HCJ 3914/92

Petitioners:
1. Leah Lev
2. Liron Lev, Minor
3. Ido Lev, Minor
4. Roi Lev, Minor

v.

1. Tel-Aviv-Jaffa Rabbinical Court
2. Supreme Rabbinical Court of Appeals
3. Ran Lev

In the Supreme Court sitting as the High Court of Justice
[February 10, 1994]
Before Deputy President A. Barak and Justices S. Levin and D. Levin

[1] CA 26/51 *Kotik v. Wolfson*, IsrSC 8, 1341
[2] CA 99/63 *Peleg et al. v. Attorney General*, IsrSC 17, 1122
[3] HCJ 136/54 *Pollack v. Herzog et al*., IsrSC 9, 155
[4] HCJ 150/59 *Committee of the Sephardic Community of Jerusalem v. Jerusalem Rabbinical Court et al*., IsrSC 15, 106
[5] HCJ 364/85 *Fakhr Aldin v. Druze Court of Appeals et al*., IsrSC 40(3) 699
[6] HCJ 305/89 *Nir v. Haifa Magistrates (Traffic) Court et al*., IsrSC 48(3) 203
[7] ST 1/60 *Winter v. Beeri*, IsrSC 15, 1457
[8] CrimA 230/56, 4/57 Shorer v. Attorney General, IsrSC 11, 750
[9] FH 22/73 *Ben Shahar v. Mahlev*, IsrSC 28(2) 89
[10] HCJ 547/84 *Of Ha'emek, Registered Agricultural Cooperative Association v. Ramat Yishai Local Council et al*., IsrSC 40(1) 113
[11] MApp 613/82 *State of Israel v. Awad*, IsrSC 36(3) 612
[12] HCJ 991/91 *David Pasternak Ltd. et al. v. Minister of Construction and Housing et al.*, IsrSC 48(5) 50
[13] HCJ 355, 370, 373, 391/79 *Katalan et al. v. Prisons Service et al*. IsrSC 34(3) 294 [http://versa.cardozo.yu.edu/opinions/katlan-v-prison-service]
[14] HCJ 14/51 *Attorney General v. Editor of "Davar" et al*., IsrSC 8, 1017
[15] BAA 663, 691, 5145/90 *A. v. Israel Bar Association District Committee of Tel Aviv – Jaffa*, IsrSC 47(3) 397
[16] MApp 678/82 *Tayar v. State of Israel*, IsrSC 36(3) 386

[17] CA 703/70 *Somech v. Ozer et al*., IsrSC 24(2) 799
[18] CA 230/69 *Kaneti v. United Shvili Film et al*., IsrSC 23(1) 505
[19] LA 451/85 *Adin Marketing Company Ltd. v. Flatto Sharon*, IsrSC 39(3) 303
[20] CA 548/78 *A. et al. v. B.*, IsrSC 38(1) 736
[21] LCA 26/89 *Mashraki et al. v. "Rotem" Insurance Company Ltd*., IsrSC 42(4) 348
[22] LCA 18/89 *Pichman v. Bank Leumi Leyisrael Ltd*., IsrSC 42(4) 513
[23] HCJ 243/62 *Israel Film Studios Ltd. v. Levi Geri et al*., IsrSC 16, 2407; IsrSJ 4, 208 [English]
[24] CrimApp 6654/93 *Binkin v. State of Israel*, IsrSC 48(1) 290
[25] HCJ 323/81 (Mot 533/81) *Vilozny v. Supreme Rabbinical Court in Jerusalem*, IsrSC 36(2) 733
[26] HCJ 158, 2130/66 *Segev et al. v. Rabbinical Court et al*., IsrSC 21(2) 505
[27] HCJ 10/59 *Levi v. Tel Aviv Rabbinical Court et al*., IsrSC 13 1182
[28] HCJ 155/65 *Gurovitz v. Tel Aviv Rabbinical Court et al*., IsrSC 19(4) 16
[29] HCJ 95/63 *A. v. Tel Aviv – Jaffa Rabbinical Court et al*., IsrSC 17, 2222
[30] HCJ 161/64 *Mussman v. Haifa Rabbinical Court et al*., IsrSC 18(3) 502
[31] HCJ 816/80 *Gotthelf v. Tel Aviv – Jaffa Rabbinical Court et al.,* IsrSC 38(3) 561
[32] HCJ 187/54 *Barriya v. Qadi of the Acre Sharia Moslem Court*, IsrSC 9, 1193
[33] HCJ 7/83 *Biaris v. Haifa Rabbinical Court et al*., IsrSC 38(1) 673
[34] HCJ 349/65 *Pero v. Qadi Madhab, Druze Religious Court*, IsrSC 20(2) 342
[35] HCJ 1923/91 *Rosenzweig v. Haifa Rabbinical Court*, IsrSC 46(2) 1
[36] HCJ 1689/90 *Aasi v. Central District Sharia Court*, IsrSC 48(5) 148)
[37] HCJ 1000/92 *Bavli v. Great Rabbinical Court*, IsrSC 48(2) 221
[38] HCJ 80/93 *Gurfinkel v. Minister of the Interior*, IsrSC 17, 2048
[39] CA 303/57 *Reich v. Hammer*, IsrSC 11, 1362
[40] HCJ 111/53 *Kaufman v. Minister of the Interio*r, IsrSC 7, 534
[41] HCJ 190/57 *Assaig v. Minister of Defence*, IsrSC 12(1) 52
[42] HCJ 505, 496, 488/83 *Baransi v. Director of the Visa and Nationality Dept*; *Dasuki v. Minister of the Interior et al*., IsrSC 37(3) 722
[43] HCJ 448/85, HCJApp 32, 5/86 320, 284/85 *Dahar et al. v. Minister of the Interior*, IsrSC 40(2) 701
[44] MApp 1064/86 *Archbishop Ajamian v. State of Israel*, IsrSC 41(1) 83
[45] FH 9/77 *Israel Electric Corporation. v. "Ha'aretz" Newspaper Ltd.*, IsrSC 32(3) 33; IsrSJ 9, 295
[46] LA 558/85 *Ilin et al. v. Rotenburg et al.*, IsrSC 40(1) 553
[47] HCJ 869, 852/86 *Aloni et al. v. Minister of Justice et al.*, HJCApp 521, 523, 543, 518, 515-512, 507, 502, 487, 486, 483/86 IsrSC 41(2) 1
[48] HCJ 578/82 *Naim v. Jerusalem District Rabbinical Court* et al., IsrSC 37(2) 701
[49] HCJ 403/71 *Alkourdi v. National Labor Court et al.*, IsrSC 26(2) 66
[50] ST 1/50 *Sidis v. Chief Execution Officer, Jerusalem et al.*, IsrSC 8, 1020
[51] CA 174/83 *N. Soher v. P. Soher*, IsrSC 38(2) 77
[52] HCJ 185/72 *L. Gur v. Jerusalem Rabbinical Court et al.*, IsrSC 26(2) 765
[53] HCJ 428/81 unreported

Labor Court cases cited:

[54]] LC 52/8-4; 7-41 unreported

United States cases cited:

[55] *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980)
[56] *Matter of Alamance County Ct. Facil*ities, 329 N.C. 84, 405 S.E.2nd 125 (1991)

Petition for an order nisi. The case was heard as if an order nisi were grated. The petition was granted, and the order nisi was made absolute.

M. Bar Shilton, Y. Bar Shilton – on behalf of the Petitioners
Y. Sidi – on behalf of Respondent 3

JUDGMENT

Deputy President A. Barak: The question before the Court in this petition is: What considerations may a Rabbinical Court take into account when considering whether or not to grant a writ ne exeat republica?

The Facts

1. Petitioner 1 (hereinafter: the Petitioner) and Respondent 3 (hereinafter: the Respondent) are married. They have three minor children (Petitioners 2, 3 and 4). Disputes arose between the Petitioner and the Respondent. The Petitioner filed a claim for child support and custody in the District Court (on May 10, 1992). She also sued for divorce in the Rabbinical Court. In response, the Respondent filed suit for marital reconciliation with the Rabbinical Court (Respondent 2). In the framework of the suit for marital reconciliation, the Respondent requested that the Tel Aviv-Jaffa Rabbinical Court issue a writ ne exeat republica to prevent the Petitioner from leaving Israel. The request stated that "for some time, the wife has been having an affair with a foreign man who is a resident of the United States, and it is her present intention to leave Israel, to move to the United States with the children, and to live there with this man". The Rabbinical Court, in the presence of the Respondent alone, issued an order barring the Petitioner and her children from leaving the country. The Petitioner requested that the Rabbinical Court rescind the order. The request noted that the Petitioner and her eldest daughter (Petitioner 2) wished to go abroad for two weeks. The vacation was planned long in advance and was "meant as a bat-mitzvah gift for the daughter". The two sons (Petitioners 3 and 4) would remain in Israel. The Petitioner has an active business in

Israel, and there is no concern that she might not return to Israel. The Respondent objected to this request. In the meantime, the original date for the Petitioner's departure from Israel passed. She amended her request to a new date (August 14, 1992), adding that she was also combining a business trip in her trip and that preventing her from leaving would inflict severe monetary damage.

The Proceeding before the Rabbinical Court

2. The Tel Aviv-Jaffa Rabbinical Court held a hearing in the presence of the parties (on August 2, 1992). The relationship between the parties was described in the course of the hearing. The Respondent stated that a foreign man disrupted the couple's marriage. According to the Respondent, the purpose of the Petitioner's travel abroad was to meet with the foreign man and to have intimate relations with him. The Petitioner emphasized the rift in their personal relationship. She stated that the purpose of the trip was an excursion (as a gift to the daughter) and business enquiries. At the end of the hearing (on July 30, 1992), the Rabbinical Court reached the following decision:

> Having heard the arguments and responses of the parties and their attorneys, in light of the material presented to us, and in view of the claims of the husband who claims and who fears that the wife's travel abroad at this stage would cause a final and irreparable rift between them, this court decides – at this stage – not to grant the wife's request to rescind the writ ne exeat republica against her. The court will hold an additional hearing on the matter of the wife's request on the 24th of Elul, 5752 (September 22, 1992) at 9:00 a.m. The parties are required to negotiate an appropriate solution which will enable them to travel abroad together, or will enable the wife to travel separately under such terms as will abate the husband's concerns.

An application for leave to appeal this decision was filed with the Supreme Rabbinical Court. The court was asked to schedule an urgent date for a hearing in order to allow the Petitioner to leave Israel on the date she requested, so that she and her daughter would be able to return to Israel in time for the beginning of the school year. The Supreme Rabbinical Court denied the application for leave to appeal (on August 6, 1992), ruling:

> Inasmuch as the Regional Court decided to schedule an additional session to continue the hearing, it is inappropriate to hear the appeal at this stage .

The petition before us was filed against these Rabbinical Court decisions.

The Parties' Arguments

3. The Petitioners claim that the reason that was given by the Regional Rabbinical Court to bar their exit from the country – how the departure would affect the couple's relationship – is invalid. This reason is contrary to the Rabbinical Court's own approach and to the case law of the civil courts. It is repugnant to the provisions of Basic Law: Human Dignity and Liberty. This Basic Law establishes the right of every person to leave Israel. Against this background, granting a writ ne exeat republica must be limited to securing a party's appearance in court and guaranteeing the monetary rights of the other party. It was further argued that the Rabbinical Court lacked authority to prevent the daughter from leaving the country.

4. In his response, the Respondent argues that he seeks to achieve marital reconciliation. The court acted within this framework and did not act *ultra vires*. There is a concern that the Petitioner may not return to Israel for the Rabbinical Court's hearings and will thereby frustrate the claim for marital reconciliation. The Petitioner must wait until the hearing in the Regional Rabbinical Court is exhausted.

5. Upon the commencement of the hearing (on August 13, 1992), (at the consent of the parties) we treated the hearing as though an order nisi had been granted. After hearing the parties' arguments, we made the order absolute and cancelled the writ ne exeat republica against the Petitioners. We instructed that the cancellation of the order be conditioned upon the Petitioners' furnishing a personal bond securing their return by September 15, 1992, and a third-party guarantee in the amount of NIS 100,000.

We ruled that the Respondent will bear the Petitioners' costs in the amount of NIS 10,000. We instructed that our reasons will be given separately. These are our reasons.

The Normative Framework

6. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 (hereinafter: the Rabbinical Courts Jurisdiction Law) sets forth the normative framework of the rabbinical courts' jurisdiction. The law establishes the jurisdiction of the rabbinical courts over matters concerning the personal status of Jews. The substantive law under to which the rabbinical courts rule on personal status matters is Jewish Law. The Rabbinical Courts also rule in accordance with the general substantive (statutory and case-law) law that applies to matters under their jurisdiction. The Rabbinical Courts Jurisdiction Law does not establish any rules of procedure for the rabbinical courts in matters that are in their jurisdiction. In the past, certain provisions in this regard were established in the Jewish Community

Regulations.[1] These regulations are no longer valid, and for this reason alone they cannot serve as a source of the authority to promulgate procedural rules. What, then, is the procedural regime that applies in the rabbinical courts?

7. One might argue that the authority to prescribe procedural rules derives from the substantive law. Since the substantive law followed by the rabbinical courts is primarily Jewish law, therefore Jewish law should also be the source of the rabbinical courts authority to establish rules of procedure (see: E. SHOCHETMAN, PROCEDURES (*Sifriyat Hamishpat Ha'ivri*, 5748) 12 (Hebrew)). This argument cannot be accepted. The authority to establish procedures derives from the nature of the body's status as a judicial instance and not from the substantive law by which that judicial instance rules. Thus, for example, the civil court rules in accordance with Jewish law in many matters of personal status, however it does not apply the procedural (and evidentiary) rules of Jewish law when ruling on such matters (see, CA 26/51 *Kotik v. Wolfson* [1] at p. 1344; CA 99/63 *Peleg. v. Attorney General* [2] at p. 1128). Indeed, to paraphrase Justice Silberg's statement that "the law here is, so to speak, a 'function' of the judge" (see: M. SILBERG, PERSONAL STATUS IN ISRAEL (*Mif'al Hashichpul*, 5718) 6 (Hebrew)), we might say in this case that the procedure is a "function" of the judge and not of the (substantive) law by which the judge rules. Therefore, the power of a rabbinical court judge to establish the court's rules of procedure does not derive from the substantive law by which he rules. How, then, are the rabbinical courts' rules of procedure established?

8. In my opinion, in the absence of statutory authorization in this matter, the power to establish procedures lies with the rabbinical courts themselves. The origin of such authorization is the inherent jurisdiction of each judicial instance to decide its own procedures (see HCJ 136/54 *Pollack v. Herzog* [3] at p. 165; also see P. Goldstein, *The "Inherent Jurisdiction" of the Court*, 10 IYUNEI MISHPAT 37, 49 (5744-45) (Hebrew); I. H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBLEMS 32 [1970]). Justice Berenson elaborated on this in reference to the rabbinical courts, stating:

> A court for which the State did not prescribe procedures and did not delineate the manner by which they shall be established is authorized, by virtue of its inherent jurisdiction, to establish its own procedures that it will follow… When there is a hierarchic system of tribunals for which the legislature has not provided procedures, the question of who will decide them and how is generally an internal manner (HCJ 150/59 *Committee of the Sephardic Community of Jerusalem v. Jerusalem Rabbinical Court* [4] at p. 114).

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[1] Regulations promulgated on January 1, 1928 under the Palestine Religious Communities Organization Ordinance, 1926 (https://www.nevo.co.il/law_html/Law22/HAI-3-126.pdf).

Similarly, my colleague Justice D. Levin stated:

> The Druze courts, which were duly established and have been conducting their hearings for years, do not operate in a vacuum. Since no procedural regulations were promulgated by the authorized minister, the judges of the Druze courts were permitted to establish their own procedures that they followed by virtue of their inherent jurisdiction (HCJ 364/85 *Fakhr Aldin v. Druze Court of Appeals* [5] at p. 704).

Thus, the rabbinical courts have inherent jurisdiction to prescribe the procedures that they will follow. In exercising that jurisdiction, the Israeli Rabbinical Courts Procedure Regulations, 5753 (*Y.P.* 5753 2298) were promulgated. A review of these regulations reveals that their content reflects Jewish law (see SHOCHETMAN, *ibid.*, at p. 11). However, in terms of the power to promulgate them, they in fact realize the rabbinical courts' inherent jurisdiction to prescribe their own procedures. Indeed, alongside the procedures that were promulgated in the past by virtue of the rabbinical courts' inherent jurisdiction, the courts continue to enjoy inherent power to regulate those procedural matters which have not been addressed in regulations (compare: HCJ 305/89 *Nir v. Haifa Magistrates (Traffic) Court* [6] at p. 214). This inherent jurisdiction derives from the rabbinical court (like any other judicial instance) being a judicial institution established by law, which is intended to rule upon disputes, and which is granted power that is inherent to the very performance of the duty and the need to conduct judicial proceedings.

Inherent Jurisdiction and its Limits

9. A judicial instance's inherent power to prescribe procedures is of signal importance. "Without it proper judicial activity would be impossible" (Justice H. Cohn in ST 1/60 *Winter v. Beeri* [7] at p. 1474). The inherent powers "are vital in order to allow the court to perform its duties properly…" (Justice Landau in CrimA 230/56 *Shorer v. Attorney General* [8] at p. 753). They underlie "that minimal authority in matters of procedures, trial efficiency and justice that the court needs in order to perform its purpose: administering justice. This power is the external reflection of the internal sense of justice with which the judge is endowed and that he expresses in his daily actions" (Justice Berenson in FH 22/73 *Ben Shachar v. Machlev* [9] at p. 96).

This power is broad. It "encompasses any matter that occurs in or out of the courtroom that is related to the trial" (HCJ 305/89 [6] at p. 214). Indeed, due to the broad scope of this power, it has long been accepted that it should be exercised with great caution (see: *Roadway Express v. Piper* (1980) [55] at p. 763). This ancillary power is not unlimited. It is not broader than the express authority to prescribe procedures. By its nature, it operates within the boundaries of procedural law and relates to the matter of the proper management of the judicial proceeding and its

proper control. Moreover: inherent jurisdiction (as well as express jurisdiction in procedural matters) is, in essence, "governmental authority". Therefore, it must be exercised reasonably. Indeed, the judge, like any person exercising governmental authority, must act reasonably. I addressed this elsewhere, stating:

> A judge may not toss a coin. He may not consider any factor that he chooses. He must consider reasonably. We have here, as in administrative law, a margin of judicial reasonableness. There are a number of options within the margin among which a reasonable judge may choose. Two reasonable judges may reach different results (HCJ 547/84 *Of Haemek v. Ramat Yishai* [10] at p. 141).

This duty to act reasonably also applies when a judge exercises his inherent jurisdiction (MApp 613/82 *State of Israel v. Awad* [11] at p. 616).

10. What constitutes reasonable exercise of judicial authority? The answer is that reasonable exercise of judicial authority means its exercise in a manner that strikes a proper balance among the values, principles and interests that must be considered. I addressed this elsewhere, stating:

> Judicial discretion, like any governmental discretion, must be exercised in the framework of the law. A judge must not be arbitrary or discriminatory. He must consider his discretion reasonably… This requirement means, *inter alia*, that the judge must weigh all of the relevant considerations, juxtapose them, and strike a balance among them where there is friction. The nature of the relevant considerations changes from case to case… what characterizes them all is that they present considerations of judicial and judiciary efficiency along with considerations of justice, morality, human rights and the court's standing in modern Israeli society… (HCJ 991/91 *David Pasternak Ltd.* v. *Minister of Construction and Housing* [12] at p. 60).

Thus, proper exercise of "inherent" judicial authority – like the exercise of explicit statutory procedural authority – means exercising the inherent authority in a manner that strikes a proper balance among the values, principles and interests that must be considered when exercising inherent authority.

11. What are the values, principles and interests that must be considered when exercising inherent jurisdiction? It would appear that these values, principles and interests are not essentially different from those that apply when exercising statutory procedural jurisdiction. Naturally, these values, principles and interests, which determine the "environment" of the (statutory or inherent) procedural jurisdiction, change from case to case in accordance with the specific procedural issue at hand. However, a number of typical considerations can be identified as a common thread through the procedural process in general and the exercise of

inherent jurisdiction in particular. Procedural justice is a central consideration. This consideration means, *inter alia*, perceiving the procedural process as intending to realize substantive law, based upon exposing the truth. Procedural justice requires observing the rules of natural justice, which treat of granting each party an opportunity to voice its arguments, prohibiting bias, and the obligation to state reasons. Rules regarding a fair hearing are also derived from procedural justice. In this context we might note knowledge that a hearing is being held, being granted a proper opportunity to present arguments, fair exercise of procedural powers, as well as open and accessible courts. The efficiency, simplicity and finality of proceedings can also be included in this framework. The aspiration for confidence, stability and certainty in procedural arrangements should also be included in the framework of these typical considerations.

12. A typical set of values that must be considered in every procedure is that of human rights. Among these it is necessary, *inter alia*, to consider a person's dignity and personal liberty (see: HCJ 355/79 *Katalan v. Prisons Service* [13]; HCJ 14/51 *Attorney General v. Davar* [14]). A person's right to privacy and confidentiality must also be considered. Any procedural arrangement must treat the litigating parties equally. It must guarantee freedom of expression, occupation and property (see BAA 663/91 *A. v. Israel Bar Association* [15]). It must consider the right to strike and lockout (see: MApp 678/82 *Tayar v. State of Israel* [16]; MApp 613/82 *State of Israel v. Awad* [11]; LC 52/8-4 7-41 [54]). It must ensure the freedom of movement that is guaranteed to every person, and in that framework, the right of every person to leave the country (see: CA 703/70 *Somech v. Ozer* [17]; CA 230/69 *Kaneti v. United Shvili Film* [18]; LA 451/85 *Adin Marketing v. Flatto Sharon* [19]). Indeed, constitutional human rights are part of constitutional law and are directed first and foremost towards the governmental authorities. However, they project (directly and indirectly) onto all the branches of law and thus create a constitutionalization of the law. Procedural law is not immune to human rights. On the contrary: procedural law must recognize them and give them expression. Indeed, in a long line of judgments, this Court has recognized procedural law's subordination to accepted human rights. Justice Elon addressed this in stating:

> …In the absence of express law, the court does not have the power to order blood tests, even if it would not involve coercion. Indeed, the court has ancillary inherent jurisdiction to issue various decisions and orders in order to effect a just and efficient examination, however orders that by their very nature comprise an infringement of a person's basic right, even if the infringement will not be coercive, cannot not be included in this ancillary power (CA 548/78 *A.. v. B.* [20], at p. 756).

Similarly, the Supreme Court of the State of New York [*sic*][2] ruled, in

[2] The Supreme Court of North Carolina – ed.

reference to the court's inherent power, that: "Even in the name of its inherent power, the judiciary may not... violate the constitutional rights of persons brought before its tribunals" (*Matter of Alamance County Ct. Facilities* [56] at p. 132). Similarly, my colleague Justice S. Levin emphasized the need to consider a person's constitutional right to leave Israel in the context of proceedings concerning the issuing of a writ ne exeat republica (see LCA 26/89 *Mashraki. v. "Rotem" Insurance* [21] at p. 552).

My colleague, Justice S. Levin, wrote:

> …In light of the severe restriction of the freedom of movement inherent to the use of this regulation (Regulation 376 – A.B), a freedom which is a constitutional right of the highest order, the regulation should not be employed unless all of its elements have been strictly proven…. (LCA 18/89 *Pichman v. Bank Leumi* [22] at p. 517).

13. I have addressed the corpus of general considerations that govern the exercise of (statutory or inherent) procedural power. Sometimes these considerations all lead in one direction and sometimes they conflict internally with one another: procedural justice leads in one direction while procedural efficiency leads in another. And both of these could lead in a direction that differs from the direction of human rights. In such a state of affairs, there is no choice other than to strike a proper balance among the conflicting considerations. In the framework of such a balance, significant weight must be given to considerations pertaining to human rights. This is particularly evident now, with the enactment of the Basic Law: Human Dignity and Liberty. This Basic Law has elevated human rights – the majority of which were based on case law ("'Unwritten' Basic Rights": HCJ 243/62 *Israel Film Studios. v. Levi Geri* [23]) to a supra-statutory constitutional level. Although the validity of the previous law – with its procedural rules – was preserved (sec. 10 of Basic Law: Human Dignity and Liberty), its interpretation, internal balances and application must be influenced by the constitutional status of human rights (see: CrimApp 6654/93 *Binkin v. State of Israel* [24]).

The Rabbinical Courts' Inherent Jurisdiction and its Limits

14. Does this general approach regarding the scope of inherent jurisdiction – both in terms of its breadth and in terms of its limitations – also apply to the inherent power of the rabbinical courts to prescribe their own procedures? The answer is affirmative. A rabbinical court is a judicial instance established by statute. "The rabbinical courts draw their judicial authority from the state's legal system that granted them that authority" (Justice Elon in HCJ 323/81 *Vilozny v. Supreme Rabbinical Court* [25] at p. 738). Like any judicial instance, it is also granted inherent powers to arrange procedures. When exercising these inherent powers, the rabbinical court is subject to all of the limitations that are imposed upon any judicial instance that exercises inherent powers. This approach was clearly expressed in a

long list of judgments that held that the rabbinical courts' procedures must respect "basic principles of fairness" (HCJ 158/66 *Segev v. Rabbinical Court* [26] at p. 521, *per* President Agranat). These are the rules of natural justice that obligate any court system, including the rabbinical courts (see: HCJ 10/59 *Levy v. Tel Aviv-Jaffa Rabbinical Court* [27]; HCJ 155/65 *Gurovitz v. Tel-Aviv Rabbinical Court* [28] at p. 19; HCJ 95/63 *A. v. Tel Aviv-Jaffa Rabbinical Court* [29] at p. 2221; HCJ 161/64 *Mussman v. Haifa Rabbinical Court* [30]; HCJ 816/80 *Gotthelf v. Tel Aviv-Jaffa Rabbinical Court* [31]). Justice Berenson addressed this matter – in the context of the Rabbinical Court's inherent power – stating:

> A court for which state law did not establish procedures nor delineate the manner for their establishment, is authorized, by virtue of its inherent jurisdiction, to decide for itself the procedures that it will apply. In this regard – to the extent that the state law does not limit the court – it is its own master. However, the arrangements it prescribes must not comprise anything repugnant to the relevant general laws of the State … and must realize the principles of natural justice, since they must be properly observed by every body that decides legal or quasi-legal matters … (HCJ 150/9 [4] at p. 114).

Observing the rules of natural justice is but one of the limitations upon inherent jurisdiction. It is not the only limitation. Justice Goitein addressed this in stating:

> It has already been decided on innumerable occasions that this court, when sitting as the High Court of Justice, will not intervene with judgments of the religious courts unless they have acted without jurisdiction, or in exceptional cases which call for our intervention for the administration of justice (HCJ 187/54 *Barriya v. Qadi of the Acre Sharia Moslem Court*, [32] at p. 1198; [IsrSJ 2, 429 at 436]).

Justice Bejski stated in a similar spirit:

> That which has been stated until now justifies the intervention of this Court, despite its reticence to do so on the merits except in cases of *ultra vires*, of infringement of the principles of natural justice, or for the sake of *tikkun olam* [“repairing the world” – ed.] (HCJ 7/83 Biaris v. Haifa Rabbinical Court [33] at p. 687).

Thus, the "administration of justice" and the "repairing of the world" are additional limitations – beyond the limitation associated with the rules of natural justice – that apply to the exercise of (statutory or inherent) procedural authority. These also include, *inter alia*, the limitations deriving from the fundamental principles concerning recusal and judicial integrity, and open and accessible courts (and compare: HCJ 349/65 *Pero v. Qadi Madhab, Druze Religious Court* [35]; HCJ 1923/91 *Rosenzweig v. Haifa Rabbinical Court* [35] IsrSC 46(2) at p. 21; HCJ

1689/90 *Aasi v. Central District Sharia Court* [36]). Similarly, any recourse by the rabbinical court to its inherent authority must be consistent with the protection of human rights. Indeed, every litigant in the rabbinical courts appears before those courts bearing all the human rights enjoyed by every person in Israel. The Israeli legal regime guarantees human rights to every person, and every person enjoys these rights in every judicial forum. The move from a "civil" judicial forum to a "religious" one does not lead to a loss or denial of basic human rights. "It would be inconsistent with these fundamental rights that the move from a civil court to a religious court would lead to a loss or infringement of these basic rights. No 'confiscation' of these civil rights can be permitted in the absence of an express statutory provision consistent with the requirements established under our constitutional system" (HCJ 1000/92 *Bavli v. Great Rabbinical Court* [37] at p. 248). Indeed, the promise of human rights is general and applies to all relationships and before all the courts. A religious court does not operate in a vacuum. It operates within the general framework of the Israeli legal system. Professor Rosen-Zvi rightly observed:

> The religious court indeed holds jurisdiction – sometimes exclusive – to address a certain area of Israeli law. But the court remains an Israeli judicial forum within the general framework of Israeli law. The court operates within the framework of Israeli law and the general legislative framework, and it is not exempt from the commandments of the provisions of Israeli law (A. ROSEN-ZVI, ISRAELI FAMILY LAW: THE SACRED AND THE SECULAR (Papyrus, 1990) 86 [Hebrew]).

The Israeli legal system is not a confederation of separate systems. The Israeli legal system is a unity that recognizes the uniqueness of its various parts. Therefore, substantive matters of personal status are subject to Jewish law, which at times may take precedence over some arrangement of the general law. However, such precedence is limited exclusively to matters of personal status, "no more and no less" (*per* Landau J. in HCJ 80/63 *Gurfinkel v. Minister of the Interior* [38] at p. 2068). It does not apply to what does not fall within the scope of personal status (see: ROSEN-ZVI, *ibid*., p. 76). Thus, for example, it does not apply to the civil "mass" (and the various property rights it encompasses) with which every person comes before the Rabbinical Court (see: HCJ 1000/92 [37]). It also does not apply to the exercise of the rabbinical court's inherent authority to address the proceedings before it. In exercising that authority, the rabbinical court must respect human rights, and like every other judicial forum, it must properly balance all of the conflicting values, principles and interests in each and every issue. This balance is imposed upon the inherent jurisdiction "from without", by virtue of the entire complex of values of the Israeli legal system. It reflects the substance and principles of the Israeli legal system of which the rabbinical courts are a part. What is that proper balance when the rabbinical court is requested to issue a writ ne exeat republica against one of the litigants?

Ne Exeat Republica

15. A stay of exit, whether as temporary or interlocutory procedural relief, can only be issued as a procedural means intended to assist a party "in realizing the relief that the substantive law grants to the party" (*per* Landau J. in CA 303/57 *Reich v. Hammer* [39] at p. 1363). The inherent authority of a judicial instance to establish procedure in regard to the granting of this procedural relief must therefore properly balance the values, interests and principles vying for dominance in the framework of procedural law. A person's constitutional right to leave Israel must be placed on one side of the scales. This right has been recognized as a basic right of a person in Israel. "A citizen's freedom of movement to leave Israel is a natural right that is recognized as self-evident in every country with a democratic regime, of which our country is one …" (*per* Silberg J. in HCJ 111/53 *Kaufman v. Minister of the Interio*r [40] at p. 536; and see: HCJ 190/57 *Assaig v. Minister of Defence* [41] at p. 55; HCJ 488/83 *Baransi v. Director of the Visa and Nationality Dept*. [42]; HCJ 448/85 *Dahar v. Minister of the Interior* [43]; MApp 1064/86 *Archbishop Ajamian v. State of Israel* [44]). It derives from being a free person, from the democratic character of the state, and from being part of the international community in which freedom of movement is recognized as a customary human right. Basic Law: Human Dignity and Liberty adopted this approach (sec. 6(a)) and granted the right to leave Israel ("All persons are free to leave Israel") supra-legal status (see: CrimApp 6654/93 [24]). "All governmental authorities" – including all judicial forums (as they, too, are governmental authorities) "are bound to respect" this right (sec. 11 of Basic Law: Human Dignity and Liberty).

16. As against the constitutional right of every person to leave the country stands the interest of a litigant to realize the substantive law. A litigant's leaving the country may influence the legal proceedings and the possibility of executing the judgment. Maintaining proper legal proceedings to ensure substantive rights is a legitimate interest deserving protection by all parties. There is also a public interest that legal proceedings be effective, that suits not be frustrated, and that judgments be executed. Leading a litigant to an "empty well" because the other side has left the country infringes both the personal interest of the victim and the public interest in maintaining proper legal proceedings. However, the plaintiff's interest that deserves protection is not the pressuring of the defendant to concede the suit in order to liberate himself from the restriction imposed by a stay of exit. The state is not a prison, and agreeing to a suit should not be a key for release from captivity. "… staying the defendant is not meant to serve as a means for pressuring him to ransom himself from captivity" Y. SUSSMAN, CIVIL PROCEDURE, S. Levin, ed., (6th ed., 1990) 571 (Hebrew)).

17. We have addressed the values, principle and interests that must be considered

in regard to granting relief in the form of a stay upon exiting the country. On one hand stands the basic value of freedom of movement, while the litigant's interest in ensuring his substantive rights by means of a legal process stands on the other. The two values stand in opposition. Balancing the conflicting values is therefore required. My colleague Justice S. Levin addressed the need for striking this balance in the area of procedural law, noting:

> The fundamental question that must be addressed in interpreting the said regulation is where is the balance point between the principle that the defendant's right to freedom of movement not be restricted unnecessarily, and the need to prevent the defendant from fleeing abroad and thus frustrating the suit filed against him (LCA 26/89 [22] at p. 552).

Professor S. Goldstein similarly observed:

> …granting any type of preliminary relief involves a delicate balance of the plaintiff's interests in preventing the defendant from frustrating the litigation, and that of the defendant in not having his liberty or property restrained prior to the definitive adjudication of his liability (Stephen Goldstein, *Preventing a Civil Defendant from Leaving the Country as a form of Preliminary Relief,* 20 Is.L.R. 18, 24 (1985)).

Indeed, the balance must reflect the relative social importance of the conflicting interests. The balance should properly be an expression of principle that reflects a "decisional framework which contains a guideline of value…" (*per* Shamgar J. in FH 9/77 *Israel Electric Corporation. v. "Ha'aretz"* [45] at p. 361 [IsrSJ 9, 295]; and see: HCJ 991/91 [12] at p. 60). This balance serves a dual purpose: first is serves as a standard for interpretation by which a procedural rule is given meaning; second, it establishes the boundaries of the (statutory or inherent) authority of the procedural rules themselves. Procedural rules whose interpretation leads to the possibility of preventing leaving the country to an extent that exceeds the standards established by the principled balance exceed the (statutory or inherent) power of the promulgator of the rules.

18. It would appear to me that the proper constitutional standard is as follows: a litigant may be prevented from leaving the country if there is a sincere and well-founded suspicion that the litigant's leaving the country would frustrate or thwart the judicial proceeding or prevent the execution of the judgment. My colleague Justice S. Levin gave expression to this standard in noting:

> …when there is real, direct or circumstantial evidence from which one may infer a danger that the proceedings may be thwarted by the

> defendant's travel abroad, the first principle (the defendant's freedom of movement – A.B.) will retreat before the need to prevent the complainant from facing an empty well when judgment is rendered against the defendant, inasmuch as the rule is not intended to shield the defendant from his creditors and thwart them (LCA 26/89 [22] at p. 553).

I would like to make a few comments in regard to this standard. First, this standard is of a constitutional character. By establishing a causal connection between preventing leaving the country (as a constitutional right) and the negative effect of the absence upon the judicial proceedings, it expresses a constitutional view of the status of the fundamental principles of our legal system. Professor Goldstein addressed this in his abovementioned article in noting (at p. 26):

> …the requirement of a causal connection is not merely a result of the interpretation of a specific rule of civil procedure, but rather the demand of a more fundamental principle of Israeli jurisprudence. It represents the application of a constitutional norm regarding the freedom of movement in general, and the right of a person to leave the country in particular.

Second, the causal connection between the danger and its prevention required by this standard is "a sincere and well-founded suspicion". This standard was adopted in the *Dahar* case [43] in regard to striking the balance between the right to leave the country and the public interest in state security. In my opinion, this standard is also appropriate for striking the required balance in the matter before us. Dr. Yaffa Zilbershats addressed this in noting:

> In our opinion, the "sincere and well-founded suspicion" test is better suited to balancing the interests in this case in which we deprive a person of his basic right to leave the country in order to protect the interest of the plaintiff that the legal proceedings or the execution of a judgment not be frustrated (Y. Zilbershats, *The Right to Leave a Country* (Ph.D. Diss., Bar Ilan, 1991) 203).

Third, not any possible harm, whether severe or insignificant, can serve to prevent a litigant from leaving the country. The harm must be of a special type, of particular severity, i.e., "frustrating the lawsuit in advance through the debtor's fleeing abroad…" (LCA 26/89 [21] at p. 552, following LA 558/85 *Ilin v. Rotenburg* [46] at p. 556). In addressing the nature of the permissible infringement of a person's right to leave Israel, Dr. Zilbershats writes (*ibid*., p. 180):

> In our opinion, because the right to leave the country is a basic human

> right of great importance, it should only be possible to restrict it if it has the potential to frustrate a judicial proceeding or prevent the execution of a judgment against the person seeking to leave the country.

Fourth, meeting the said standard is a necessary condition for exercising the authority of preventing a litigant form leaving the country. It is not a sufficient condition. Thus, for example, procedural rules may impose additional demands, for example, that a condition for granting a writ ne exeat republica is that: "The defendant is about to leave the country permanently or for an extended period" (rule 376(a) of the Civil Procedure Rules, 5744-1984). Fifth, before exercising its discretion, the court must consider whether there are less drastic means for ensuring the interest deserving protection while not infringing freedom of movement. Thus, for example, providing an appropriate bond may often meet this requirement. Sixth, the court should exercise this procedural authority with great care. "Unquestionably, preventing a person from leaving the country infringes an individual's liberty, and therefore requires careful consideration…" (*per* Ben-Porat, D.P. in LA 451/85 [19] at p.305). The court must therefore meticulously examine whether the required standard is met, and only "if all the elements have been strictly proven" can the requested order be granted (*per* S. Levin, J. in LCA 18/89 [22] at p. 517). Granting the order must not be routine, and it should properly be granted only when justified by the circumstances.

Seventh, naturally, the application of the said standard changes in accordance with the substantive right that the judicial proceeding itself is intended to realize. Proceedings for the return of a loan are not the same as divorce proceedings. In the former, the legitimate interests of the creditor can usually be ensured by an adequate bond. In the latter, at times (although not always) the sincere and well-founded suspicion that the woman may be rendered an *agunah* [a "chained woman" – ed.] may require granting a writ ne exeat republica. Moreover, proceedings that can lawfully be conducted without the personal presence of the parties are unlike proceedings that can only be lawfully conducted if the parties are actually present. In the former case, a party's leaving the country will not frustrate the proceedings, while in the latter it will frustrate the very possibility of conducting proceedings. Nevertheless, even here a less drastic means should always be preferred. Eighth, this standard is formulated to take account of the fact that we are concerned with interlocutory relief in the course of a pending proceeding. We must bear in mind that the claim has not yet been proved, and a judgment has not yet been rendered. The certain infringement of one party's freedom of movement stands against the mere claim of the other party who argues that his substantive right has been infringed, but whose claim has not yet been accepted and no judgment has recognized it. In such a situation, the standard that should be adopted should be one that tends, as far as possible, to protect the person who will suffer the certain infringement of rights. In so doing, we express the serious weight of an individual's right to leave the country.

Ne Exeat Republica in the Rabbinical Court

19. As we have seen, the Rabbinical Court has the inherent power to establish rules of procedure. Procedures for preventing a litigant from leaving the country were established within that framework. Such procedures are established under rule 106 of the Rabbinical Courts Rules of Procedure, 5753 (see: HCJ 852/86 *Aloni v. Minister of Justice* [47] at p. 61). In the framework of its inherent power, the Rabbinical Court can, indeed, establish procedural rules in general, and procedural rules in regard to preventing a person from leaving the country in particular, in accordance with its procedural conceptions, which may differ from the procedural conceptions of the "civil" courts or of other religious courts (see: Shochetman, *On Orders of Ne Exeat Regno against Judgment-Debtors and the Authority of the High Court of Justice to Review Procedural Orders of Rabbinical Courts*, 14 MISHPATIM 83 (1984)). However, the Rabbinical Courts inherent power to establish procedural rules in general, and procedural rules in regard to preventing leaving the country in particular is limited by the proper balance of the values, interests and principles that characterize Israeli law. Therefore, the Rabbinical Court's authority to order that a litigant may not leave the country is limited by the appropriate standard for balancing the conflicting values, interests and principles in this context. In accordance with them, judicial authority to bar a litigant from leaving the country may be exercised only when there is a sincere, well-founded suspicion that his leaving the country will frustrate or thwart the legal proceedings or prevent the execution of the judgment. It is against this background that one must understand this Court's statement that "the purpose of the restriction imposed upon a person, which prevents his leaving Israel, is identical for a [civil] court or a rabbinical court" (HCJ 578/82 *Naim v. Jerusalem District Rabbinical Court* [48] at p. 711), and that "the areas of the authority of the various judicial forums – civil and religious – in regard to preventing leaving the country…must be similarly construed" (*per* Shamgar P. in HCJ 852/68 [47] at p. 61). Adopting this standard will achieve the normative harmony and legal unity to which every legal system aspires. This will ensure that the fundamental values and principles grounding our legal system will be protected and uniformly realized in the procedural rules of all Israeli judicial forums. In the framework of their inherent power, the rabbinical courts are free to establish procedural rules consistent with their worldview. "Their procedural rules are their own business" (*per* Berinson J. in HCJ 403/71 *Alkourdi v. National Labor Court* [49] at p. 70). However, that procedural freedom is not unrestricted. It is subject to the limits – to which all judicial forums are subjected – that derive from the proper balance of values, principles and interests that reflect the values of the State of Israel.

From the General to the Particular

20. The District Rabbinical Court's decision to prevent the Petitioner from leaving the country must be examined against the background of this normative

structure. The Petitioner's suit for divorce from the Respondent was pending before the Rabbinical Court. The Respondent's suit for marital reconciliation was also pending. The court was requested to issue a writ ne exeat republica against the Petitioner and the children in the framework of the reconciliation suit. The Rabbinical Court granted the request on the basis of the Respondent's claim that he "fears that the woman's leaving the country at this stage would result in a final, irreparable rupture between them". The Rabbinical Court ordered a further hearing in two months, and requested that the parties negotiate "to achieve a suitable solution that would allow their joint travel abroad, or allow the wife to leave subject to conditions that would allay the husband's fears". The Great Rabbinical Court denied the wife's appeal, holding that there were no grounds for hearing the appeal "inasmuch as the District Rabbinical Court had set a date for a further hearing of the matter".

21. Does the District Rabbinical Court's decision maintain the proper balance between the freedom of movement (of the Petitioner) and ensuring the realization of the substantive rights (of the Respondent) by means of the judicial process? In my opinion, it does not, for two reasons. First, the evidentiary groundwork presented to the Rabbinical Court did not substantiate a "sincere and well-founded suspicion". All that was before the court was the husband's claim (unsupported by any additional evidentiary foundation) and the wife's denial. That is insufficient to ground a sincere, well-founded suspicion. Second – and of primary importance in this context – the condition that the Petitioner's absence from the country might frustrate or thwart the judicial proceeding in regard to reconciliation was not met. The judicial proceeding in the matter of reconciliation would not be frustrated at all by the Petitioner leaving the country. It is clear from the circumstances that the Petitioner will be travelling abroad for only a brief period. This brief absence from Israel cannot potentially influence the proceedings. In any case, the matter can be adequately addressed by requiring an appropriate guarantee. Postponing the hearing on revoking the writ ne exeat republica for two months is inconsistent with the status of the freedom to leave the country as a basic human right. Note that I am willing to assume – without deciding the matter – that the Petitioner's leaving the country might negatively influence the couple's relationship, and might even – as the husband argues – result in a final rupture of the relationship. It is also possible – although here, too, I cannot make a finding – that preventing the women's leaving might serve to advance a reconciliation between her and the Respondent. But even if that were the case, the Rabbinical Court's inherent power to establish procedures does authorize it to prevent a litigant from leaving the country when the standard that properly balances the relevant values, interests and principles is not met. Indeed, the suit for marital reconciliation (which is a matter of personal-status law, see: ST 1/50 *Sidis v. Chief Execution Officer, Jerusalem* [50] at p. 1031; CA 174/83 *N. Soher v. P. Soher* [51] at p. 82) raises serious problems, particularly in the area of interlocutory relief. Interlocutory orders that infringe basic human rights like the right to property (in regard to vacating a residence), freedom of movement (in prohibiting leaving the

country, see: HCJ 185/72 *L. Gur v. Jerusalem Rabbinical Court* [52] at p. 770) and the autonomy of personal will (by preventing meeting another person) may be granted out of a desire to realize the substantive law (see in this regard: S. Dichovski, *The Authority of the Rabbinical Courts as reflected in their Judgments*, 10-11 DINEI ISRAEL 9, 15*ff*. (5741-43) (Hebrew)). In this case, we are witnesses to an example of the fundamental problem deriving from the first attempt "of its kind in Jewish history to apply religious law and impose religious jurisdiction in a society in which the majority of its members define themselves as secular" (P. Maoz, *The Rabbinate and the Religious Courts: Between the Hammer of the Law and the Anvil of Halakha*, 16-17 ANNUAL OF THE INSTITUTE FOR RESEARCH IN JEWISH LAW 289, 394 (1991) (Hebrew)). In the matter at hand, this special attempt leads to a gap between the basic conceptions underlying marital reconciliation in religious law and the worldview of a largely secular society. As judges, we take the law as a given and do not question it. However, to the extent that interlocutory orders are granted in the context of marital reconciliation that do not meet the requirements of proper balancing of the values, principles and interests that must be addressed, the Rabbinical Court is not authorized to issue a writ ne exeat republica merely because the matter interferes with marital reconciliation (as opposed to interfering with the judicial proceedings in regard to reconciliation), inasmuch as its procedural power to grant such orders is subject to the limitations required by the proper balance that we discussed. In his aforementioned book, Prof. Rosen-Zvi correctly pointed out (pp. 117, 119):

> The Rabbinical Court issues [orders – A.B.] comprising remedies attendant to marital reconciliation that infringe the spouse's liberty. Some of these orders also concern prohibitions that directly affect third parties. For example, an order forbidding a spouse to meet with a particular person whose name appears in the body of the order. Such an order seriously infringes an individual's right and is inconsistent with the fundamental values of Israeli society…
>
> …Israeli law does not grant the Rabbinical Court a free hand even if it is required by the worldview of religious law and the original content of the marital reconciliation cause of action. The Rabbinical Court operates within the framework of boundaries set by Israeli law. These exigencies obligate it, and it may not deviate from or exceed their borders.

Indeed, to the extent that such interlocutory orders do not conform to the delicate balance of the values, principles and interests that must be considered – primary among them the human rights of the parties to the proceedings and of third parties – they deviate from the inherent authority (as currently expressed in the Rules of Procedure of the Israeli Rabbinical Courts, 5753) of the Rabbinical Court to grant interlocutory relief. It may be superfluous to note that, nevertheless, the Rabbinical Court is authorized to take the conduct of the parties into account among its

considerations in accordance with Jewish law, and give it the duly required weight under the substantive law. In this regard, it is apt to recall the words of Deputy President Y. Kahan, who held:

> Clearly, the Rabbinical Court may draw all the conclusions that derive under [Jewish – ed.] law from the fact that the Petitioner, who is married, is conducting intimate relations with another man.
>
> However, we have not found any legal basis upon which to ground a restraining order as issued in this case (HCJ 428/81 [53]).

That is also so in the matter before us. The Rabbinical Court is not authorized to issue a temporary order prohibiting the Petitioner from leaving the country. However, it is authorized to make inferences in regard to the substantive law in the matter of reconciliation from the fact that the Petitioner left the country, and from her conduct in the country and abroad. For these reasons, we have made the order absolute (as stated in para. 5 of our opinion).

Justice S. Levin: I concur.

Justice D. Levin: I concur.

Decided in accordance with the opinion of Deputy President Barak.
Given this 29th day of Shevat 5754 (Feb. 10, 1994).