

Copyright (c) 2000 Regents of the University of California
UCLA Women's Law Journal

Fall / Winter, 2000

11 UCLA Women's L.J. 45

LENGTH: 7801 words

ESSAY: ISRAELI DEMOCRACY, RELIGION, AND THE PRACTICE OF HALIZAH IN
JEWISH LAW*

* I thank Fran Olsen, Geoffrey Marshall, Natan Nachmani, and Daniel Statman for their advice and thoughtful comments on previous drafts and acknowledge the assistance of Rabbi Ehud Bandel and Rabbi Uri Regev.

Raphael Cohen-Almagor**

** Senior Lecturer, University of Haifa; Visiting Professor and the Fulbright-Yitzhak Rabin Scholar, UCLA School of Law (1999-2000). He is the author of *The Boundaries of Liberty and Tolerance* (1994), *Speech, Media, and Ethics: The Limits of Free Expression* (2001), *The Right to Die With Dignity: An Argument in Ethics, Medicine, and Law* (2001), and *Euthanasia in Netherlands* (forthcoming).

SUMMARY:

... In Israel, offensive norms such as halizah, regardless if proper in the past, are not relevant to Jewish life nowadays and have no place within a democratic society. ... They speak of "conceptions of the good," "ways of life," and values according to which persons lead their lives without explaining which practices may fall outside the tolerable realm. ... Rawls explains that to find a shared idea of citizens' good appropriate for political purposes, political liberalism looks for an idea of rational advantage within a political conception that is independent of any particular comprehensive doctrine and hence may be the focus of an overlapping consensus. ... Rawls elaborates that a society is well-ordered by justice as fairness so long as, first, citizens who affirm reasonable comprehensive doctrines generally endorse justice as fairness as imparting the content of their political judgments; and second, unreasonable comprehensive doctrines do not gain enough currency to compromise the essential justice of basic institutions. ... In this context, a contention could be made challenging the very characterization of Israel as a liberal democracy, claiming that Israel is neither liberal, nor a democracy. ... This holds true for the practice of halizah in Israel. ...

TEXT:

[*46]

Introduction

This Essay examines some of the theoretical assumptions underlying a liberal response to religious norms conceived as offensive to some

people. Some guidelines are presented which are designed to safeguard the rights of individuals, asserting that democracies have the right to curtail norms that disrespect women. In Israel, offensive norms such as halizah, n1 regardless if proper in the past, are not relevant to Jewish life nowadays and have no place within a democratic society.

This Essay's framework of analysis is liberal rather than feminist, though I share some basic feminist convictions. Like feminism, this Essay acknowledges that the voice of women on numerous issues is different from the voice of men. This Essay recognizes that women have enforced public silence on many issues that have a direct bearing on their lives, and that there are values important to women which are not necessarily shared by men. Women should not be subsumed under a larger setting such as the family, the tribe, or the community, but instead women should be recognized as autonomous individuals and as citizens with rights. Furthermore, a discourse should be formed that highlights women's concerns, which are human concerns, since they have yet to be tackled adequately by society. n2

[*47]

The Dilemma

The dilemma that cultures and religions pose for democracies throughout the world involves the notions of neutrality n3 or impartiality on the one hand, and the limits of pluralism on the other. It has been argued that liberalism is in some sense neutral with respect to competing conceptions of the good. Therefore, it follows that democracies should allow citizens the freedom to develop their own conceptions. n4 The inevitable question arising from this assertion is whether - in the name of liberty, tolerance, and pluralism - all conceptions of the good should be open as options to be pursued in a liberal democratic society. n5

Bearing in mind that neutrality forbids any attempts by governments to force others to adhere to ways of life in which they do not believe, the question arises as to whether neutrality should prescribe that governments remain silent in the face of phenomena that offend women or discriminate against them. The problem, then, is whether every norm that any religion or culture values or deems important may be permitted to endure within the framework of a liberal society.

This Essay has two major objectives. The first objective is to press liberal thinkers to deal with real-life situations. They speak of "conceptions of the good," "ways of life," and values according to which persons lead their lives without explaining which practices may fall outside the tolerable realm. What does liberalism purport to include within the defense of neutrality? This issue will be examined by addressing the questionable practice of halizah. n6 This issue was selected not because it is necessarily the most central. There are other concerns that are arguably more germane and more significant in terms of the harm involved and [*48] the number of people affected. n7 The issue of halizah is a neglected one, and this Essay's second objective is to place it on the public agenda, to evoke discussion and debate, and hopefully, to help people in need.

The Rawlsian Conception and Beyond

The theoretical framework of this Essay draws on the writings of John Rawls. n8 Reflecting on the dilemma of whether all conceptions may have a place in liberal democracies, Rawls concedes that no society can include within itself all forms of life. He argues that in a democratic culture, a workable conception of political justice must allow for a diversity of doctrines and the plurality of conflicting conceptions of the good. n9 But given the profound differences in beliefs and conceptions of the good, public agreement on the basic questions of philosophy cannot be obtained without the state's infringement of basic liberties. Rawls argues that no social world exists that does not exclude certain ways of life that realize some essential values in special ways. n10

In Political Liberalism, Rawls reiterates that some conceptions will die out in a just constitutional regime. He further clarifies his position by distinguishing between comprehensive doctrines and reasonable comprehensive doctrines. Rawls explains that comprehensive doctrines include conceptions of the values in human life, as well as ideals of personal virtue, character, friendship, and familial and associational relationships. n11 Reasonable comprehensive doctrines, on the other hand, cover the major religious, philosophical, and moral aspects of human life in a relatively consistent and coherent manner. They organize [*49] and characterize recognized values so that they are compatible and express an intelligible view of the world; and they normally belong to, or draw upon, a tradition of thought and doctrine. n12

Rawls maintains that a modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines, but by a pluralism of incompatible yet reasonable comprehensive doctrines. Political liberalism assumes that, for political purposes, this plurality is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime. Political liberalism also assumes that reasonable comprehensive doctrines do not reject the essentials of a democratic regime. n13

To argue that some conceptions of the good may have no place requires a recognition that some values do underlie a liberal society, which cause members of society to view other conceptions as uncongenial. Rawls implies that all people despite their cultural differences must share certain norms and moral codes; hence the range of norms that society can respect has limitations. The most basic norms that democracy must secure are respecting others as human beings and not inflicting harm upon others. n14 Having explained these two norms in other publications, they are presented here without much elaboration. n15

The Respect for Others Argument is founded on the assertions that others should be respected as autonomous human beings who exercise self-determination to live according to their own life plans, and that people are respected as self-developing beings who are able to develop their inherent faculties as they [*50] choose. n16 At the same time, the requirement of mutuality is needed so that respect is shown for those who respect others.

The boundaries of tolerance are determined by adding the Harm Principle to the Respect for Others Argument. Under the Harm Principle, restrictions on liberty may be prescribed when there are clear threats of immediate violence against some individuals or groups. n17 A Jewish sage, Rabbi Hillel, pronounced the same idea in a different phrase, "What is hateful to you do not do unto your fellow people." n18 The upholding of the Respect for Others Argument and the Harm Principle safeguards the rights of those who might find themselves in a disadvantageous position in society, such as women, ethnic, religious, national and cultural minorities, and homosexuals.

Rawls's theory of justice as fairness is a moral conception that provides an account of the cooperative virtues suitable for a political doctrine in view of the conditions and requirements of a constitutional regime. Rawls explains that to find a shared idea of citizens' good appropriate for political purposes, political liberalism looks for an idea of rational advantage within a political conception that is independent of any particular comprehensive doctrine and hence may be the focus of an overlapping consensus. n19

Accordingly, an acceptable concept of justice can be achieved in spite of differences, but some conceptions may have no place in a well-ordered society. Rawls elaborates that a society is well-ordered by justice as fairness so long as, first, citizens who affirm reasonable comprehensive doctrines generally endorse justice as fairness as imparting the content of their political judgments; and second, unreasonable comprehensive doctrines [*51] do not gain enough currency to compromise the essential justice of basic institutions. n20 Notwithstanding Rawls's recognition that culture and institutions may cause people to reject some convictions, and that the cultural context of choice is important in deciding ways of life, Rawls does not explicitly state that culture is a primary good. n21

The assumption underlying Rawls's theory of justice is that the public culture of democracy is obligated to pursue forms of social cooperation that can be achieved on a basis of mutual respect. He explains that the principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions that those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether. n22 Rawls's ideal polity would not be congenial toward those who believe that their personal conception of the good involves enforcing others to abide by it. The justification for excluding controversial beliefs from the original position lies in the social role of justice, which is to enable individuals to make their shared institutions and basic arrangements mutually acceptable. Mutual respect would foster social cooperation among individuals who hold fundamentally different conceptions of the good. For example, Rawls does not exclude religious groups with strong beliefs who may demand strict conformity and allegiance from their members, but he could not endorse the formation of a theocracy, n23 for some people lack such intensity of religious belief. n24 He supports objection and state intervention to prevent this scenario in order to protect the rights [*52] of individuals who dissociate themselves from the intensive and all-embracing conception of the given cultural group. Democracy is a form of government that secures rights of all, majority and minority alike. Majority rule is opposed when it does not protect the rights of

minorities, and likewise minority coercion that does not respect the rights of the majority is resisted.

Consider the example of orthodox Jewish sects that wish to establish separate means of public transport for men and women in their neighborhoods in order to safeguard their dignity and to prevent "bad thoughts" and possible offenses against decency. They strongly believe that this arrangement is necessary to uphold their cherished values and to secure stable community life. As long as they run their transport services in their own neighborhoods we may say, by implication, that an outsider has no call to interfere. But when they try to force their beliefs on people outside their own homogenous ultra-orthodox community, then a case for state interference exists. Reciprocity in according due weight and respect to others' choices must be safeguarded as necessary. This is a derivative from the Respect for Others Argument, recognizing that people have different conceptions of what constitutes a worthwhile life, and at the same time providing a restriction on toleration where respect ceases.

A number of factors are relevant in deciding when intervention is warranted. These factors include: the severity of rights violations within the minority community, the extent to which formalized dispute resolution mechanisms exist within the community and are seen as legitimate by group members, the ability of dissenting group members to leave the community if desired, and the existence of historical agreements which base the minority's claim on some sort of autonomy to conduct their own business. n25

The Israeli Democracy

This Essay deals with Israeli democracy. In this context, a contention could be made challenging the very characterization of Israel as a liberal democracy, claiming that Israel is neither liberal, nor a democracy. Israel is not liberal because collectivist [*53] elements are embodied in its structure, n26 and because it defines itself as a Jewish-Zionist state. Defining itself as a Jewish-Zionist state goes against the neutral characterization of liberalism because it introduces perfectionist elements in its framework that go against the neutral characterization of liberalism. n27

Indeed, Israel is not liberal in the same sense that England or the United States is liberal. Collectivist elements are still quite prominent in Israel's structure, a derivative of the socialist ideology that shaped decision making in Israeli society since the early days of the Yishuv n28 until the rise of the Likud party to power in 1977. n29 Israeli leaders have never decided whether they wanted Israel to be socialist or capitalist, and thus a mixture of these ideologies are found that influence Israeli economic and social life. The lack of separation between state and religion makes Israel prone to non-liberal tendencies. But Israel is not the only democracy where state and religion inhere in the same body of the sovereign. England is a prominent example of such a failure to make the distinction. n30 The crucial consideration and the common denominator of all liberal societies is the acceptance of two principles: respecting others and not harming others. These two principles underlie Israeli society. The Israeli political [*54] culture contains liberal and republican

ingredients as well as a sense of a community that has been crystallizing since the late 19th century. n31

The second proposed argument that Israel is not a democracy draws upon the state's attitude towards its non-Jewish inhabitants. First, since 1967 Israel has deprived more than 1.8 million Palestinians living in the occupied territories (Judea, Samaria, and the Gaza Strip) of fundamental liberties, which undermines finding Israeli democracy. n32 However, since the signing of the Oslo Peace Accords between Israel and the Palestinian Liberation Organization (PLO), n33 Israel has given up parts of the occupied territories and has shifted responsibility to the Palestinian authority. Nevertheless, Israel still controls some parts of Judea, Samaria, and the Gaza Strip. Second, double standards exist in Israeli society regarding non-Jewish citizens that make many of them feel alienated in Israel. n34

However, Israel never claimed that democracy existed in the occupied territories. Martial rule has existed in these territories since 1967. Israel within its Green Line n35 can still be described as a democracy, despite its occupation of the West Bank and the Gaza Strip. Non-liberal values infiltrate into these borders but the democratic notions are still powerful. The instances of injustices [*55] and the fact that liberal codes are not closely followed in some parts of the land do not override a finding of Israeli democracy, since this occurs in democracies all over the world. Examples of such injustices can be found in the United Kingdom, Australia, and North America. In Northern Ireland liberal codes are not followed closely and the European Court of Human Rights intervened to uphold basic human rights. n36 The dreadful treatment of the native-born Indians by the United States and Canada, n37 and the Australians toward their Aborigines, can hardly be described as liberal. n38 This statement is not made so as to condone the Israeli attitude toward the Palestinians. Injustices in other parts of the world do not justify injustices in Israel. These injustices do not constitute the sole arbiter of whether these countries can be described as liberal democracies. The United States, Canada, Australia and the United Kingdom are still described as liberal democracies despite, not because of, their treatment of cultural and national minorities. Therefore, no democratic society is immune to problems and deficiencies. Israel is no exception.

As to double standards applied to non-Jewish citizens, formally all Israeli citizens are equal before the law, regardless of national affiliation, religious beliefs, and political stands. However in practice, Israeli Palestinians, the Bedouin, and the Druze do not share and enjoy the same rights and obligations as do Israeli [*56] Jews. n39 The Law of Return, passed on July 5, 1950, gives the Zionist doctrine its most forceful legal expression. n40 It accords automatic citizenship to every Jew who decides to make aliya n41 and to settle in Israel. Effectively, the Law of Return is a nationality law, granting only Jews nationality status in the state of Israel. In addition, the Law of Citizenship is not a nationality law because non-Jews are not and can never be nationals. This Law is the law of perpetuity of Jewish history. Unlike Western nationalism, which identifies nationality with citizenship in the state, nationalism in Israel is identified with the Jewish majority. n42

Notwithstanding these reservations, Israel is a democracy. While Israel may not be a "perfect" democracy n43 it can be called a democracy just as Germany, Austria, France, and Italy, for example, are termed "democracies" despite the attitude of their governments and/or peoples towards foreign nationals living in their countries. Notions of the separateness, purity, and uniqueness of European and other cultures are prevalent in all these as well as in other countries. The hostility towards foreigners finds expression in attacks, threats, property damage, graffiti, malicious pamphlets, and bodily harm. n44 The increased xenophobia, [*57] racism, and anti-Semitism in Europe has propelled organs of the European Community concerned with labor and immigration to call for more action against the hatred of foreigners. n45

As for Israel, its democracy is young and fragile. Israeli democracy is still in the process of forming and it suffers from internal schisms and tensions which make it vulnerable to antidemocratic and illiberal notions. The Jewish-Palestinian divide is one such schism. Other important examples are those between orthodox and secular Jews, and between Sephardim and Ashkenazim. n46 The Jewish state was founded in accordance with democratic principles. Its political system is based on free elections and multi-party competition. The Jewish State honors the basic freedom of its citizens and usually refrains from resorting to arbitrary arrests. n47 The Israeli political culture values the open exchange of ideas and compromise; acknowledges the plurality of ethnic groups, cultures, religions, and nationals that exists in the land; promotes tolerance and peaceful conflict resolution; and denies legitimacy to intolerance and violence. n48 This democratic culture finds explicit and formal expression in leaders' utterances and in the laws and declarations of the state. Israeli leaders hold that Israel maintains "a stable democratic regime," [*58] and that it guarantees a maximum degree of civic freedom. n49 The Declaration of Independence affirms that Israel will foster the development of the country for the benefit of all its inhabitants; that it will be based on the foundations of liberty, justice, and peace; that it will ensure complete equality of social and political rights to all of its citizens irrespective of religion, race, or sex; and that it will guarantee freedom of religion, conscience, language, education, and culture. Furthermore, two of its Basic Laws guarantee the basic rights and liberties of all citizens. n50

Halizah

As described above, rights violations within a minority community are seen differently than rights violations that occur through coercion by a minority on all members of society who do not share the same convictions. This conclusion leads to the strong objection to the compulsory practices such as halizah in Israel. This practice is not the only problem existing in religious issues in Israel, nor is it the most crucial problem. n51 It only reflects [*59] and illustrates the intricate question of religious coercion in a mostly secular society. All Jews, no matter whether they observe religion or are completely secular, need to conduct their private affairs of marriage and divorce in the religious courts. n52 Some may argue that halizah at its worst is only a minor problem because it involves only a token ceremony that does not inflict bodily injury and not many cases of halizah occur. However, this Essay's argument is not utilitarian but one of moral

principle. The practice of halizah is offensive to the sensibilities of women, and involves coercion that conflicts with the liberal elements of democracy that vouchsafe the rights of individuals. One of these is the right to follow one's conscience and to practice one's beliefs as one sees fit, as long as this practice does not entail offense to others.

All Jews in Israel, religious and secular alike, are obliged to observe halizah. In this ceremony a Jewish widow who has no children releases her brother-in-law from the obligation to marry her in accordance with the law of levirate (yibum), and obtains her own freedom to remarry. The Bible says the following: "If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not be married abroad unto one not of his kin; her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of a husband's brother unto her." n53 By the law of Moses it became obligatory upon the brother of a man dying childless to take his widow as wife. This was in order to ensure the continued existence of the name of the deceased. n54 If the brother refused, "then shall his brother's wife come unto him in the presence of the elders and loose his shoe from off his foot, and spit in his face, and shall answer and say, so shall it be done unto that man that will not build up his brother's house." n55 Religious authorities in Israel have assured me that women were never required to spit in the man's face, but on the floor in front of him, ignoring that many women found it insulting to spit at all.

Under Rabbinical law the ceremony later became more complex. The parties appear before a court of three elders with two assessors. After inquiry as to the relationship of the parties [*60] and their status (if either be a minor or deformed, halizah cannot take place), the shoe is produced. It is usually the property of the community and is made entirely of leather from the skin of a 'clean' animal. It is of two pieces, the upper part and the sole, sewn together with leather threads. It has three small straps in front, and two white straps to bind it on the leg. After it is strapped on, the man must walk four cubits in the presence of the court. The widow then loosens and removes the shoe, throwing it some distance, and spits on the ground, repeating thrice the Biblical formula, "So shall it be done." n56 After performing halizah, the widow is free to marry anyone she wants, provided that he is not a cohen. n57 The woman is not free to marry a cohen because, for all practical purposes, a woman who performed halizah is considered a divorcee, and divorced women may not marry cohanim.

The practice of halizah is imposed on individuals who perceive it as an anachronism and as a degrading ceremony that has no place in a modern, advanced world which does not conceive women as the property of anyone. Nevertheless, all Israeli Jews in the circumstances described above are required to perform this rite because of the monopoly enjoyed by orthodox religious courts in laws of matrimony. A 1953 law provides that matters involving marriage and divorce of Jews are to be governed by Jewish law, which means that in this important domain of life, Jewish law is the law of the State of Israel. n58 Israeli Jews could avoid this ceremony, but then they could not be assisted by all the religious functions provided by the Rabbinate n59 and the religious councils. A man who refuses to participate in the halizah [*61]

ceremony may be obliged by the religious courts to pay alimony to his brother's widow. A woman who refuses to take part can marry in the future only in civil ceremony, and possibly in Reform and Conservative ceremonies. She might forfeit financial and other benefits reserved for those who marry in Orthodox ceremonies. n60 Salient among these benefits are those concerning mortgages, taxation, national security payments, and the adoption of children. n61

The Reform Movement, prominent and widespread in the United States but quite powerless in Israel, has eliminated the entire code dealing with laws of marriage and divorce and left it to the secular law. Part of the reason lies in the unpalatable character of halizah as described by Rabbi Henry Fisher, a conservative rabbi, who asserts that no Jewish woman of intelligence, who has ever experienced halizah, has left the ritual without a sense of revulsion that is often transferred to Jewish practice in its entirety. Rabbi Fisher also stresses the frequency with which the giving of halizah is used by the dead man 's brother as a means of extorting money from the widow as a price for releasing her from perpetual widowhood. n62 One proposal to prevent this occurrence is to ask all brothers at the time of a marriage to sign a document pledging to submit to halizah without payment. n63 Another possible solution requires that at the time of marriage the brothers must sign a document testifying that they forfeit the need for halizah if such a need arises.

[*62] The issue of halizah is quite complicated and also senseless. If, for example, the brother is only one year old, the widow will have to wait twelve years until the child is thirteen before she is able to perform halizah, at which time she will be able to remarry. If the brother lives in another part of the world, the widow has to seek him out and ensure that he will participate in the halizah formality, and release her from his assumed responsibility. For example, cases in the past have involved brothers living behind the Iron Curtain at a time when member states in the Eastern Bloc neither allowed Jews to travel abroad nor Israelis to enter their borders. n64 Cases were recorded in which it was known that the dead person had a brother somewhere in the world, but the whereabouts of the brother were unknown. Since the brother was known to be alive, the widow could not remarry before tracking him down and seeking halizah. n65 These circumstances, therefore, created grave difficulties for widows.

Furthermore, as a matter of principle, religious sages n66 decreed that yibum is forbidden in any event. Yibum is forbidden because marrying a brother's wife is considered incest (giluy arayot) unless it is a religious duty (mitzvah). Orthodox authorities felt on many occasions that men wanted to marry their brothers' widows, not to fulfill a mitzvah, but for partisan ulterior motives, such as the widow's beauty or the widow's financial resources. The practice of halizah is a paradox because it is mandated in order to escape yibum, but if yibum is prohibited, why resort to this practice at all? The answer is that items ordained in the Bible cannot be overruled and disregarded. Therefore, this ritual must be performed in order to avoid a situation that is prohibited anyway. Non-religious persons would find this reasoning difficult to digest, resulting in alienation toward the Rabbinic institutions.

Most Israeli Jews possess Jewish feelings that manifest themselves in the wish to marry in a religious ceremony, conceived to be a mark of Jewish identity. The act of halizah, on the other hand, is perceived as something remote, strange, peculiar, and even offensive. This act is not offensive to the point of causing [*63] irreversible damage to the woman's psyche. If it were, then it would be considered morally on a par with physical harm, and the state would be justified in intervening and restricting it. n67 Potentially, however, the act of halizah might create a wedge between secular Jews (who are still the majority in Israel) and Judaism.

To solve this quandary, only those who believe in halizah may practice it. Alternatively, religious authorities should seek a solution that does not betray the Torah's n68 religious requirements but meets the conditions of the secular majority, many of whom fail to comprehend the halizah reasoning. For example, a document accompanying the ketubah (bill of marriage) could be composed, in which the husband declares that if he dies childless, and his wife and any of his brothers survive him, a divorce should be written for his wife to be effective one hour before his death. This arrangement, adopted by the Conservative movement in the United States, n69 could serve as one possible solution to reconcile Biblical ordinances with individual freedom of conscience.

As it now stands, it is senseless to compel persons who do not appreciate the symbolic aspects of the ceremony to perform it, especially when these individuals find the practice unpleasant and even repugnant. Here, the Jewish characteristic of the State of Israel, which finds expression in the coercive nature of halizah, conflicts with Israel's status as a democracy. Halizah is one of the expressions of the perfectionist system that does not separate state and religion. Democracy should allow each individual the opportunity to follow her or his conception of the good without coercion. Israel today gives precedence to Judaism over liberalism. On issues such as this, the reverse should be the case.

The argument for religious autonomy and against religious coercion leads to distinguishing between intergroup relationships [*64] and intragroup relationships. n70 Throughout this Essay, it has been stated that one group has no right to coerce the entire society into following its conception of the good and abiding by its cultural norms. In the event that a religious or cultural group makes such an attempt, other segments of society must open further channels of communication and resolve the situation by peaceful means. If these means fail, they need to apply and develop legal mechanisms for protecting human rights. One mechanism that is available to protect women rights is Basic Law: Human Dignity and Freedom (1992) which purports to protect human dignity and freedom in order to anchor the values of the State of Israel as a Jewish and democratic state. n71 Women who do not wish to go through the practice of halizah could appeal to the Supreme Court of Justice, n72 arguing that this senseless and offensive practice violates their liberty and dignity. It is our democratic duty to draw the boundaries and fight against coercion.

Conclusion

The purpose of the discussion was to suggest that liberal democracy requires the curtailment of some norms that undermine its basic principle of granting equal respect and concern to all. Democracy cannot endure norms that deny respect to individuals and that are offensive to some, although they might be dictated by some religions. Some norms are unacceptable by liberal standards because they are perceived to be intrinsically wrong. Among these are norms prescribing discrimination on inappropriate grounds. n73 This holds true for the practice of halizah in Israel. Democratic governments have to play the role of umpires both by applying just considerations when reviewing different conceptions and by trying to reconcile conflicting interests, [*65] trends, and claims. This delicate task demands integrity as well as impartiality. Governments should not exploit their role for their own advantage and should consider the society as a whole when making decisions, not only certain fractions of the whole.

Democratic governments cannot be neutral with regard to offensive conduct. We should strive to ensure that governments grant each person equal concern and respect, and to promote the view that each person matters, and matters equally.

FOOTNOTES:

n1. Halizah is a Jewish ceremony where a Jewish widow who has no children releases her brother-in-law from his religious obligation to marry her.

n2. For further deliberation, see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 5-23, 151-74 (1982), Alison Jaggar, *Feminist Politics and Human Nature* (1983), Catharine MacKinnon, *Only Words* (1993), Judith Evans, *An Overview of the Problem for Feminist Political Theorists*, in *Feminism and Political Theory* 1 (Judith Evans et al. eds., 1986), and Georgina Waylen, *Women and Neoliberalism*, in *Feminism and Political Theory* 85 (Judith Evans et al. eds., 1986).

n3. Neutrality refers to the boundaries of toleration.

n4. See John Rawls, *A Theory of Justice* 327-28, 446-52 (1971) [hereinafter Rawls, *Justice*]; John Rawls, *Political Liberalism* 190-95 (1993) [hereinafter Rawls, *Political Liberalism*]; see also B.A. Ackerman, *Social Justice in the Liberal State* 11-12, 347-78 (1980); R.M. Dworkin, *A Matter of Principle* 191-94, 205 (1985); Will Kymlicka, *Liberalism, Community and Culture* 76-85, 95-96 (1989); Peter De Marneffe, *Liberalism, Liberty, and Neutrality*, 19 *Phil. & Pub. Aff.* 253, 253-74 (1990); Ronald Dworkin, *Why Liberals Should Believe in Equality?*, *N.Y. Rev. Books*, Feb. 3, 1983, at 32 (1983).

n5. "Conception of the good" refers to a conception that encompasses both personal values and societal circumstances. It consists of a relatively determinate scheme of ends that doers aspire to achieve for their own sake, attachments to other individuals, and loyalties to various groups and associations.

n6. Also spelled halisah.

n7. I have dealt with the issue of murder for family honour and female circumcision in *Female Circumcision and Murder for Family Honour Among Minorities in Israel, Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East 171-87* (Kristin Shultze et al. eds., 1996).

n8. For a fuller account of the Essay's theoretical framework, see R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance: The Struggle Against Kahanism in Israel 68-87* (1994).

n9. John Rawls acknowledges that it is a disputed question whether and in what sense conceptions of the good are incommensurable. He states that incommensurability is to be understood as a political fact, an aspect of pluralism: namely, the fact that there is no available political understanding as to how to commensurate these conceptions for settling questions of political justice. See John Rawls, *The Idea of an Overlapping Consensus*, 7 *Oxford J. Legal Stud.* 1, 4 (1987).

n10. See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *Phil. & Pub. Aff.* 223, 225-30 (1985).

n11. See Rawls, *Political Liberalism*, *supra* note 4, at 13, 175.

n12. See *id.* at 59. Recently Rawls has broadened the scope of his theory to argue for mutual respect among peoples. See John Rawls, *The Law of Peoples* (1999).

n13. See Rawls, *Political Liberalism*, *supra* note 4, at xvi.

n14. These norms are called the Respect for Others Argument and the Millian Harm Principle.

n15. For an explanation of the Harm Principle, see R. Cohen-Almagor, *Harm Principle, Offence Principle, and the Skokie Affair*, 41 *Pol. Stud.* 453 (1993), reprinted in *Controversies in Constitutional Law: Hate Speech and the Constitution* 277 (Steven J. Heyman ed., 2d ed. 1996) [hereinafter Cohen-Almagor, *Harm Principle*]. For a discussion of the Respect for Others Argument, see R. Cohen-Almagor, *Between Neutrality and Perfectionism*, 7 *Can. J. L. & Jurisprudence* 217 (1994). See also R. Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (2000) [hereinafter Cohen-Almagor, *Speech*].

n16. More specifically, people are respected for developing capabilities they wish to develop, not every capability with which they are blessed.

n17. Cf. John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* 72-73 (1948) ("The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection... . Power can be rightfully exercised over any member of a civilised community, against his will, [when it] is to prevent harm to others."). See also *id.* at 114, 138.

n18. Babylonian Talmud, Sabbath 31a. For further discussion on Hillel, see Yitzhak Buxbaum, *The Life and Teachings of Hillel* (1994).

n19. See Rawls, *Political Liberalism*, *supra* note 4, at 180. By an "overlapping consensus" Rawls means a consensus that is affirmed by the opposing religious, philosophical, and moral doctrines likely to thrive over generations in a relatively just constitutional democracy, where the criterion of justice is that political conception.

n20. See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 *N.Y.U. L. Rev.* 233, 249 (1989).

n21. Primary goods are things that every rational man is presumed to want and therefore are criteria utilized by parties to assess principles of justice. The list of primary goods includes rights and liberties, opportunities and powers, income and wealth, a sense of one's own worth, leisure time, and certain mental states, such as freedom from physical pain. See John Rawls, *The Priority of Right and*

Ideas of the Good, 17 *Phil. & Pub. Aff.* 251, 257 (1988) [hereinafter Rawls, *Priority of Right*]; see also Rawls, *Justice*, supra note 4, at 62, 92; Rawls, *Political Liberalism*, supra note 4, at 75-76, 181-82.

n22. Rawls, *Political Liberalism*, supra note 4, at 195.

n23. A theocracy is a state controlled by religious sages, e.g., Iran.

n24. Cf. Rawls, *Justice*, supra note 4, at ch. IV 33-35; Rawls, *Political Liberalism*, supra note 4, at 197-98; John Rawls, *Discussion, Fairness to Goodness*, 84 *Phil. Rev.* 536, pt. VI (1975); Rawls, supra note 10, at pt. VI; John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. Phil.* 515, 540-43 (1980) (including three Rawls lectures, of which section II of "Representation of Freedom and Equality" is most illustrative of this point); Rawls, *Priority of Right*, supra note 21, at pt. VII.

n25. For further discussion, especially on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), see Will Kymlicka & Raphael Cohen-Almagor, *Ethnocultural Minorities in Liberal Democracies*, in *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin* (R. Cohen-Almagor ed., 2000).

n26. Liberalism is founded on the premise that the individual, not the collective or the state, is the focus of attention. Hence, a state that is founded on collectivist elements will find itself in tension with liberal democracy. For a discussion of the normative foundations of Israel, see R. Cohen-Almagor, *Cultural Pluralism and the Israeli Nation-Building Ideology*, 27 *Intl. J. Middle Eastern Stud.* 461 (1995), and Yonathan Shapiro, *The Historical Origins of Israeli Democracy*, in *Israeli Democracy Under Stress* 65 (Ehud Sprinzak & Larry Diamond eds., 1993).

n27. A state that does not endorse neutrality is called "perfectionist" because it wishes to promote and advance a particular conception of good. Israel wishes to promote a Jewish-Zionist concept. For further discussion on perfectionism and neutrality, see Joseph Raz, *The Morality of Freedom* (1986), Cohen-Almagor, supra note 8, and Cohen-Almagor, *Speech*, supra note 15.

n28. The prestate period, from the first waves of immigration to Palestine late in the 19th century until the establishment of the state in 1948.

n29. Likud is a right-wing political party bloc that was founded in September 1973 to challenge the Labor Alignment. It first came to power in 1977, with Meachem Begin as prime minister. See Likud Party, *The Party* (visited Aug. 1, 2000) <<http://www.likud.org.il>> (Hebrew). For more information on the Likud Party political platform, see AICE, *The Jewish Student Online Research Center*, 1996 Likud Party Platform (visited Nov. 3, 2000) <<http://www.us-israel.org/jsource/Politics/likud.html>>. For further deliberation, see Menachem Begin, *The Revolt* (1977), and Colin Shindler, *Israel, Likud and the Zionist Dream: Power, Politics, and Ideology* (1995).

n30. On state and religion in England, see Anthony Bradney, *Religions, Rights and Laws* (1993), and *The Centre for Citizenship, Church and State in Britain* (visited Nov. 3, 2000) <<http://home.clara.net/citizen/church4.html>>.

n31. For further discussion, see Benjamin Neurberger, *Israel's Democracy - How Liberal? How Stable?*, in *Univ. of Cape town, Kaplan Centre Papers 1* (1988), Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship*, 86 *APSR* 432 (1992), and Sam Lehman-Wilzig, *Israeli Democracy: How Democratic? How Liberal?*, in *Basic Issues in Israeli Democracy* (R. Cohen-Almagor ed., 1999) (Hebrew).

n32. On occupied territories, see *Judea, Samaria and the Gaza District Since 1967* (1986), and MEDEA, *Occupied Territories* (visited Nov. 3, 2000) <<http://www.medea.be/en/index126.htm>>.

n33. Oslo A was signed in 1993, Oslo B in 1995.

n34. A poll from 1989 showed that almost half (45%) of the Israeli Palestinians do not feel "at home" in Israel, and 69% feel that discrimination against Arabs occurs frequently. See *Political Supplement*, Yedioth Ahronoth [Israeli Daily], Aug. 25, 1989, at 10 (Hebrew). For further deliberation, see R. Cohen-Almagor, *The Intifada: Causes, Consequences, and Future Trends*, 2 *Small Wars and Insurgencies* 12 (1991), and David Kretzmer, *The Legal Status of Arabs in Israel* (1990). In October 2000, following the problematic visit of the Likud leader Ariel Sharon to the Temple Mount, riots erupted in Israel during which 13 Israeli-Palestinians were killed. The Palestinians claimed that the trigger for those riots was Sharon's visit but they were the

result of deep-seated feelings of anger, frustration and alienation toward Israeli administration that does not treat them equally.

n35. These are the borders prior to the 1967 Six Day War. During the war Israel expanded its borders to include the West Bank, Gaza Strip, the Golan Heights, and Sinai. In 1979, after the signing of the Camp David Peace Accord with Egypt, Israel returned Sinai to Egypt.

n36. For instance, the Court recorded that under the emergency regulations (which in themselves are not democratic) in Northern Ireland the practice of not informing the persons arrested of the reasons for their arrest had been declared unlawful by the domestic courts. Cf. *Lawless v. Ireland*, 1 E.H.R.R. 15 (1961). For further deliberation, see Jamie O'raa, *Human Rights in States of Emergency in International Law* (1992), and David Feldman, *Civil Liberties And Human Rights in England and Wales* (1993). Geoffrey Marshall, former Provost of Queen's College, Oxford, once contended in a private discussion (July 1992) that British police officers do not – as a rule – use weapons, except in Northern Ireland where different rules of the game apply.

n37. See *Beyond the Impasse: Toward Reconciliation*, Montreal: Inst. for Res. in Pub. Pol'y (Guy Laforest & Roger Gibbons eds., 1998); D.E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 Am. Indian L. Rev. 159 (1994); R. Williams Jr., *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 Rev. Const. Stud. 146 (1995); see also *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

n38. Cf. Frank S. Stevens, *Racism: The Australian Experience* (1972). For further deliberation, see Jan Pettman, *Living in the Margins: Racism, Sexism, and Feminism in Australia* (1992), *The Teeth Are Smiling: The Persistence of Racism in Multicultural Australia* (Ellie Vasta & Stephen Castles eds., 1996), and Greta Bird, *The Process of Law in Australia: Intercultural Perspectives* (1988).

n39. The Palestinians constitute the largest minority in Israel. The Bedouin and the Druze are much smaller in size in comparison. Generally speaking, each minority resides in its own community, village, and/or tribe. See Ian Lustick, *Arabs in the Jewish State* (1980); Raphael Patai, *Israel Between East and West* (1970); Oren Yiftachel, *Planning as Control: Policy and Resistance in a Deeply Divided Society* (1995).

n40. Israel's Law of Return grants every Jew the right to automatically acquire citizenship. See Asa Kasher, *Justice and*

Affirmative Action: Naturalization and the Law of Return, in *Israel Yearbook on Human Rights* 101 (1985); Claude Klein, *The Right of Return in Israeli Law*, 13 *Tel Aviv Univ. Stud. L.* 53 (1994); Menashe Shava, *Comments on the Law of Return (Amendment no. 2, 5730-1970)*, 3 *Tel Aviv Univ. Stud. L.* 140 (1977); *Israel Law of Return* (visited Nov. 3, 2000) <[http://www.miftah.org/Documents/documents/i law return.html](http://www.miftah.org/Documents/documents/i%20law%20return.html)>; *Israel's Law of Return Giving Every Jew the Right to Automatically Acquire Citizenship* (visited Nov. 3, 2000) <<http://www.lectlaw.com/files/int16.htm>>.

n41. Meaning to immigrate.

n42. For further discussion, see Roselle Tekiner, *Race and the Issue of National Identity in Israel*, *Int. J. Middle Eastern Stud.* 39 (1991). See also Cohen-Almagor, *supra* note 34; Riad Ali, *Us and You*, *Davar Rishon [Israeli Daily]*, Feb. 1, 1996, at 5 (Hebrew).

n43. Not that a perfect democracy exists anywhere on the planet.

n44. See Rob Witte, *Racist Violence and the State* (1996); see also Human Rights Watch, *"Germany for Germans": Xenophobia and Racist Violence in Germany* (1995); *New Xenophobia in Europe* (Bernd Baumgartl & Adrian Favell eds., 1995); Maxim Silverman, *Deconstructing the Nation: Immigration, Racism and Citizenship in Modern France* (1992).

n45. On May 29, 1990, the Council of the European Communities and representatives of the governments of the Member States assembled in the Council adopted a declaration on combating racism and xenophobia. The European Parliament in turn noted its concern that certain democratic parties were giving way to pressure from racist and extreme-right movements and were taking advantage of the situation to limit the right of asylum.

n46. Generally speaking, three groups of people are distinguished in the Jewish population in Israel: Sephardim whose origins lie in Asia and Africa; Ashkenazim whose origins lie in Europe and America; and Sabras, native-born Israelis. For further discussion, see R. Cohen-Almagor, *Cultural Pluralism and the Israeli Nation-Building Ideology*, 27 *IJMES* 461 (1995), and Eliezer Ben-Rafael & Stephen Sharot, *Ethnicity, Religion and Class in Israeli Society* (1991).

n47. These basic rights include speech, journalism, movement, assembly, demonstration, and religion, as well as the freedom to resist

the government within the law. For further deliberation, see Sam Lehman-Wilzig, *Stiff-necked People, Bottle-necked System: The Evolution and Roots of Israeli Public Protest, 1949-1986* (1990), and Sam Lehman-Wilzig, *Wildfire: Grassroots Revolts in Israel in the Post-socialist Era* (1992).

n48. Cf. Dan Horowitz & Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (1989), Dan Horowitz & Moshe Lissak, *The Origins of Israeli Polity* (Charles Hoffman trans., 1978); Amnon Rubinstein, *The Zionist Dream Revisited, from Herzl to Gush Emunim and Back* (1984).

n49. Cf. David Ben-Gurion, *Towards a New World*, in *Israel: Years of Challenge* 212, 233 (1964); David Ben-Gurion, *Laws or a Constitution, in Rebirth and Destiny of Israel* 363 (1959).

n50. *Basic Law: Human Dignity and Freedom* (1992) purports to protect human dignity and freedom in order to anchor the values of the State of Israel as a Jewish and democratic state. It maintains that a human being's property must not be harmed, that every person is entitled to the protection of his or her life, limb, and dignity, and that no person's freedom may be taken or restricted by arrest, imprisonment, extradition, or in any other manner. In turn, *Basic Law: Freedom of Occupation* (1992) holds that every citizen or resident of the State is entitled to engage in any occupation, profession, or line of work, and that every governmental agency must respect the freedom of occupation of every citizen or resident. On the importance of these two basic laws, see Aharon Barak, *Constitutional Revolution: Protected Basic Rights*, 1 *Mishpat U'mimshal* 9 (1992) (Hebrew), Aharon Barak, *Protected Human Rights: Scope and Limitations*, 1 *Mishpat U'mimshal* 253 (1993) (Hebrew), and Aharon Barak, *Constitutional Interpretation* 261-646 (1994) (Hebrew).

n51. Another intricate and sensitive issue connected to halizah, but which is not considered here and requires a thorough and separate analysis, involves agunot women. An agunah is a woman who is unable to live with her husband because of his disappearance, insanity, or abandonment with a refusal to give her a get (to divorce her), and yet is declared by Jewish law as married. She is unable to remarry until receiving the get. In Israel there are several hundred women in this situation. According to Daniela Valensi, head of a voluntary fellowship for agunot and women whose get is being delayed by their husbands, some 16,000 women are waiting to receive their divorce bills from the Rabbinate. For further discussion, see *International Coalition for Agunot, For Sarah's & Tami's Sake...* (without date or place of publication) (Hebrew) (on file with International Coalition for Agunot), and *The Rabbinical Assembly, The Committee on Jewish Law and Standards* 5 (1994).

n52. The Palestinian-Israelis have their own religious courts and are not obliged to conduct their personal affairs in the Jewish courts.

n53. Deuteronomy, 25:5.

n54. Cf. Halisah, 12 The Encyclopedia Britannica 844 (13th ed. 1926).

n55. Id.

n56. Id.; see also Ariel Rosen-Zvi, Israeli Family Law 252 (1990) (Hebrew); Benzion Schereschewsky, Family Law in Israel 234-42 (1992) (Hebrew).

n57. Yebamot, 24 (1). The halacha distinguishes between three main classes: Cohen, Levi, and Israel. Cohanim and Levi'im used to serve in the Temple and therefore have a privileged status in society. All people whose family name is "Cohen" are considered to be descendants of those who served in the Temple. "Cohen" is the most common surname in Israel, followed by "Levi." All other people, with few exceptions, are considered "Israel."

n58. See Itzhak Englard, Law and Religion in Israel, 35 Am. J. Comp. L. 185 (1987); Zelev Falk, Religion and State: The Israeli Experience, 7 Jewish Law Assoc. Stud. 51 (1994); Pinhas Shifman, Family Law in Israel: The Struggle Between Religious and Secular Law, 24 Israel L. Rev. 537 (1990); Pinhas Shifman, State Recognition of Religious Marriage: Symbols and Content, 21 Israel L. Rev. 501 (1986); Isaac S. Shiloh, Marriage and Divorce in Israel, 5 Israel L. Rev. 479 (1970).

n59. The Rabbinat is the chief religious authority in Israel. It administers Jewish life in Israel, being in charge of the religious divisions in every local municipality as well as of the religious courts. See Eyal Yinnon, The National Rabbinat: Election, Separation and Freedom of Speech (2000); Chief Rabbinat, Regulations of the Religious Courts (1993) (Hebrew).

n60. Rabbi Uri Regev, Head of the Center of Jewish Pluralism associated with the Reform movement in Israel, explained to me that if

the couple also marries in a civil ceremony abroad (say in Cyprus), then they will not be deprived of these benefits. Discrimination against couples who do not marry in Orthodox marriages occurs only if they do not supplement their contract with this measure. However, this requirement constitutes coercion. Reform and Conservative marriages as well as civil nonreligious ceremonies should enjoy legitimate legal status for all purposes as Orthodox marriages do. Interview with Uri Regev, Head of Center of Jewish Pluralism (May 1995).

n61. Interviews with Uri Regev, Natahn Nachmani, and lawyers working in the field (May 1995).

n62. See Rabbi Henry Fisher, Discussion, 15 Proc. of the Rabbinical Assembly 151 (1951). For further deliberation, see Rabbi Isaac Klein, The Problem of Chalitzah Today, 15 Proc. of the Rabbinical Assembly 146 (1951), and Isaac Klein, The Problem of Halisah, in Responsa and Halachic Studies 13 (Isaac Klein ed., 1975).

n63. This solution is based on an old custom that existed in Poland already in the 16th Century.

n64. Many cases involved civil marriages and in those instances the rabbinical courts simply declared that there was no effective marriage, hence no need for halizah. Still, there were problematic cases where the practice was deemed necessary.

n65. Some of these cases are described in Moshe Zemer, Sane Halacha 63-65 (1993) (Hebrew).

n66. Rabbeinu Tam is one of these prominent religious sages. See Yehuda Leib Ben-Samuel, The Prayer Book of Rabbeinu Tam (2000) (Hebrew).

n67. This would fall under the formulation of the Offence Principle. See Cohen-Almagor, Harm Principle, supra note 15.

n68. The Old Testimony.

n69. There are three major movements of Judaism in the United States, in declining order of popularity: the Reform movement, the Conservative movement, and the Orthodox movement. In Israel, the Reform and Conservative movements are very small and quite powerless. The dominant and overwhelming movement is the Orthodox. The Orthodox are very strict in their interpretation of Jewish law. The Conservative are less strict, and the Reform allow wide latitude in accommodating halachic directives to modern life. For further discussion on the Conservative movement, see Pamela Susan Nadell, *Conservative Judaism in America* (1988), and Marshall Sklare, *Conservative Judaism: An American Religious Movement* (1972).

n70. Inter-group relationships are defined as one group imposing its views on another. Intra-group relationships are defined as a group imposing its views on its own members.

n71. For a discussion of this Basic Law, see *supra* note 50. For further deliberation, see Aharon Barak, *Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 *Israel L. Rev.* 3 (1997), and David Kretzmer, *The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?* 26 *Israel L. Rev.* 238 (1992).

n72. This is the highest court in Israel. Cf. Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 *Israel L. Rev.* 1 (1999), available in *Basic Issues in Israeli Democracy* 129 (R. Cohen-Almagor ed., 1999) (Hebrew).

n73. Inappropriate grounds include, e.g., sex, color, religion, race, and ethnic affiliation.