

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

Professor Aharon Barak, President (Ret.) of the Supreme Court of Israel

*Excerpts of the address presented by Professor Aharon Barak, President (Ret.) of The Supreme Court of Israel, at HUC-JIR's Ordination and Academic Convocation in Jerusalem on November 10, 2006, when six new Israeli Reform rabbis were ordained. Barak, a child survivor of the Holocaust, was awarded an honorary doctorate for his work to protect human rights and human dignity, to shape the values of the State of Israel as a democratic and Jewish state, and to strengthen pluralism within Israeli society.*



We find, therefore, that the phrase “the value of the State of Israel as a Jewish and democratic state” has considerable legal importance. It has a constitutional status. This formulation bears a heavy and important load. It has an effect both on prescribing the scope of a human right and also on prescribing the protection given to it in Israeli law. Hence the considerable importance of

the answer to a question: What are the values of the State of Israel as a Jewish and democratic state? How are they determined? What weight is to be given to them? And what is the relationship between the values of the State of Israel as a Jewish and democratic state and its values as a democratic state?

## A Formulation Carrying a Heavy Normative Load

With the enactment of *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*, the phrase “the values of the State of Israel as a Jewish and democratic state” has become part of Israel’s legal and social culture. The values of the State of Israel serve as the criterion for the constitutionality of any status that infringes upon human rights anchored in the basic laws. Indeed, any statute, that infringes a protected human right will not be constitutional, even if it is for a worthy purpose, if such infringement of the human right does not conform to the values of the State of Israel as a Jewish and democratic state.

With the enactment of *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*, the phrase “the values of the State of Israel as a Jewish and democratic state” has become part of Israel’s legal and social culture. The values of the State of Israel serve as the criterion for the constitutionality of any status that infringes upon human rights anchored in the basic laws. Indeed, any statute, that infringes a protected human right will not be constitutional, even if it is for a worthy purpose, if such infringement of the human right does not conform to the values of the State of Israel as a Jewish and democratic state.

## Answer within the Framework of Consensus

The phrase “the values of the State of Israel as a Jewish and democratic state” is a vague statement. As a text, it does not indicate an unequivocal answer. Determining the extent of the application of the phrase will keep us very busy in the future. I say “us,” and by this I mean the whole of Israeli society and not just the lawyers within it, and Jews outside of Israel. Indeed, the phrase “the values of the State of Israel as a Jewish and democratic state” in the basic law reflects something that is instinctive about the State of Israel and

about Israeli society. We are not a people like other people. We are not a state like other states. We are a democracy and our values are like the values of any democratic state. But we are also a Jewish state and for this reason our values are the values of a Jewish state. Israeli society as a whole is going to have to contend with this duality. Thinkers and researchers, rabbis and professors, yeshiva students and university students – all the strata of Israeli society and Jews around the world – will have to ask themselves what are the values of the State of Israel as a Jewish and democratic state.

## Our Distinctiveness as a Jewish State

The words of the Declaration of Independence

should be noted: The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious, and political identity was shaped. Here they first attained statehood, created cultural values of national and universal significance, and gave to the whole world the eternal Book of Books.

A “Jewish State,” therefore, is the state of the Jewish People; “it is the natural right of the Jewish People, like all other peoples, to be masters of their own fate in their own sovereign state.” A “Jewish State” is a state to which every Jew has the right to immigrate and one of those basic values is the ingathering of the exiles. A “Jewish State” is a state whose history is intertwined with the history of the Jewish People, whose principal language is Hebrew, and whose main festivals reflect its national rebirth. A “Jewish State” is a state primarily concerned with the settlement of Jews in its fields, its towns, and its villages. A “Jewish State” is a state that perpetuates the memory of the Jews who were slaughtered in the Holocaust. A “Jewish State” is a state that fosters Jewish culture, Jewish education, and love of the Jewish People. A “Jewish State” is “the realization of the age-old dream of the redemption of Israel.” A “Jewish State” is a state for which the values of the Torah of Israel, of freedom, justice, equity, and peace, the values of the heritage of Judaism, and the values of Jewish law are among its fundamental values.

*(continued on next page)*

# Barak

(continued from previous page)

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

There are two main aspects to the State of Israel as a Jewish state. One is the Zionist aspect and the other is the legal or heritage aspect. It goes without saying that there is a close connection between the Zionist aspect and that of Jewish heritage, and they often overlap. Moreover, there also exists a connection between the values of the State of Israel as a Jewish state and the values of the State of Israel as a democratic state. It was Judaism that has made human dignity a supreme constitutional value by depriving the dignity of man from the honor due to the Creator, because man is created in His image. Human rights, too, find their expression in our heritage of Israel.

## A Jewish State in its Zionist Aspect

A Jewish State is a state that expresses the Zionist vision.

It is the vision of children returning to their ancestral land. It is the vision of the national home of every single Jew. Hence, the right of every Jew to immigrate to Israel – a right guaranteed in the *Law of Return 5710–1950*. A Jewish State in its Zionist aspect is a state whose principal language is Hebrew, whose culture is Jewish, and whose main festivals reflect the national resurgence of the Jewish People; a state that redeems state lands for the settlement thereon of Jews; a state whose national anthem is “*HaTikvah*” and whose flag is the blue and white flag.

## A Jewish State in its Heritage Aspect

The values of the State of Israel as a Jewish state include its heritage values. We learn about these values from the world of Halakha itself. In it are to be found the values of the State of Israel as a Jewish state as they have developed throughout the history of the Jewish People over the generations. An outstanding expression of the heritage aspect is to be found in the *Legal Foundations Law*, which provides: If the court has before it a legal question requiring its decision and has

not found an answer to it in legislation, decided cases, or by way of analogy, it shall decide it in the light of the principles of freedom, justice, equity, and peace in the heritage of Israel.

## The Values of the State of Israel as a Democracy

The values of the State of Israel as a democratic state have two bases: the one, the rule of the people through its elected representatives; the other, the rule of certain values and principles, including separation of powers, the rule of law, the independence of the judiciary, and the protection of human rights. For sure, democracy is not just the rule of the majority. It requires the recognition of certain fundamental values, the central ones being human rights. There is no democracy if the majority denies the minority its rights.

## The Relationship between the Jewish Aspect and the Democratic Aspect

It seems to me that a proper constitutional conception necessitates an attempt to achieve reconciliation and harmony between those values, by seeking constitutional unity and normative harmony, while attempting to find that which unifies and that which is common to them and while preventing conflict between them and minimizing points of friction.

To this end, we have to understand that in each of the aspects of the State of Israel as a Jewish state there are differences of opinions and differences of nuances. Zionism is not monolithic. There are within it different, and sometimes opposing, views as to the ways to fulfill the Zionist vision in the State of Israel. In the same way, Judaism is not homogeneous. It contains different streams and differing outlooks. The concept of democracy, too, is not one-dimensional. The world of democracy is rich and multi-faceted. It comprises various and diverse approaches to the proper ways to attain democracy. There are indeed in each of the value components of the State of Israel many, and at times contradictory, trends.

The interpreter – striving for reconciliation and harmony – must take from each of the Zionist, heritage, and democratic sources those values, conceptions, and principles in

it that are compatible with the values and principles to be found in other sources. He must not take from them values that produce conflict and contradiction. Thus, for example, if we find in the world of Judaism both a particularistic stream and a universalistic stream, the interpreter will probably adopt the universalistic stream, because it is more compatible with the values of the State of Israel as a democratic state than is the particularistic stream. In the same way, if, within the conception of democracy, it is possible to regard interpersonal relations in different ways, it is only right to adopt that approach that is compatible with the view of Jewish heritage.

## The Failure of Reconciliation and Harmony – What Then?

We must expect that there will be occasions when this reconciliation cannot be realized; the attempts to find a common denominator are likely to fail; the values are likely to be diametrically opposed so that a synthesis between them is impossible. What is the judge to do in such a situation? There are those who think that the constitutional text requires us to give preference to the values of the State of Israel as a Jewish state. There are others who think that the text requires that preference be given to the values of the State of Israel as a democratic state. I consider neither of these approaches to be correct. The judge must act rationally, he must act objectively; he must choose that solution, which, more than any other, is in conformity with the general structure of the legal system. He must produce a solution that is compatible with our constitutional history. He must produce a solution that is in conformity with the consensus in Israeli society. He must produce a solution that has links to the past and at the same time serves as the basis for development in the future.

## The Non-Jewish Minority

In analyzing the values of the State of Israel as a Jewish and democratic state, and in creating a balance between them, we must take into consideration the many non-Jews who are living here with us. It is true that there is a special key to the house known as the State of Israel that has been

given to the members of the Jewish people. But once a person is living here, in our national home, he has a right to equality, whatever his religion may be and to whatever people he may belong.

It has been rightly noted that the principle of equality and the prohibition of discrimination, embodied in the command 'You shall have one law as well for the stranger as for the home-born' (Leviticus 24:22), as interpreted by our sages to mean 'a law that is equal for you all' (Ketubot 33a, Bava Kama 83b) has been a "sacred principle in the Torah of Israel ever since it became a people." Justice Elon has pointed out that "the idea of the creation of Man in the image of God (Genesis 1: 27) is a firm principle in the world of Judaism. The Torah of Israel starts with it and from it Jewish law has derived fundamental principles regarding the value of man – any man, whoever he may be – the equality of man and the love of man."

The values of the State of Israel as a Jewish-Zionist state, too, are not based on discrimination against the non-Jewish citizen. Zionism was born as a reaction against discrimination and against racism. In the Declaration of Independence it is stated that "the State of Israel will ensure complete equality of social and political rights for all its citizens irrespective of religion, race or sex." A democratic state is surely obliged to respect the basic right to equality of each individual in it and to safeguard such right.

Justice Berenson expressed this well more than thirty years ago: "When we were exiled from our land and sent far from our country we became the victims of the nations of the world among whom we were living and throughout all the generations. Having undergone this bitter and wretched experience, which has penetrated very deep into our national and human consciousness, it is to be expected that we will not go the perverted way of the nations of the world, and as our independence in the Land of Israel is renewed we must take care to be on guard against any trace of discrimination or application of double standards towards any law abiding non-Jew who is living here with us and who wants to live here with us in his own way, according to his religious practice

and faith. Hatred of strangers is a twofold curse. It destroys the image of God that is in the hater and it brings down evil on the hated who has done no wrong. We must show a benevolent and tolerant attitude towards all who are created in the image of God and uphold the great principle of equality in rights and duties of all men."

Equality is a complex right. It is not on every occasion, when people are treated differently, that they are being discriminated against, nor is it on every occasion, when people are being treated the same, that they are being treated equally.

### The Judge is Part of the People

The saying of the writer Shalom Aleichem that it is hard to be a Jew is well known. It is also hard to safeguard democracy when it has to defend itself from its enemies. In one case, in which we held that torture may not be used in questioning terrorists, I wrote: "It is the fate of democracy that not all means are regarded by it as legitimate and not all the methods used by its enemies are available to it. More than once democracy has had to fight with one hand tied behind its back. Despite this, democracy has the advantage because the preservation of the rule of law and the recognition of the rights of the individual constitute an important component in its conception of its defense. At the end of the day, they reinforce its spirit and its strength and enable it to overcome difficulties."

And if it is hard to be a Jew, it is seven times more difficult to be a judge in the Jewish and democratic State. Nevertheless, the

Israeli courts have been able to deal with these difficulties. They will do so fairly, honestly, and objectively. They will do so while preserving their independence. The judges of Israel regard judging as a way of life in which there is an objective and unbiased search for the truth. Not the exercise of force, but reasoning and deliberation. Not power, but meekness. Not might, but compassion. Not yielding to or compromising with pressure groups, but insistence on the fulfillment of the law. Not deciding in accordance with passing whims, but consistently following the underlying conceptions and fundamental values of the heritage of Israel, Zionism, and democracy.

No wall is to be built between the judge and the society in which he operates. The judge is part of his people. He moves with it.

I expressed those ideas in an opinion considering whether extraordinary methods of interrogation may be used on a terrorist in a "ticking bomb" situation: "Deciding these applications has been difficult for us. We are not in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The fear that our ruling will prevent us from properly dealing with terrorists troubles us. But we are judges. We demand that others act according to the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial." ■

*For the full text of Professor Aharon Barak's address, please visit: [www.huc.edu/read/barak](http://www.huc.edu/read/barak)*



returned to Japan, this time to Tokyo, where she also freelanced as an interpreter for the Israeli Consulate for visiting Israeli delegations. While in Japan she also studied the art of the Japanese Tea Ceremony under the aegis of a well-known tea master. In 1993 Schechter returned to her native New York to become an associate researcher for the investment bank think tank, Nomura Research Institute at the World Financial Center.

By the age of 27, however, she had come to a career crossroads. Her question – “What am I going to do with my life?” was answered by her mother, Naomi Sarna, a psychotherapist, who said “Why don’t you become a rabbi?” Her first year of rabbinical school in Israel confirmed that path.

September 11, 2001 prompted more soul searching. “I was living in Los Angeles and attending rabbinical school when our nation was hit. That morning my husband and I

recruiter, ‘Here I am; let me help.’ I don’t know who was more excited, he or I.”

Her training included summers at the Chaplain Candidate Training Program at the academic center of the Air Force, Maxwell Air Force Base in Montgomery, Alabama, and at the Commissioning Officer Training (COT) program, at the same location. Schechter also did summer stints at the Air Force Academy in Colorado Springs, Colorado and at Langley Air Force Base in Virginia, each for five weeks of active duty training. Upon ordination, she was promoted to first lieutenant and was a reservist for three months and then came on active duty.

Chaplains are non-combatants and are not trained to fight. “The primary mission of the military chaplain is to be a visible reminder of the holy, to help people of all faiths meet their religious requirements, and to ensure that everyone’s constitutional right of freedom of

Most recently, Schechter deployed to Southwest Asia for a four-month tour in support of Operation Iraqi Freedom and Operation Enduring Freedom, leaving her husband Joe Charnes and now 15-month-old daughter, Yael Emunah, back home in California. “My husband quit his job to be a full-time dad for our baby and I am eternally grateful to him for his devoted love.” Schechter is due to return around *Shavuot*.

For Passover, Schechter organized the distribution of over a thousand pounds of kosher food for personnel and led three *seders* in the region. Military personnel came from many bases to attend her *seders*: one at an undisclosed location attended by 30 people (8 of them Jews), another at an Air Force base for 50 people (8 Jews), and a third at an Army base for 18 people (15 Jews). Kosher food, *Haggadot*, and “morale packages” were supplied by American Jewish communities and the Jewish Welfare Board.

“It was a real joy having our Christian friends at the *seder* table with us. They were enthusiastic and pitched in to help make the *charoset* and *gefилte fish*. Several Christian members of the community feel a real kinship with Jews and love learning about the Jewish roots of their religion.”

This summer, Schechter will be assigned to San Antonio, Texas, where she will join a team of chaplains serving newly enrolled recruits undergoing basic training. “Ultimately, our mission is our nation’s defense. It is a great privilege, honor, and responsibility to take part in this. Taking the Oath of Office in front of the American flag was one of the proudest moments in my life.” ■



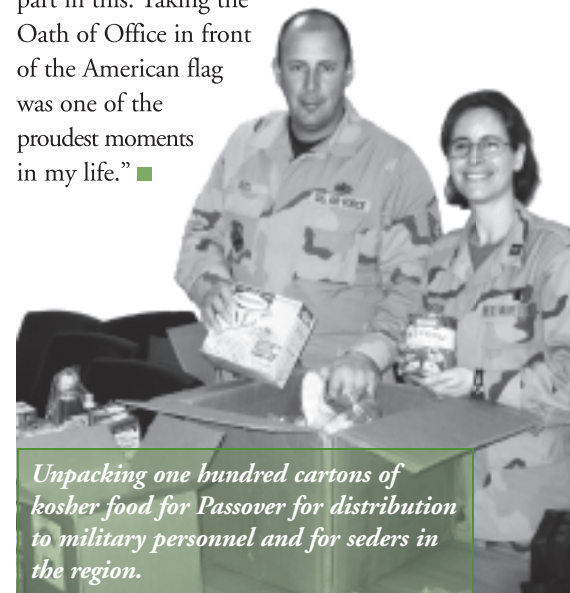
*A Shabbat meal on an Air Force base in Southwest Asia.*

immediately decided that I would join the military as a chaplain. We wanted to support the troops and it seemed the obvious thing to do.”

On September 12th she contacted the U.S. Air Force, and thus followed in the footsteps of her father, Rabbi Philip Schechter, C ’60, who served as a young rabbi/chaplain at Walker Air Force Base in Roseland, New Mexico and was the circuit rabbi for bases in New Mexico, Montana, Kansas and California. “On the day I called the recruiter I thought of God testing Abraham and Abraham replying, ‘*Hineni*, Here I am.’ If I was being tested, I did not know it. I so badly wanted to join. I literally said to the

religion is secure. We also serve as consultants to commanders, helping them make decisions regarding issues of religion and morale.”

For the past three and a half years Schechter has enjoyed being stationed at Los Angeles Air Force Base and supporting the Jewish program at the Vandenberg Air Force Base, also in California. Both bases are part of Space Command and deal with missiles and satellites such as the well-known GPS system. “It is mandatory that anyone who plays a supportive role during launch stay on base. My coming to Vandenberg was the first time in ten years that Jewish members in this position could meet their religious needs despite a pending launch.”



*Unpacking one hundred cartons of kosher food for Passover for distribution to military personnel and for seders in the region.*