus 24:22.

[51] CrimA 3632/92 Gabay v. State of Israel, PD 46(4) 487, 490 (1992).

[52] See the sources that cited in *supra* note 17.

[53] See *Ka'adan*, *supra* note 9, at 281.

[54] *id*, at 282.

[55] HCJ 392/72 Berger v. Regional Committee for Planning and Construction, Haifa Region, PD 27(2) 764, 771 (1973).

[56] See Zamir & Sobel, *supra* note 46.

[57] See HCJ 6924/93 Association for Civil Rights in Israel v. Government of Israel, PD 55(5) 15, 27 (2001). See also Elyakim, Rubinstein, *On Equality for Arabs in Israel*, in PATHS OF GOVERNMENT AND LAW: ISSUES IN ISRAELI PUBLIC LAW 278 (2003) [Hebrew]; Itzhak Zamir, *Equal rights to Arabs in Israel*, 9 MISHPAT U MIMSHAL [Law and Government] 11 (2005) [Hebrew].

[58]



[\\_\\_\\_](#) Declaration of the Establishment of the State of Israel, *supra* note 15.

[\[59\]](#) See *Ka'adan*, *supra* note 9.

[\[60\]](#) Declaration of the Establishment of the State of Israel, *supra* note 15.

[\[61\]](#) See YACOBSON & RUBINSTEIN, *supra* note 17. See also DAVID BEN-GURION, WE AND OUR NEIGHBORS 32 (1931) [Hebrew]; Ze'ev Jabotinsky, *Eretz Israel- Two Nationality*, in REVISIONIST ZIONISM 131 (1985) [Hebrew].

[\[62\]](#) See HC 35/48 Breslov & Partners Ltd. v. Trade and Industry Minister, PD 2 330, 334 (1949); HCJ 30/55 Committee for Protection of Expropriated Nazareth Land v. Minister of Finance, PD 9 1261(1955); HCJ 301/63 Streit v. Chief Rabbi, PD 18(1) 598, 612 (1964); *Berger*, *supra* note 55; HCJ 328/88 Avitan v. Israel Land Administration, PD 43(4) 297 (1989); HCJ 1113/99 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs, PD 54(2) 164 (2000).

---

[Table of Contents](#)

Copyright 2009 The American-Israeli Cooperative Enterprise