HCJ 153/87

LEAH SHAKDIEL
v.
MINISTER OF RELIGIOUS AFFAIRS ET AL

The Supreme Court sitting as the High Court of Justice
[May 19, 1988]
Before Ben-Porat D.P., Elon J. and Barak J.

Editor's synopsis -

The Jewish Religious Services Law provides for the establishment of local religious councils throughout the country, charged with the duty to provide Jewish religious services and to allocate public funds in support of such religious services, as are needed in the area. By Law, the membership of such councils is to reflect the general public desire and need for the distribution of such religious services in the locality and the range of interest in such services. In determining the Council's make-up, attention must be given to the different groups represented in the Local or Municipal Council and to their respective strength, but this factor is not conclusive. The members of the religious council are appointed by the Minister of Religious Affairs, the local Chief Rabbis and the Local Council, following a procedure whereby each of the above voices his opinion of the others' candidates. Disagreements between the parties concerning proposed members of the religious council are resolved by a ministerial committee comprised of representatives of the Prime Minister, the Minister of Religious Affairs and the Minister of the Interior.

This case concerns the makeup of the religious council in Yerucham. The Petitioner is a religiously observant woman, who teaches Judaic subjects in the local school. She is a member of the Local Council, representing the National Religious Party, and was proposed by the Local Council to be a member of the Yerucham religious council. The local Rabbi opposed her inclusion on the religious council on the ground that she is a woman, that women have not hitherto served on religious councils and that her presence would impair the council's functioning.

The Petitioner was not included among the members of the religious council. Her exclusion was explained by the ministerial committee as not based upon any principled objection to a woman serving on such a council but rather as grounded in a tradition that has developed since the establishment of the State, adhered to by all the concerned parties, that women would not be proposed as members of religious

councils due to the close working relationship existing between such councils and the Rabbinate. It was also feared that the Petitioner's membership on the religious council in Yerucham would obstruct its proper functioning. The Petitioner contends that her disqualification is based on irrelevant grounds. Since the religious council is an administrative body, concerned with providing and funding religious services to the local community, and does not decide questions of religious Law, there is no reason to disqualify a woman from serving on it.

The court issued an order *nisi,* directing the Respondents to show cause why the court should not direct that the Petitioner be included as a member of the Yerucham religious council. The Respondents appeared in opposition to the order *nisi*. In a decision rendered by Justice Elon, the court ordered that the rule be made absolute, holding:

1. The ministerial committee, being a body that fulfills a public function under the Law, is subject to judicial review. As with all such public administrative bodies, it must exercise its discretion in good faith, honestly, rationally and without unlawful discrimination, and must make its decisions on the basis of relevant considerations.

2. The Jewish religious services provided by the religious council are an integral part of the municipal services furnished in the locality and must be provided to all who request them, without regard to sex, ideology, education or any other distinction. Although such services are religious in character, the religious council is responsible only for their provision and is not concerned with the resolution of any questions concerning matters of religious Law. The qualifications for membership on the council are determined by the general legal system. Candidates for membership on the council need not meet such qualifications as are required by religious Law.

3. The exclusion of the Petitioner from membership on the religious council because she is a woman is contrary to the fundamental principle of the Israeli legal system that forbids discrimination on grounds of gender. This principle finds expression in the Declaration of Independence and is one of the principles which has found its expression in the Women's Equal Rights Law, 5711-1951.

Justice Barak concurred in the result in a separate opinion.

Note - An especially interesting aspect of this case is Justice Elon's exhaustive review of Jewish religious legal literature *(halakha)* concerning women's qualifications to participate in public communal activities and to hold public office. Justice Elon points out that, even in earlier times, most Rabbinic scholars did not agree with Maimonides' opinion that disqualified women. In any event, he concludes, nowadays, it is the view of the overwhelming majority of Rabbinic authorities that women may so participate and may hold such public office.

Israel cases referred to:

[1] H. C. 44, 61/68, *Rosh Ha'ayin Local Council v. Minister of interior; Sharf v. Minister of Religion*s 22P.D. (2)150.

[2] H.C. 191/64, *Elbaz v. Minister of Religion*s 18P.D.(4)603.

[3] H.C. 680/81, *Chairman of the Municipal Department of the Confederation of Agudat Yisrael in Israel v. Minister of Religious Affairs* 37P.D. (1)709.

[4] H.C. 590/75, *Barsimantov v. Minister of Religions* 30P.D.(2)636.

[5] H.C. 287/76- unpublished.

[6] H.C. 223/76-unpublished.

[7] H.C. 568/76, *Rabbi Harlap v. Ministerial Committee under the Jewish Religious Services Law* 31P.D.(1)678.

[8] H.C. 516/75 *Hupert v. Minister of Religion*s 30P.D.(2)490.

[9] H.C. 121/86 *"Shas" Party Faction v. Minister of Religious Affairs* 40P.D.(3)462.

[10] H.C. 392/72 *Berger v. Haifa District Planning and Building Committee* 27P.D.(2)764.

[11] C.A. 337/61, *Lubinsky v. Tel-Aviv Tax Assessment Officer* 16P.D.403.

[12] H.C. 202/57, *Sidis v. President and Members of the Great Rabbinical Court* 12P.D.1528.

[13] F.H. 10/69, *Boronovsky v. Chief Rabbis of lsrael* 25P.D.(1)7.

[14] H.C. 148/79, *Sa'ar v. Minister of interior and Police* 34P.D.(2)169.

[15] P.P.A. 4/82 (M.A. 904/82), *State of Israel v. Tamir* 37P.D.(3)201.

[16] H.C. 114/86, *Weil v. State of lsrael* 41P.D.(3)477.

[17] S.T. 1/81 *Nagar v. Nagar* 38P.D.(1)365.

[18] E.A. 1/65 *Yeredor v. Chairman of the Central Elections Committee for the Sixth Knesset* 19P.D.(3)365.

[19] H.C. 258, 282/64, *Zilonilas Ya'ari v. Minister of Religions; Agudat Yisrael v. Minister of Religion*s 19P.D. (1)517.

[20] H.C. 241/60, *Kardosh v. Registrar of Companies* 15P.D.1151; S.J. vol. IV, 7.

[21] F.H. 16/61, *Registrar of Companies v. Kardosh* 16P.D.1209, S.J. vol. IV, 32.

[22] H.C. 73, 87/53, *"Kol Ha'am" Company Ltd.; "EI Ittihad" Newspaper v. Minister of Interior,* 7P.D.871; S.J. vol. I, 90.

[23] H.C. 262/62, *Peretz v. Kfar Shmaryahu Local Council* 16P.D.2101.

[24] H.C. 163/57, *Lubin v. Tel-Aviv-Jaffa Municipality* 12P.D.1041.

[25] H.C. 44/86, *Butchers Branch of Jerusalem District v. Jerusalem Chief Rabbinate Council* 40P.D.(4)1.

[26] H.C. 195/64, *Southern Company Ltd. v. Chief Rabbinate Council* 18P.D.(2)324.

[27] H.C. 282/51, *National Labour Federation v. Minister of Labour* 6P.D.237.

[28] H.C. 507/79, *Roundnaff (Koren) v. Hakim* 36P.D.(2)757.

[29] H.C. 114/78 (Motion 451, 510/78), *Burkan v. Minister of Finance* 32P.D.(2)800.

[30] H.C. 98/69, *Bergman v. Minister of Finance* 23P.D.(1)693 S.J. vol. VIII, *supra,* p. 13.

[31] H.C. 507/81, *M.K. Abu Hatzeira v. Attorney General* 35P.D.(4)561.

Jewish law sources referred to:

These references are not listed here, since they are given their full citation in the body of the case. On the Jewish law sources in general, see note under **Abbreviations,** *supra,* p. viii.

Y. Shofman for the Petitioner.

M. Mazoz, Deputy State Attorney, for Respondents Nos. 1-2.

JUDGMENT

ELON J.: 1. Once again we are asked to scrutinize the composition of a religious council under the Jewish Religious Services Law (Consolidated Version), 5731-1971, this time the religious council of Yerucham. This court has already commented that "the ways of establishing a religious council ... are clearly very intricate and protracted ..." (H.C. 44, 61/88[1], at 154), as is evident from the numerous judgments delivered by us on the subject. In the instant case, the formation of the religious council was not only complicated and drawn out beyond the "ordinary" or "customary" measure, due to various reasons, but the matter also raises a question never before considered in the judgments of this court. The Petitioner challenges her disqualification as a member of the religious council, for the sole reason, she contends, that she is a woman. That is the heart of the petition, but before

considering it we shall briefly examine the sequence of events in this matter, starting with two preliminary comments:

a. The original petition was filed against the Minister of Religious Affairs (Respondent No. 1) and the Committee of Ministers under section 5 of the above-mentioned Law (Respondent No. 2), and in the course of its hearing two additional respondents were joined - the Yerucham Local Council (Respondent No. 3) and the Rabbi of Yerucham (Respondent No. 4);

b. In the original petition, the Petitioner also questioned the delay of the first two Respondents in concluding the task of forming the religious council. In the course of hearing the petition the composition of the religious council was concluded, but the Petitioner was not included among its members. This left us only the first question to deal with, i. e. why the Petitioner was not included as a member of the religious council. We issued an order *nisi* as well as an interim interdict restraining the first two Respondents from giving notice in *Reshumot*[*] concerning the new composition of the Yerucham religious council (without inclusion of the Petitioner), until otherwise ruled by this court. We now propose so to rule .

2. The Petitioner is a resident of Yerucham, an Orthodox Jewess, and a trained, experienced teacher of Judaic studies. She is a member of the Yerucham Local Council representing the Labour Party, and on January 26, 1986, the Local Council proposed her as one of the four candidates nominated on its behalf to the religious council.

3. That election was preceded by several events which are relevant to our discussion here.

The religious council of Yerucham is composed of nine members, like the number of the members of the Local Council (section 2 of the above-mentioned Law). It was first appointed in 1975. Notice of a newly composed religious council was published in *Reshumot* in 1981, which was invalidated, however, by judgment of this court (H.C.

[*] Official Gazette.

513/81). The council appointed in 1975 thus resumed its functioning, but with only five remaining members out of nine; one had died, two had resigned and one had left Yerucham. The Minister of Religious Affairs approached the Local Council and the Yerucham rabbinate three times (once before the municipal elections on October 25, 1983, and twice thereafter) requesting them to propose their candidates for the religious council, as prescribed by section 3 of the Law, but to no avail, for reasons that were not entirely clarified. The Minister repeated his request for the fourth time in March 1985, and it was only on September 18, 1985 that he received a response from the secretary of the Local Council, who named four candidates on behalf of the Council, with the Petitioner excluded. It transpired that the list of candidates had apparently been compiled by the head of the Council, but was not confirmed by the Council itself. This need was indicated to the head of the Council, and he submitted the matter to the Local Council for resolution. On January 26, 1986 the Council discussed the matter and elected its candidates for the religious council, among them the Petitioner.

Meanwhile, and before the said decision of the Local Council on January 26, 1986, the *Shas* party faction petitioned this court (H.C. 344/85) with respect to the reconstitution of 40 religious councils, including that in Yerucham. On November 10, 1985, judgment was given, by consent of the parties, to the effect that the case of each of these religious councils which the Minister of Religious Affairs failed to reconstitute within 90 days, should be referred to the Committee of Ministers under section 5 of the Law. On February 8, 1986, pursuant to that decision, the matter of the formation of 21 religious councils which the Minister of Religious Affairs was unable to reconstitute - including the religious council in Yerucham - was referred to the Ministerial Committee for determination.

The Petitioner contends that the resolution of the Local Council of January 26, 1986, concerning its choice of candidates, was conveyed to the Minister on February 6, 1986 (that is, before the matter of the formation of the religious council was referred for determination to the Ministerial Committee). It is not clear from the evidence before us precisely when that resolution of the Local Council reached the attention of the Minister, but the point is not material since it is not disputed that the Petitioner was included in the list of candidates made known on January 26, 1986, as aforesaid. On March 23, 1986, the Petitioner, as one of the candidates nominated to represent the local authority on the religious council, wrote

to the Minister inquiring as to the reason for the delay in the formation of the religious council in Yerucham. In a letter dated May 6, 1986, Mr. Marmorstein, head of the department for religious councils in the Ministry of Religious Affairs, informed the Petitioner that no notice whatever had yet been received by the Minister respecting any change in the Local Council's nominees for the religious council in relation to the list previously submitted. Mr. Marmorstein added the following comment:

> If we understand your letter correctly, it appears that you are one of the candidates. In this regard I can already inform you that the matter is not at all feasible; there are no female members on the religious council, only male members can serve on it, and I assume that you would not even want to create such a precedent.

As to the substance of the matter, the letter continued, the formation of the religious council had been referred to the Committee of Ministers, pursuant to the above-mentioned decision of this court in the petition brought by the *Shas* party faction, and it was to be hoped that the Committee would conclude its task within a reasonable period of time.

This hope was not fulfilled. In response to the above letter, the Petitioner wrote to the Prime Minister, who serves as chairman of the Committee of Ministers (section 5 of the Law), complaining strongly about the suggestion in Mr. Marmorstein's letter that she was unable to serve as a member of the religious council, and asking to speed up the formation of the religious council, with herself included as one of its members, representing the local authority. She also approached other persons, and the matter was even raised for discussion in the Knesset.

In a letter written by Mr. Marmorstein to counsel for the Petitioner, dated October 28, 1986, he described the sequence of events in the composition of the Yerucham religious council. It was stated, among others, that since the decision of the Yerucham Local Council (concerning its candidates for the religious council) had been sent to the Minister on February 6, 1986, neither the formation of the religious council nor the joint opinion (required under section 4 of the Law) could have been prepared by February 8, 1986 (the date on which the matter of constituting the religious council was referred to the Committee

of Ministers), "and unconnected with the petition of the *Shas* faction, the Committee of Ministers dealing with the composition of the religious councils was asked to handle Mrs. Leah Shakdiel's complaint following her approach to the Prime Minister".

The Committee of Ministers did not consider the matter of the religious council in Yerucham. Meanwhile a new Minister of Religious Affairs was appointed and thereafter the composition of the Yerucham religious council was taken up by the various competent bodies. The new Minister asked for time to consider the matter, it was raised again in the Knesset plenum and Internal Affairs Committee, and resolutions were passed. The Minister of Religious Affairs met with the Petitioner, and assurances were given on his behalf that the matter would be arranged and settled (as to which more will be said below), but no solution was forthcoming. In these circumstances, the Petitioner filed her petition before this court, and on March 12, 1987, we issued an order *nisi* as mentioned at the outset of our judgment.

4. Approximately one month after the order *nisi* was issued, the Committee of Ministers - composed of representatives of the Prime Minister, the Minister of Religious Affairs and the Minister of the Interior - began its discussions on the formation of the religious council in Yerucham. On April 21, 1987 the chairman of the Committee requested the three authorities whose nominees compose the religious council - that is, the Minister of Religious Affairs, the local authority and the local rabbinate (section 3 of the Law) - to propose their candidates. The Minister of Religious Affairs submitted his list of candidates in anticipation of a meeting scheduled for May 8, 1987. The meeting was postponed because the local rabbinate had not yet nominated its candidate, and this was done on May 29, 1987. On June 9, 1987 the Committee of Ministers held another meeting, and in view of changes in the list of candidates submitted by the Minister of Religious Affairs, another meeting was scheduled "to allow further consultation between all the parties". This meeting was set for August 5, 1987, but was postponed at the request of the head of the Local Council because, among other reasons, the Council was to discuss again its list of candidates on that same day. In mid-August a letter was received from the Local Council, in which it submitted its final list of candidates, this list including two changes, but the candidacy of the Petitioner remained unaffected. The Local Council also advised that it confirmed the candidates of the Minister of Religious Affairs and the candidate of the local

rabbinate. The Committee of Ministers decided, at its meeting on August 28, 1987, to request the opinion of the Minister of Religious Affairs and that of the local rabbinate respecting the candidates of the local authority, as well as the opinion of the local rabbinate respecting the candidates of the Minister of Religious Affairs. On September 20, 1987 the Committee of Ministers received the opinion of the local rabbi, in which he expressed his opposition to the candidacy of the Petitioner (a matter I shall discuss further below). Thereafter the Committee of Ministers held three meetings - on September 30, 1987, October 26, 1987, and November 29, 1987 - at the conclusion of which it determined the composition of the religious council in Yerucham, excluding the Petitioner. The Committee's reasons were set forth in a decision given on November 29, 1987, to which we shall presently refer.

5. We were asked to hold over the hearing of the petition until the Committee of Ministers completed its deliberations, which we agreed to do. In the meantime we decided to join the local authority and the local rabbinate as additional respondents to the petition, as already mentioned. We heard the petition on December 21, 1987, with counsel for all the parties present. On December 22, 1987 we decided to serve a copy of the material filed with the court on the representatives of the local authority who had been appointed members of the religious council by the decision of the Committee of Ministers, since it appeared that if we were to admit the petition and hold the exclusion of the Petitioner from the religious council to be unlawful, one of these four appointees to the religious council might be affected by having to vacate his seat in favour of the Petitioner. We also notified them that if they so wished they could submit their written reply to the petition and the material filed with the court within two weeks. All four representatives submitted their written replies, and the response of one of them is of particular interest here, as will be elaborated below.

6. In the original petition, as already mentioned, the Petitioner complained of the delay in forming the religious council in Yerucham. Mr. Mazoz, learned counsel for Respondents nos. 1 and 2, concedes that the delay was unreasonable, but contends that it was largely attributable to the other two Respondents because they were dilatory in complying with the Minister's request to submit their candidates for the religious council. We have already described the sequence of events and there is indeed no doubt that the inaction of the local authority and the local rabbinate contributed significantly to dragging out the matter. It also

appears, however, that both the Minister and the Committee of Ministers were tardy, beyond any substantive justification, in forming the religious council, even after the list of the candidates of the local authority had been submitted, and especially after the beginning of February 1986, when the Committee of Ministers was charged with the task by this court. There can be no justification for the lapse of almost two years until the formation of the Yerucham religious council, even if we take into consideration the workload of the Committee of Ministers in forming religious councils elsewhere too. For fourteen months, from February 1986 until April 1987, the Committee did nothing towards forming the Yerucham religious council, until the lodging of the instant petition. We have listed these details so as to bring the matter to the attention of the competent bodies. Now that the task of composing the Yerucham religious council has been concluded, there is no further need for us to deal with the Petitioner's complaint about the delay.

7. In his summary of arguments, Mr. Mazoz raised a preliminary plea as to the Petitioner's lack of standing before this court, contending thus: Since the period within which the local authority and the local rabbinate were required to propose their candidates for the religious council had expired (according to section 3 of the Law), their right to appoint representatives to the religious council had lapsed and that right passed to the Minister; however, as a result of the Minister's delay in forming the religious council, this court ruled (in H.C. 344/85) that the composition of the Yerucham religious council was to be effected within ninety days, or the matter would be referred to the Committee of Ministers under section 5. The effect of all this, according to Mr. Mazoz, is that because the lists of candidates were not submitted in time by the authorities mentioned in section 3 of the Law, and the entire matter was referred to the Committee of Ministers, there wasn't before the Committee any duly proposed list of candidates whatever, so that it was free to determine the composition of the religious council without being bound by any proposed list of candidates. Indeed, this was expressly stated in paragraphs A and B of the decision of the Committee of Ministers given on November 29, 1987, with respect to the local authority's nominated candidates. Hence, continues Mr. Mazoz, "in these circumstances the Petitioner lacks legal standing, procedural and substantive alike, as regards both the proceedings and the decision of the Committee of Ministers"; and in any event, according to section 5 of the Law, only the three authorities that compose the religious council have standing before the Committee of Ministers -"and the Petitioner does not have any preferred right or standing in

relation to any other resident of Yerucham seeking appointment as a member of the religious council". It follows that "the Committee of Ministers did not disqualify the candidacy of someone (the Petitioner) who had been lawfully proposed by the competent body, but decided not to appoint someone whose candidacy was put forward by a body (the local authority) which lacked the legal competence to make appointments at that stage, when that candidacy was also opposed by another body (the local rabbinate) of equal standing (to the local authority)".

8. This argument, for all its subtlety, has no foundation whatever, either in fact or in logic, and Mr. Mazoz wisely did not press it before us.

The religious council is composed of representatives of three bodies - the local authority (45%), the Minister of Religious Affairs (45%) and the local rabbinate (10%), each body proposing its own candidates (section 3 of the Law). The legislature considered this to be the desirable balance for the religious council, which provides local Jewish religious services and which is not elected by the residents in general elections. The three authorities express their opinion concerning all the proposed candidates - "with regard to their fitness to serve as members of the council and to their being properly representative of the bodies and the communities interested in the maintenance of Jewish religious services ... in the locality" (section 4 of the Law). We shall refer below to the qualifications required of the candidates. Where the local authority or the local rabbinate fail to respond to the Minister's request to list their candidates, the Minister may propose those candidates in their stead (section 3(b)), and in the event of any disagreement between the three authorities, the matter is referred to the Committee of Ministers for determination, against which decision the Minister may appeal to the Government (section 5 of the Law). The function of reconstituting the religious council and giving notice of its new composition is imposed on the Minister, as specified in section 6 of the Law.

The Committee of Ministers accordingly does not act in a "vacuum", and it too is bound to adhere to the structure and balance statutorily prescribed for constitution of the religious council, including the role of the three authorities. The function of the Committee of Ministers is to consider differences disclosed between the three authorities and to settle them. In other words, it must receive and study the lists of candidates proposed by each of

the three authorities, hear their respective opinions on them, all as specified in the Law, and settle the disagreements that arise among them. The Committee of Ministers so acted, precisely and rightly, in the instant case. At its first meeting, on May 8, 1987, there were present, in addition to the members of the Committee representing the Prime Minister, the Minister of the Interior and the Minister of Religious Affairs, that is, the directors-general of their respective ministries, also the rabbi of Yerucham, the head of the Local Council and a senior adviser to the Minister of Religious Affairs on matters of religious councils (as well as the legal adviser to the Office of the Prime Minister). The chairman of the Committee asked the representatives of the three authorities to submit their nominees for the religious council. The head of the Local Council named the four representatives chosen by that body - including the Petitioner. The representative of the Minister of Religious Affairs also named four candidates, and added that there might be changes after consultation with all the proposed candidates, so as to give proper representation to all the bodies and communities. The local rabbi said that he would submit the name of his candidate within two weeks, after considering the names of the candidates on behalf of the local authority and the Minister of Religious Affairs. At the end of the meeting the chairman of the Committee asked the parties to consult among themselves so as to reach agreement on all the candidates. At the meeting of the Committee on June 9, 1987, the representative of the local rabbinate was named, and the representation of the *Shas* faction on the religious council was discussed, whilst the representatives of the Minister of Religious Affairs and the Local Council asked for another opportunity to study their lists of candidates. On August 6, 1987 the Local Council announced its final list of candidates, which again included the Petitioner, and the local rabbi was again asked his opinion concerning the list of the representatives proposed by the Local Council and by the Minister of Religious Affairs, respectively. The Committee of Ministers thus acted correctly and in accordance with the provisions of the statute and its purpose, when it called upon the three authorities for their lists of candidates and for their opinions respecting all the candidates listed as proposed members of the religious council. In this context the Petitioner's candidacy was repeatedly put forward by the Local Council to the Committee, and despite changes from list to list of the candidates proposed by the Local Council at different times, the Petitioner's candidacy remained unaffected. The Committee of Ministers decided to reject her candidacy and she was excluded from membership of the religious council for reasons that we shall refer to below. How then can it be argued that the Petitioner has no *locus standi* before us to complain about the wrong

done to her, about the violation of her right to be numbered among the members of the religious council? One of the authorities appointed under the Law to propose candidates for the religious council, indeed the most important of the three, in fact proposed the Petitioner's candidacy, while she now claims that she was unlawfully disqualified. How can it be said that "the Petitioner does not have any preferred standing in relation to any other resident of Yerucham seeking appointment as a member of the religious council"?

No less unfounded is Mr. Mazoz's argument that the Committee of Ministers did not disqualify the candidacy of the Petitioner, but merely decided not to appoint a person whose candidacy was proposed by a body (i.e. the local authority) that had no legal competence to make appointments at the time. As already mentioned, the local authority is a body that seeks to propose its candidates for the religious council (also in relation to the Committee of Ministers), and the rejection of any of its proposed candidates amounts to disqualification of that candidate. If that candidate considers the disqualification to be unlawful, as does the Petitioner here, the doors of this court are open to her and we are ready to hear and consider her petition, like any other petition brought against a governmental body that is claimed to have based its decision on unlawful or extraneous considerations. It is true that the parties to the formation of the religious council are the three authorities specified under section 3 of the Law, and not the proposed candidates. Likewise, the party to an appeal before the Government against a decision of the Committee of Ministers, is a Minister and not the person disqualified by the Committee of Ministers. But any person who has a legitimate interest in the composition of the religious council may petition this court, even if not representing one of the three aforementioned authorities (see H.C. 191/64[2] at 610; H.C. 680/81[3] at 713). Certainly this applies to a person who was a candidate to represent one of the authorities that constitute the religious council and whose candidacy was disqualified.

9. We thus arrive at the essence of the petition: the complaint against the decision of the Committee of Ministers of November 29, 1987 to fix the composition of the religious council in Yerucham without including the Petitioner among its members, despite her nomination as a candidate on behalf of the local authority. Mr. Shofman, learned counsel for the Petitioner, claims that the decision of the Committee of Ministers is invalid, because it disqualified the Petitioner from serving on the religious council on the basis of the unlawful

consideration that the Petitioner is a woman; that this amounted to discrimination on grounds of sex which is contrary to law and neither permitted nor justified, also not for purposes of membership of a religious council. All the considerations mentioned in the decision of the Committee of Ministers, the Petitioner contends, are incorrect, unlawful or irrelevant. Mr. Mazoz, on behalf of the Respondents, replies that the exclusion of the Petitioner from membership of the religious council did not stem from any principled objection because she was a woman, but was rooted in the special circumstances of the formation of the religious council in Yerucham, namely: the objection of the local rabbi and the Minister of Religious Affairs to the candidacy of the Petitioner because she was unfit for the office, and the fear that the Yerucham religious council would not function properly, and its regular activity would be stymied, if the Petitioner served as one of its members. Mr. Mazoz argued further that the Committee also took into account the nature of the activity of a religious council, which deals with matters of clear religious-halakhic concern, and the tradition in Israel is that women do not serve as members of religious councils. These are material considerations, according to Mr. Mazoz, and the court should not intervene in a decision based on them.

10. The main points of the argument presented by Mr. Mazoz are detailed in the above-mentioned decision of the Committee of Ministers, and we shall now examine them. It is not disputed that the Committee of Ministers, as a statutory body carrying out public functions, is subject to judicial review by the High Court of Justice (section 15 of Basic Law : Judicature), and like any other public administrative body it must exercise its discretion in good faith, with integrity, without arbitrariness or unjust discrimination, and it must reach its decision on the basis of material considerations. As regards the extent of the intervention by this court, it has already ruled that the discretion is the Minister's, and so long as it is not shown that his considerations lacked foundation or that he exercised his powers unreasonably, the court will not intervene in his actions (H.C. 590/75[4] at 640; H.C. 287/76[5]). So too it has been held (per Landau J., in H.C. 223/76[6]) that

> the discretion is vested in the Minister of Religions and where there are no clear and persuasive grounds to contradict the opinion of the person entrusted with the discretion, this court will not intervene in the matter.

These statements are as pertinent to the discretion of the Committee of Ministers in settling the composition of the religious council under section 5 of the Law, as they are pertinent to the discretion of the Minister of Religious Affairs in discharging his own function. Thus it was held in H.C. 568/76[7] at 679-680:

> ...The matter of the fitness of the candidates lies initially within the discretion of the three bodies that compose the religious council, and if there are any reservations about the fitness of a given candidate, the matter is entrusted to the discretion of the above mentioned Committee of Ministers. This court does not usually interfere with administrative discretion, even in relation to the election of candidates to a representative body, unless it appears that the act was lacking in good faith or done out of improper motives, or on similar grounds for disqualifying an administrative act.

With these rules in mind we shall now examine the decision of the Committee of Ministers (R/15). After noting that this court (in H.C. 344/85) had referred to it the matter of composing the religious council in Yerucham, the Committee goes on to state (in paragraph B) -

> ...the local authority and the local rabbinate did not propose their candidates for the religious council within the statutory period of time; when the local authority first presented its list of candidates, more than two years late, it did not include Mrs. Shakdiel among them. After that the list of candidates of the local authority was changed twice. In light thereof, the Committee considers, from both the legal and the public interest aspects, that it is not bound to accept the recommendations of the local authority, but must rather consider each proposed candidate individually after consulting with the bodies concerned.

We do not accept this determination. The function of the Committee is to settle disagreements that arise between the different authorities, and the fact that these were late in presenting their candidates, or that one of them changed its list of candidates does not

allow the Committee of Ministers to ignore the existence of a particular candidate or to reject his candidacy, unless there is a disagreement with respect to that candidate. In that case the Committee must resolve the matter (as indeed it did with respect to the candidacy of the Petitioner), but it may not refuse to accept a candidate agreed upon by all the bodies that compose the religious council, or rest content with mere consultation between them.

11. The Committee further clarified that it had asked each of the three authorities to propose its candidates as well as give its opinion on the candidates in general. In doing so, the Committee acted correctly. The Committee notes that differences of opinion arose in relation to two matters: the absence of representation for the *Bnei Torah* community, and the inclusion of the Petitioner in the local authority's list. With regard to the first matter the Committee decided by a majority opinion that this community was adequately represented in the overall appointments to the religious council. As to the nomination of the Petitioner, the Committee gave its decision in these terms:

> E. The local rabbi, who was asked by the Committee of Ministers for his opinion of the candidates, objected to the candidacy of Mrs. Shakdiel, for reasons of her unsuitability and the proper functioning of the religious council. It became clear to the Committee that the attitude of the local rabbinate, and in fact also that of the chief rabbinate, is that even if the religious council is in theory an administrative body, it acts in practice as a body that ministers to matters of religious principle touching upon classic halakhic issues, and as such serves as a meeting place for the rabbis of the town and the neighbourhood as well as the scholars of the region. The religious council deals with both the administrative aspect of marriage registration and the halakhic aspect of the fitness of the registration; it deals with the building of ritual baths, but also with the determination of their fitness; it supervises the *kashrut* or fitness of foods, including the slaughter of animals, the setting aside of contributions and tithes and the problems of the *shemitta* [sabbatical] year with its related laws; it also deals with burial services and a long list of religious matters, among them the local rabbinate and other religious-halakhic concerns.

F. The representative of the Minister of Religious Affairs pointed out that in the forty years of the State's existence it became an accepted tradition among all the agencies concerned that the religious council should be a body with strong ties to the rabbinate and the halakha that guides it; hence an understanding evolved that women would not be nominated for membership in this body. He advised that the matter had meanwhile become the subject of public debate, amidst calls for change, various proposals being raised and examined from a broad perspective with a view to appropriate arrangements for promoting understanding and dialogue, along with respect for the view of the Israeli rabbinate. In the circumstances, the representative of the Minister of Religious Affairs asked us not to consider him to have taken any principled position on the issue, and to confine the issue to the case in Yerucham alone.

G. Having regard to the objection of the local rabbi to Mrs. Shakdiel's candidacy, and his reasons, and considering her views and position on the subject of religion and state, as publicized by her in the communications media, the Minister's representative was convinced that her appointment would disrupt and impair the functioning of the religious council in Yerucham. There is a reasonable fear that her appointment will lead to a complete break in relations between the religious council and the local rabbi, stir sharp dispute within the religious leadership in Yerucham, and thus prejudice the proper, orderly and regular functioning of the religious council.

H. The Committee agrees that this matter should not be decided on grounds of general principle and that it should address only the specific problem of the Yerucham religious council. From this point of view, the Committee is of the opinion that the arguments of the representative of the Minister of Religious Affairs should be accepted, in the hope that the question of principle will be decided in the near future from a broad and general perspective.

> I. For the above reasons, and having considered the need for the appropriate representation of all sectors of the local population, the Committee has decided to determine the composition of the religious council of Yerucham as follows: [Here the Committee lists the names of the nine appointees, with the Petitioner's name omitted - Ed.]

We shall examine these reasons *seriatim:*

12. The objection of the local rabbi, R. David Malul, is found in a letter written by him to the Committee (R/14), in which he expressed his opinion of the nominees for the religious council in these terms:

> I have received the list of candidates for the Yerucham religious council. As a rabbi who has known the entire community in all its diversity for many years, candidate Mrs. Leah Shakdiel also being known to me, I have reached the conclusion that she is unsuited to serve as a member of the Yerucham religious council. It is feared that her membership will disrupt the orderly course of activity of the religious council. Furthermore, she is not properly representative of the public which is interested in the maintenance of religous services in Yerucham. I therefore ask the local council to appoint another representative in her stead, in accordance with section 4 of the Jewish Religious Services Law.

Section 4 of the Law, under which Rabbi Malul's opinion was given, provides that

> the three authorities referred to in section 3 shall express their opinion of the candidates with regard to their fitness to serve as members of the council and to their being properly representative of the bodies and communities interested in the maintenance of the Jewish religious services (hereinafter referred to as "religious services") in the locality.

The opinion follows the terminology of section 4, and the section is expressly mentioned in its conclusion. The opinion is not, therefore, a halakhic ruling (even were there place for such a ruling with regard to the composition of a religious council), and Rabbi Malul did not purport to act in discharge of a halakhic function. The opinion was given within the frame and under the provisions of the Jewish Religious Services (Consolidated Version) Law, and it is, therefore, subject to scrutiny and review by this court. All the more so once the Committee of Ministers adopted that opinion as one of its reasons for deciding to exclude the Petitioner from membership in the Yerucham religious council .

13. Rabbi Malul did not specify why the Petitioner is not fit to serve as a member of the Yerucham religious council. In fact, his opinion merely reproduces the text of section 4 of the Law. Nor does the decision of the Committee of Ministers offer any explanation of the alleged unfitness.

The functions of the religious council and the qualifications required of its members have been discussed several times in the judgments of this court. Section 7 of the Law, concerning the powers of the religious council, provides:

> A council is competent to deal with the provision of religious services and for that purpose it may enter into contracts, hold property on hire or lease and acquire immovable property, all in accordance with the items of its approved budget.

The functions of the council accordingly embrace the provision of Jewish religious services. Thus in H.C. 516/75[8], Shamgar P. said as follows:

> The powers of the council are prescribed in section 7 of the Law, under which it is competent to deal with "the provision of religious services". The Law does not clarify the meaning of "religious services", but the current nature of these services may be deduced, among others, from the regulations concerning submission and approval of the religious council's budget. The schedule to the Jewish Religious Services Budget Regulations, 5728-1968 (K.T. 2177, 1968, 760) lists the religious

> council's main fields of activity covered by the budget, namely: rabbinate and marriage, kashrut and ritual slaughter, family purity [ritual], burial services, the Sabbath and *eruvin* and religious cultural activities.

And further on, *per* Shershevsky J., at page 503:

> ...The Law does not speak about religious services in general but about Jewish religious services, that is, about the religious services that are known to be specially and specifically for Jews. What these religious services are, can be learned, *inter alia* - as my esteemed colleague Shamgar J. has shown - from those listed in the schedule to the Jewish Religious Services Budget Regulations, 5728-1968. These religious services are not a matter of personal outlook, so that their substance can change from time to time according to the subjective view of whoever considers himself competent to express his own so called Jewish outlook, but are matters objectively governed by Jewish law and custom from time immemorial, as such known to be specifically Jewish and distinct from any other religion.

We are thus dealing with known and customary religious services. The religious council is charged with making appropriate budgetary provision for these services (see section 14 of the Law), and is accordingly vested with the requisite powers to discharge its legal functions (section 7 of the Law). The religious services provided by the religious council constitute a substantial part of the municipal facilities in the locality (H.C. 121/86[9], at 466), and it must provide them on call, regardless of sex, worldview, education or any other distinction. The religious council is, therefore, an administrative body created by statute, whose function it is to maintain Jewish religious services and to have an interest in their maintenance, and to assist the local residents in receiving the religious services that they require and wish to have.

To sum up, the services provided by the religious council are of a religious character, but the council is responsible only for their provision and not for making any kind of halakhic decision with respect to them. The latter decisions are entrusted to a body that

enjoys the requisite halakhic authority and competence (see the Chief Rabbinate of Israel Law, 5740-1980, section 2, subsections 1, 3, 5, 6, section 5, etc.).

14. The character and functional purpose of a religious council, as outlined in section 4 of the Law, determine also the qualifications required of its aspirant members:

> Every candidate must have two attributes: personal, that he is a religious person or at least not anti-religious; and public, that he represents a body or community with a religious interest.

(H.C. 191/64[2], at 610.)

It is likewise the rule that the interested bodies and communities

> ...be not merely indifferent in the sense they do not care if they [the religious services - M.E.] are provided or not, but must in fact show a positive interest in their existence and that they would be disturbed by the absence of such services.

(H.C. 516/75[8], at 503-504.)

These statements are pertinent both to the bodies represented by the candidates and to the candidates themselves. Candidates for membership of the religious council are not required to have recognized qualifications set by the *halakha* (see H.C. 568/76[7], at 679-680), as might have been justified were the religious council vested with the power or function of halakhic determination or decision. So indeed has it been contended by the Petitioner (section 36(b) of the petition). Mr. Shofman added in his oral argument before us that if a religious council decided matters of *halakha,* the Petitioner would not have pressed her petition .

15. We must now examine the Petitioner's alleged unfitness to serve as a member of the religious council in Yerucham, and for what reason she is not properly representative of the public interested in the maintenance of local religious services. It appears from the material before us, and the point is not contested, that the Petitioner is religiously observant, a trained and experienced teacher of Judaic subjects, and that she dedicates her time - in

addition to managing her home and raising her four children - to educational affairs in her place of residence. Do these excellent and special qualities not qualify the Petitioner to serve as a member of the Yerucham religious council? The Petitioner states in her petition as follows (paragraph 47):

> One of the new institutions in the state is the religious council, an institution of great importance in fashioning religious life at the local level. The Petitioner did not confine her candidacy to representing only the women of Yerucham on the religious council. She can certainly bring to bear a new and formerly unrepresented perspective to the council meetings. But as a resident of the locality who is interested in the maintenance of religious services, and as an elected representative of the public, she considers herself a full participant in public activity, and wishes to serve on the religious council as a full partner to decisions in all matters falling within the competence of the council.

These statements are true and sincere, unchallenged by any of the litigants and acceptable to us. Male members of the religious council have never been required to show knowledge of the Torah, scholarship, or strict observance of all the commandments, and never have we heard that the lack of any of these - or even all of them together - should disqualify a man from serving on a religious council. Is it because the Petitioner is blessed with all these virtues that her competence shall be diminished, and she be deprived of her right to serve on the Yerucham religious council? It is clear beyond doubt that the Petitioner is interested in the availability of religious services as defined in the Law, and in the regulations and case law, as already outlined; moreover, that she wishes to devote her time, energy and talent to that end. How can she be regarded as unfit to serve in this capacity and to represent the residents of Yerucham?

Hardly surprising, therefore, is the Petitioner's grave suspicion that the only possible explanation for her "unfitness" to serve as a member of the religious council is the fact that she is a woman, and nothing else. This suspicion is well-founded, since that very explanation was expressly proferred by the competent parties concerned (see the above-mentioned letter

of the head of the department for religious councils, of May 6, 1986), and we shall further elaborate the point below.

16. It was also explained, in paragraph E. of the decision of the Committee of Ministers, that even if the religious council is an administrative body in theory, it is in actual practice a body that deals with matters of religious principle, affecting classic halakhic issues. This explanation is unclear and hard to comprehend. The religious council indeed deals with matters of religious principle affecting classic halakhic issues; but does this preclude the Petitioner from contributing to this great and important task her own experience and wisdom? The elaboration of this explanation (*ibid*, par. E) - that the religious council also deals with the halakhic aspect of *kashrut,* marriage registration, ritual baths and similar basic questions of *halakha* - is most perplexing. These are, after all, clearly matters for religious scholars and halakhic decision. Given the usual composition of many of the religious councils throughout the country, are their members, though male, competent and qualified to decide such matters? We have never heard that expertise in the laws of ritual baths and *kashrut* is a condition for membership of a religious council. Likewise as regards the competence and qualifications of most members of the religious councils to make decisions concerning the setting aside of tithes, the problems of the *shemitta* [sabbatical] year, and other matters of the kind referred to in the decision of the Committee of Ministers. Mr. Mazoz did not know, understandably so, how to defend this reasoning of the Committee of Ministers, and, with all due respect, better it had been left unuttered. If that reasoning holds good, and that were indeed the situation, then the incumbent members of most of the religious councils in the country should immediately be unseated to make way for religious scholars, knowledgeable in law and rite and familiar with the Talmudic sources.

17. The decision of the Committee of Ministers further states that it accepted the apprehension of the representative of the Minister of Religious Affairs, who was convinced that the Petitioner's appointment "would disrupt and impair the functioning of the religious council in Yerucham", and that there was reasonable ground to fear "a complete break in relations between the religious council and the local rabbi and this would stir sharp dispute within the religious leadership in Yerucham". The reason for this grim forecast was the objection of the local rabbi to the Petitioner's appointment "in light of her views and

position on the subject of religion and state, as publicized by her in the media". The representative of the Minister explained that it has been the tradition for forty years, ever since the establishment of the State - because of the strong ties between the rabbinate and the religious council - that women do not serve on this body. Also that for some time now calls have been made for reform and that the matter is under consideration, hence - so it is stated in the decision of the Committee of Ministers - the present decision in the matter of the Petitioner's exclusion from the religious council, should not address general principle but confine itself specifically to the composition of the Yerucham religious council.

18. These apprehensions, some of them convincing to the Minister's representative and the Committee and some of them seemingly reasonable, must be seriously considered and carefully examined. Before doing so we must comment that we find one of the disqualificatory grounds mentioned in the above extract from the decision of the Committee of Ministers, very strange, to say the least. What are those views and perspectives of the Petitioner on matters of religion and state, said to have been publicized by her in the media, which generated the fear of all the anticipated mishaps? In all the abundant material before us we found no mention of these views, no one bothered to explain to the Petitioner and her counsel what was at stake, and certainly no one asked the Petitioner any question about the matter. Even counsel for the state was unable to enlighten the court in this regard. Since we do not know the particulars, it is unnecessary to ask since when do one's views and attitudes on the relationship between state and religion disqualify him from membership of a religious council. We take a grave view of the inclusion of this passage in the decision of the Committee of Ministers, without even bothering to explain the matter. This not only does injustice to the subject, but also injury to the Petitioner, and the controversial statement should never have been made. We return to discuss the fear that the proper functioning of the religious council might be impaired, along with the relations within the local religious leadership.

19. It accordingly seems clear that the above-mentioned fears stemmed from the proposal to include a woman among the members of the religious council. We find no other factor to justify these fears, considering the Petitioner's personality, her way of life and the many virtues with which she has been endowed. One may assume that the Petitioner's gender was the underlying reason for the local rabbi's objection, even if he refrained from so

intimating. On the other hand, this ground is perhaps more than hinted at in the reasons given by the representative of the Minister of Religious Affairs, and by the Committee of Ministers, for accepting the contentions of the local rabbi. These reasons refer to a tradition that would exclude women from religious councils, and it is added that the matter is being studied following various calls for reform; also that meanwhile the Petitioner's case was not decided on "principle", the decision affecting only the Yerucham religious council. This is mere semantics without real substance. Since we have found no justification for the Petitioner's disqualification from service on the religious council of Yerucham other than the solitary contention concerning her gender, the decision of the Committee of Ministers to disqualify the Petitioner was necessarily one of principle. In matters such as these it is not the phraseology that counts, nor is the nomenclature assigned by the Committee of Ministers decisive, only the substantive content-which here is clear from the circumstances (see H.C. 392/72[10], at 773). Several events that preceded the decision of the Committee of Ministers further support the conclusion that the Petitioner's gender was the reason for her exclusion from the religious council, as we shall presently see.

20. We have said that a religious council established in accordance with the Jewish Religious Services (Consolidated Version) Law is an administrative body, the composition of which is subject to the pertinent statute and case law (see, in particular, H.C. 568/76[7]). Hence the exclusion of a female candidate from appointment to a religious council, because she is a woman, clearly contradicts a fundamental principle of Israeli law which prohibits discrimination on grounds of gender. This fundamental principle was laid down in the Declaration of Independence, and is among those that have gone beyond recognition in the case law to become enshrined in legislation. I am referring to the Women's Equal Rights Law, 5711-1951, section 1 of which reads as follows:

> The law shall apply equally to man and woman with regard to any legal act; any provision of law which discriminates, with regard to any legal act. against a woman as woman, shall be of no effect. *

* The above free version differs somewhat from the authorized English translation (L.S.I. Vol. 5, p.171) - Ed.

The Law provides further that it shall not "affect any legal prohibition or permission relating to marriage or divorce" (section 5). Also that it "shall not derogate from any provision of law protecting women as women" (section 6, to which we shall presently refer).

It has been ruled that the Women's Equal Rights Law has the same status as an ordinary statute, with no special standing in the technical sense, so that it can be repealed or amended by an ordinary legislative act of the Knesset (C.A. 337/ 61[11], at 408-409). Nevertheless, by substance and character -

> ...This Law is not like any other ordinary Law! We are looking at an ideological, revolutionary Law that changes the social order; its name and its first "programmatic" section indicate that - except for the reservation in section 5 - the Law sought to uproot any matter in which women suffer a legal disadvantage under existing law...

(Per Silberg J., H.C. 202/57[12], at 1537.)

The Women's Equal Rights Law has been given a broad interpretation, in light of its substance, and the words "legal act" in its first section are intended to refer to any legal act affecting a woman, whether she is the subject of the act or its object. The Law guarantees women

> ... equal status before the law not only in terms of competence with regard to an "act", in the narrow sense of the word, but in all legal respects.

(C.A. 337/61[11], at 406, *per* Witkon J.)

As aforesaid, there may be situations where the principle of equality between the sexes will not apply, for instance, in matters of prohibition and permission relating to marriage and divorce, or where the purpose of the statute is to protect women as women. In the words of Witkon J. (*ibid*. [11], at 407):

> When we seek to examine the meaning of this provision in light of the provision of section 1 of the Women's Equal Rights Law, we must emphasise the word *discriminate*. Discrimination - as this court has often stated - does not mean every difference or distinction in the law or in its application to different persons, but only a difference that is based on irrelevant distinctions. "The essence of discrimination is that it distinguishes between different people just because they are different, even though the difference between them is immaterial and does not justify the distinction" - so it was held in *The Committee for the Protection of Nazareth Lands v. Minister of Finance,* H.C. 30/55. And consider further *Weiss v. The Legal Council,* H.C. 92/56, as well as other sources.

And in the words of Agranat P. (F.H. 10/69[13], at 35):

> This court has held more than once that one must always distinguish - both for the purpose of statutory interpretation and as a standard for the reasonableness of the administrative action of a public authority vested with discretionary power - between wrongful discrimination (hereinafter "discrimination") and permissible distinction. The principle of equality, which is none other than the converse side of the coin of discrimination, and which the law of every democratic country aspires to realise for reasons of justice and fairness, means equal treatment of persons between whom there is no substantial difference that is relevant for purposes of the matter in issue. If they are not treated equally there is discrimination. On the other hand, if the difference or differences between different people are relevant to the purpose under discussion, then it will be a permissible distinction if they are treated differently for that purpose, so long as the differences justify this. The concept of *equality* in this context thus means *relevant equality,* and for the purpose concerned, requires an *equality of treatment* for those characterised by the situation mentioned above. On the other hand, there will be a permissible distinction if the difference in the treatment

> of different persons stems from their being in a situation of *relevant inequality,* having regard to the purpose of the treatment, just as there would be discrimination if it stemmed from their being in a situation of inequality that is *not* relevant to the purpose of the treatment.

Classic examples, in legislation and in the case law, of such distinctions stemming from real differences between men and women, are those relating to pregnancy, giving birth and nursing (see the recent Equal Employment Opportunities Law, 5748-1988, section 3).

One may note the gap in some areas between the declaration as to women's equal rights and the actual implementation of this principle. Opinions are also divided as regards a limitation upon privileges for women, between advocates of special treatment and those advocating greater equality. The matter has been extensively discussed and researched (see, for example, R. Ben-Israel, "Equal Employment Opportunities for Women", 4 *Tel Aviv University Studies in Law* (1978-79) 142; F. Raday, "Equality of Women and Israeli Law", 27 *The Jerusalem Quarterly* (1983) 81; H. Shahor-Landau, "Equality for Working Women in the EEC Law and Lessons for Israel", 13 *Mishpatim* (5743-44) 457 (in Hebrew)). Some of these matters have been regulated by recent legislation of the Knesset - among others, the Equal Retirement Age for Male and Female Workers Law, 5747-1987, and the Equal Employment Opportunities Law.

21. Can one justify the disqualification of the Petitioner from membership of the religious council of Yerucham, despite her lawful nomination by the local authority, on one of the above mentioned grounds for disregarding the principle of women's equal rights? The answer is negative. Discrimination on the basis of religious-halakhic considerations is allowed in matters of marriage and divorce, but such considerations do not operate here. Counsel for the Petitioner agrees that if the religious council were a halakhic body with the function of deciding halakhic questions, the candidates nominated for such a body should meet the requirements of the *halakha* and the qualifications for halakhic decision-making. However, the religious council is not such a body, but rather an administrative body charged with satisfying religious needs. It follows that even if a woman could not serve on such a body from the halakhic point of view (which is not so according to the opinions of many great scholars, as we shall presently see), this consideration does not pertain to the

composition of an administrative body, where the qualifications of its members must be determined solely according to the relevant legislation and case law of the general legal system.

Needless to say, the Petitioner was not disqualified from membership of the religious council in order to protect her as a woman, and her disqualification accordingly constitutes a distinction that is irrelevant to her being a woman, amounting to wrongful discrimination.

22. We must still consider whether those grave fears expressed by the representative of the Minister of Religious Affairs, and in the decision of the Committee of Ministers, serve to outweigh the interest in the fundamental right of women's equality. For we adhere to the rule that fundamental rights are not absolute but relative, that their existence and preservation call for a proper balance between the different legitimate interests of two individuals or of the individual and the public, given that all the interests are founded in and protected by the law (H.C. 148/79[14], at 172; P.P.A. 4/82 (M.A.) 904/82) [15], at 210; H.C. 114/86[16], at 490-491).

After due consideration and deliberation I conclude that given the issues and the facts in the present case, the scale does not tip in favour of those grave fears pleaded by the Respondents. Non-discrimination against a woman, because she is a woman, is a fundamental principle of the legal system in Israel. To warrant the subjection of this fundamental principle to such a balancing process, it should have been contended, at least, that a woman's membership of a religious council is forbidden from a halakhic point of view, with the result that such an appointment would bring the work of the religious council to a standstill. Had this argument been made, there would have been room to seek a balance and compromise between the two poles. For we are concerned here with a religious council which, although a statutory, administrative body and therefore subject to the statutory principles, is also a body whose functions, and its functionaries, are closely associated with the world of the *halakha,* and it would have been proper to try and bridge the two opposites. None of the Respondents, however, contended that it is forbidden for women to serve on the religious council, nor was this mentioned in the decision of the Committee of Ministers. Even the local rabbi, the only person to object to the inclusion of the Petitioner in the religious council, does not explain his objection on grounds of a halakhic prohibition,

but in terms of unsuitability and non-representation of the bodies interested in the maintenance of the religious services. The Minister of Religious Affairs and his representative on the Committee of Ministers spoke of a "tradition", evolved from an understanding over a period of forty years, "not to propose women as candidates for membership in this body", hence - so it was said in the decision of the Committee of Ministers - the objection of the Minister, and the objection

of the Committee which adopted his position, do not constitute a principled decision not to include women in the religious councils. It is true that at an early stage, on May 6, 1986, the head of the department of religious councils wrote to the Petitioner that "it is not possible" for a woman to be a member of a religious council, but this style of speech changed afterwards. Following the appointment of a new Minister of Religious Affairs, the Petitioner was invited to the Minister, and was informed by his adviser on women's affairs, Mrs. Lichtenstein (paragraph 27 of the petition) -

> ... that the Minister had decided to agree to the appointment of the Petitioner, but the Petitioner was asked to refrain from making the decision public for two weeks. Mrs. Lichtenstein asked the Petitioner to delay the filing of her petition [before the High Court of Justice - M.E.] until March 11, 1987, saying that by this date the matter would be taken care of. The Petitioner agreed to Mrs. Lichtenstein's requests.

The Petitioner attested to the truth of these facts and they were not refuted by the Respondents. Why was the promise made to the Petitioner by the Minister of Religious Affairs, through Mrs. Lichtenstein, not kept? The Petitioner answers this question in another affidavit, submitted in M.A. 279/87, on July 21, 1987, as follows:

> 2. On March 9, 1987 there was a meeting of the Chief Rabbinate Council, and the question of the service of women on religious councils was raised at this meeting. The Chief Rabbinate Council adopted a resolution that women are not allowed to serve on religious councils.

3. This decision was reached a short while before the date on which the Minister of Religious Affairs (Respondent No. 1) was supposed to announce his consent to my appointment to the religious council (paragraph 27 of the Petition). Respondent No. 1 did not announce his consent to the appointment as promised, and the petition was filed on March 11, 1987.

4. On a date unknown to me, Respondent No. 1 [the Minister of Religious Affairs - M.E.] asked the Chief Rabbinate for clarification of the matter. The answer of the director of the Chief Rabbinate Council, dated April 9, 1987 - attached as Appendix P/1- was as follows:

> In response to the question posed by the respected Minister in the matter of Mrs. Shakdiel as a member of the Yerucham religious council, I hereby notify you that the Chief Rabbinate Council rejected this notion and decided that women are not allowed to be permanent members of the religious council.

This opinion of the Chief Rabbinate of Israel is an opinion of *Torah* [religious learning] like all the religious laws prescribed by our rabbis over the generations, and fall within the halakhic rule of compliance with "all that they instruct you".

5. It was the decision of the Chief Rabbinate Council, apparently, that prevented Respondent No. 1 from realizing his intention and expressing his consent to my membership of the religious council. This appears from an interview given by Respondent No. 1 on the I.D.F. radio station, on July 9, 1987. The interview followed upon the decision of Respondent No. 1 to appoint the Tel-Aviv Municipal Council's representatives to the electoral assembly for the Tel-Aviv Chief Rabbi, and to include only men on that list. The full interview, as recorded by the I.D.F. radio station, is attached as Appendix P/2, and excerpts from it follow:

> Z. Hammer [Minister of Religious Affairs]: ...I firmly believe that a woman can and should contribute to the patterns of religious life except in matters in which the *halakha* does not so permit.
>
> Y. Roeh [Interviewer]: ... Such as this electoral body?
>
> Z. Hammer: ... No, no, no! The *halakha* - I do not think it prohibits [a woman's] service on the electoral body or membership of a religious council. But the point is that for many years it has not been so, and when it is necessary to break through in a new direction, there are difficulties ... And I would say that whoever really wants women to enter the sphere of religious life and its administration - that is, within the limits of the *halakha,* of course - must be patient and help us do it in a way that will be acceptable to the rabbis as well as the chief rabbinate.

The opinion of the Chief Rabbinate was not included by the Respondents in the material before us, nor did they rely upon it in their arguments, perhaps for the reason that even the Respondents do not believe there is any halakhic prohibition against women serving on a religious council, as was clearly acknowledged by the Minister of Religious Affairs in the above-mentioned interview excerpts (and which he did not deny). In fact, as we shall see below, there is much support for the view that there is no such halakhic prohibition. Given this state of affairs, we regret to say that there is no need to exercise further patience and meanwhile deny the Petitioner her fundamental right not to suffer discrimination, all contrary to the provisions of the Women's Equal Rights Law.

23. We hope and trust that the orderly functioning of the religious council in Yerucham will not be impaired by the inclusion of the Petitioner in this body, and that this will not lead to a "complete break" between the religious council and the local rabbi, nor create a dispute within the Yerucham religious leadership. The local rabbi apprehended that the Petitioner might not be fit to serve as a member of the religious council. I am sure that once the

respected rabbi comprehends the laudatory intention and acts of the Petitioner to promote the religious services in Yerucham, he will have only praise for her activity - as the wisest of all men said: "many daughters have done valiantly, but you excel them all" (Proverbs, 31: 29). In our times, when Jewish women are educated and knowledgeable, and most of our children's education - even in the religious schools - is entrusted to female teachers, it is an accepted daily occurrence that men and women discuss together matters of schooling and education around the same table. And there is no reason, whether on ground of *halakha,* tradition or custom, for the Petitioner not to sit at the table of the discussions of the religious council. Is there anyone more interested than she in the religious fitness of food products and the ritual baths, in the maintenance of synagogues and the dissemination of religious culture?

24. I find confirmation for this expectation-assumption in the letter written by Rabbi David Milgrom in response to our query raised at the end of the hearing. Having regard to the possibility that the petition might be admitted and the order *nisi* made absolute, we approached the four representatives of the local authority who had been named as members of the religious council in the decision of the Committee of Ministers, asking for their reply, if any, to the petition and material submitted to the court. We did so since one of the four representatives of the Local Council would be prejudiced by having to give up his place on the religious council in favour of the Petitioner, should we hold her to have been unlawfully disqualified. We are especially interested in the detailed response of Rabbi David Milgrom, who wrote, *inter alia,* as follows:

> 2. If the order *nisi* is made absolute in the sense that the Petitioner is included in the composition of the Yerucham religious council, this will be achieved at the expense of excluding one of the members named by the Committee of Ministers.
>
> 3. I submit that in such case it would be right to exclude one of the representatives of the Minister or, alternatively, a member of the Labour party proposed by the local authority.

…

> 5. I wish to emphasise that in addition to my representing the S*has* party on the religious council I also represent the *Bnei Hatorah* community in Yerucham, in all about one hundred orthodox families who live in Yerucham and I am their sole representative. Naturally, the orthodox community has an especially strong interest in the local religious services.

For this reason Rabbi Milgrom submitted it would be proper for him to continue serving on the religious council, even if the court decided that the Petitioner be reinstated, and that some other representative of the Local Council on the religious council should give up his place on this body, the number of whose members cannot be more than nine. The substance of this submission must be considered by the Committee of Ministers, and we express no opinion on the matter. But we do learn, indirectly, that Rabbi Milgrom, who represents *Shas* and the ultra-orthodox community in the locality, sees nothing wrong in serving on the religious council together with the Petitioner, if it be so decided; moreover, he wants us to determine that he shall remain a member of the religious council, together with the Petitioner. Rabbi Milgrom is not afraid of disruption or paralysis of the religious council on account of the Petitioner's membership, nor is he apprehensive of any prohibition against serving on a religious council which has a female member. And if this is the view of the representative of *Shas* and the orthodox community of *Bnei Hatorah* in Yerucham - and he appears to be the only person bearing the title of rabbi on the proposed religious council - why should we fear that the other members of the council, or the public, might disrupt and paralyse the orderly functioning of the religious council should the Petitioner be elected to serve on it?

25. In summary, it is clear without doubt, from the reasoning in the decision of the Committee of Ministers and from the opinions of the local rabbi and the Minister of Religious Affairs, that their objection (principled or otherwise) to the inclusion of the Petitioner in the composition of the Yerucham religious council, stems from the view of the Respondents that women should not serve as members of this body. That is the underlying view, though some of the Respondents believe that this situation should prevail as a matter of principle in the future too, while some of them hold that it ought to be so for the time being, until it becomes possible to change this state of affairs. Either way, this

disqualification and such considerations are improper, and they invalidate the decision of the Committee of Ministers to disqualify the Petitioner from membership of the religious council. The initial refusal to include the Petitioner as a member of the religious council because of her gender was stated clearly and bluntly in the letter written to her by the head of the department for religious councils on May 6, 1986. The refusal was later repeated in somewhat more restrained language by the Minister of Religious Affairs then in office, until finally the incumbent Minister of Religious Affairs has stated that there is no principled halakhic obstacle to women serving on a religious council, though he requests patience until agreement is reached upon the matter by all the parties. It appears that the Committee of Ministers also adopted this position of the Minister of Religious Affairs. This denial of the Petitioner's fundamental right, in anticipation of a process of "maturation" over an unknown and indeterminate period of time (see Minister Hammer's speeches in the Knesset on December 2, 1986 and October 28, 1987) is unjustified, and there is no foundation for disqualification of the Petitioner from service on the religious council.

26. We intimated above that there is strong support within the halakhic framework itself, for the view that the Petitioner, as a woman, should not be barred from membership of a religious council. We shall now elaborate (cf. Me'iri, *Sanhedrin* 33a). The issue merits inquiry, richly coloured as it is by values that determine the character of the family and the image of society, and it impinges on an area in which the law and the *halakha* meet. We shall accordingly seek to elucidate the matter as it is reflected in the writings and rulings of the halakhic scholars and thinkers.

The question whether, and to what extent, a woman may serve in public office has been sparsely addressed as such in the talmudic *halakha* (see e.g. B.T. *Berakhot* 49a, in relation to women not bearing the crown; and see our discussion below on *Sifre,* Deutoronomy, *Parashat Shoftim,* para.157, and *Pesikta Zutarta, Pareshat Shoftim*). In the Bible, the Talmud and later, there is mention of distinguished female figures - prophets, judges, queens, wise and scholarly (see S. Ashkenazi, *Women in Jewish Perspective* (2nd ed., 1979/80), especially Part I, pp 115-142; "Women in Jewish Sources", in *Hagut* - Anthology of Jewish Thought (Religious Culture Department, 1982/3) 25-26). These were isolated phenomena, while the guiding rule - one of great significance in the edifice of the Jewish family over the generations - was: "All glorious is the king's daughter within (the palace)"

(Psalms, 45:14), that is, a woman finds respect in educating her children and managing her home, and it is not her way to be involved in public affairs. We find a first, clear and concise expression of this theme in Maimonides' comment on Deutoronomy 17:15 "You shall set a king over you" (*Yad,* Kings 1:5):

> One does not place a woman on the throne, as it was said: "a king over you"- and not a queen, and likewise all offices in Israel - only a man may be appointed.

Maimonides' generalisation with respect to "all offices in Israel" (which might derive from the *Sifre commentary* on the above verse in Deuteronomy, according to the version before Maimonides - see *infra),* was disputed among many of the *Rishonim*[*] (see *infra*), but his opinion was accepted in practice.

27. An interesting and wide-ranging debate on the subject took place at the beginning of the present century, in connection with granting women the right of franchise. In our present context the question arose primarily in relation to elections to the institutions of self-government of the Jewish community in Palestine just after the end of the first world war, as well as in different communities in the Jewish Dispersion. It might be recalled that until then women had been denied the right to vote under most world regimes, and only during the latter half of the second decade of this century were women awarded full rights, to elect and be elected, in most of the states and provinces of the United States and Canada, in Russia, England and Germany. In some countries, such as France, this right was awarded only in 1944, and in Switzerland in 1971 (See: L.H Tribe, *American Constitutional Law* (Mineola, 2nd ed., 1988) 1599; O Hood Phillips and P Jackson, *Constitutional and Administrative Law* (London, 7th ed. by P. Jackson, 1987) 187; P.W.H. Hogg, *Constitutional Law of Canada* (Toronto, 2nd ed., 1985) 723; J.F. Aubert, "The Swiss Federal Constitution" *Introduction to Swiss Law* (Deventer, ed. by F. Sessemontet and T. Ansay, 1983) 1518; Encyclopedia Britannica (vol. 23, 1971) "Women, Legal Position of", at 623-627). We shall refer to this aspect again below. As to the views of the rabbinical scholars in Palestine and in the Jewish Dispersion, these fall into three camps. The majority

[*] Early post-Talmudic rabbinical authorities - Ed.

opinion was that women should not be granted election rights, whether active - that is, the right to vote, or passive - that is, the right to be elected. This was the view of most of the halakhic scholars in the Palestine community (see M. Friedman, *Society and Religion* (Ben Zvi Publications, 1977/ 8) 146-184) and of the outstanding scholars in the Diaspora; some of the scholars opined that women have active election rights but not passive ones; and a third camp was of the opinion that there was no halakhic impediment to women exercising both active and passive election rights, that is, they are permitted both to vote for and to be elected to public and governmental office.

28. It may be noted that on this matter Rabbi Avraham Yitzhak Hacohen Kook, at the time chief rabbi of Jerusalem and later chief rabbi of Palestine and founder of the chief rabbinate, belonged to the camp that denied women both active and passive election rights. He expressed his view on three occasions in the context of the great debate waged at the time. (See Collection of Essays by Rabbi Avraham Yitzhak Kook (Goldhartz Fund Publications, Jerusalem, 1983/4) 189-194: *responsum* to the Mizrahi Confederation Committee of 11 Tishrei 5680-1920; also "general response to the many persons who have asked me" of 10 Nissan 5680-1921; and the third time, in "Decision of the Conference of Rabbis of Eretz Israel" of 26 Nissan 5680-1920, which was signed by Rabbi Kook alone. As to variant versions of this decision, see Friedman, *op. cit.,* at 165-167)). Rabbi Kook discussed the matter from three perspectives (Essays, *ibid*., at 189):

> a. *in terms of the law;* whether the matter is permitted or prohibited;
>
> b. *in terms of the public welfare;* whether the people stand to benefit from affirmation of the matter, or from its negation;
>
> c. *in terms of the ideal;* whether our moral cognition negates the matter or affirms it.
>
> We must clarify our attitude to these three standards, since I wish this inquiry to encompass people in all walks of life: those wholehearted believers for whom the halakhic ruling is decisive; those for whom the

> welfare of the nation is decisive, and those who are concerned mainly with the moral ideal *per se.*

From the legal perspective, Rabbi Kook saw two reasons for opposing feminine participation in public office:

> Legally speaking I have nothing to add to the statements of the rabbis who preceded me:
>
> a. In the Pentateuch, the Prophets and the Writings, in the *halakha* and the *aggada,* we hear a single voice, that the duty of the regular public service is imposed on the men because "it is the nature of man to subdue but it is not the nature of woman to subdue" *(Yevamot* 65b) ... and "all her glory is within (the palace)".
>
> b. The endeavour to avoid a mingling of the sexes in public gatherings passes as a beaded thread through the entire *Torah,* so that the law is certainly against any innovation of public leadership that necessarily leads to a mingling of the sexes in public, in a group or conference, in the regular course of public life.

As to the *public welfare,* Rabbi Kook advocated maintenance of the connection with the sources of Judaism and the Bible, in the name of which the nations of the world recognized at that time the rights of the people of Israel to the Land of Israel (*ibid.*, at 189-190). And as regards the *ideal* status of women - that was a vision for the future "of women and mothers, in life in general and in particular ... but this future vision is still entirely unreflected in contemporary cultural life which is rotten from within, though seemingly smooth on the outside" (*ibid.*, at 190).

The above response is characteristic of this great spiritual leader, who integrated in his decisions, along with the halakhic sources, a philosophy on the rebirth of the nation and its return to the Land of Israel, together with a vision for the future, according to his perspective and understanding. He was convinced that it was for the good of women not to

be dragged into the whirlpool of public life, and likewise for the good of the nation returning to its homeland. In this manner he sought to persuade also those for whom the welfare of the nation or the moral ideal, rather than the strict *halakha,* was decisive.

In the two other sources mentioned Rabbi Kook expands the discussion, adducing further reasons for the position he takes. He intimates that even the nations of the world were only then beginning to accept "this modern innovation" of women's suffrage, which was incompatible with the world of Judaism and the special character of the Jewish family. Rabbi Kook perceived the matter thus: (*ibid.*, at 192):

> The psychological reason for this demand, the call for public elections in the name of women's rights, derives mainly from the miserable status of the masses of women in these nations. If their family situation was as serene and dignified as it generally is among the Jews, neither the women themselves nor the men of science, morality and lofty ideals would demand what they call election "rights" for women, according to the usual formula, which is likely to disrupt matrimonial harmony and eventually must necessarily lead to serious deterioration in national and political life in general. And so, out of the despair and bitterness resulting from the crudeness of men in spoiling family life, it is thought to find succour in some kind of public power of proxy, so to try and mend their faltering domestic situation with little concern for the further stresses thus added, since the whole edifice is already so breached. We have not and shall not stoop to this level, and would not want to see our sisters in such an inferior status. The Jewish home is still a hallowed institution, and we should not dim the radiance of our sisters' lives and allow them to become troubled by the clamour of opinions and controversies in matters of elections and politics.
>
> The Jewish woman bases her rights on the delicate content of her special spiritual character, rather than on cut and dried laws formulated in ready moulds, which to her are like iron constraints quite unsuited to her delicate constitution, and which, by her nature, she is generally not

> strong enough to use, when they cannot even compensate for the damage wrought at the recesses of the spirit that encompass and govern all areas of life.
>
> The family is the foundation of our nation, the House of Jacob will build the people of Israel. We are preparing the edifice of the nation - according to our spiritual nature. We are always ready to propound a moral duty to hear the opinion of the woman in every Jewish home, also in relation to general, social and political questions. But the agreed view must necessarily issue from the home, the family as a whole, and the man, the head of the family, is charged with the duty to transmit and make public the family view.

Here too Rabbi Kook notes that there are "great kingdoms that have not yet progressed in this area" and have not granted voting rights to women (*ibid*., at 193). In his eyes, the meaning of women's suffrage is "to dim the radiance of our sister's lives" with the bitterness and clamour of political life, and this "clamour" and its attendant "obsequies" will lead to "the ruination of domestic harmony".

It is interesting to note the comment made years later by Rabbi Kook's son and spiritual heir - Rabbi Zevi Yehudah Kook, head of the Merkaz Harav Yeshiva - on his father's views concerning women's voting rights *(Talks of Rabbi Zevii Yehuda Kook,* edited by S.H. Avineri (Ateret Kohanim Yeshiva Publication)):

> Father, of blessed memory, objected to including women in the election process. The writer Azar complained about this in a small monograph, claiming it was not democratic and respectfully asking my late father to reconsider. The *Gaon,* Rabbi Haim Ozer [Grodzinski - M.E.] wrote a long paper objecting strongly to women's suffrage, but the word "forbidden" did not appear in it. It is true that those who printed the notice put that word in the heading, but it does not appear in the text itself, because "forbidden" is a responsible term. My late father likewise objected, but did not use the word "forbidden".

(See also Friedman, *op. cit.,* at 166.)

29. Rabbi Kook's first above-mentioned letter was addressed to the Mizrahi Confederation, among whose spiritual leaders there were at that time indeed many who advocated giving women election rights, both active and passive. We shall mention here several of these leaders. Rabbi Y.L. Maimon (Fishman), writer and research scholar, later to become the first Minister of Religious Affairs in the State of Israel, wrote:

> The Mizrahi Confederation in *Eretz Yisrael* acknowledges the value of the participation of Jewish women in the rebirth of our nation and does not object at all to giving Jewish women the right to vote, neither as a matter of principle, nor on religious grounds.

(Do'ar Ha'yom, 5 Shevat 5680, 25/1/1920; Friedman, *op. cit.,* at 151; note 14; and also at 166.)

Rabbi Y. Nissenbaum defended this position enthusiastically at the second Mizrahi Conference, held in Warsaw in April 1919 (see *Hagut, supra.,* at 77-81). After discussing the political motives affecting the wide controversy over women's suffrage at the time, he stated (at 77-78):

> For us this question has only national and moral content. The Hebrew people is now in such a situation that it needs to muster all its forces, and it cannot forgo at this time one half of its forces, its women and daughters, leaving them out of all public and national endeavour. All the more so, since this half, consigned as it is to such idleness, is attracted to alien work which only impedes all our Hebrew work! This is the national aspect of our women's issue. And it also has a moral aspect. Now that many Hebrew women have roused themselves to the national resurgence, and seek to participate in all the efforts of our community and our nation, our moral sensibility requires that they be given their sacred wish: to dedicate their powers and talents to their nation. Do men need a national life and women not? Thus we would seem not to have

> any question about granting women the right to vote. If during all the years of our exile the lives of men and women were equated for the purpose of *all penalties, all laws* and *all deaths,* why should not their lives be equal in this period of revival for the purpose of all rewards, all rights and all the nation's work of redemption? ...But among us, followers of Mizrahi, as among orthodox Jews in general, this vital need raises two other questions. The first is religious - whether giving women the right to vote does not violate some religious law that cannot be disregarded; and the second is moral - whether this does not violate some other moral sensibility that should not be taken lightly. This would seem to be the *women's issue* that is on our agenda and requires a clear and decisive solution.

After reviewing the role of women in Jewish history, Rabbi Nissenbaum went on to say (at 80-81):

> It is true that the *Sifre* comments: "set a king on you, a king and not a queen", and that Maimonides adopts this *Sifre* as the *halakha,* even expanding it to say: "likewise all offices in Israel, only a man may be appointed" *(Yad, Melakhim* chapter 1). But this ruling of Maimonides was not clear to our scholars in France, and they did not decide categorically that "a woman is disqualified from judging" (see *Tosafot* to *Baba Kama* 15, *Niddah* 50, and elsewhere). And from these scholars we may also learn that a woman may competently be chosen to participate in the deliberations of the learned men who clarify the laws, and perhaps even the deliberations of the law makers. Thus they say with respect to Deborah the Judge, that "she used to teach them, the people of Israel, the laws", and accordingly, ipso facto she is competent, by all opinions. Or they say, "perhaps the sons of Israel accepted her over themselves". If so, is "acceptance" greater than "election"? And if a woman is elected as a judge or legislator, perhaps her "acceptance" pertains not only to those who voted for her, but also to the others, for even Deborah was

> not accepted by all the people of Israel, and she nevertheless judged in her song all those who did not heed her call to fight for the Lord...
>
> But I have inadvertently been drawn into the portals of the *hsalakha,* which I did not think to enter this time but to leave the matter to our esteemed rabbis. If in terms of the *halakha* the rabbis find no impediment to giving Hebrew women not only the active right to vote - which has already been permitted by the Hassidic rabbis who called upon their followers, and their wives and daughters to take part in the elections to the Polish Sejm (and "should the priest's wife be revered less than the innkeeper's?") - but also the passive right to be elected, then neither, in my opinion, is there any impediment to granting this right on account of our inherent sense of modesty. True modesty will not be affected in any way by the fact that women too participate in meetings and express their views in the governing bodies at the communal, municipal, regional or central levels, or in a Hebrew parliament.

A blunt opinion was expressed at the same time and in the same spirit by Rabbi Y.L Zlotnik (Avida), distinguished research scholar (see A. Rubinstein, *Movement in Times of Change* (Bar Ilan Publications, 1980/1), at 159-161):

> I shall now relate to one question that is facing the Mizrahi both inside and outside *Eretz Yisrael.* This is the question of the right of women to elect and be elected to community and public office.
>
> According to the view and opinion of the leaders of official Judaism, it is altogether impossible to agree from the ultra-orthodox perspective to treat men and women equally in relation to these rights, but many people and many rabbis hold a completely different view.
>
> This question is now a very actual one. The matter was deliberated in *Eretz Yisrael* when they wanted to hold a constituent assembly of the local Jews, and they were compelled to accept the position that women

could only vote and not be elected. The question is now on the agenda in our country in relation also to elections for the community institutions. It would certainly be easy and convenient for those who wish to show that tradition and the old order are precious in their eyes, to decide dispassionately that women should not be given the right to vote. But anyone who gives the matter serious thought will not rush to make such a decision .

It is understandable that a man who lives according to tradition and the ancient customs, accepted and sanctified by the nation with the passage of time, will find it difficult to agree immediately to such a fundamental change in the social order. Nevertheless, a responsible (Mizrahi) Confederation cannot treat these burning questions lightly and solve them superficially without considering all the relevant material.

If we look at the matter closely we will find that there is no moral ground to deny women their right to express an opinion on public and community affairs. Factions of the ultra-orthodox community are also known to understand this, hence their eventual agreement to give women active election rights. On the other hand, they do not think it possible for women to have passive election rights, that is, to be elected, because it is not possible for an ultra-orthodox Jew to sit at one table with a woman, this being contrary to the Hebrew modesty.

But let us look at things as they really are: even most ultra-orthodox Jews find it impossible in their private and social lives to avoid completely the society of women. There are only a chosen few who are truly capable of averting their eyes from seeing evil; and I can indeed understand and wholeheartedly respect the righteous man who states that because he cannot sit at one table with a woman, he waives his passive election right and does not seek to be elected ... But I cannot understand at all the moral logic of one who declares: "Because I do not want to sit together with a woman, therefore the woman shall not be

> elected, only myself alone'. Where is the moral content of such a view and statement? And if we cannot rob the individual woman of her right to vote for whoever she wishes, how can we deprive thousands of their right if they find that some woman is the fittest of all for a particular position?
>
> And the Mizrahi should make a special effort to enlist the assistance of all sectors of the nation in its struggle for revival. How shall the Mizrahi allow the exclusion of all girls and women from the task of the nation's renascence and from public and community activity? If the Mizrahi were only a small self-contained and self-sufficient group, without outside links and interests, it could restrict its work to its own circle of members alone. But if the Mizrahi wishes to influence other segments of the people, how can it exclude girls and women from public work? After all we can see that the time has long passed since "All glorious is the King's daughter within (the palace)". The Hebrew woman no longer wants to leave all the matters of life and the nation in the hands of the men alone, and if the Mizrahi wants to fight against her, she too will join the struggle to overcome the Mizrahi. We cannot turn back the march of life, so who will gain from this vain and pointless war - the Torah? Judaism?
>
> Even in my imagination I cannot picture a Jewish state with laws that limit the rights or constrain the activities of any person.

30. At that time many halakhic scholars in the Diaspora believed that women should not be granted suffrage, among them Rabbi Haim Ozer Grodzinski, of Vilna, Lithuania, a leading responsa writer of his generation, and Rabbi Israel Meir Hacohen of Radin, near Vilna, known as the *Hafetz Hayyim,* foremost halakhic decider of his generation (see the comment of Rabbi Zvi Yehudah Kook, *supra,* and of Rabbi Yehiel Weinberg, *infra).*

Another interesting contemporary debate took place between Rabbi Professor D.Z. Hoffman, head of the Berlin Rabbinical Seminary, an important responsa writer and Judaic

research scholar, and Rabbi Dr. Ritter, chief rabbi of Rotterdam. (The debate is quoted in *Jeschurun,* vol. 6 (a German-language journal, edited by Rabbi Yosef Wohlgemut, 1919) - Hoffman's article at 262-266, and Ritter's at 445-448. Hoffman's article was translated into Hebrew, in *The Kibbutz in the Halakha* (collection of essays, Sha'alvim Publications) 286-290, but the extracts below are my own translation). As already mentioned, the question of women's suffrage arose at the time also in relation to the leadership of the Jewish communities in the Diaspora (see Friedman, *op. cit.,* at 150; Rubinstein, *op. cit.,* at 159, note 3, and the bibliography cited), and the above debate apparently took place in that context. Rabbi Hoffman's view was *(Jeschurun, loc. cit.,* at 262) -

> According to the Talmudic *halakha* and the later scholarly statements, women should not be granted passive election rights. Active election rights can be given to women once the community so decides.

Rabbi Hoffman based his negation of passive election rights on Maimonides' above-mentioned statement *(Yad, Melakhim, supra),* which he believed founded on *Sifre,* Deutoronomy, *Shofetim,* para. 157, according to a version that was possibly before Maimonides, considering the version found in *Pesikta Zutarta* (see *Jeschurun, loc. cit.,* note no. 3; and see also the above passage from *Sifre,* Deutoronomy, in ed. Rabbi Meir Ish Shalom, and notes thereto, as well as in ed. Finkelstein-Horovitz, and notes). Rabbi Hoffman considered this view founded also on other laws, among them that a woman cannot serve as a *dayyan* [a religious court judge] *(shulhan Arukh, Hoshen Mishpat,* 7:4). The latter rule is subject to a difference of opinion, the matter depending on the circumstances (see also the commentaries to the *Shulhan Arukh* on this rule, and specifically in *Halakha Pesuka* (Harry Fischel Institute Publications, 1961/2) 47-48; *Responsa Mishpetei Uziel,* Vol. 3, *Hoshen Mishpat,* 5).

Rabbi Hoffman deals with the question discussed by the commentators - how was it that Deborah served as a prophet and judge? - and with the answer suggested by the Tosafists (*Tosafot to Shavuot,* 29b; and see below on the *responsum* of Rabbi Uziel). Interesting are his views on the fact that Shlomzion [Salome] sister of Shimon Ben Shetah, head of the *Sanhedrin* served as a queen, and was considered by the scholars as righteous (see B.T. *Berakhot* 48a; Leviticus *Rabba,* 35:10; and see also B.T. *Ta'anit* 23:1). Hoffman

explains that Shlomzion reigned after the death of her husband, King Yannai a Saduccee who persecuted the Pharisee scholars of the law and abolished their cherished tradition; that she restored the former glory, bringing the Pharisees back into the community and reinstating the tradition of the *halakha* (see Josephus, *Antiquities of the Jews,* 13,16, 1-2). Thus he writes *(Jeschurun, loc. cit.,* at 263-264):

> and it is not surprising, therefore, that a woman was permitted to serve as queen, as an exception to the rule, especially since she thus served according to the will of her husband King Yannai.

On the other hand (*ibid*., at 264) -

> one cannot find any argument in the traditional sources against permitting women active election rights. It is indeed possible that this is contrary to ancient custom, so that one must take care to obtain the consent of the community as is customary in relation to communal enactments.

Rabbi Ritter took a different view, holding it was true that until then there had been no explicit halakhic discussion of the matter, but -

> it is clear that according to custom only men were given the right to vote, and women were never given the right to vote throughout the thousands of years of existence of the Jewish communities.

Hence, he held we cannot change the custom *(Jeschurun loc. cit.,* at 445). Rabbit Ritter went on to cite testimony which, in his opinion, supported this position indirectly (see also the comments of Rabbi Uziel, *infra).*

31. A completely different approach is found in an instructive *responsum* written by Rabbi Ben Zion Uziel, to the effect that women have both active and passive election rights. Rabbi Uziel served as the chief rabbi of Palestine and then Israel, during the years 1939-1953, and at the time of the halakhic and public controversy over women's suffrage in the

early 1920s, he was the chief rabbi of Tel Aviv and Jaffa. His *responsum,* published in 1940 *(Mishpetei Uziel, vol. 3, Hoshen Mishpat,* 6) opens with this comment:

> I wrote this *responsum* at the time so as to clarify the *halakha* for myself, and I did not want to publish it and rule on the question in practice. But now, after the question has become resolved of itself, I decided to publish it to aggrandize the *Torah.*

The comment, "the question has become resolved of itself", is noteworthy, also in the world of halakhic decision, and we shall discuss it below. The *responsum* is very detailed and we shall refer to several passages which are generally instructive and illustrative of the paths of decision in the *halakha.* (The *responsum* was reprinted in *Piske Uziel* (selected responsa of R. Uziel on contemporary issues, Rabbi Kook Institute Publications, 1976/7, 44); the following extracts are cited according to the pagination in both the original and the later edition.)

R. Uziel opens as follows (*ibid.,* at 32; at 228):

> This question became a controversial issue in Eretz Yisrael and it rocked the entire community. Manifestos, adjurations, pamphlets and newspaper articles were published daily calling for the entire preclusion of women from participation in elections. Some rested their argument on religious law and some on preserving the bounds of morality and modesty, and others on domestic harmony, and they all rested upon the same maxim "the new is forbidden by the Torah" [see *Responsa Hatam Sofer, Orah Haim,* 28, 181; *idem., Yoreh De'ah,* 19-M.E.]. Unfortunately I do not have at my disposal now all the accumulated material on this question, but we are indebted to that distinguished "receptacle" of the Torah [Rabbi Hayyim Hirschenson], who collected the essence of all that material in volume 2 of his book *Malki BaKodesh,* and this makes it possible to consider all the prohibitory views within my reach.

The author of *Malki BaKodesh,* Rabbi H. Hirshenson, was born in Safed in 1857 and was educated in the *yeshivot* of Jerusalem. He was an eminent halakhist and corresponded with the outstanding rabbis and halakhic authorities of his generation on questions of the *halakha.* In the second part of his book (Minister Publications, 1921, 12-15, 171-209), he discusses at length the question of women's election rights, reaching the conclusion that they have both active and passive such rights. He thus takes a diametrically opposite position to Rabbi Kook *(supra).* The correspondence between the two reflects the great respect Rabbi Kook had for him (see *Letters of Rabbi Kook,* Vol. 4 (Rabbi Kook Institute Publications, 1984/5) 23-25 and at 102-103; *Hagut* - Anthology of Jewish Thought, *supra,* at 92-93).

In his *responsum,* Rabbi Uziel deals first with the question of women's active right to vote, in the following terms *(Mishpetei Uziel, supra,* at 32-33; *Piskei Uziel, supra,* at 229:

> With respect to the first [i.e. the active election right-M.E.], we have not found any clear ground for a prohibition, and it is unthinkable to deny women this personal right. For in these elections we appoint our leaders and empower those we have chosen to speak for us, to manage the affairs of our community and impose taxes on our property, and the women either directly or indirectly accept the governance of these elected representatives, and heed their instructions and their public and national enactments. How then shall we hold the rope at both its ends: to impose on them the duty of obedience towards the nation's representatives and yet deny them the right to elect them? And if we are told to exclude them from the electoral body because they are light-minded and do not know how to choose worthy leaders of the community, we will also say: if so, we should exclude from the electoral body all those men who are lightminded, the like of whom can always be found among the people. But reality shows that in past as well as present times, women are as educated and knowledgeable as men to conduct negotiations, to sell and buy, to manage their affairs in the best fashion. And whoever heard of appointing a guardian for an adult woman without her consent? As for the *dictum* of our rabbis:

> "women are light-minded", (B.T. *Shabbat 33b, Kiddushin* 80b) it has a completely different meaning; and the statement "a woman's wisdom is only in her spinning wheel" (B.T. *Yoma* 66b) was merely a nice phrase to evade answering the question a woman had posed, the Talmud itself testifying that this same woman was wise: "a *wise* woman asked Rabbi Eliezer". And our rabbis stated expressly, "and God made the rib" (Genesis 2:22), teaches us that the Holy One ... endowed the woman with greater understanding (T.B.*Niddah* 45b). As regards licentiousness, what licentiousness can there be in an individual going to the voting booth and casting a ballot? If we have come to fear this - we will have suppressed all of life, and it will be forbidden to walk in the street or enter any shop, men and women together, or it will be forbidden to do business with a woman because this will lead to familiarity and then to licentiousness, whereas no one has ever said this before.
>
> For the sake of domestic harmony? As the distinguished rabbi wrote: "if so, we should also deny sons and daughters who are dependent upon their father the right to vote; whenever the scholars feared antagonism, they compared women to grown sons who are dependent on their father (T.B. *Baba Metzia* 12a). Still a disputant might say: two wrongs do not make a right. But, in truth, the notion of antagonism is inappropriate here, for difference of opinion will find expression in one form or another, and one cannot suppress his outlook and opinions. In any event, family love that is based on a joint effort is strong enough not to be affected in any way by such differences of outlook.

Rabbi Uziel then analyses the "indirect" reasons given by Rabbi Ritter for denying women also active election rights:

> The illustrious Dr. Ritter makes an innovation, to deny women the right to vote because they are not a community or a congregation and were not counted in the census of the children of Israel, and were not named

> as progeny of their families (the text of the article is not before me, but I deduce this from what he writes). Let us suppose that they are not a community or a congregation or a family or part of the census or anything else. But are they not creatures formed in His image and with the faculty of reason? And do they not have common affairs that are pertinent to the assembly of representatives, or the committee that it elects, and the directives of which bodies they heed with respect to their property and the education of their sons and daughters?

Rabbi Uziel sums up this part of his *responsum* thus *(op. cit.,* at 33; at 229-230):

> If so, having failed to find any hint of such prohibition, I find no positive reason to object to or to say no to the answer sought by a part of the public. And perhaps it was with reference to such cases that it was said "even if ninety nine urge distribution and one only favours individual snatching, this one is listened to since he spoke the halakha" (Mishna, *Pe'ah* 4:1). [That is, if ninety nine say that the landowner should reap the grain that he left as *pe'ah*[*] and distribute it to the poor, and one says that the poor should take the *pe'ah* themselves while it is attached to the soil, we heed the one, because that is the law - M.E.] But it is also said: "and the women laid their hands on it"[**], to gratify the women (T.B. *Hagiga* 16), even though it appears to be prohibited [see *infra* - M.E.]. In any event, in the instant matter, where there is no prohibition and the barring of their participation would seem to them insulting and oppressive, certainly in a matter such as this we should give them their right.

In summary, Rabbi Uziel is of the opinion that there is no halakhic rule, express or implicit, that denies women active election rights. Expressions such as "women are lightminded" and "a woman's wisdom is only in her spinning wheel" should not be interpreted literally. The fear of women mingling in gatherings of men has no validity in the contemporary reality, and the concern about domestic harmony following possible

[*] *Pe'ah* - corner of a harvested field which has to be left for the poor - Ed.
[**] The sacrificial animal - Ed.

differences of opinion among spouses as to whom to vote for, is unconvincing, because the same situation pertains to differences of opinion among other members of the family. Particularly instructive is Rabbi Uziel's reasoning that the duty to obey and comply with the leadership should not be imposed on a person who lacks the right to vote for the leadership that will direct him: "whoever heard of appointing a guardian for an adult woman without her consent?"

Noteworthy too is Rabbi Uziel's method of adducing "indirect" testimony from the spirit of the *halakha,* to indicate the desirable decisory policy. According to the *halakha a* person bringing a sacrifice lays his hands on the head of the animal. On this matter it is said in *Sifra, Vayikra,* par. 2 "and he shall lay his hands on the head of the burnt offering" (Leviticus 1:4) -"the sons of Israel lay their hands and the daughters do not lay their hands", that is, the rule of laying one's hands on the animal sacrifice does not apply to women. And the commentary continues:

> Rabbi Jose said, Abba Elazar told me: we had a calf for a peace offering and we took it out to the women's court (in the Temple) and the women laid their hands on it. Not because the laying on of the hands is their function, but to gratify the women.

And if it is proper so to act with respect to a matter prohibited by law - laying one's hands on the head of the animal sacrifice - all the more so, says Rabbi Uziel, is this proper with respect to giving women voting rights, which is not legally prohibited, whereas "precluding their participation [in the elections - M.E.] would seem to them insulting and oppressive".

Rabbi Uziel then proceeds to discuss the second aspect of the issue-passive election rights, a woman's eligibility for public office. On the face of it, says Rabbi Uziel, an express prohibition is reflected in the statement of the *Sifre* and of Maimonides *(Yad, Melakhim, supra),* that "likewise all offices in Israel - only a man may be appointed", and he cites additional authorities to the same effect (*ibid.*, at 33-34; at 230). At first he suggests that since this rule is not mentioned either in the Mishna or the Talmud, and since it is implicit in the works of other scholars of that time *(Rishonim)* that they did not hold the same opinion,

one should not rule according to it. But this did not satisfy him, and he arrived at an interesting distinction between Maimonides' ruling and the issue of passive election rights concerning a woman's eligibility for public office. He holds (*ibid.*, at 34; at 231-232):

> And if the heart still hesitates on the matter, which is only right since one should not dismiss the *Sifre* and the ruling of Maimonides on the basis of evidence and nice points not expressly contrary to their opinions, yet one may qualify women for election on a different ground, which is: that this halakhic rule applies only to appointments by the Sanhedrin, whereas here there is no question of appointment only an acceptance, since by way of the elections a majority of the community expresses its opinion, consent and trust as regards the elected persons, empowering them to supervise all public affairs, and even Maimonides admits that there is no tinge of a prohibition in this respect.
>
> So too we find that Rabbi Nissim Gerondi wrote (Commentary to tractate *Shevuot,* at the beginning of chapter 3):
>
> > and the verse about Deborah, that she was a judge of Israel, does not mean literally a judge but a leader, and despite what is said in *Sifre:* "You shall set a king over yourselves, not a queen", there they did not appoint her but obeyed her decree; and even if she was a judge, they accepted her in the manner that a person accepts a relative [who is otherwise not qualified to judge the case - Ed].
>
> And thus Rabbi Solomon b. Adret wrote: "one should say (that Deborah) was not really a judge but a leader like the judges that judged Israel [that is, led Israel, which is the simple meaning of the term judge in the Book of Judges - M.E.], and even though it is said in *Sifre*, you shall set a king over yourselves, not a queen, there they did not appoint her but treated her like a queen and obeyed her instructions" (Commentary to tractate *Shevuot,* at the beginning of the chapter on the oath of testimony). And Rabbi Hayyim David Azulai quotes from the

> *Zikhron Devarim* of Rabbi Hacohen Perahyah: "and Deborah was a leader just like a queen", which is what Rabbi Solomon b. Adret said *(Birkhe Yosef, Hoshen Mishpat* 7:11). From which one learns that the entire prohibition against appointing women to public rule applies only to appointments by the Sanhedrin.
>
> For it is clear that even according to the *Sifre* it is permitted to accept her as a judge, that is, as a leader and she judges in the same way that it is permitted to accept a relative. And therefore, where appointments are made by elections, which is acceptance of the elected persons as leaders, one may by law elect women too, even according to the view of the *Sifre* and Maimonides. And we have not found anything to the contrary in the statements of the *Rishonim.*

Rabbi Uziel proceeds to discuss the view, much emphasized in the comments of Rabbi Kook and other scholars on the present issue, that a woman's involvement in public functions violates her modesty, since she becomes embroiled in the turmoil of the public and political debate. He writes (*ibid.*, at 34; at 232) :

> There is still, however, room for questioning, because even if in terms of the *halakha* the acceptance is effective and she can be elected under the rule "they accepted her governance", yet in terms of morality and the bounds of modesty, perhaps the matter is forbidden?

The answer Rabbi Uziel gives to his own question is a lucid illustration of halakhic policy in decision-making:

> Reason would have it that there is no licentiousness in any serious conference or useful discussion, and every day men meet with women on commercial business, and negotiate with each other, and none of this produces any alarm or outcry. And even those given to sexual abandon do not contemplate forbidden acts while they are seriously bent on their business affairs. And the admonition of our rabbis "do not converse too

> much with a woman" (Mishna, *Avot* 1:5) refers to unnecessary idle talk, it being this kind of conversation that leads to sin. Not so, however, as regards a conversation or debate about important public affairs; and sitting together for the purpose of public work, which is divine service, does not engender sinful habits or lead to levity, and all Israel, men and women are holy and are not suspected of breaching the bounds of modesty and morality. In answer, do not quote this statement of the scholars: "at first women sat within and the men were without, and were led to levity, so they instituted that women should sit in the gallery and men below" *(Sukkah* 50a). This was said with reference to a mass gathering of both worthy and licentious people together, in which case we are apprehensive of the licentious minority, especially when they are immersed in the festivity and ruled by the evil inclination. But this was not said in reference to a gathering of elected representatives, whom it would be wrong to portray as sexually licentious, and the like of which Israel shall not know.

Rabbi Uziel ends his *responsum* thus: (*ibid.*, at 35; at 234:

> Conclusion: A. A woman has a full right in elections so as to come under the disciplinary duty owed the elected persons who lead the people. B. A woman can also be elected if so consented to and enacted by the public.

32. Rabbi Uziel's *responsum* was apparently written during the 1920's, but was published only in 1940, at which time - so it was stated at the beginning of the *responsum* - "the question had resolved itself". That statement was largely true, but not entirely so. In this respect it is illuminating to look at two brief *responsa* written by Rabbi Yehiel Weinberg, a prominent responsa writer of his generation, who served with the Hildesheimer Rabbinical Seminary in Berlin and later resided in Montreux, Switzerland. The first *responsum,* written in 1932, reads as follows (*Responsa Seridei Esh,* vol. 2, 52):

> And in the matter of women's election right - in the Halakhic Commission of the Association of Rabbis in Germany I showed that in terms of religious law there are no grounds to prohibit suffrage, and I refuted the evidence brought by the great teacher, the late Rabbi Hoffman. In any event we all agreed that the election of women is against the custom in Israel as well as the Israelite morality in public life, which always tried to preserve "all glorious is the king's daughter within (the palace)", since the Jewish woman should guard her home and the education of her children, and should not be vociferous or a gadabout to squander her strength, destroy her modesty, and lose her charm and appeal through political and public disputes and quarrels.
>
> It is, therefore, certainly appropriate to do all that is possible to prevent the participation of women in the leadership of the communities as well as in the elections. However, the peace and unity of the community should not be broken, if its powerful and persuasive members prevail to introduce suffrage. But in principle one should not depart from the ruling of the late Rabbi David Hoffman, who was a great teacher, and the only one to write words of reason founded on the rabbinical sources.

According to Rabbi Weinberg, Jewish religious law accords women both active and passive election rights. But he considers the election of a woman to an office of community leadership as "against the custom in Israel", so as not to lead her into political and public disputes and quarrels, and it is therefore appropriate, in his view, to abide by the decision of Rabbi Hoffman, who supported giving active but not passive election rights. He adds, however, that if those in favour of giving women also the passive election right prevail, it should not be opposed so as not to disturb the peace and unity of the community.

Nineteen years later, in 1951, Rabbi Yehiel Weinberg wrote his second *responsum* on the same subject (*ibid.*, vol. 3, at 105):

> With respect to his question on women's election right, Rabbi D.Z. Hoffman allowed them to vote but not to be elected; but the rabbis in

> *Eretz Israel,* as well as the Hafetz Hayyim and Rabbi Hayim Ozer Grodzinski and others, barred the active election right too. And Chief Rabbi Uziel, in his *Mishpetei Uziel,* permits women both to vote and to be elected. And why should I thrust myself into the controversy between those who permit and others who prohibit; let time take its course and resolve the matter. Those who prohibit have a moral ground, that it violates modesty for a woman to deal with affairs of the public and the community. And they also bring suporting testimony ... and it is sought to reject and dispute. But there is no benefit in the disputation, for the matter has deeper implications.

This passage is instructive. The writer acknowledges the difference of opinion on the matter, yet does not wish to enter the controversy, nor considers it necessary. In this *responsum* he no longer supports Rabbi Hoffman's view that in terms of the religious law women do not enjoy the passive election right. His decision is - "let time take its course and resolve the matter".

That expression should not be regarded as an evasion of the decisory duty; rather it embodies one of the methods employed in the world of halakhic decision-making. As is known, custom is one of the *halakha's* legal sources (in this regard see my book *Jewish Law* (2nd ed. at 212 ff., 219, ff.; 3rd ed., at 203 ff., 210 ff.). Sometimes custom serves to decide the law where there are different opinions among the halakhic scholars; sometimes it decides the law on a question that has arisen in practice and to which there is no known answer in the existing *halakha* (a *lacuna*), and sometimes custom does not merely add to the existing *halakha* but even alters one of its rules. This latter function of custom is limited to civil or monetary law (*dinei mammonot*) only, and, with certain exceptions, does not apply to matters of ritual permission and prohibition. Elsewhere I have elaborated further on this subject (see *Jewish Law,* 2nd ed. at 726 ff.). As for the role of custom in deciding the religious law where there are differences of opinion among the halakhic scholars, it is said in the Babylonian Talmud - in response to the question how to decide the law where the scholars are divided: "go out and see what is the usage of the people" (B.T. *Berakhot* 45a; *Eruvin* 14b; see also the Jerusalem Talmud *Pe'ah,* chapter 5; and see my book, *op. cit.* (2nd ed.), at 728-730, and the footnotes there). "Let time take its course and resolve the matter",

in the words of Rabbi Weinberg, is thus an accepted method of decision according to the custom followed by the public.

33. Another interesting *responsum* on this issue was given by Rabbi Moshe Feinstein, a leading responsa writer of our generation. He does not discuss the general question of women's election rights, only that of the appointment of a woman to a specific public office, that is, her appointment as a kashruth (dietary laws) supervisor. He relates the facts thus *(Responsa Iggerot Moshe, Yoreh De'ah,* vol. 2, 44):

> In the matter of the widow, the wife of a scholar who was a kashrut supervisor, who has been left penniless and lacking means of sustenance for her orphan sons.
>
> And her being a modest woman and truly godfearing, and also wise, understanding and responsible, whether one may rely upon her to take the place of her husband as a supervisor, in this manner to provide for herself and her sons.
>
> May it please the esteemed scholar to advise me on the matter.

Rabbi Feinstein first discusses the question whether a woman can be trusted to fill the position of a kashrut supervisor, and after a detailed discussion concludes -

> that as regards her trustworthiness there is no reason for apprehension, for if she is regarded as a worthy woman, who knows and understands how and what to supervise, she may be relied upon.

Rabbi Feinstein then considers an additional question that arises, i.e. according to Maimonides (as we have already noted) only men can be appointed to public office and "it appears that kashruth supervision is such an appointment". Rabbi Feinstein finds support for this in the Talmudic statement that the task of supervising weights and measures among the merchants is an appointment, "and that is exactly like supervision of kashrut, because what distinction is there between the fitness of weights and measures and the fitness of food

under the dietary laws". Rabbi Feinstein makes an interesting distinction between a position to perform a task that is not an appointment to "office", that is, to a position of authority, and a position that is an appointment to office or authority. This is an important distinction because Maimonides' prohibition relates to an appointment to a position of authority and not to a labour in general, which a woman is permitted to do. He writes:

> And the reason is that the difference between considering one a labourer or as appointed to a position of authority has nothing to do with the importance of the task. But if one was hired to do the will of his workgiver he is a worker even if the work is important, and if he was hired to act also contrary to the wishes of the proprietor, as in the supervision of weights and measures where the proprietor might want him to approve imperfect weights and measures whereas he is appointed to condemn and confiscate them from the proprietor, then he is in a position of authority over the proprietor, since the proprietor is bound to do what the supervisor tells him.
>
> And the very same applies to an appointment as kashrut supervisor, for his task is to act even against the will of the proprietor and not to allow him to procure forbidden items. And if so, according to Maimonides, one should not appoint a woman for this task.

Though he concludes that the office of kashrut supervisor is an appointment to a position of authority, Rabbi Feinstein rules that a woman may be appointed to this office. In his opinion, Maimonides' view that only men may be appointed to "office" does not originate from a Talmudic source, but from "his own reasoning", and he shows that the author of the *Hinnukh* (R. Aaron Halevy, 13th century Spanish halakhist), and the Tosafists, as well as Rashi and Rabenu Nissim all disagree with him, holding it is permitted to appoint a woman to an office of authority. The conclusion is -

> therefore, for reason of a great need, for the sustenance of a widow and her orphan sons, one may rely on those who disagree with Maimonides and appoint her as a supervisor in her husband's stead .

In other words, in a situation of "great need", such as the livelihood of a widow and orphans, one may rely on the opinion of those who disagree with Maimonides and appoint her a kashrut supervisor. I might add that Rabbi Feinstein subsequently finds a way to reconcile the appointment also with the view of Maimonides, by making the rabbi himself the formal supervisor even if in fact it is the woman who discharges the function.

A later *responsum* of Rabbi Feinstein *(Responsa, ibid.,* 45) throws light on the contemporary communal background and the controversy surrounding the issue here discussed. It appears that Rabbi Feinstein's above-mentioned ruling on the woman's appointment encountered opposition from other rabbis, one of whom complained about it in a letter written to Rabbi Feinstein, apparently in strong language. Rabbi Feinstein responds:

> I do not know why the esteemed scholar needs to apologise for differing from my opinion. Certainly every one must seek the truth according to his own understanding, whether it be lenient or stringent, even if he is a pupil who opposes his teacher's reasoning, all the more so when the disagreement is not between the teacher and his pupil.
>
> And if he meant to apologise for the critical language he used against me, it is well known, mercifully, that I am not, Heaven forbid, demanding with anyone, and certainly not with a learned scholar. So I shall confine myself to the substance of the matter.

Comments worthy indeed of their author!

34. The question of women's election right also occupied the religious *kibbutz* movement in connection with the election of female members to fill various "offices" on the *kibbutz* (see *The Kibbutz in the Halakha, supra.,* at 277 ff.). *Kibbutz* Hafetz Hayyim, an affiliate of the Poalei Agudat Yisrael movement, posed that question to Rabbi M. Auerbach, whose *responsum,* given in 1934, was the basis for the directives which were set as a "middle course" between the divergent views, for instance, by distinguishing between the different organs of the *kibbutz (ibid.,* at 285 ff.; and cf. the essay of Rabbi Y. Efrati, at 277

ff., who endorsed this course). A slightly different and more lenient tone was sounded in the essay by Rabbi Yonah Dovrat (*ibid*., at 291 ff.) and amidst some of the *kibbutzim* belonging to this movement (see *Amudim*, Religious Kibbutz Journal, 1955/6, at 16-17). On the other hand, the religious *kibbutzim* affiliated with the National Religious Movement - which form a clear majority of the religious *kibbutzim* - give female members the full election right, both active and passive, with reference to all the bodies and institutions of the *kibbutz* and the movement (see *Amudim* 1987/8 (month of *Iyar)* containing the resolutions of the 20th Council of the Religious *Kibbutz* on the status of women, *inter alia* "calling upon the Minister of Religions to confirm the election of women as members of religious councils").

Finally we shall mention the opinion of Rabbi M. Steinberg, rabbi of Kiryat Yam, that "women have the right not only to vote but also to be elected to public institutions, because election is not the same as appointment" (*Hilkhot Nashim* (1983/4)). As authority he cites the ruling of Rabbi Uziel (*supra*) and explains his reasoning thus (*ibid*., footnote 5):

> Therefore this is not appointment but acceptance, for by virtue of the elections the majority of the congregation voices its consent to the elected representatives acting on its behalf in supervising the public affairs.

(And he also cites the above-mentioned ruling of Rabbi Feinstein that a woman may be accepted as a kashrut supervisor.)

35. The differences of opinion encountered in the course of our inquiry are characteristic of the world of the *halakha* and, moreover, should be seen as integral processes of thought and decision-making, and reflective of the primary rule and guiding principle long ago determined in the Talmudic disputation between the academies of Hillel and Shammai: "both these and those are the words of the living God" *(Eruvin* 13b). I have discussed elsewhere the origin of this phenomenon and its import in the world of the *halakha* (see M. Elon, *Jewish Law* (2nd ed.) at 870 ff.) and shall not elaborate here. One of the characteristics of the ancient *halakha,* as it has come down to us, is its anonymity and uniformity; the *halakha* as decided in the *Sanhedrin* by majority vote, became the general

ruling of the entire *Sanhedrin*. Towards the close of the period of the *Zugot*[*] (at the beginning of the first century) there was increasing difference of opinion in all branches and fields of the *halakha,* with not only theoretical but also practical implications, each school acting according to its own ruling. External political forces, and internal factors (the dispute between the Pharisees and the Saduccees, and the differences of opinion among the Pharisees themselves - between the Houses of Shammai and Hillel) divested the *halakha* of its directive and regulatory authority, as well as its decision making capacity:

> When the disciples of Shamai and Hillel who had not studied diligently, increased, disputes multiplied in Israel and one *Torah* became as two.

(T.B. *Sanhedrin* 88b; a slightly different version appears in the Jerusalem Talmud, *Sanhedrin* 1:4 and 8:2.)

These disputes introduced the phenomenon of a practical pluralism in halakhic decision. At first, during a certain period, this was a tolerable situation *(Tosefta, Yevamot* 1:111; *Mishna, Yevamot* 1:4; *Mishna Eduyot* 4:8), but this pluralism could not endure, and differences of opinion in various areas of family law and the laws of purity and impurity led to bitter dispute, threatening to divide the nation (See *Jewish Law, supra,* at 872-874). One generation after the destruction of the Second Temple (at the beginning of the second century), with the consolidation of the new center of study at Yavneh, headed by Rabban Gamliel the Younger, the unity of the *halakha* was restored in practice -

> and at Yavneh a heavenly voice was heard, saying: both these and those are the words of the living God - but the *halakha* is according to the House of Hillel.

And with this decisive determination, that the system of the "halakha cannot tolerate pluralism in actual practice, the principle of a pluralism of views in the *halakha,* was recognized. Though conceptually, "these and those are the words of the living God", yet for practical purposes -

[*] "Pairs", who headed the *Sanhedrin* - Ed.

> what was it that entitled the House of Hillel to determine the *halakha?* because they were kindly and modest... [tolerant - according to Rashi; see *Jewish Law, supra,* at 874-875, ff.]

36. I am not a halakhic decider, nor the scion of such, and I know all too well that that title does not befit me. But there is the *Torah,* and I must study it. And I wrote as I did on the halakhic discourse for no other reason than to study, and to draw from the springs of our scholars, whose wisdom we imbibe and by whose mouths we live. And I too, if it were at all possible, would follow the example of the late Chief Rabbi Uziel, keeping what I have written to myself, to be published at some other time. But what choice have I, when the decision on the sensitive and complex issue before us entails deliberation of the halakhic discourse and clarification of the opinions of our rabbis on the subject, one that continues to stir public debate. This is not, therefore, the time for a "hidden scroll".

Consider the wisdom of Rabbi Weinberg's perspective on this controversy, to "let time take its course and resolve the matter", for time has indeed brought resolution. Thus, the three luminaries of the previous generation, all considered and held that women were not even entitled to the active election right, namely: the former Chief Rabbi of Eretz Israel, Rabbi Kook; the most prominent of the *responsa* writers in the lands of the Dispersion, Rabbi Hayyim Ozer Grodzinsky; and the greatest halakhic authority of his generation, the author of the *Mishnah Berurah,* Rabbi Yisrael Meir Hacohen of Radin (known as the *Hafetz Hayyim).* Many other rabbis and scholars also held the same view. But time has wrought changes to resolve the issue otherwise. In all the observant communities, without exception, among *Hassidim* and *Mitnagdim,* ultra-orthodox and national-religious, in all their camps and factions, women participate in all the elections for the state institutions and organs. And we have not heard, for many years now, of any halakhic authority warning religiously observant Jewish women against voting on the ballot day. That is the custom, and no one sees need any longer to ascertain what the practice of the public is.

Rabbi Weinberg's above-mentioned statement pertained also to the passive aspect of women's election right, that is, their eligibility for public office. Here, too, it seems that time has resolved the matter for the majority of the observant community: religiously observant

women have served as members of the Knesset; they have served and continue to serve as members of local authorities and discharge a variety of public functions, thus conducting themselves consistently with the view of great halakhic scholars, as explained above. It is true that in some sectors of the religious public, women do not serve as members of local authorities and in similar public offices. But how can one deny a religious woman this right, if she wishes to follow the opinion of leading scholars who permit the election of women to public office, as well as the practice of many hundreds of Jewish women who keep the *Torah* and its commandments yet serve in a variety of public offices? And is it possible to say in this day and age that a woman who sits in the Knesset, or on a local council or a *kibbutz* secretariat, is lacking in the modesty that befits a daughter of Israel? Thus we see all the matters and premises stated in the instructive and detailed *responsum* of late Chief Rabbi Uziel realized in practice.

The Petitioner seeks to take her place among the members of the religious council in Yerucham, and the Local Council, i.e. *the public,* chose her and proposed her candidacy for that office. The religious council, as we have seen, exercises no halakhic authority whatever, it makes no halakhic decisions and - having regard to the male component of its membership - it is incapable of making halakhic decisions. For the first requisite for ruling on the law is to study and know the Talmud and the halakhic codes, and to have the appropriate qualifications for so doing. All that the religious council does is to provide religious services, construct and maintain ritual baths, facilitate study of the Torah and Judaism by the public, and also see to proper arrangements for observing the dietary laws. And if it is permissible for a woman who is known to be observant to act as a kashrut supervisor - as we saw in the responsum of Rabbi Feinstein - shall it be forbidden to the petitioner to see to the budget and other requirements for maintaining proper kashrut arrangements in Yerucham?

37. I have not overlooked the opinion of the esteemed Chief Rabbinate Council, that women may not be permanent members of a religious council. We all hold dear the dignity and standing of this supreme state halakhic institution, which is headed by the two chief rabbis of the State of Israel and whose members are learned halakhic scholars. And I reiterate that all I have written is for no other purpose than to elucidate and deliberate concerning the halakhic discourse. To this end, I have cited the opinion of authoritative

halakhists, the Chief Rabbi of Eretz Yisrael and other rabbinical scholars, all of whom hold that a woman may serve in public office if elected thereto by the public - with which view the Chief Rabbinate would seem to disagree. With great respect, however, I venture to suggest that perhaps the Chief Rabbinate Council does not really differ from those who believe that a woman may serve in public office, but believes that it is the function of the religious council to deal also with halakhic aspects of the provision of religious services. I find support for this suggestion in the fact that the Committee of Ministers likewise erred in this respect, which was one of the reasons for it deciding as it did, as I explained in detail above. And if that is indeed the case, and there is ground for my supposition, it is possible that the Chief Rabbinate Council may want to reconsider the matter of the Petitioner's seat on the Yerucham religious council.

38. Before concluding I might profitably mention a comparable phenomenon of halakhic controversy and debate on a related issue coming to the fore in recent generations. I refer to the matter of women studying the Torah. I have already had occasion to discuss the issue in this court (S.T. 1/81, *Nagar v. Nagar* [17]), in relation to the duty to teach and educate sons, which is imposed equally on the father and the mother, and I shall retrieve from that decision some of its main points of interest in the instant context.

According to the *halakha* in the Mishnah and Talmud, the father must teach his son *Torah,* and the woman is exempted from this obligation. The explanation for this rule is that the father, who is himself obligated to study the *Torah,* must likewise teach his son; but the woman, who is not herself obligated to study *Torah* is accordingly not obligated to teach her son. And women are not themselves obligated to study *Torah,* because others are not enjoined to teach them Torah, as we learn from the verse, "And you shall teach them to your sons" (Deutoronomy 11:19), which the rabbis interpreted - "not to your daughters" *(Kiddushin* 29a, Mishna and Talmud). And Maimonides summarizes the rule thus *(Yad, Hilkhot Talmud Torah* 1:1):

> Women... are exempt from studying the Torah; but the small son, his father must teach him Torah, for it is said: "and you shall teach them to your sons and speak of them". And the woman is not obligated to teach her son, for whoever is obligated to study is obligated to teach.

As regards the substance of women's exemption from study of *Torah,* and the farreaching change of attitude that has occurred in latter generations, we stated in *Nagar v. Nagar* ([17], at 404-406):

> This "threefold" exemption of the woman - who is exempted from teaching her son and from teaching herself, while the father is exempted from teaching his daughter - has prompted differences of opinion ever since the time of the *Tannaim*[*]. According to Ben Azzai -"a man is under an obligation to teach his daughter *Torah",* whereas Rabbi Eliezer ben Hyrcanus thought otherwise - "whoever teaches his daughter *Torah* teaches her frivolity" (Mishnah, *Sotah* 3:4). The reasons for this dispute and for Rabbi Eliezer's harsh comment have been variously interpreted, but we shall not elaborate here ... Various talmudic and post-talmudic sources do indeed speak in praise of wise, scholarly and learned women... but the *halakha* was decided according to the view of Rabbi Eliezer (see Maimonides, *Talmud Torah* 1:13; *Shulhan Arukh, Yoreh De'ah,* 246:6 ...). With the passage of time the prohibition on study by women underwent various and relaxations, whether relating to the nature and scope of the material studied - the written *Torah* and practical commandments - or to the depth of their study, and so on.
>
> A material change of perspective on this socio-halakhic matter has occurred in recent generations, concurrently with the profound socio-ideological changes. The halakhic scholars have justified this change of perspective on various grounds, the extent and nature of the change in approach varying according to the character of the reasoning. Thus a generation or two ago Rabbi Yisrael Meir Hacohen of Radin, author of the *Hafetz Hayyim,* related to Rabbi Eliezer's statement about the prohibition of teaching Torah to his daughter, as follows:

[*] Sages of the Mishna - Ed.

> It appears that all this applies to past times ...
>
> when the tradition of the fathers was very strong and every one acted according to the way of our ancestors ... we could say that the daughter should not study Torah, but should rely on the guidance of her righteous fathers. But now, when, sinfully, tradition has weakened greatly with the fathers... especially among those whose practice it is to study the writings and language of the nations, it is certainly very meritorious to teach them the Five Books of Moses, as well as the Prophets and the Writings and rabbinical ethics...

(Collection of *Halakhot* of the *Hafetz Hayyim, Sotah,* 21.. .)

This ruling gained wide acceptance in Israel, both prior to the establishment of the State and thereafter. Rabbi Zalman Sorotzkin, a leading *yeshiva* figure wrote *(Moznayyim La-Mishpat,* 1955/6, par. 42):

> It is only in relation to the study and disputation of the Oral Law that it was said "whoever teaches his daughter *Torah...".* But even with respect to the Oral Law a woman is permitted to study the final conclusion, without questions and analysis ... It is not the same today as in former times: in former times Jewish households conducted themselves according to the Shulhan Arukh and it was possible to learn all the Torah from experience... But now ... in this generation not only is it permitted to teach *Torah* and piety to young girls, but it is also an absolute obligation and, as we explained, it is a very meritorious act to found schools for girls and to implant genuine faith in their hearts as well as knowledge of the *Torah* and the commandments.

It is the nature of halakhic decision - as is the case with all adjudication - that it does not detach itself from the existing law but narrows it or distinguishes it from the new law in the making. Hence the restrictive

interpretation of the prohibition against teaching one's daughter Torah as applying only to the study and disputation of the Oral Law. A significant proportion of the contemporary halakhic scholars have shed even this reservation. Thus Benzion Firer, rabbi of Nir Galim, was asked whether the heads of the religious education system were correct in teaching the Written and the Oral Law to girls. He responded unequivocally, distinguishing between former and contemporary generations -

> When the headlong chase after the tree of knowledge has gripped all human beings, men and women alike, who will stand up and stop this mighty current ... For it is inconceivable to prevent girls from studying precisely the *Torah* and Judaism, every part of it.

Rabbi Firer outlines the existing reality:

> Like it or not, the fact is that the place of the melamed [male tutor] has been taken by the [female] teacher, and this teacher hands down the Torah to the boys and girls in the primary schools ... And, since it is she who imparts knowledge of the Torah in the primary school, and to boys also, it follows that the observance of the commandments by the boys depends on her knowledge. And since, in any event, they regard all the religious laws equally today - those that pertain to her as a woman and those that pertain to her as the teacher of boys... I would wish for all the daughters of Israel to study the Torah ...

(No'am (halakhic publication, Jerusalem), vol. 3, 134.)

Also in point is a responsum of Rabbi Moshe Malka, a former leader of the Moroccan Jewish community and present head of the Petah Tikva rabbinical court (Responsa Mikveh Ha-Mayyim, vol. 3, Yoreh De'ah, 21):

> The dispute between Ben Azzai and Rabbi Eliezer had reference to their times, when the norm was "all glorious is the king's daughter within the palace", and a woman never went outside the home, nor participated in worldly affairs, when her entire enterprise and wisdom were confined to managing her home and educating and raising her sons ... Not so in current times, when women play a large role in all walks of life, penetrate the depths of the secular sciences and occupy the benches of the universities, run offices and own businesses, and have a hand and a voice in the leadership of the state and in political affairs ... Rabbi Eliezer would certainly admit that there is no prohibition against teaching her the Oral Law too, so that she may know how to take care and observe all the laws of the *Torah* that are pertinent to her affairs and work. Moreover, we are actually obligated to teach and impart to her as much as possible...

Rabbi Aaron Lichtenstein, head of the Har Etzion Yeshiva at Alon Shvut, writes in like vein ("Fundamental Problems in Women's Education", in The Woman and Her Education" (Kfar Sava 1980/1) 158-159; a question and answer transcript):

> In my view it is desirable and necessary, and not only possible, to give girls intensive education, even from the sources of the Oral Law, be it because women engage in all occupations, leaving no reason to withhold the Torah from them, or be it because of the statement of the Hafetz Hayyim...
>
> ...In my opinion what girls need in order to receive a practical religious training far beyond their instruction today, is an intensification of girls' studies, in quantity and in quality and with instruction in all spheres of the Torah...

> ...One should strengthen study of the Oral Law. In practical terms, it would be beneficial to teach them the [Mishnaic] orders of *Zeraim, Mo'ed* and *Nezikin,* as well as the relevant minimum of *Nashim, Kodoshim* and *Tohorot.* And when we teach, we should do so in depth... I have no objection to teaching girls *Gemara* [Talmud]... and it should even be institutionalised as an integral part of school studies, in the form of a proper lesson ... and this seems to me to be the recommended course for the daughters of our generation...".

Now the above reasoning in relation to study of the *Torah* by women, applies *a fortiori* to the matter here in issue. With respect to the former issue, there is an express rule in the Talmud, generally upheld in the halakhic codes, that a woman is not only exempt from studying the *Torah* but even forbidden to do so, this rule being derived from the Biblical verse "and you shall teach them to your sons", and not your daughters. But the profound socio-ideological changes experienced in latter generations, has radically altered also the outlook on the issue of women studying *Torah,* and it has been determined that not only is there no longer any prohibition, but women are even obligated to study *Torah;* and not only do they study it for themselves, but they even teach it to the sons of others. And if this is the outcome of the controversy concerning women studying the *Torah,* then the issue of the election of women to public office should have the like outcome, *a fortiori,* since most rabbinical scholars are of the opinion that the matter is not expressly prohibited in the Talmudic *halakha,* and some of the codifiers and *Rishonim* differed from Maimonides' opinion that only a man may be appointed to all public office. And if so radical a departure as abrogation of the grave prohibition against women studying the Torah could result from social and ideological changes, why not a much less radical departure that permits a woman to serve on a religious council? Should we not see Rabbi Malka's assessment of the contemporary situation *(supra)* -

> ...in current times, when women play a large part in all walks of life, penetrate the depths of the secular sciences and fill the benches of the universities, run offices and own businesses, and have a hand and a voice in the leadership of the state and in political affairs

- as constituting decisive reason to permit modern women to take part in developing and maintaining religious services in their place of residence, by serving on the council charged with implementation of the task? At a time when women actively take part in diverse educational, cultural, social and political pursuits, is not a woman's preclusion from serving on a religious council, in particular, a harsh insult to her dignity and standing, precisely as a religious woman? She may discharge a public function in all areas of social, cultural and political life, but not in a public body that caters to her religious way of life? Is the native-born to be on the earth and the foreign-born in the highest heavens? (T. B. *Baba Kama,* 42a).

It need scarcely be said that in the world of the *halakha* we do not discuss purely legal-halakhic questions, in the sense of juridical rights and duties. Rather the ideological and normative values of Jewish religious life are inherent in and inseparable from the subject of the discourse. For we are taught "do not read *ways of behaviour* [*halikhot*], but *legal rules* [*halakhot*] (cf. T.B. *Megilla* 28b) and by way of paraphrase we could equally well say, "do not read *legal rules* [*halakhot*] but *ways of behaviour* [*halikhot*], since legal rules and ways of behaviour come inextricably linked. We have seen clearly reflected - throughout the scholarly passages here cited-in addition to the legal exposition of our subject, also lengthy and detailed discussion of the conceptual implications of Jewish family life; the roles of the father and the mother, of the woman and the man, domestic harmony, the concept of modesty, and so on. All this because examination of these concepts is essential to the juridical-halakhic ruling on our subject. However, these important concepts must be addressed according to both their original significance and their contemporary setting, as we have learned from the passages quoted. Take, for example, this last concept [of modesty - Ed.] and its deep significance in Jewish life, for all persons, as stated by the prophet Micah:

> You have been told, man, what is good and what the Lord requires of you - only to do justice, and to love mercy, and to walk modestly* with your God. (Micah 6:8; and see B.T. *Makkot* 24a.)

* Or humbly- Ed.

It is fitting to cite a passage on the subject written by Rabbi A. Lichtenstein (see *The Woman and Her Education, supra,* at p. 158):

> The question is, to what extent do we want to perpetuate the original position we find in the *halakha* or to modify it by legitimate halakhic means, having regard to historical developments. This is a question of outlook affecting not only our present problem but also many others, such as the sabbatical year, the transactions permit[**], and so on. When we circumvent the *halakha,* by halakhic means of course, should we say that the *halakha* wanted one thing then and now wants another? Or does the *halakha* still require the same today, except that we cannot meet its standard? To discuss this problem we must consider not only the specific question on the agenda but also the normative ramifications of the problem. When we seek to circumvent the *halakha* today, by legitimate means, we must ask whether or not it is for attaining a meaningful purpose, religiously and normatively speaking. There is a difference between using a circumvention in order to feed a number of poor women, as in the example of Rabbi Tarfon given in the Jerusalem Talmud *(Yevamot,* 4:12), or so that someone can gain a few extra pounds.
>
> As for the problem of changing or reforming the status of women, if it is feasible to build a sounder and more perfect society, one that is mindful of the values of the *Torah* and the *halakha,* then it must be contended that what once was, was suited to those times, but today there is reason to relate to contemporary reality detached from the past. It is impossible to bring back the past-that is not realistic. It is not possible to revive the simplistic naivete of women that was then. Hence it is needed to replace the *Ze'ena Ure'ena*[*], with a tractate of the Mishna, such as *Hullin,* to teach women more and lend their lives a content closer to that of men, so that women can derive benefit from the existing reality. But to have neither the one nor

[**] In Hebrew *heter iska,* a technical legal device that permits charging interest on certain commercial loans - Ed.

[*] Popular Yiddish Rendering of the Pentateuch and Five Serolls, used primarirly by women - Ed.

> the other, that certainly is inconceivable. If there is to be neither innocent belief as in past times, nor serious study of the *Torah,* women will fall between two stools, and that clearly will not be good.

Such is the way of the *halakha* from ancient times. On this score we wrote elsewhere (see *Jewish Law, supra,* p. 9; also p. 38):

> ...The history of the Jewish nation is reflected in the history of Jewish law, its institutions and subject matter. For the development of Jewish law was intertwined with the problems that arose in reality, the law and reality reciprocally influencing each other. The halakhic scholars and the community leaders faced a twofold task: on the one hand, a continuing concern to create and develop the Jewish law, and on the other hand, a great responsibility to preserve the spirit, purpose and continuity of the ideas that were central to each legal institution. The performance of this twofold task - to find and determine legal solutions that were founded in the past and also served the many needs of the current generation - is clearly evident to anyone who studies the history of Jewish law in its different periods...

To the above end, the system of Jewish law has drawn upon its own legal sources - those very sources recognized by the *halakha* as means to create and develop the rules of the system (*ibid.*). Thus the statements of the responders and codifiers cited above show that they invoke all of the five creative halakhic sources - *midrash* [exegesis or interpretation], *takkanah* [regulation or enactment], *minhag* [custom], *ma'aseh* [(an act of) precedent], and *sevara* [logical reasoning].

The status of women in the *halakha* serves as a classic example of the development of a central subject in the world of Jewish law, the subject being rooted in and intimately tied to daily life and its exigencies, guiding that reality at the same time as it is guided by it. We see, on the one hand, a constant concern for the continued development and creativity of the *halakha,* and on the other hand, the great responsibility of preserving its spirit, purpose and continuity, along with its central, fundamental values.

39. From the above survey we also discern, incidentally, another facet of the concept of "Israel's heritage", relevant to the interpretation of this concept as used in section 1 of the Foundations of Law, 5740-1980, forming part of the modern Israeli legal system. This is the facet of Israel's heritage-as found in the halakhic sources and as consolidated under contemporary realities.

40. We must now turn to the adjudication of the issue before this court. The decision of the Committee of Ministers to exclude the Petitioner from the composition of the religious council in Yerucham, was founded on erroneous factual premises and on extraneous considerations, and it is therefore null. The Petitioner, having been lawfully elected by the Yerucham local authority as a candidate on its behalf for membership on the religious council, is entitled to inclusion as a member of that council, and we have not found any ground to disqualify her.

We are aware of the sensitivity of the halakhic, social and public aspects of the matter, and are aware of the grave reservations accompanying the matter and which are entertained by those entrusted by law with its determination, who have sought-and justly so-to avoid any ideological or quasi-halakhic confrontation with the halakhic authorities in Israel today. We are also mindful of the possible mishaps, for a certain period, in the orderly and uninterrupted functioning of the religious council. But none of this is sufficient to free us from the decree of the law in Israel, which prohibits discrimination against the Petitioner so as to exclude her from membership of the Yerucham religious council. It is regrettable that notwithstanding the protracted period of discussion of this matter, or the fact that the course for its proper resolution was marked out from both the legal and the public perspectives, there was lacking the courage to make the necessary and inevitable decision. In particular it pains us that no decision was taken in favour of the Petitioner, a result sanctioned by the *halakha* in the opinion of prominent authorities.

41. We therefore decide that the Petitioner shall be included in the composition of the religious council in Yerucham, as a nominee on behalf of the local authority. As a result, one of the four representatives of the local authority nominated by the Committee of Ministers to serve on the religious council will be required to vacate his seat in favour of

the Petitioner. For this purpose, and for this purpose alone, we remit the matter of the composition of the religious council in Yerucham back to the Committee of Ministers, for it to decide - after hearing all the interested parties and considering the balance required in the representation of the different bodies on the religious council - which of the four representatives of the local authority on the religious council shall vacate his seat in favour of the Petitioner. The Committee is called upon to make such decision within thirty days of the delivery of this judgment.

Respondents shall pay the costs of the Petitioner in the amount of NIS 7,500, with linkage and interest increments from this day until the day of actual payment .

BARAK J. I have read the judgment of my colleague, Elon J. I concur in his opinion, of which I would say, as Agranat P. once said (see E.A. 1/65, at 384) "I have read with great interest the instructive, and I might add, courageous, judgment of my learned colleague...". Yet I wish to denote the essentials of my own perspective on the present matter, since we have a difference of "emphasis" in several respects.

1. The decision in the matter of the Petitioner was made by a ministerial committee, acting by virtue of section 5 of the Jewish Religious Services Law (Consolidated Version) - (hereinafter "the Religious Services Law"). Under this Law, the Minister of Religious Affairs nominates 45 percent of the members of the religious council, the local authority 45 percent, and the local rabbinate 10 percent (section 3(a)). Each of the three authorities must express its opinion concerning the candidates proposed by the other two authorities "with regard to their fitness to serve as members of the council and to their being properly representative of the bodies and communities [*edot*] interested in the maintenance of Jewish religious services (hereinafter referred to as "religious services') in the locality" (section 4). If there is any disagreement between the three authorities, it is referred to a committee of ministers for determination (the Prime Minister, the Minister of Religious Affairs, the Minister of the Interior or their representatives - section 5). In the present case there were differences of opinion, and for this reason the determination of the Committee of Ministers was sought. Under review here, is the validity of the decision of the Committee of Ministers, although we could equally have examined the validity of the list of candidates proposed by the Minister of Religions and that of the local rabbinate.

2. The Committee of Ministers is a statutory body acting by virtue of a Law of the Knesset. The rules of administrative law that apply to all administrative discretion, apply also to the discretion of the Committee of Ministers. Therefore, if it transpires that the act was done in bad faith or from improper motives or other such factors that may disqualify an administrative act, the decision of the Committee of Ministers will be invalidated (*per* Berinson J. in H. C. 568/76[7], at 679-680). This court's judicial review of the decisions of the Committee of Ministers is the ordinary judicial review which it exercises. The question before us is the legality of the decision. We do not assume the function of a ministerial committee. We examine whether such a committee, acting reasonably, could have reached the decision actually made (cf. H.C. 258, 282/84[19], at 520).

3. It appears from the decision of the Committee of Ministers, that it adopted the considerations urged by the representative of the Minister of Religions (paragraph H of the Ministers' decision, cited in paragraph 11 of the judgment of my colleague, Elon J.). The Minister of Religions on his part took into consideration the objection of the local rabbi and his reasons, noting that he was convinced that "her appointment would disrupt and impair the functioning of the religious council". As for the local rabbi - whose view persuaded the representative of the Minister of Religions and the Committee of Ministers- his objection was based on the fact that the Petitioner is a woman, for which reason the orderly functioning of the council's activities would be disrupted. It was indicated that the chief rabbinate also opposed the appointment. It follows that the decision of the Committee of Ministers to reject the Petitioner's candidacy was founded on the conviction that, being a woman, her service on the council would disrupt its activities. It is true that the Committee of Ministers noted, and this was also the attitude of the Minister of Religions, that the issue was not necessarily to be decided "as a matter of principle". Yet such a principled decision was in fact made, to the effect that if the local rabbi or the chief rabbinate object to the election of a woman to the religious council, in any particular locality, her election should not be confirmed. The question before us is whether that consideration is a valid consideration, one that a reasonable ministerial committee may take into account. The answer is dependent upon the purpose and objective of the Religious Services Law. It is impossible to determine the legality of a particular consideration unless one examines the question within the context of the statute that

establishes the body exercising that discretion. A particular consideration may be illegal within the frame of one statute and legal within the frame of another. Every statute sets its own bounds and considerations (see H.C. 241/60[20]; F.H. 16/61[21]). Sometimes it is difficult to cull from a statute's legislative background any identifiable legislative purpose that is relevant to the solution of the problem in hand. In such a case one may assume that the legislature favoured recourse to the customary values of the legal system (see H.C. 73, 87/53[22]; H.C. 262/62[23], at 2113). Thus,

> ...in the absence of an express provision one should not assume that the legislature intended to depart restrictively from principles that are axiomatic...

(Per Olshan P. in H.C. 163/57[24], at 1050.)

4. The purpose of the Religious Services Law is to fix a framework for the provision of religious services to Jews. For this purpose a religious council is established, which sets a budget and organizes activities for the provision of religious services. All Jews, men and women, religious and secular, avail themselves of these services. It is sufficient to note that the council organizes burial services, which everyone needs, and marriage registration, which every Jew needs if he wishes to marry. Against the background of these activities we have ruled more than once that the qualifications for serving on a religious council are "secular" and not necessarily "religious". Thus, Berinson J. has held (in H.C. 568/76[7], at 679):

> The religious council is appointed not by the Torah law but under a statute enacted by the Knesset. This statute does not determine special personal qualifications for members of the religious council, except that they must be "fit" for the position both personally and in terms of their being representative of the bodies and the communities interested in the provision of Jewish religious services in the locality. This being so, I think that it is not this court's function to examine the minute details of the candidates' fitness in terms of the *halakha* and to impose upon them qualification standards that are not written in the statute.

Cohn J. rephrased the same idea as follows (*ibid* at 680):

> ...The Petitioner and his learned counsel assume as self-evident that a person who is unfit to hold a public office by religious law, should also be disqualified from serving as a member of a religious council under the Jewish Religious Services (Consolidated Version) Law, 5731-1971, which is, as we know, a secular law. It seems to me that the qualifications and competence under the above Law should be determined according to secular criteria, and are in fact a matter for the discretion of the authorities who make the appointments.

Indeed, there is nothing in the Religious Services Law to indicate that only persons learned in matters of the faith and its law may serve on the religious council, and even a person who is not religious is competent, in principle, to serve on the council (see H.C. 191/64[2], at 610). There is nothing in the Law or in its purpose from which to deduce that the halakhic rules of competency are also the legislative standards, and, therefore, even if a woman is not competent to serve as a member of the council according to the *halakha,* this does not mean that a woman is not competent to serve on the religious council under the Religious Services Law. The two competencies are entirely separate matters. For all that, I am not contending that a religious consideration is extraneous to the Religious Services Law. It is only natural for religious considerations to be relevant to a statute dealing with the provision of religious services. Thus, for example, the religious council provides services in matters of dietary rules and ritual slaughter. It is only natural for these concepts to be interpreted, in the broad sense, according to the *halakha,* since there is no secular law concerning dietary rules and ritual slaughter. Furthermore, the "religious consideration" is itself subject to judicial review, both as to the very existence of a halakhic consideration and to its content (H.C. 44/86[25]; H.C. 195/64[26]). But that question does not arise in the instant case. The question here is whether the religious laws that determine one's competency to serve as a member of the religious council are the laws that apply within the frame of the statute. To this my response is in the negative, because the statute is secular, it deals with religious services for all Jews - religious and secular alike - and the council itself is an administrative body, which must provide religious services in the most efficient way. In these circumstances - and in the absence of any contradictory provision in the Religious

Services Law - there are no grounds to assume that the religious criteria, whatever they may be, are criteria *sine qua non.* To the contrary: the assumption ought to be that all persons whose personal traits would enable them to perform the task in the optimal way, are competent to serve on the religious council. This test does not negate the competency of any man or woman *a priori.* All are fit to discharge the function; from among the fit one must choose the most suitable. Therefore, and assuming that all other factors are equal, I would not necessarily find it wrong to prefer a religiously observant candidate over a secular candidate, because one may assume that the former would perform his function better. But it may possibly be otherwise. There may be a secular candidate who, despite his secularity, would perform his function better. It all depends on the circumstances of the matter. Therefore, a woman is competent to serve as a member of the council, and her selection is dependent on her personal qualifications.

5. We have seen that there is nothing in the Religious Services Law to prevent a woman from serving as a member of the religious council. One might contend that it does not follow that to bar the membership of a woman, as such, is unlawful. Hence, what is the source of the rule that disqualification of a female candidate, merely because of her gender, contravenes the Religious Services Law? This conclusion stems, in my opinion, from the general principles of our legal system, in the light of which every law must be interpreted (*per* Cheshin J. in H.C. 282/51[27]). One of these general principles is that of equality. Every statute must be interpreted in a manner ensuring equality for citizens of the state (see C.A. 507/79[28], at 794; H.C. 114/78, Motion 451,510/78[29], at 806). Landau J. said in this connection (H.C. 95/69[30], at 698):

> ... This unenacted concept is of the essence of our entire constitutional order. It is therefore only just - precisely in the borderline cases, where a statutory provision can be construed in two ways-that we prefer the construction that supports and does not undermine the equality of all persons before the law.

And I took the same approach elsewhere (H. C. 507/81[31], at 585), holding:

> The fundamental principle that serves as a legislative objective for all actions of the legislative body, is the principle of the equality of all persons before the law ... We must therefore assume that legislative enactments are designed to attain this objective and not to contradict it, and so we must construe them.

Accordingly, we must construe the Religious Services Law in such manner as to guarantee the equality of all persons before the law. Between two possible interpretations, we must choose that which guarantees equality in the optimal manner, and reject the interpretation that contradicts equality. It follows that we must interpret the Religious Services Law in a manner that guarantees equality of the sexes. Indeed, it is a fundamental principle of our constitutional regime that equality between men and women be ensured, and that the male should not be discriminated against because he is male, nor the female because she is female. This principle is found already in the Declaration of Independence, which states that the State of Israel "will maintain complete equality of social and political rights for all its citizens, regardless of religion, race and sex". The importance of the Declaration of Independence is that it embodies fundamental principles of the regime. It is true that it is not a constitution and it does not have any entrenched force. But it does not follow that it lacks all legal efficacy. To the contrary: it constitutes the charter of the nation's values, since it embraces, among others, several principles that underlie the foundations of the regime as well as a number of basic premises to which legislation must conform. The charter of values has legal effect, since rights are derived therefrom and every law is interpreted in its light. Thus (*per* Sussman J., H.C. 262/62[23], at 2116)

> It determines the way of life of the citizens of the state, and every state authority must guide itself according to its principles.

Indeed, the attainment of equality is the "umbrella-purpose" of each and every statute, and every statute must be interpreted accordingly, so long as there is no particular purpose that is clearly intended to negate this "umbrella-purpose".

6. The principle of equality between women and men found explicit expression in the Women's Equal Rights Law. This statute provides (section 1) -

> the same law shall apply to man and woman with regard to any legal act;
> any provision of law which discriminates, with regard to any legal act,
> against a woman as woman, shall be of no effect.

This provision not merely reiterates and emphasizes the principle of equality that was laid down in the Declaration of Independence - in which respect it is not very innovative - but gives it "teeth", in the sense that any legal directive which serves to discriminate against a woman as such with regard to any legal act, is not to be followed. In this respect one must regard it as "an ideological, revolutionary law that changes the social order ..." (*per* Silberg J. in H.C. 202/ 57[12], at 1537). It is true that in the absence of a rigid constitution the Knesset may amend and repeal - whether expressly or by implication, wholly or partly - the provisions of the Women's Equal Rights Law, and may enact a discriminatory provision (see C.A. 336/61[11], at 408). Such a provision will of course be given effect, so long as it is understood that it was intended to depart from the fundamental principles of the system, on the one hand, and from the Women's Equal Rights Law, on the other. Such departure may be gathered from the language of the statute and its purpose. In other words, we would be dealing with the interpretation of the new Law. The interpretative process would entail overcoming the presumption in favour of the principle of equality, and the presumption against repeal by implication (full or partial) of statutes. It follows that the discriminatory provision must be phrased in "potent" language, and its legislative history must be clear, in a manner that is powerful enough to overcome the various contrary presumptions that guarantee equality.

7. The assumption as to equality, on the one hand, and the Women's Equal Rights Law, on the other, create a normative "umbrella" under which every statute must be so interpreted that the principle of equality in general, and equality of the sexes in particular, shall be realized. Of course, the language of a statute and its specific purpose might lead to the conclusion that the particular statute was indeed intended to realize special objectives that are not consistent with the principle of equality. The judge, as a faithful interpreter, will give full effect to such a statute and will construe it in the light of such objectives. In order to arrive at this conclusion, however, one must point to "potent" language in the statute itself and a "clear" legislative history, from which one may deduce a rebuttal of the

presumption of equality and the presumption against repeal by implication (wholly or partly) of the directive of the Women's Equal Rights Law. In the absence of such indicators, the general assumptions regarding equality and nonrepeal by implication of a statute will stand. Now I am not suggesting that in order to negate the presumption of equality there must be express language to that effect. In my view, even in the absence of such express language the presumption of equality may be negated, so long as this is founded on "potent" linguistic ground and an "unequivocal" legislative purpose. Thus, for example, it seems to me that it would be legitimate discrimination - and perhaps not discrimination but rather distinction - if there were a principled position to appoint only Jews to the religious council. Even though the Religious Services Law does not state expressly that only Jews may serve on the religious council, it seems to me that the "potent" language of the Jewish Religious Services Law allied to its legislative purpose (to provide religious services to Jews), suffice to negate the presumption of equality in this matter with regard to any person who is not Jewish.

8. The Religious Services Law does not contain any "potent" language oriented towards discrimination against women as regards appointments to the religious council, and its legislative history discloses no "clear" basis for a discriminatory approach. It may be assumed that this matter was not even considered. In these circumstances it is to be presumed that the Religious Services Law, too, was intended to realize the principle of equality between the sexes, thus excluding the assumption that this statute was designed to repeal by implication the Women's Equal Rights Law. Each of these premises taken separately, and the cumulative weight of both, lead to the conclusion that appointments to the religious council must be made in observance of the principle of equality. Therefore, each of the three authorities that nominate candidates to the religious council must propose its candidates without violating the principle of equality. Likewise, the Committee of Ministers, which resolves any disagreement between the three authorities, must make its decision in observance of the principle of equality. It follows that the candidacy of a woman should not be disqualified for the sole reason that she is a woman. Each and every candidate must be appraised "on the merits", that is, according to the degree of his or her fitness to serve as a member of the council, on the one hand, and in accord with the representation of the bodies interested in religious services, on the other (section 4). Of course, there is no obligation to appoint a woman to every religious council. If there are no women suitable for the position, there is no obligation to appoint one that is unsuitable. The appointment of an

unsuitable woman, for the sole reason that she is a woman, would be an improper consideration. Thus, just as it is wrong to refrain from appointing a woman for the sole reason that she is a woman, so by the same token is it wrong to appoint a woman for the sole reason that she is a woman. The appointment must be on its merits. The decision of the Committee of Ministers did not meet this requirement. It refrained from deciding in favour of appointing the Petitioner for the sole reason that she is a woman. There is no substantial argument that the Petitioner is unfit for the position for any reason, other than her being a woman. Thus, the dominant consideration of the Committee of Ministers was an extraneous consideration, the effect of which, in the existing circumstances is to nullify the Committee's decision.

9. My colleague, Elon J., examines the question (in paragraph 21 of his opinion) whether the Petitioner's disqualification from service on the religious council can be justified on grounds specified in the Women's Equal Rights Law for exclusion of the provision concerning equality. As for myself, I would prefer to leave this matter for further consideration. As I indicated, the instant case involves the interpretation of a statute concerning appointments to a religious council, and to that end, it suffices to rely on the principle of equality that is an element of the "credo" of our state. The reference to the Women's Equal Rights Law furnishes additional grounds for an approach that may be employed independently. It is a nice question, what the law would be were one conclusion reached under the one heading (the fundamental principles) and a different one under the other (the Women's Equal Rights Law). As aforesaid, there is no need to resolve this question, and I wish to leave it for another occasion. Likewise I wish to leave open for further consideration the distinction suggested by my colleague between an administrative body and a halakhic body, since such a distinction creates many difficulties with respect to an administrative body that is also a halakhic body. A person's competence to serve on such a "hybrid" body will also be determined - in the absence of an express statutory provision - by way of construing the pertinent statute in light of its purpose. The halakhic character of the body will be one of the elements, though not the only one, taken into account in interpreting the legislative act. But, as I have said, we do not need to address this question here, and it should be left for another occasion.

10. My colleague, Elon J., examined the position of the Committee of Ministers that there are grave fears concerning the efficient functioning of the religious council if a woman serves on it. He proceeds on the assumption (paragraph 22 of his opinion) that the fundamental right of women's equality is a relative and not an absolute right, and it should be balanced against legitimate interests of the individual and the public. He concludes that the grave fears of the Respondents should not act to tip the balance, since a woman's membership on a religious council is not prohibited by the *halakha,* and there is therefore no fear that her appointment would paralyse the religious council's work. He goes on to state that had it been contended that a halakhic prohibition bars women from serving on a religious council -

> ... there would have been room to seek a balance and compromise between the two poles. For we are concerned here with a religious council which, although a statutory, administrative body and therefore subject to the statutory principles, is also a body whose functions, and its functionaries, are closely associated with the world of the *halakha,* and it would have been proper to try and bridge the two opposites.

In this respect I wish to note that whatever the nature of such balancing, it cannot be based on negation of the equality principle, and the balance must always be based on the premise of equality. Furthermore, the act of balancing can be done only if there is evidence that the public interest in the maintenance of religious services will be actually affected if full effect is given to the principle of equality. Mere apprehension is not sufficient. It must be shown that insistence on the principle of equality alone will affect the functioning of the religious services. Only if there is actual proof of this, will there be room to consider whether such consideration should be weighed along with the principle of equality. Finally, it will be possible to take such consideration into account only after having exhausted all the legal processes that would ensure the proper functioning of the religous council in full observance of the principle of equality. Striking a balance with the principle of equality is a means of last, not first, resort. Therefore one must first inquire whether all legal measures have been exhausted to ensure that the chief rabbinate (from whom the rule issued that women should not be included in religious councils) shall also act within the frame of the law. One should not forget that the chief rabbis also act within the frame of the law, and the

principle of equality which applies to everyone, applies to them too. There is equality even in applying the principle of equality.

M. BEN-PORAT, D.P.: I agree that the petition should be admitted, which is the conclusion reached by my esteemed colleagues, albeit with some differences of "emphasis".

Order nisi made absolute and petition granted as stated in the decision of Elon J.

Judgment given on May 19, 1988.