

Westminster Synagogue

**NO
CONTRADICTION:
JUDAISM AND
DEMOCRACY IN
THE ISRAELI
SUPREME COURT**

Study pack



PART I: THE FOUNDATIONS

1. THE ORIGINS OF THE JUDICIARY

Moses sat to judge the people; and the people stood about Moses from the morning until the evening. And when Jethro saw all that he did to the people, he said: "What is this thing that you are doing to the people? Why are you sitting alone, while all the people stand about you from dawn 'til dusk?" And Moses said: "Because the people come to me, and I judge between a person and their neighbour, and I make them know the statutes of God."

And Moses' father-in-law said to him: "The thing that you are doing is not good. You will surely wear away, both you and your people; for the task is too heavy for you; you are not able to perform it alone. Listen to me, and I will give you advice. Teach your people the statutes and the laws, and show them the way they must walk. And let them judge each other; and it shall be, that every serious matter they shall bring to you, but every small matter they shall judge themselves; so shall they make it easier for you and bear the burden with you."

Exodus 18:13-20, 22

2. THE DREAM

The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

Declaration of the Establishment of the State of Israel, 1948

3. THE ASPIRATION

Zionism, the national liberation movement of the Jewish people, brought about the establishment of the State of Israel, and views a Jewish, Zionist, democratic and secure State of Israel to be the expression of the common responsibility of the Jewish people for its continuity and future.

The foundations of Zionism include strengthening Israel as a Jewish, Zionist and democratic state and shaping it as an exemplary society with a unique moral and spiritual character, marked by mutual respect for the multi-faceted Jewish people, rooted in the vision of the prophets, striving for peace and contributing to the betterment of the world.

From the Jerusalem Programme (official platform of the World Zionist Organisation), 2004

4. VALUES THAT LAST

The process of judging forces the judge to give expression to the fundamental values of the society and not to its subjective values, to the extent that the two are different. Judging is an objective test which does not require the judge to give expression to the temporary and the fleeting. They must give expression to the central and the basic. Thus, when a given society is not faithful to itself, the objective test does not mean the judge must give expression to the mood of the hour. They must stand firm against this mood, while expressing the basic values of the society in which they live.

Aharon Barak (later to become Chief Justice of Israel): Judicial Discretion, Yale University Press, 1989

PART II: THE COURTROOM

5. ETHNIC DISCRIMINATION

The State of Israel has allocated land to the Jewish Agency. The Jewish Agency, in turn, has established a village on that land. The village was established through a co-operative which accepts only Jews as members. The result in this situation is that an Arab cannot build their home on state lands allocated to the Agency. Under these conditions, is the State's decision to allocate lands to the Agency unlawful, due to prohibited discrimination against Arabs? That is the question before us in this petition.

One of Judaism's established foundations is the idea that man was created in image of God: Genesis 1:27. Thus begins the Torah of Israel, and from this Jewish law derives basic principles as to the value of human life – each person as they are – in their equality and their love.

The Jewish State having been established, it treats all its citizens equally. The State of Israel is a Jewish state in which various minorities, including the Arab minority, live. Each of the minorities living in Israel enjoys complete equality of rights. It is true, members of the Jewish nation were granted a special key to enter, through the Law of Return, but once a person has lawfully entered the home, he enjoys equal rights with all other members of the household.

There is, therefore, no contradiction between the values of the State of Israel as a Jewish and democratic state and between the absolute equality of all of its citizens. The opposite is true: equality of rights for all people in Israel, be their religion whatever it may be and be their nationality whatever it may be, is derived from the values of the State of Israel as a Jewish and democratic state.

Judgment of Barak P in Ka'adan v Israel Land Administration HCJ 6698/95, 1995

6. UNDEMOCRATIC POLITICAL PARTIES

According to Rabbi Akiva, the supreme value in human relations is love of one's fellows; and according to Ben Azai, the supreme and preferred value is the equality of all, since every people were created in the image of God. And these two values – equality and love of one's fellow – came together as one at the hands of the Jewish nation, together forming a cornerstone of Judaism throughout its generations and history.

“You shall not abhor an Egyptian, because you were a stranger in the land”: Deuteronomy 23:8. Racism, which has brought so much suffering to humankind, even to this very day, is alien to Judaism, and has been categorically rejected by it.

The content of the Kach manifesto, including deporting the Arab population to other countries, stripping away rights from those remaining in Israel and denying social security benefits to Arabs so as not to subsidise population growth in that sector, stands in blatant contrast to the world of Judaism – its ways and perspectives, to the past of the Jewish nation and its future aspirations.

They contradict absolutely the fundamental principles of human and national morality, the Declaration of Independence of the State of Israel, and the very foundations of present-day enlightened democracies.

This phenomenon should cause grave concern among the people who dwell in Zion. This court is charged with the preservation of the law and its interpretation, and the duty of inculcating the values of Judaism and civilization, of the dignity of all and the equality of all who are created in the Divine image, rests primarily upon those whom the legislature and the executive branch have chosen for the task. When, however, such a seriously dangerous phenomenon is brought to our attention, we may not refrain from sounding the alarm against the ruinous effects of its possible spread upon the character, image and future of the Jewish State.

Judgment of Elon DP (also a rabbi) in Neiman v Chairman of the Central Elections Committee of the Eleventh Knesset EA 2/84, 1984

7. WOMEN ON BUSES

Giving individuals the option of practicing gender separation among themselves may well be a genuine wish of men (and women) in ultra-Orthodox society. We do not believe there is any impediment to enabling those men and women to act according to their beliefs.

The present situation concerns bus lines that – even if there are those who think they ‘belong’ to the ultra-Orthodox community – are actually available to and used by the entire public including users who do not desire segregation. This latter group of passengers, and especially women passengers, are forcibly segregated against their will, and at times by means of verbal violence and beyond. Therefore, no one can dispute that this represents a grave and unconscionable violation of equality and dignity, at the criminal level.

Judgment of Rubinstein J in Ragen v Ministry of Transport HCJ 746/07, 2011

8. WOMEN ON AIR

I have decided to express at the outset my sense of revulsion and repugnance at the phenomenon of the exclusion of women, which seems only to be increasing. This is an illegitimate, unworthy phenomenon that has been describes as one that “delivers a mortal blow to human dignity” (*Israel Women’s Network v Minister of Labour and Welfare* HCJ 2671/98), and it is a gross violation of the basic, fundamental rights of women.

Moreover, the exclusion of women also has the potential of instilling a conception that the public domain belongs to ‘men only’, and consequently, of perpetuating gender-driven gaps in status and behaviours that by their very nature humiliate, degrade and debase women. This is particularly evident when women are forced to turn to the authorities and the courts for a declaration that they are ‘permitted’ to execute basic acts in the public sphere, and clearly the harm that this involves is not limited only to their individual matter, but involves injury to society as a whole.

Judgment of Danziger J in Radio Kol baRamah v Kolech Religious Women’s Forum LCA 6897/14, 2015

9. DEMOLISHING SUICIDE BOMBERS’ HOUSES

Every person must pay for their own crimes. In the words of the Prophet Ezekiel: “The child shall not bear the iniquity of the parent.” One should punish only cautiously, and one should strike the sinner themselves alone. That is the Jewish way as prescribed in the Law of Moses.

The wife of the suicide murderer is the mother of four small children. Nobody claims that they were accomplices in his plot to murder innocent souls. If we demolish the bomber’s apartment we will simultaneously destroy the home of this woman and her children. We will thereby punish them even though they have done no wrong. We do not do such things here.

I deliberated long and hard until I reached this conclusion. This is the Torah that I learned from my teachers, and this is the doctrine of law that I have in my hands. I can rule no other way.

Judgment of Cheshin J in Janimat v Central Command HCJ 2006/97, 1997

10. TORTURE

We are aware that our decision to prohibit torture absolutely does not make it easier to deal with terrorism. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes a democracy must fight with one hand tied behind its back.

Nonetheless, it has the upper hand. Preserving the rule of law and the recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

Judgment of Barak P in Public Committee Against Torture in Israel v Government of Israel HCJ 769/02, 1994

11. MIGRATION FROM PALESTINE

In considering the law being challenged, which sets a blanket restriction on the entry of spouses of Israeli citizens residing in the Occupied Territories into Israel based on concerns of national security, we return to principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end does not justify the means; that security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterised by the fact that it imposes limits on the ability to violate human rights; it is based on a recognition that surrounding the individual is a wall protecting his rights, which cannot be breached even by the majority.

Thus, for example removing the family members of suicide bombers from their place of residence and moving them to other places would increase security in the territories, but it is inconsistent with the character of Israel as a “democratic freedom-seeking and liberty-seeking state”: *Ajuri v IDF Commander in the West Bank* HCJ 7015/02.

We must adopt this path also in the case before us. The additional security achieved by abandoning individual assessments and changing over to a blanket prohibition involves such a serious violation of the family life and equality of many thousands of Israeli citizens that it is a disproportionate change.

Democracy does not act in this way. Democracy does not impose a blanket prohibition and thereby separate its citizens from their spouses, nor does it prevent them from having a family life; democracy does not

impose a blanket prohibition and thereby give its citizens the option of living in it without their spouse or leaving the state in order to live a proper family life; democracy does not impose a blanket prohibition and thereby separate parents from their children; democracy does not impose a blanket prohibition and thereby discriminate between its citizens with regard to the realisation of their family life.

Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed. Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test.

Judgment of Barak P in Adalah: The Legal Centre for the Rights of the Arab Minority v Minister of the Interior HCJ 7052/03, 2006

12. THE WALL

Is the damage caused to the local inhabitants by the route of the separation fence in the Beit Sourik area proportionate? The question is: is the security advantage gained from the route, compared to other possible alternate routes, proportionate to the additional injury to the local inhabitants caused by this route, compared to the alternate routes?

The route of the fence separates local inhabitants from their lands. All this constitutes a severe violation of the rights of the local inhabitants. The delicate balance between the security of the area and the lives of the local inhabitants, for which the commander of the area is responsible, is upset. The route is therefore annulled and the military commander must consider alternatives which, even if they result in a lower level of security, will cause a substantial (even if not complete) reduction of the damage to the lives of the local inhabitants.

Having completed the examination of the proportionality of each section of the fence separately, it is appropriate that we lift our gaze and look out over the proportionality of the entire route of the part of the separation fence which is the subject of this petition.

The length of the part of the separation fence to which these orders apply is approximately forty kilometres. It causes injury to the lives of 35,000 local inhabitants. 4,000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their

lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops.

Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will have to separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabballa and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.

The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

The military commander is the expert on the military aspect of the route of the separation fence. We are experts on its humanitarian aspects. The military commander determines whether the separation fence will pass over the hills or in the plain. That is their expertise. We examine whether the harm caused by this route to the local inhabitants is proportional. That is our expertise.

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are

aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.

Judgment of Barak P in Beit Sourik Village Council v Government of Israel HCJ 2056/04, 2004

13. THE OTHER WALL

We have emphasised on various occasions that the sons and daughters of a free society in which human dignity is a fundamental value are asked to respect the personal-emotional feelings of the individual and their dignity as a person, while understanding that the personal-emotional priorities and the manner of expressing them differs from person to person.

Thus we were of the opinion in *Jerusalem Community Jewish Burial Society v Kestenbaum* CA 294/91 that a free society is sparing in imposing limits upon the choices of the individual and acts with patience and tolerance, and tries to understand the other, even when they choose paths that the majority does not deem acceptable or desirable.

Tolerance is not a slogan for accumulating rights, but a criterion for granting rights to others.

Judgment of Shamgar P in Hoffman v Director of the Western Wall HCJ 257/89, 1994

14. #BDSFAIL

Freedom of political expression is protected not only because we are a democratic state, but also because we are a Jewish state. It has been this way from the earliest days of our existence.

We are told that our patriarch Abraham was called "Ivri", from the same root as 'Hebrew', because he maintained his opposition to the idolatrous regime: "The whole world was on one side ('e-ver'), and he was on the other side ('e-ver)": Genesis Rabbah 48:8. The first holiday of the Jewish nation – in fact, its constitutive holiday – is Passover. It is a holiday that

counterposes individual liberty and the slavery regime of the Egyptian Pharaoh.

These points accentuate the centrality of freedom of political speech as integral to freedom of the individual confronted by the existing regime that limits his choice. The issue is not only the ‘marketplace of ideas’, but a person’s right to freedom of expression in opposition to the ruling political regime, and the power of the individual to make their own decisions and express their views without society – even a democratic society – deciding for them in the public’s name.

The harsh result of this law, which makes calls for a boycott of Israel or any part of Israel or the territories an actionable wrong, will be a chilling effect that will influence freedom of expression. The presence of a chilling effect in this case is not at all speculative. The creation of a chilling effect is the primary means chosen by the legislature for achieving the law’s purpose.

Calling for a boycott, at least in some of situations, is a person’s basic right of conscience. There are people whose conscience will not permit them to purchase an automobile produced by a certain country. Others are upset by the very thought of patronising certain stores that sell non-kosher products alongside kosher ones. They do not wish to empower those that they perceive as ‘offenders’. To each their choices, and to each their conscience. Such choices stand at the core of a person’s freedom to realize his values in his lifestyle. At times, a call for a boycott is a call to act in accordance with one’s conscience. Conscience may be the compass of freedom of expression, including the freedom of political expression.

Judgment of Hendel J in Avneri v Knesset HCJ 5239/11, 2015

16. OFFENSIVE FILMS

“With intelligence shall humankind distinguish between the true and the false”: Maimonides’ *Guide to the Perplexed* 1:2.

There is no doubt that this film, accusing the military of serious war crimes in Jenin, injures the feelings of many members of the public, including the feelings of the soldiers who participated in the battle and their families, especially the parents, spouses and siblings of the fallen. However, it should not be said that this injury, with all of its pain and anguish, is not within the bounds of that which is tolerated in our democratic society. An open, democratic society, which upholds the freedom of expression, certain in the feeling that this advances society and does not threaten it, is willing to bear offense, even substantial

offense to the feelings of the public, in the name of the freedom of expression.

Our fundamental assumption is that the false and the fraudulent should be confronted with the good and the true, and that it is the latter that will ultimately prevail, taking its place among the rainbow of beliefs, ideals, and faiths of the free world.

Judgments of Dorner and Procaccia JJ in Bakri v Israel Film Council
HC 316/03, 2003

17. MAINTAINING STANDARDS IN TIMES OF WAR

We will not falter in our efforts for the rule of law. We have sworn by our oath to dispense justice, to be the servant of the law, and we will be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law will make its voice heard.

Judgment of Cheshin J in Sabiah v IDF Commander in the West Bank HC 1730/96, 1996

18. PIKUACH NEFESH

We are not prevented from exercising judicial scrutiny merely because the military commander's actions have political and military ramifications. When the decisions or actions of the military commander violate human rights, they are justiciable. The doors of the court are open. The argument that the violation of human rights was the result of security considerations does not prevent the exercising of judicial scrutiny. 'Security considerations' and 'military necessity' are not magic words.

It is not relevant whatsoever whether settlement activity conforms to international law or defies it. For this reason, we shall express no position regarding that question. The life of a person who is in the area illegally is not up for the taking. Even if a person is located in the area illegally, he is not outlawed.

Judgment of Barak P in Marabeh v Prime Minister of Israel HCJ
7957/04, 2005

19. DEUTERONOMY ON FAIR ELECTIONS

One might ask what the reason is for the prohibition against influencing the voter by way of dispensing favours. After all, the recipient of a favour exercises their civil right to vote, and they votes for whom they want, so what consequence is it if their choice is influenced by a payment or by a favour, so long as their freedom to exercise their right to vote in accordance with their wishes was not taken from them?

Anyone asking this question should be enlightened and made to see and understand correctly what genuine democratic elections are all about, as explained above. Freedom of choice election means not merely the physical freedom to cast a ballot in the booth, but also, and principally, the complete freedom to go through the voting process as a free person, both psychologically and intellectually. Therefore, any act that may reduce or eliminate, either directly or indirectly, the voter's freedom of thought and their ability to give genuine expression to their philosophy in accordance with their independent judgment – because of a favour that inhibits their freedom or because the opinions of others have been imposed on them – violates the basic principle of freedom and independence of choice.

Thus, bribery generally, and election bribery *a fortiori*, is meant to subjugate the will and freedom of choice of the citizen, and to render their vote, which should be free and independent, dependent on something else.

It seems to us that it would be instructive and useful to describe the treatment of fraud in the Jewish tradition and in Jewish law. Bribery is viewed extremely negatively in Jewish law and tradition. We find in the Scriptures how negatively our ancestors viewed the act of bribery, which they condemned in absolute terms as follows: "Thou shalt not wrest judgment; thou shalt not pay heed to persons; neither shalt thou take a gift, for a gift doth blind the eyes of the wise and pervert the words of the righteous": Deuteronomy 16:19.

Judgment of Levin J in Flatto-Sharon v State of Israel CrimA 71/83, 1984

PART III: THE PUBLIC GALLERY

20. A TIME TO SPEAK

All the three organs of the Government must work towards realisation of constitutional goals, and the judiciary has to be inspired by the values enshrined in the constitution. If rule of law is to run akin to rule of life and a feudal society is to be transformed into an egalitarian society by the rule of law, an introduction of the element of reflection of popular will so as to make judicial system more viable and effective as an instrument of change is inevitable – and total aloofness of judiciary is inconceivable.

While undoubtedly political packing must be abhorred in putting the independence of the judiciary at risk, one cannot lose sight of the fact that judges must keep pace with the changing mores of the day. Our decisions must be informed by values enshrined in the constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a change for the better and the promised millennium. An activist role in furtherance of the same is a *sine qua non* for the judiciary.

If 'value packing' connotes appointment of persons otherwise well qualified as required by the constitution but having the additional qualification of awareness of the high priority tasks of eradication of poverty, removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation feudal over lordship, coupled with conscious commitment to administering socioeconomic justice, establishment of a just social order and an egalitarian society, then not only is value packing is not to be frowned upon nor thwarted by entrenched establishment-prone people but it must be advocated with a crusader's zeal.

Judgment of Desai J, sitting in the Supreme Court of India, in S P Gupta v President of India AIR 1982 SC 149, 1981

Gabriel Webber

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