CA 6024/97

Fredrika Shavit

v.

Rishon Lezion Jewish Burial Society

The Supreme Court sitting as the Court of Civil Appeals

[July 6, 1999]

Before Court President A. Barak, Justices M. Cheshin, I. Englard.

Facts: Petitioner challenged the refusal of a Jewish burial society to allow an inscription on her mother's tombstone recording the dates of birth and death according to the Gregorian, as well as the Hebrew, calendar. The district court held that the recently-passed Alternative Burial Law permitted Jews to bury their loved ones in civilian cemeteries, not according to Jewish religious law, had the effect of overturning previous court rulings requiring Jewish burial societies to permit non-Hebrew characters and dates on tombstones. Sites have yet to be established for alternative burial.

Held: Jewish burial societies have a public, as well as a private, character, and as such are subject to public law. The Alternative Burial Law did not have the effect of overruling previous holdings requiring Jewish burial societies to permit non-Hebrew lettering. This is particularly true because the statute has yet to be implemented. Barring family members from recording the names of their deceased loved ones in the language of their choice harms the sensibilities of the relatives and the human dignity of the deceased. It outweighs the potential harm

to the sensibilities of religious visitors to the cemetery who may be offended by the non-Hebrew lettering, particularly considering that the Jewish law prohibition against inscribing non-Hebrew calendar dates and letters is not sweeping and comprehensive. Furthermore, the weight accorded to the sensibilities of religious people offended by practices that violate religious law decreases in the public domain, like a cemetery, as compared to the weight such harm is accorded in the private domain, like the home.

Basic Laws cited:

Basic Law: Human Dignity and Liberty, ss.1a, 8.

Legislation cited:

Right to Alternative Civil Burial Law, 1996 – ss. 2, 3, 4, 4A, 5, 6.

Standard Contracts Law, 1964 s.14.

Standard Contracts Law, 1982.

Contracts Law (General Section), 1973, s.30.

King's Order in Council on the Land of Israel (Holy Places), 1924.

Regulations cited:

Right to Alternative Civilian Burial Regulations (Licensing Burial Cooperatives and Establishing Burial Procedures) 1998.

Bills cited:

Right to Alternative Civilian Burial Bill.

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Israeli Supreme Court cases cited:

[1] CA 280/71 *Gideon v. Jewish Burial Society*, IsrSC 27(1) 10.

[2] HCJ 532/74 *Ben-Ze'ev v. Public Council for the Memorialization of the Soldier*, IsrSC 30(1) 305.

[3] CA 492/79 *Moses v. Jerusalem Community Jewish Burial Society*, IsrSC 35 (4) 157.

[4] HCJ 556/83 *Best v. Defense Minister*, 38(1) 177.

[5] HCJ 1438/91 *Ginossar v. Defense Minister*, 45(2) 807.

[6] CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*, 46(2) 464.

[7] HCJ 5688/92 *Wechselbaum* v. *Defense Minister*, 47(2) 812.

[8] HCJFH 3299/93 *Wechselbaum* v. *Defense Minister*, 49(2) 195.
[9] HCJ 3807/96 *Bargur v. Defense Minister*, (not reported).
[10] HCJ 5843/97 *Bargur v. Defense Minister*, 52(2) 462.
[11] CA 1795/93 *Egged Members' Pension Fund v. Ya'acov*, 51(5) 433.
[12] LCA 5768/94 *ASHIR Import, Manufacture and Distribution v. Forum Accessories and Consumables*, 52(4) 289.
[13] CA 6821/93 *United Mizrachi Bank v. Migdal Agricultural Cooperative*, 49(4) 221.
[14] HCJ 337/81 *Miterani v. Minister of Transportation*, IsrSC 37 (3) 337.
[15] HCJ 5016/96 *Horev v. Minister of Transportation*, IsrSC 51(4) 1 {[1997] IsrL 149}..
[16] HCJ 3648/97 *Stemaka v. Minister of the Interior*, IsrSC 53(2) 728.
[17] CA 3414/93 *On v. Diamond Exchange Industries (1965)*, IsrSC 49(3) 196.
[18] HCJ 2481/93 *Dayan v. Jerusalem District Commander*, IsrSC 48(2) 456.
[19] HCJ 3872/93 *Meatrael* v. *The Prime Minister and Minister of Religious Affairs,* IsrSC 47(5) 485.
[20] HCJFH 7015/94 *Attorney General v. Anonymous*, IsrSC 50(1) 48.
[21] HCJ 3261/93 *Manning v. Minister of Justice*, IsrSC 47(3) 282.
[22] EA 1/65 *Yardor v. Chairman of the Central Election Committee for the Sixth Knesset*, IsrSC 19(3) 365.
[23] EA 2/84 *Neiman v. Chairman of the Central Election Committee for the Eleventh Knesset*, IsrSC 39(2) 225.
[24] HCJ 73/53 *Kol Ha'Am v. Minister of the Interior*, IsrSC 7 871.
[25] HCJ 148/79 *Sa'ar* v. *Minister of the Interior and of Police*, IsrSC 34(2) 169.
[26] CA 105/92 *Re'em Engineers v. The Municipality of Upper Nazareth*, IsrSC 47(5)189.
[27] HCJ 351/72 *Keinan v. The Film and Play Review Board*, IsrSC 26(2) 811.
[28]HCJ 806/88 *Universal City Studios v. The Film and Play Review Board*, IsrSC 43(2) 22.
[29] CrimA 217/68 *Izramax Ltd*. v. *State of Israel*, IsrSC 22(2) 343.
[30] HCJ 7128/96 *Temple Mount Faithful Movement v. The Government of Israe*l, IsrSC 51(2) 509.

[31] HCJ 292/83 *Temple Mount Faithful Association* v. *Jerusalem District Police Commander*, IsrSC 38(2) 449.
[32] HCJ 257/89*Hoffman* v. *Appointee over the Western Wall*, IsrSC 48(2) 265.
[33] HCJ 243/81 *Yeki Yosha v. The Film and Play Review Board*, IsrSC 35(3) 421.
[34] CA 214/89 *Avneri v. Sharipa*, IsrSC 43(3) 840.
[35] HCJ 465/89 *Ruskin v. Jerusalem Religious Council*, IsrSC 44(2) 673.
[36] HCJ 47/82 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs*, IsrSC 43(2) 661.
[37] HCJ 3944/92 *Marbek Slaughterhouses v. Chief Rabbinate of Netanya*, IsrSC 49(1) 278.
[38] HCJ 1000/92 *Bavli v. The Great Rabbinical Court*, IsrSC 48(2) 221.
[39] HCJ 6163/92 *Eizenberg v. Minister of Construction and Housing*, IsrSC 47(2) 229.
[40] HCJ 935/89 *Ganor v. Attorney-General*, IsrSC 44(2) 485.
[41] HCJFH 4601/95 *Sarrousy v. National Labor Court*, IsrSC 52(4) 817.

Israeli District Court Cases Cited:

[42] HM (TA) 752/94 *Burgman v. Rishon Lezion Jewish Burial Society* (unpublished).
[43] HM (TA) 1275/93 *Kagan v. Rishon Lezion Jewish Burial Society* (unpublished).
[44] HM (TA) 200585/98 *Sasson v. Herzliya Jewish Burial Society* (unpublished).

Israeli Books Cited:

[45] 1 Menachem Elon, Jewish Law (3d ed. 1987).
[46] *See* 3 A. Barak, *Parshanut Bimishpat [Interpretation in Law] Parshanut Chukatit [Constitutiona]*
[47] Aharon Barak, Judicial Discretion (1986).

Israeli Articles Cited:

[48] E. Benvenisti, *Tchulat Hamishpat Haminhali al Gufim Pratiim [Administrative Law, Private Bodies*] Mishpat U'Mimshal 2 (1994-95) 11.

[49] A. Dayan-Orbach, *Hamodel Hademocrati shel Chofesh Habitoi [Freedom of Expression]*, Iyunei Mishpat 20 (1996-97) 377.

Jewish Law Sources Cited:

[50] Babylonian Talmud, Tractate *Baba Metzia*, 30B.
[51] Babylonian Talmud, Tractate *Yoma*, 9B.
[52] Etz Yosef, Ein Ya'akov, Tractate *Baba Metzia* 30.
[53] Rabbi Shmuel Eliezer Edels (Maharsha), *Baba Metzia*, 30.
[54] *Shulchan Aruch*, *Choshen Hamishpat*, 12B.
[55] Rabbi Moshe Isserlis (Rama), *Shulchan Aruch*, *Choshen Hamishpat*, 12B.
[56] Babylonian Talmud, Tractate *Sanhedrin* 74A-B.
[57] Rabbi Moshe ben Maimon (Maimonides), *Basic Laws of the Torah*, ch.5, laws 2-4.
[58] Responsa *Tzitz Eliezer*, part 9, 14, ch. 100B.
[59] Responsa *Yabia Omer*, part 7, *Yoreh Deah*, 32, ch. 100B.

Appeal of the decision of the Tel Aviv/Jaffa District Court (Judge. Y. Zeft) from 22.7.1997 in DC 657/97. The appeal was granted by majority opinion, with Justice I. Englard dissenting.

Gali Bar-El, Uri Regev – for the appellant;
Yair Shilo – for the respondent.

JUDGMENT

Justice M. Cheshin

1. Regarding gravestones, what should be inscribed upon them? What should an epitaph record? Who should decide these things? After all, it is only family and friends who will visit the grave. They are the ones who will remember the deceased; it is they who will come to cry and grieve. But are they the ones who should decide how the deceased should be memorialized on his or her gravestone, or is that the role of another party, for example, the Jewish burial society? Perhaps it should be decided

by the municipal rabbi – each rabbi for his own municipality? Or perhaps another authority should make this decision?

The courts have dealt with these questions several times regarding both civilian and military cemeteries. The first time was in CA 280/71 *Gideon v. Jewish Burial Society* (hereinafter – *Gideon* [1]), followed by HCJ 532/74 *Ben-Ze'ev v. Public Council for the Memorialization of the Soldier* [2], CA 492/79 *Moses v. Jerusalem Community Jewish Burial Society* [3], HCJ 556/83 *Best v. Defense Minister* [4], and HCJ 1438/91 *Ginossar v. Defense Minister* [5]. After these, came CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum* (hereinafter – *Kestenbaum* [6]) which was followed by *Wechselbaum*; first in the High Court of Justice (HCJ 5688/92 *Wechselbaum v. Defense Minister* [7]) and then in a further hearing (HCJFH 3299/93 *Wechselbaum* v. *Defense Minister* [8]). After *Wechselbaum* [7] [8] came *Bargur*, which was also heard twice (*HCJ 3807/96 Bargur v. Defense Minister* [9] and *HCJ 5843/97 Bargur v. Defense Minister* [10]). The district courts have also addressed this question more than once (in addition to those cases that came before the Supreme Court on appeal). *See e.g.* HM (TA) 752/94 *Burgman v. Rishon Lezion Jewish Burial Society* (the *Burgman* case) [42]); HM (TA) 1275/93 *Kagan v. Rishon Lezion Jewish Burial Society* [43]; HM (TA) 200585/98 *Sasson v. Herzliya Jewish Burial Society* [44] and others. To all these, add the Right to Alternative Civil Burial Law, 1996, and the regulations pursuant to the law, as well as HC 619/97 MK Tzuker v. Minister of Religious Affairs (currently pending before the Court).

I would be surprised if there is another nation or language that occupies itself so passionately and intensively with the issue of what should be inscribed on gravestones; occupies itself continuously, and yet cannot settle on a standard.

The Facts

2. On December 7 1996 (Kislev 26 5757), Mrs. Rosa Greitel

passed away. The deceased's family wished to bury her, as is customary, in her home town – the city of Rishon Lezion. The Rishon Lezion Jewish Burial Society responded to their request, and she was interred in the cemetery under its management, which is the only one in the city. Thereafter, the family requested that the deceased's name be inscribed on her gravestone in both Hebrew and Latin characters, and that her birth date and death date be recorded according to the standard Gregorian calendar, as well as the Hebrew calendar. The Jewish burial society initially refused both these requests – the inscription in foreign lettering and the Gregorian dates. Later, after the Rishon Lezion Jewish Burial Society's chief rabbi, Rabbi Breuer, gave a dispensation, it allowed the deceased's first name (Rosa) to be inscribed in Latin characters. However, the burial society stood firm and refused to grant the family's wish regarding the Gregorian birth and death dates.

In refusing to grant the family's wishes, the Jewish burial society relied on the ruling of its chief rabbi, and when the family applied to Rabbi Breuer directly for a dispensation – they encountered an absolute refusal. The family pointed out that the very same cemetery already contained gravestones bearing Gregorian dates. Rabbi Breuer's answer was that, although it had been permitted in the past, since his appointment as rabbi of the local Jewish burial society, he had not allowed Gregorian dates of birth and death to be inscribed on gravestones. The family then appealed to Rabbi Wolfa, the chief rabbi of Rishon Lezion, and to the Jewish burial society rabbi in charge of the Jerusalem district, but to no avail. The rabbis responded by referring the family back to Rabbi Breuer, who stood by his ruling. Since all other avenues were closed, the deceased's daughter – Dr. Fredrika Shavit – applied to the Tel Aviv-Jaffa District Court, requesting that it uphold and formally acknowledge her right to engrave Gregorian dates of birth and death on her mother's gravestone.

In the district court, Judge J. Zeft rejected Dr. Shavit's request, and that rejection is the subject of this appeal.

Legal Background – Gideon *[1] and* Kestenbaum *[6]*

3. It seems I was naïve in believing that the courts must follow in the footsteps of previous rulings. First there was *Gideon* [1], in which the Court – in a majority opinion – ruled that everyone has the right to carve standard Gregorian dates of birth and death on a gravestone (in that case, on a father's grave). The judgment of Justice Etzioni – which Justice Berenson joined – gives us a clear and explicit ruling, in precise and unambiguous language, and those who study it will understand it perfectly. Judge Etzioni wrote, for example:

> No one in the world disputes the right of people to honor the memories of their loved ones who have departed from this world in the way that they see fit, in line with their way of life and traditions, providing they do not harm the legitimate sensibilities and interests of others. It is also clear that a cemetery is a place not only for burying the dead but also for expressing the love and respect the living continue to feel for the departed.

Gideon [1] at 23.

He continued:

> This is simply an arbitrary negation of the right to use the standard calendar to record the dates of birth and death of a person whose life revolved around this calendar!

Id.

What more is there to add? The Court has established its ruling on the matter, that the prohibition on carving Gregorian birth and death dates is a "restrictive condition" that is discriminatory under section 14 of the Standard Contracts Law, 1964.

4. After the *Gideon* [1] judgment was handed down in 1972, there was an 18-year respite on this issue – until *Kestenbaum* [6]. In that case, Mr. Kestenbaum asked the district court to allow him to inscribe on his late wife's gravestone her name in Latin characters and her birth and death dates according to the Gregorian calendar. The district court ruled in favor

of the plaintiff, and the Supreme Court rejected the appeal of the Jewish burial society by majority opinion. The judgment took up 62 closely-typed pages, and I can't think of even one aspect that the Court did not consider and thoroughly delve into. The common denominator in the reasoning of the majority on the panel was their different interpretations of "public policy," in the broad sense of the concept. President Shamgar emphasized in his remarks that the principles of public law necessitate a ruling in favor of the petitioner. He added that such a conclusion is also required by the provisions of the Standard Contracts Law, 1982, and also by public policy as elucidated in section 30 of the Contracts Law (General Section), 1973.

Justice Barak also found that the need to favor the petitioner flowed from principles of public law and provisions of the Standard Contracts Law, but in his view, the real flaw in the Jewish burial society's decision was that it violated public policy. Thus Justice Barak said "… the main point of the legal problem before us is not the actions of the Jewish burial society in areas of public law, and not even in its overstepping the bounds of the Standard Contracts Law. The heart of the problem is really the application of the principles of public law – values such as the Hebrew language, human dignity and tolerance – in the areas of private law." *Kestenbaum* [6] at 529. In his subsequent remarks, Justice Barak pointed to the framework-principles of private law – such as principles of good faith and public policy – and ruled that these comprise the basic principles of law and the fundamental social outlook upon which the legal system is founded. His conclusion was that the Jewish burial society's decision that the name of the deceased could be inscribed in Hebrew letters only violates public policy in that it is a mortal blow to human dignity – the dignity of both the living and the dead: "The source of the blow to human dignity is the negation of the freedom to inscribe on the gravestone whatever the deceased (in his or her lifetime) and his or her family (after his or her death) wish to be inscribed." *Id.* at 523. The value of human dignity supersedes all other values with which it may come into conflict.

We wished to mention several more things that the Court ruled in *Kestenbaum*, but since the judgment is overflowing with words of wisdom

and ethics, and out of fear that asserting one ethical stance might denigrate others, we decided not to cite them here. We refer the reader therefore to *Kestenbaum* [6], and each can draw his or her own conclusions.

5. I accept the words of my colleagues and their opinions in both cases. The truth is that the essence of all three reasons for the ruling in *Kestenbaum* [6] comes from the same source. I raised a similar idea in CA 1795/93 *Egged Members' Pension Fund v. Ya'acov* [11]. In that matter, the regulations of a cooperative society were at issue, and the question was whether it was right and fitting to invalidate a particular regulation as illegal. My colleague, Justice Englard, believed that it was appropriate to void that regulation because it was a discriminatory condition under the provisions the Standard Contracts Law. Unlike my colleague, Justice Englard, my colleague, Justice Turkel, felt that the Standard Contracts Law did not apply to regulations of a cooperative, yet his conclusion was also that a regulation must be voided when it clashes with public policy under section 30 of the Contracts Law (General Section). When I read the words of my colleagues on that occasion, I was at a loss to understand the need for such hair-splitting arguments, since the conclusions were almost identical.

I wrote there that public policy "is the wellspring and the source from which the tributaries of norms flow out to all corners of the law." CA 1795/93 *Egged Members' Pension Fund v. Ya'acov* [11] at 467. I continued:

> "Public policy" dwells in the royal capital of the kingdom of contracts, and it sends its envoys to all the principalities of contracts. One of these is the principality of Standard Contracts. When settling down in the principality of Standard Contracts, the envoy of public policy seeks to assimilate into the local people and merit a local title of its own, a title that will make it feel at home. It receives the ironic title of "the discriminatory condition." In coming to the principality of Standard Contracts, public policy metamorphoses into "the

> discriminatory condition." The concept of the discriminatory condition consists of the re-crystallization of public policy in the principality of Standard Contracts. In other words, in the relationship between the "supplier" and the "customer" – the two parties involved the Standard Contracts Law – public policy is represented by the discriminatory condition, and the discriminatory condition is public policy.

Id. at 467-68.

As it was in that case, so it is here. The Court arrived at the same conclusion in both *Gideon* [1] and *Kestenbaum* [6]. This was no coincidence. The same fundamental principles embedded deep in our hearts – human dignity, tolerance, the social need to contribute and not just to take, the rights of the individual, freedom of conscience and expression, freedom of thought and action as befits a free society – are what guided Justice Etzioni's pen as he wrote his decision, and what cleared the path for President Shamgar and Justice Barak to say what they said. Thus the Court emphasized further – both in *Gideon* [1] and *Kestenbaum* [6] – that the rights of an individual can be stopped in their tracks, can be limited, where they are hurtling toward a severe head-on collision with the equally-ranked rights of another. Thus, for example, we will not allow substantial harm to the sensibilities of another. If someone wishes to inscribe on the grave of his father or mother – in a Jewish cemetery – a Christian cross, I assume that the Court would not fault a decision of the Jewish burial society to forbid it. It was not so in the cases of *Gideon* [1] and *Kestenbaum* [6], which dealt only with carving names in foreign characters (as well as Hebrew writing) and inscribing Gregorian dates of birth and death.

6. Those were the rulings in *Gideon* [1] and *Kestenbaum* [6]. At issue in those hearing was what was permitted in gravestone inscriptions, and the Court delved into and solved every aspect of the problem. It addressed all differences of opinion, weighed in on every question, and handed down its ruling. The decisions are clear, and there are no ambiguities or doubts in them. In my naiveté, I thought that these rulings

established everything needed to make a decision in the case before us. How is it, therefore, that the lower court refused to follow these rulings? Why and wherefore did the lower court see a need to carve out a new path for itself and refuse to take the path which had already been well-signposted? It is understood that the district court relied primarily on a law passed after the *Gideon* [1] and *Kestenbaum* [6] rulings, that is, the Right to Alternative Civil Burial Law, 1996 (hereinafter – the Alternative Burial Law). In the lower court's opinion, this law overturned the *Gideon-Kestenbaum* ruling.

We all agree, of course, that a later law can supersede a law or ruling that precedes it, so the question is whether this particular law indeed irreconcilably contradicted the rulings that preceded it. This, put simply, is the doctrine of "implied negation." Therefore we will briefly review the Alternative Burial Law, and afterward address its relationship to the *Gideon-Kestenbaum* ruling.

The Alternative Burial Law

7. The Alternative Burial Law – a brief and concise law – is known by the full name of the Right to Alternative Civilian Burial Law. In the words of section 2 of the law: "Everyone has the right to a burial which accords with one's ideology in an alternative civilian cemetery if one so chooses…" The law further established (section 3) that "burial is conducted while preserving the dignity of the dead." The law originated with a bill proposed by Members of Knesset David Zucker and Binyamin Temkin, who explained their aims as follows:

> Everyone who dies in Israel has the right to be buried in a dignified manner (section 3) appropriate to their ideology. Therefore it is proposed not to impose upon the burial process to religious practices which are sometimes foreign to the ideology of the deceased.

Right to Alternative Civilian Burial Bill, 1996 at 600.

The bill continues:

> It is proposed to solve the problem of the burial of Jews who do not identify themselves with Judaism or any other recognized religion and who wish for a burial in line with the principles and ideology by which they lived their lives.
>
> It is also proposed to solve the problem of the burial of those without a recognized religious affiliation.

Under the legislation, the Minister of Religious Affairs will designate places to be used as alternative civilian cemeteries, which will be located in the different regions of the country at reasonable distances from each other. Sec. 4. The alternative civilian cemeteries are supposed to be administered by burial cooperatives. Sec. 5. The Minister of Religious Affairs is authorized to create regulations for the implementation of the law, including regulations for licensing burial cooperatives and acceptable burial practices. Sec. 6.

Our opinion is that the law – as its name suggests – refers to *alternative* civilian burial, In other words: the norm is burial in a regular cemetery, but one has the right to an alternative if one expresses this desire. Section 2, as we have seen, sets down the right of a person to choose to be buried in an alternative civilian cemetery, and the same section further states that "the choice can be expressed in his legal will or in any other way." Therefore, one who wishes – when the time comes – to be given an alternative civilian burial bears the burden of making sure this desire is expressed. It can be assumed that if close family members say that this was indeed the will of the deceased, those wishes should be respected.

The Alternative Burial Law is a framework law: a law that acknowledges fundamental rights and outlines the principles of their implementation in the future by the individual appointed to the task. That is its charm. That is also its hindrance.

8. The authorities did not hasten to implement the law. Thus, for example, even though the law was passed on March 21, 1996, no regulations were instated for two and a half years until the Right to Alternative Civilian Burial Regulations (Licensing Burial Cooperatives and Establishing Burial Procedures) was published on December 17, 1998, to be implemented 30 days later. It is clear that these regulations were only instated following a petition brought before the High Court of Justice discussed below.

This was the course of events: the Minister of Religious Affairs dragged his feet in creating regulations for the implementation of the Alternative Burial Law, and since he did not designate – as was his obligation under section 4(a) of the law – sites for alternative civilian cemeteries, MKs David Zucker and Binyamin Temkin – the initiators of the law – and with them Mr. Erez Epstein, petitioned the High Court of Justice, requesting that it order the Minister of Religious Affairs to fulfill the tasks assigned to him by the law. This petition (HCJ 619/97) was brought before the Court on January 27, 1997 – some ten months after the law went into effect – and it is still pending today. Almost two years after the petition was filed, the Minister of Religious Affairs established those regulations mentioned above, and in doing so, one of the requests of the petitioners was addressed. Their other request – regarding the designation of sites for alternative burial – is yet to be addressed, despite certain actions taken towards the implementation of the law.

9. The situation is that the Alternative Burial Law – at this time – is nothing more than the "dry bones" of a law: it is not fleshed out, and there is no life in it. The petition which seeks to force the authorities to carry out the tasks entrusted to them is still pending before this court.

Here we conclude the initial sections dealing with the issue of the Alternative Burial Law, and now we will move to the judgment of the lower court.

Why did the district court deviate from the ruling of Gideon-

Kestenbaum?

10. Initially, the judgment of the lower court cites the ruling of *Kestenbaum* [6] – upon which the appellant relies – and continues by ruling that since the judgment was handed down, circumstances have changed, due to the legislating of the Alternative Burial Law. This law, the court ruled, "frees anyone who desires a different sort of burial from burial according to religious precepts and rites." Therefore, the implication of the law, that is "the flip side of the coin," is that the Jewish burial society acquires every right to insist on the burial rites it considers acceptable. As the court put it:

> Since the judgment in CA 294/91 [*Kestenbaum* [6] – M.Ch.], circumstances have changed. On March 21, 1996, the Right to Alternative Civilian Burial Law, 1996 was published …
>
> This law frees anyone who desires a different sort of burial from burial according to religious precepts and rites, providing cemeteries designated for this purpose in different regions of the country, spaced apart at reasonable distances, and managed by burial cooperatives. The "flip side" of this law, that which we deduce from it, is that Jewish burial societies acquire the option of insisting that burials carried in cemeteries under their management be done according to the Jewish laws and rites accepted in their community.
>
> Even though CA 294/91 [6] established that the laws of tolerance and respect for individual liberty oblige the Jewish burial society to allow deviation from what it considers appropriate for a Jewish cemetery in the State of Israel, the legislature had a different view:
>
> One who wishes to have a burial in accordance with one's personal ideology will be interred in a civilian cemetery. There, one can realize one's right to be buried according to one's views and wishes, and not in the cemeteries belonging to the Jewish burial societies. This law nullifies the basis of the ruling in CA

> 294/91 [6], according to which a cemetery with a religious character must respect the wishes of the individual even if they do not coincide with the rites and precepts considered appropriate by the management and owners. In its place, the legislature established the principle of separation between cemeteries where burials take place according to religious precepts and rites and cemeteries where burials reflect the particular ideology of the deceased, as expressed in his legal will or through other means.

In other words, the Alternative Burial Law sets new obligations and also voids existing obligations. In terms of the new obligations, we learn that alternative civilian cemeteries must be established. In terms of voided obligations, we learn of the nullification (through an "overturning effect" or the "flip side of the coin" as the lower court put it) of the principle established in *Kestenbaum* [6] (and in *Gideon* [1]) regarding respecting the wishes of an individual. In as much as the new law gave the individual the option of being buried according to his personal wishes in an alternative civilian cemetery, there is no longer any reason to force Jewish burial societies to accede to the wishes of individuals.

The court agrees, that indeed, the Alternative Burial Law has yet to be implemented, since alternative civilian cemeteries have not yet been established, but in its opinion this fact does not "justify coercing the respondent [the Jewish burial society – M.Ch.], in the interim period (until the alternative civilian cemeteries are established), to deviate from the standards it considers acceptable based on the ruling of the local rabbi, according to the law and custom of the community." The court further ruled that the Alternative Burial Law does not have any transitional provisions and that "the rights established by it, like the principle of separation of religious burial sites and alternative burial sites," have "immediate application" (The court was referring both to the provisions of the statute themselves as well as "the flip side of the coin"). The Jewish burial society "has no … influence on the pace of activity of the Minister … and is not responsible for his actions or omissions. The request for a right based on the law must be addressed to the Minister, and not to the

respondent."

The lower court additionally ruled that there are cemeteries in the vicinity of Rishon Lezion (the Holon Cemetery and the Yarkon Cemetery) run by Jewish burial societies that allow the inscription of Gregorian dates of birth and death on gravestones. Thus, as the court said, "The right to a gravestone to the taste and personal philosophy of the deceased can be realized at a reasonable distance from Rishon Lezion, and it is therefore unjust to force the respondent to overturn the municipal rabbi's ruling regarding burial practices appropriate in a Jewish cemetery in Israel."

The appellant has rejected these claims one by one, and below we will address these arguments.

Regarding the "Overturning Effect" of the Alternative Burial Law

11. There is no argument that the Alternative Burial Law introduced a significant change to the laws of burial in Israel. Before it existed, the Jewish burial societies in this country held a kind of monopoly on the burial of Jews. The law is meant to pave the way for burial corporations other than Jewish burial societies and the establishment of alternative civilian cemeteries in which people may be buried, if they so choose, in ways other than according to the Orthodox Jewish tradition. The question is if the law has an "overturning effect" which negates *Gideon-Kestenbaum* and frees the Jewish burial society from the yoke of these rulings. The lower court ruled thus – that the Alternative Burial Law does indeed overturn *Gideon-Kestenbaum* – but we find it difficult to accept this stance.

12. First of all, it must be said – though this is not main point – that the stance of the lower court troubles us deeply, and not only because the Alternative Burial Law is currently a mere "skeleton" of a law. The statement that "a person has the right to be buried according to his ideology in an alternative civilian cemetery if he so chooses" – as per section 2 of the law – is at present just empty words far from the reality. Alternative civilian cemeteries have not been established – it has not even

been announced when they will be established – and I have difficulty accepting that the mere existence of a law is capable of overturning a court ruling.

"Alternative relief" must fulfill two conditions to be considered in effect: First, there must be relief, and second, this relief must be current, effective, and available to those who seek it. In this case, the appellant does not currently have access to relief and there is certainly no effective relief. In other words: in the present situation, alternative burial does not exist. In light of this, we have trouble understanding how the Rishon Lezion Jewish Burial Society can shed its obligations to the general public – to the residents of the city that it is supposed to serve – which it has borne at least since *Gideon-Kestenbaum*. It makes a mockery of a person's dignity to tell the appellant that she must go to the Minister and complain about the delay in the implementation of the law. Can one postpone the day of one's death until the alternative cemeteries are ready? However, we will not rest with this reason alone. We will now discuss the law as though the alternative civilian cemeteries had been established, thus reaching the heart of the matter.

13. The whole truth is that every statutory arrangement has an "overturning effect," that is the "flip side of the coin," as the lower court put it. We commented on this in LCA 5768/94 *ASHIR Import, Manufacturing and Distribution v. Forum Accessories and Consumables* (hereinafter – *ASHIR* [12]):

> Just as there is no person without a shadow, thus – in principle – there is no statutory arrangement without an overturning effect following in its wake. Just as a shadow follows its owner wherever he goes, the overturning effect follows the statutory arrangement. The shadow cast by the overturning effect may be small or large, however there will always be an overturning effect of some sort.

Id. at 402-03.

And what is this overturning effect?

> …the overturning effect that is evident from the structure of a law – and which surrounds the law on all sides – is an implied expression of the exclusiveness of the law in certain areas and is similar to the negating of a law (or ruling) by a subsequent law.

Id. at 393-94.

The overturning effect – the shadow of a law – accompanies the law, and there is no such thing as a shadow that is its own master. The overturning effect will be guided by the provisions of the law that are on the surface as well as the law's very foundations, and an overturning effect cannot exist independently. In our case, we could say the overturning effect that envelopes the Alternative Burial Law is that after the law goes into effect, there will be no dispensation to perform "alternative" burials except according to the provisions of the law. However we did not say that this is in fact the real overturning effect of the law. All we are saying is that the overturning effect is *likely* to be guided by the express provisions of the law.

We find it hard to understand how it is possible, from the law's provisions, to extrapolate – as something self-evident – the "principle of segregation" to which the lower court refers. Under the district court's interpretation, after the law goes into effect, there are two kinds of burials: "religious burial" – each place according to its own custom – and "alternative burial." Apparently, the mere existence of the alternative burial option makes the Jewish burial society master of its domain, free of the yokes of public law, public policy, and the Standard Contracts Law – everything that guided the *Gideon-Kestenbaum* ruling. The lower court assigned the Alternative Burial Law a shadow that is much longer and broader than the Alternative Burial Law is capable of bearing, a shadow that would only be appropriate were it accompanied by an explicit and broad statutory arrangement for areas relating to the Alternative Burial Law, at least in its present framework.

14. Moreover, the original intention of the Alternative Burial Law, in principle, was to *add an alternative* to the accepted way to burial – for those who desire a burial in line with their personal ideology as opposed to the common practices in our community. The law was intended to create an alternative, not to diminish the existing option, and the addition does not detract from the obligations borne by the Jewish burial society – every Jewish burial society – in its area. To say that the establishment of the Right to Alternative Burial intended – through an overturning effect – to negate the right to non-Hebrew writing and Gregorian dates on a gravestone is a *non-sequitur*. Establishing the right of a person to an alternative burial according to his or her ideology does not mean that the right of this same person to non-Hebrew writing on a gravestone in a regular cemetery is negated, even though this right was established before alternative burial existed. We have not found in the Alternative Burial Law any suggestion that, after it goes into effect, the Jewish burial societies acquire the right to impose demands that *ex hypothesi* – according to the *Gideon-Kestenbaum* ruling – violate human dignity, violate public policy, subvert the principles of public law, and are prohibited under the Standard Contracts Law.

15. The subject of the overturning effect is inextricably bound up with the subject of implied rescission. See our remarks in CA 6821/93 *United Mizrachi Bank. v. Migdal Agricultural Cooperative* [13] at 554-57, and *ASHIR* [12], *supra*, at 393-403. The lower court effectively held that the Alternative Burial Law implied the rescission of the ruling of *Gideon-Kestenbaum*. We cannot agree with this conclusion. A ruling made by the Supreme Court bases itself on basic principles of the legal system in Israel – human dignity, public policy, the principles of public law – and it is so sturdy and strong, that we find it difficult to accept that it was rescinded by implication, allegedly, simply due to the passing of the Alternative Burial Law; that the wind that the Alternative Burial Law blew in through its passage whisked away the *Gideon-Kestenbaum* ruling, until it disappeared, as though it had never existed. In order to overturn a ruling such as *Gideon-Kestenbaum* – a ruling that anchors itself in basic human rights – we would expect to find an explicit provision in the new law. We

have not found such a provision.

In other words, the ruling gave the appellant the right to inscribe the Gregorian birth and death dates on her mother's gravestone, and we haven't found anything in the provisions of the Alternative Burial Law – neither in the express provisions nor in the implied provisions – to negate this right as if it never existed. This was so even before the establishment of the Basic Laws. Compare with HCJ 337/81 *Miterani v. Minister of Transportation* [14] at 358-59. The point is that to negate fundamental rights – or to limit the scope of their application – clear and explicit legislation is necessary. We cannot settle for an overturning effect. If this was the case before the Basic Laws, it is true all the more so after their passage, because now the Basic Law: Human Dignity and Liberty directly protects human dignity, and it is based on the same unshakable foundation as the *Gideon-Kestenbaum* ruling.

16. Furthermore, the introduction of the Basic Law reinforced a principle that was accepted previously. This was the intention of the limitation clause of Basic Law: Human Dignity and Liberty (section 8), according to which – whether directly or by association – a legal provision may violate basic rights only if it meets the following basic conditions: it befits the values of the State of Israel; it was enacted for a proper purpose; and it causes harm to an extent no greater than is necessary. On this last condition, see President Barak's opinion in HCJ 5016/96 *Horev v. Minister of Transportation* (hereinafter – *Bar-Ilan Street* [15]) at 53-54 and the precedents cited above, including HCJ 3648/97 *Stemaka v. Minister of the Interior* [16] at 776 and others.

In *Kestenbaum* [6], Justice Barak said the following:

> Human dignity in Israel is not a metaphor. It is the reality, and we draw operative conclusions from it. In the matter before us, the necessary conclusion is that a government agency's general mandate to carry out certain activities – for example, the management of a cemetery – should not be interpreted to mean

> that this same government agency is licensed to cause serious and severe harm to the human dignity of those involved in this case. A government authority that seeks to infringe on human dignity must have explicit and clear authorization from the legislature, and since the legislation of the Basic Law: Human Dignity and Liberty, this agreement needs to be anchored in a law "that befits the values of the State of Israel, was enacted for a proper purpose, and [causes harm] to an extent no greater than is necessary" (sec. 8). This basic concept – the need for an explicit statutory provision that allows for harm to human dignity – is not new to us. We have always accepted that a government agency is not entitled to infringe upon basic rights without explicit authorization to do so … today another requirement was added to the essence of this law.

Id. at 524.

Thus we have difficulty – very great difficulty – in accepting an interpretation of the Alternative Burial Law which effectively sweeps by the wayside a right that the *Gideon-Kestenbaum* ruling views as extrapolated from human dignity, public policy, and the very core of public law. We reject this interpretation outright.

Additionally, if indeed the Jewish burial society has a "dual character" – as ruled in *Kestenbaum* [6] – then it is subject to public law. *See Kestenbaum* [6] at 484-85, 490-92, 517-19. *See also* CA 3414/93 *On v. Diamond Exchange Industries* (1965) (hereinafter – On [17]); E. Benvenisti, *Tchulat Hamishpat Haminhali al Gufim Pratiim [Administrative Law, Private Bodies*] [48]. We also note that the Jewish burial society is subject to public law, because it fulfills a public and social duty by law. Human dignity and public policy lead us directly to the obligation of the Jewish burial society to act in accordance with the *Gideon-Kestenbaum* ruling. Taking all this into account, I am frankly stunned that the Jewish burial society can shed its obligations with no more justification than an implied rescission and a conceptual overturning effect. The nullification of the *Gideon-Kestenbaum* ruling requires far

greater force than that which an overturning effect and implied rescission can provide.

The Claim of the Jewish Burial Society That It Is a Private Non-profit Organization

17. The Jewish burial society claims that the *Gideon-Kestenbaum* ruling does not apply to it for the following reason: unlike the Jewish burial societies involved in *Gideon* [1] and *Kestenbaum* [6], it is a private non-profit organization. It is entirely unaffiliated with the Rishon Lezion Religious Council, and the land of the cemetery is under its ownership, it having purchased the land for full value. In light of this, the respondent claims, it follows that the Jewish burial society may act as it sees fit and is allowed to impose its will on the appellant regarding inscriptions on gravestones. This claim is not acceptable to us in the present case. No doubt this is also the respondent's position on the application of the Standard Contracts Law to the relations between the Jewish burial society and the appellant. This is also its position on the application of public law and, of course, public policy.

The cornerstone of the *Gideon-Kestenbaum* ruling was as follows: Jewish burial societies were formally born into the family of private law. However, due to the nature of their work, they have transformed into dual-character bodies, subject to private law and also to principles of public law. President Shamgar said in *Kestenbaum* [6] (at 484) that the role of the Jewish burial society is "… essentially public, both formally and as part of its character …" The nature of the activities of the Jewish burial society has not changed; its religious character is an intrinsic part of its essence, and it brought us to the *Gideon-Kestenbaum* ruling.

Indeed, the fact that certain land is owned by a private body does not in itself exempt that body – always and under all circumstances – from principles of public law. Private property may have a public character due to the nature of its use, and this character in itself brings principles of public law to bear on the [owner – ed.], obligating it. *See*, *e.g. On* [17]

supra. *See also* HCJ 2481/93 *Dayan v. Jerusalem District Commander* [18]; A. Dayan-Orbach, *Hamodel Hademocrati shel Chofesh Habitoi [Freedom of Expression]* [49] at 422. Certainly, these issues apply to the Jewish burial society we now address, which is a community Jewish burial society. In fact, it is the one and only Jewish burial society in Rishon Lezion.

The Jewish burial society before us will be judged in the same way as other Jewish burial societies, and laws that relate to other Jewish burial societies also relate to this one.

The Ruling of the Rabbi of the Jewish Burial Society; Human Dignity; the Private Domain and the Public Domain

18. The Jewish burial society also claims that it must bow to the Jewish legal ruling of its chief rabbi and to the orders of the chief rabbi of Rishon Lezion, and that these rulings forbid it to carve foreign letters and Gregorian dates of birth and death. This claim is not acceptable to us either.

First of all, this notion was already discussed in *Gideon* [1] and *Kestenbaum* [6], and despite the Jewish legal opinions that were presented, the Court ruled against the Jewish burial society – not once but twice. We note in particular the words of Deputy President Justice Elon in *Kestenbaum* [6] (at 488-89, 499-503). Even though the Deputy President was in the minority in the final judgment, on this issue, he wrote about the opinion of the panel.

Secondly, it is known that there is no sweeping and comprehensive Jewish law that prohibits the carving of foreign characters or Gregorian birth and death dates on a gravestone. In many cemeteries in Israel, there is no such prohibition. *See e.g.* President Shamgar's opinion in *Kestenbaum* [6] *supra*, at 483, and Justice Etzioni's opinion in *Gideon* [1], *supra*, at 19. The Jewish burial societies in those places allow families, if they so desire, to inscribe the names of the deceased in foreign lettering and the dates of birth and death according to the Gregorian calendar.

Furthermore, even in the Rishon Lezion cemetery there are gravestones bearing non-Hebrew script and Gregorian dates, but according to the rabbi of the Jewish burial society they date from before his appointment to his post, and since he arrived he has forbidden the practice. This claim [of the rabbi – ed.] means that the rabbi of each Jewish burial society – or each local rabbi – is allowed to permit or prohibit at will, and the whole community must obey him. In the cemetery of the Jewish burial society of Tel Aviv, there is no such prohibition – neither from the rabbi of the Jewish burial society nor the local rabbi – on inscribing foreign characters or Gregorian dates. Nevertheless, if at some future date, a new rabbi suddenly popped up in Tel Aviv and decided to get strict, then, according to the claim of the Jewish burial society, his prohibition would be binding.

This ruling giving the local rabbi the last word in his area – the concept of the "local rabbinic authority" – is only binding among the religiously observant public or through an express law of the state. In former days, and in Jewish communities that were dispersed among the nations in many lands, this was Jewish Law, and there was no other. This is still Jewish Law in Jewish communities in the Diaspora in the present day. *See* 1 Menachem Elon, *Jewish Law* [45] at 547.

The case is different here in Israel, as we have been gathered back to our homeland. I can find no good reason – in terms of the laws of state – to impose the ruling of the local rabbinic authority on all – on those who are religiously observant and those who are non-religious – as if it were the law of the state. Thus, we can in no way accept the behavior of the rabbi of the Jewish burial society, who tried to impose his decision on the entire community, on the religiously observant and on the non-religious. The more we contemplate such an imposition, the more we are shocked.

Take Rehovot and Ness Ziona, Tel Aviv and Jaffa, Ramat Gan and Givatayim, Holon and Bat Yam, Haifa and its bayside suburbs – gravestones erected in all of these localities may be inscribed with the Gregorian birth and death dates; it's OK in all those places, but in Rishon

Lezion, it is strictly forbidden. Since we know that the city limits of these places are set by the state and not by Jewish Law, as are the geographical areas of authority of their local rabbis, we must ask: what is the difference between Minsk and Pinsk [as the saying goes – trans.], such that in one city something is permissible, and in another, it is forbidden?

Some may answer that the Jewish burial society may impose the decision of the local rabbinic authority on the residents of Rishon Lezion simply because that is how Jewish Law works. However, we find it neither legal nor just to force citizens to abide by prohibitions of the local rabbinic authority. The *Gideon-Kestenbaum* ruling lives on, as far as we are concerned, and has lost none of its force – neither its legal nor moral power.

Before me lies Talmud Tractate *Yevamot*, a large and weighty tome which commands respect. This edition was published by Rabbi Nachman Avraham Goldenberg in the year 5622 – "in Berlin, 1863." Next to it is Tractate *Nedarim* which was published by the Widow and Brothers Ram Press, and its publication date – as printed on the front's piece: 5657-1897. Similar is the *Mishna Torah*, the monumental work of the "great eagle, the illustrious rabbi, our teacher Moshe son of Maimon, blessed be the memory of the righteous." This enormous and heavy volume "was meticulously proofread and brought to print" by Rabbi Nachman Avraham Goldenberg, and its year of publication is marked as 5622, "Berlin, 1862." Also on my table, in its permanent place, is a Bible published by the Rabbi Kook Institute (proofread by Mordechai Breuer), and it dates to the year 1989. The Mishna with commentary by Rabbi Pinchas Kehati is from 1991; Volume 1 of the *Talmudic Encyclopedia* was printed in 5712-1951; the *Rinat Yisrael* prayer book edited by Shlomo Tal (fourth edition) is from 1983; and the eighth printing of the *Complete Writings and Sayings* of Moshe Sabar, published by the Rabbi Kook Institute, is from "5747 (1987)."

It would seem, therefore, that the prohibition against using the Gregorian calendar is not sweeping and comprehensive. In these

circumstances, the *Gideon-Kestenbaum* ruling applies in every sense.

In the future, we might encounter a case of someone who wishes to carve a symbol of a cross on a gravestone, for example, but this is a different case and there is no need to elaborate on it further. The stringent ruling that we examine in the case at bar has already been addressed in *Gideon* [1] and *Kestenbaum* [6], and there is no need to repeat what has already been said.

19. The Jewish burial society made itself the "guardian" of the deceased who are buried in the Rishon Lezion cemetery – of them and their relatives – and it claims that the dignity of the dead and the sensibilities of their family members will be offended if there are gravestones inscribed with non-Hebrew letters and Gregorian dates in the cemetery. This claim is extremely surprising, all the more so because in other cemeteries in Israel, this prohibition has not been adopted. Are the people of Rishon Lezion different from other people in Israel? What singles them out from their compatriots? Is the sensitivity of the people of Rishon Lezion to non-Hebrew letters and Gregorian dates more acute than that of the rest of the population of Israel? There is no difference between the residents of Rishon Lezion and the residents of Greater Tel Aviv (for example), at least in the present matter. The only difference is the ruling of the rabbi of the Jewish burial society. But the ruling of the rabbi of the Jewish burial society does not obligate the entire public. On the other hand, the *Gideon-Kestenbaum* ruling is binding; it obligates even the rabbi of the Rishon Lezion Jewish burial society.

Additionally, as we have said, the Jewish burial society made itself the guardian of those buried in Rishon Lezion – of them, their relatives, and the feelings of these parties. However, the Court has not heard from the relatives of the deceased, and no complaint from their lips has reached us. The Jewish burial society's claims have not left the realm of conjecture, and conjecture, of course, is limitless. We add, however, that even if someone did come before us with a complaint, it is doubtful that we would hear them. However, since no complaint was issued, there is

certainly no need to bother with such never-ending conjecture.

20. This claim of harm to the dignity of the dead and the feelings of the families is not new to us. It came up in *Kestenbaum* [6], and the Court dealt with it comprehensively. Thus, for example, said President Shamgar:

> A gravestone is not a public structure, but rather, first and foremost, a sign of the *personal* connection between the living, who keep the memory of the departed alive in their hearts, and those who have passed on; it is a memorial that is erected by those who will come to visit, that is intended, first and foremost, for them, and those concerned with it must be protected and distinguished.
>
> …
>
> One who erects a gravestone and another who comes to visit a different grave in the cemetery do not stand on the same plane. The general model needs to be that one who enters the space of his neighbor may not interfere needlessly with his life and sensibilities. Everyone must allow others the right and the freedom to do as they please, according to their own feelings and sensibilities, and tolerance is mandatory. People should not meddle in others' business which is not relevant to them, though of course this does not refer to conditions that a reasonable person cannot accept.

*Id.*at 482.

My colleague Justice Barak expounded on the subject of human dignity, but we should pay particular attention to his comments on the dignity of the dead; in *Kestenbaum* [6], Justice Barak wrote the following about inscriptions on gravestones:

> Insisting on exclusively Hebrew writing on the gravestone of a Jew, against his or her will, causes serious and severe harm to that

> person. This is not the hyper-sensitivity of an extremist Jew. This is an 'ordinary person,' who has no extraordinary sensitivities, and who is seriously harmed if he or she is powerless to choose an inscription in the language which he or she deem most appropriate to memorialize himself or herself or a loved one. Human dignity does not just refer to the dignity of living people. It includes dignity after death as well. It is also the dignity of those dear to the deceased, who keep his or her memory alive in their hearts. This dignity is expressed, among other ways, in the erection of a gravestone, in visits to the cemetery on annual memorial days, in public ceremonies, and the upkeep of the grave. This is the connection – sometimes rational and sometimes irrational – between the living and the dead, that crystallizes the humanity within us and gives expression to our souls' longed-for wishes. This is the 'hand of memory' that the living extend to the dead. This is the external expression that reflects the internal connection between the generations. Recognition of human dignity mandates giving people the freedom to inscribe gravestones in the way they see fit. The negation of this freedom and the imposition of exclusively Hebrew writing constitute a severe and serious violation of the fundamental value of human dignity. More precisely, a violation of human dignity occurs when someone is denied the liberty to carve an epitaph as the deceased (in his or her lifetime) and the family (after the death) wish to carve it.

Id. at 523.

21. In HCJ 3872/93 *Meatrael v. The Prime Minister and Minister of Religious Affairs* (hereinafter – *Meatrael* [19]) I discussed freedom of religion and freedom from religion, and, in the course of discussing these principles, I spoke about the private domain, the public domain, and what lies in between. Among other things, I wrote the following:

> Allow me perhaps to pinpoint the principle that guides relations between religion and state with a saying (drawn from a very different context, and polished clean of its unwanted and irrelevant

> associations): Be a human being in the street and a Jew in the home. The public domain is the city street, and the private domain is one's home. The state and its representatives – be they the government, the administration, or the courts – will safeguard and protect the freedom of religion of a person in his or her home, but when one leaves one's home and comes into the public domain, or into the private domain of another, one cannot force one's will and opinion on another. The private domain belongs to the individual – it is the individual's alone, and his or her authority reigns there – and the public domain belongs to everyone. The dignity of a Jew is a private matter, and the state will protect the individual's right to behave as he or she chooses in the home (while still providing protection for others and maintaining public order) whether the person is religiously observant or non-observant. Not so in the public domain, where the need to maintain public order, acceptable behavior, and public peace is essential. As the saying goes, Torah goes well with decent behavior – Torah in a Jewish home and decent behavior to all Jewish people (including those at home) …
>
> The observant population's interests are quite weighty, perhaps even determinative, within the privacy of their own homes. However, the further one travels from one's home, and the closer one is to entering the public domain – or another's private domain – or when one's request involves one's fellows' rights, so too will the strength of his or her interests be weakened, because they will be balanced against the interests of his or her neighbor, in the latter's public or private domain.

Id. at 507-08.

In *Bar-Ilan Street* [15], I also referred to the private domain and the public domain, and I said, *inter alia*:

> As a general rule, the private domain belongs to the individual and the public domain to the public. A person's home belongs to him

or her and to his or her family; city streets belong to the entire community. This is also the case in relations between religion and state. Every person has the right to freedom of religion and freedom from religion in the private domain. The state and its emissaries must safeguard and protect this freedom, using all means available to them. This is the case with respect to the private domain, and it is equally the case regarding the public domain. In the private domain and in the public domain, the state will protect the individual's right to freedom of religion and freedom from religion. This right of a person means that he or she cannot be coerced on issues of religion, in either direction. In the private domain, the state will preserve freedom of religion and freedom from religion because it is the private domain, and in the public domain, the state will preserve freedom of religion and freedom from religion, because it is the public domain. All this will be said and will be fulfilled, provided that order and public peace is preserved. *See e.g.* the *Meatrael* case at 507-09.

Our concern is with these two sets of pairs: individuals and the collective, the private domain and the public domain. Both these pairs relate to each other in certain ways. We can be sure of the following, subject to statute and constitution: neither an individual nor the collective can impose on another in the latter's private domain. Similarly, in the public domain, an individual will not be allowed to impose his or her will on another or on the collective. Our case raises a question with regard to the connection between the individual and the collective in the public domain. Is the public entitled to force its religious customs on the individual who finds himself or herself in the public domain, in its midst, and thus negate that individual's right to freedom in the public domain? The Court touched on this issue in *Meatrael* [6] [as cited above – trans.].

…

> All this is to say that the collective bears a heavy burden whenever it seeks to deny the freedom of an individual situated in the public domain; to force practices that are religious in nature on that individual.
>
> The private domain is distinct from the public domain. What is the private domain and what is the public domain with respect to freedom of religion and freedom from religion? All agree that a person's home forms part of the private domain. Nevertheless, I believe that it is possible – and indeed proper – to expand that which is considered the private domain even beyond the four walls of one's house and yard – though with great care. Take, for example, an observant neighborhood of alleys and narrow side streets upon which no stranger ever treads. It would not be an exaggeration to say that, regarding the public desecration of the Sabbath, even those alleys between houses should be deemed to be the observant residents' private domain.

Id. at 142-43 {314-15}.

I made further remarks along the same lines.

22. A person's grave and the monument that is upon it are both the private domain and the public domain simultaneously. Each dead person has his or her private domain, where he or she and the family do as they will. For example, in the home – while the deceased was still among the living – he or she may have talked with his or her family in a foreign language (Russian, German, English, Amharic), wrote in a non-Hebrew script (Russian, German, English, Amharic), and run his or her life – as most of us do – by the Gregorian calendar. A person and his or her language – the language of speech, the language of writing, the language of the calendar – are one.

Close family members may have related to the deceased only in that language and through the Gregorian calendar. That's how they chatted among themselves, that's how they wrote to each other, and now they wish

to remember him or her as he or she was. They wish to continue to talk to their loved one in his or her language. They wish to imagine him or her as he or her was. They wish to read his or her name on the grave as they know is and see his or her birth date as he himself or she herself used to write it. Writing the name of the deceased only in Hebrew and recording the dates of birth and death only according to the Hebrew calendar create a psychological barrier between the family and the deceased, distancing the deceased from his or her loved ones.

This is an emotional matter – could it be irrational? Of course. But visiting graves is also an emotional matter. Yet this doesn't prevent a mother who has lost her son from embracing the cold, dumb gravestone. It is nothing but arrogant and paternalistic coercion to tell that grieving mother that she must learn Hebrew – doesn't she realize that she is in the Hebrew homeland now? – and that if she does as she is told, she will be able to read her son's name in her (new) language and his birth and death dates by the Hebrew calendar.

This is the private domain.

Yet a cemetery is also the public domain, because gravestones are exposed for all to see, row after row, each one right beside the next, and people must walk among them to get to the one they seek. In a certain sense, a cemetery is like a shared house – or a common courtyard shared by adjacent houses – with one important difference: living neighbors will always part eventually, while neighbors in a cemetery will be neighbors forever (or until the resurrection of the dead, if you will).

A neighbor should always be careful to be a good neighbor, one who does not do things that will harm his or her neighbor. Thus, for example, a cross should not be carved on a Jewish grave, since a cross can harm – to an intolerable degree – the dignity of the dead neighbor and the feelings of his or her family. Just as a good neighbor does not make too much noise or create bad smells, the same principle should hold true in a cemetery. I am at a loss, however, to understand how the writing of a name

in foreign letters – the letters the deceased lived by – will harm his or her neighbor. Didn't that neighbor see foreign writing in his or her lifetime? Why would it harm him or her after death?

The case is the same with Gregorian dates of birth and death. Did that same neighbor not also live his or her life according to the Gregorian calendar? And if the neighbor did not run his or her own life that way, didn't he or she have relatives, friends, and people all around who used that calendar? The deceased and the family and the deceased "neighbor" and family all have legitimate interests, but there is no equating the dignity of the deceased which we address in this case and that of her relatives with the dignity of some hypothetical deceased neighbor and his relatives. The dignity of the deceased we address – her dignity and that of her family – must be the determinative factor. The prohibition imposed by the Jewish burial society on the appellant transgresses – significantly – all acceptable bounds.

23. The Jewish burial society drew our attention to HM (TA) 752/94 *Burgman v. Rishon Lezion Jewish Burial Society* (hereinafter – *Burgman* [42]) heard in the district court before Judge Dr. G. Kling. Also in that case, the Jewish burial society (the very same one that is before us now) refused to all allow non-Hebrew writing or non-Hebrew dates on a gravestone. In that case, family members claimed that they ran their lives "… according to the Gregorian years, we are accustomed to using them. We are not familiar with nor do we understand the Hebrew calendar at all, and a significant portion of our family does not read or speak Hebrew ..." Moreover, the widower of the deceased in the case claimed: "I know and understand the wishes of my late wife and she would have preferred that her name be recorded on her gravestone in her mother tongue and that her birth and death dates be inscribed according to the standard calendar, in addition, of course, to Hebrew writing." The widower further claimed: "I emphasize that I am not denigrating the Hebrew script – all that I ask for is the option to inscribe, in addition, the dates of birth and death of my late wife according to the standard calendar, and also her name in Cyrillic letters."

Despite *Kestenbaum* [6], the court did not grant the plaintiffs their request, and it upheld the Jewish burial society's refusal. The court explained that it must differ from *Kestenbaum* [6], and its opinion cited several reasons. The main one was that in *Kestenbaum* [6], the Jewish burial society held a monopoly. But as far as the present respondent (the Rishon Lezion Jewish burial society) was concerned, the deceased's family had the option of turning to other Jewish burial societies in cities close to Rishon Lezion. Thus: "Since the plaintiffs have a choice, one that was not open to the appellants in the *Kestenbaum* case, and since the respondent does not enjoy the same exclusive standing it held in *Kestenbaum*, in our case there is no obligation to follow what was said there."

While it is true that President Shamgar noted in *Kestenbaum* [6] (*supra*, at 477, 484) that the Jewish burial society in that case looked after more than fifty percent of those buried in Jerusalem, that comment was made only in relation to the applicability of the Standard Contracts Law (and even so it was only one of three reasons he brought). Meanwhile, Deputy President Elon, in his ruling, explicitly differentiated *Kestenbaum* [6] from *Gideon* [1], saying that in the former, an alternative burial option did exist, and there was *no* monopoly. *Kestenbaum* [6], *supra*, at 490, 496, 503-04, 507, 510.

In any case, nothing in any of these statements detracts from the other reasons that formed the basis of the final judgment: not from the issue of public policy and not from the applicability of principles of public law. Additionally, the Court's judgment in *Kestenbaum* [6] bases itself – first and foremost – on public policy and the applicability of public law on dual-character bodies. To reduce the ruling to a case of monopoly is simply unacceptable.

We might also ask, why isn't the Jewish burial society of Rishon Lezion considered to hold a monopoly on burial in that city? Where does it get the legal and ethical right to send the people of Rishon Lezion to bury their dead in other cities? The Court could have used that to resolve the issue in *Kestenbaum* [6]. That is, it could have sent the appellant to bury

his wife in a different cemetery (or a different section of the same cemetery which is managed by a different Jewish burial society).

The court in *Burgman* [42] ruled that in *Kestenbaum* [6], the majority of the justices saw fit "… under the circumstances, to prefer … the right of the appellants, who wanted a gravestone that would speak to their hearts in a language they understand and a date they understand." On this, the court said:

> It is not my place to ponder the opinion of the majority of justices in the *Kestenbaum* matter. But I will say that I doubt that a person who lives in Israel should be heard when he or she claims not to know anything of the Hebrew calendar or how to read Hebrew. A significant part of the lives of all who live in Israel is related to the Hebrew calendar, according to which we mark the Jewish festivals and Israel's Independence Day. These festivals are public holidays under section 18a of the Jurisdictional Areas and Authority Ordinance, 1948, and many legal norms and even punishments derive from the Hebrew calendar. A person should not be heard when he or she claims that because of his or her faith, or lack of faith, he or she does not know when these festivals fall, that he or she is a stranger to the Hebrew calendar. It cannot be doubted that the Hebrew calendar has importance and ramifications for all aspects of life in the state, and it is one of the characteristics of the state as a Jewish state.
>
> All who live in Israel, or who come to visit here, accept the inevitability of their encounter with the Hebrew language. In many countries, the names of streets and traffic signs are written only in the local language. It is the way of the world that each and every country has its own language and script, and one who enters its borders must adapt to this situation. If they can deal with traffic and streets signs, why would it be any extra burden on those relatives of the deceased, who come from overseas to grieve at her graveside, not to find Cyrillic writing there. If they do come to

> visit the grave of the deceased, relatives from Israel can help them, if they can't find the grave. Thus, in my opinion, the harm caused to the relatives of the deceased, if the gravestone is inscribed in Hebrew only, is not as serious and severe as that caused to the relatives of the other deceased, who live by their religious faith and are dismayed to see foreign writing when they visit the graves of their relatives.

I cited these words in full, and I must say that I have great difficulty agreeing with them. My response to the court lies my remarks above.

Side Comment (unrelated yet related)

24. When my time comes, and a monument is erected on my grave, I request that my birth and death dates be inscribed upon it according to the Hebrew calendar. That is how I was born, that is how I will go, and that's how I will be remembered. This is my will, and this is how I will instruct my children. However, I would not dare to presume to stand in the way of another who wishes to inscribe on his father's grave the dates of birth and death according to the standard calendar. Just as I ask that they respect my wishes, thus I have learnt to respect the wishes of others.

Conclusion

25. For reasons that I clarified and explained at length, I recommend to my colleagues that we grant the appeal, reverse the judgment of the district court, and declare that the appellant has the right to inscribe the dates of birth and death according to the standard (Gregorian) calendar on her late mother's gravestone. I also recommend to my colleagues that we order the respondent to bear any expenses that the appellant will incur due to the lateness of the additional inscription. In a case of disagreement, the lower court will decide these costs. In addition, the respondent will bear the appellant's costs and attorney's fees at a total sum of NIS 50,000.

Later

26. I took pleasure in reading the opinion of my colleague, Justice Englard, but I must vehemently disagree with him. My response to my colleague lies in what I have already written, but now I wish to add several remarks.

My colleague says that the disagreement between the litigants is basically an ideological dispute and that we, the judges, are dragged into it against our will. I have two things to say about that: First of all, from the perspective of the appellant, at least, I have not found the dispute to be an ideological one. The opposite is true. The dispute is of a most personal nature – the Hebrew calendar is not meaningful to the relatives of the deceased – and when the relatives come to the cemetery, they seek to commune with the person as they knew her.

Secondly, even if this were an ideological dispute between the litigants, it would still be our job to settle it, since that is why we were appointed to the bench. The legislature instructs us: say what you will say, only say it. *See e.g.* HCJFH 7015/94 *Attorney General v. Anonymous* [20] at 88.

A second matter: The dispute between the litigants is, in fact, about the desires and dignity of an individual – the appellant before us – versus the ruling of the local rabbinic authority that guides the Jewish burial society. However, this kind of ruling is only binding among the religiously observant population or when accompanied by statutory enforcement. We must keep in mind that the State of Israel is not run according to Jewish Law. It is a state run by law. Israel is a democracy, and the law rules within her borders. *Meatrael* [19] at 500. Our considerations revolve around the individual, the human being, his or her wishes, interests, well-being, and welfare –all according to law of the state. On principle, we say that our judicial processes are anthropocentric and not Theocentric. The disputes over which we preside are between individual and individual, not individual and Jewish Law. On these

disputes, we must pass judgment.

Third: It is imprecise to say that we want to force the Jewish burial society to do something which it is forbidden to do. The Jewish burial society is seeking to coerce the appellant, and this coercion, we forbid.

And last: the Alternative Burial Law could change burial practices in Israel, including burial practices in the cemeteries of the various Jewish burial societies. It may cause change, and it may not. Time will tell, and we cannot prophecy what the future will hold. However, even if a change in the custom does come about – and a real change, if it does come, would take years – the vast majority of people will still make use of the Jewish burial societies. They will continue to look after the dead and bring them to Jewish graves in the cemeteries under their control. All that will change is that the Alternative Burial Law will allow for another option, that is an "alternative civilian burial." The standard way of burial will be in a regular cemetery under the auspices of a Jewish burial society, but other cemeteries will exist, "alternative civilian cemeteries." All the dead are equal, but burial in an "alternative" cemetery is not "regular" burial; rather it is "alternative" burial. Furthermore, one who wishes to be buried in an alternative cemetery bears the responsibility of expressing this desire. If he does not make such a request, he will be interred, as is standard, in a cemetery belonging to a Jewish burial society.

There are those who will ask to be buried in an "alternative civilian" manner. However, I believe I am not mistaken when I say that this will be only a minority of the population. At least in our time, most citizens will not change their custom and ask to be buried in an alternative civilian cemetery. Their wish (implicitly) will be to be laid to eternal rest among their parents, grandparents, and relatives; just as they were together in life, they will wish to be together after death.

So the question must be asked: in light of all these things, what right has the Jewish burial society – what legal right, ethical right, any

kind of right – to force a local rabbinic ruling on the whole of the Jewish people? During a person's lifetime, his local rabbi has no authority over him or her, unless the person seeks his counsel. Why do we empower this rabbi to decide the manner of the burial for this same person after death?

One who takes on a public duty must know that it is forbidden to force his or her will onto the public except within the bounds of the law, and even the law itself will bow its head before a Basic Law. A Jewish burial society is regulated, to a limited degree, in the same way as a public agency. The local rabbi's opinion – by itself – does not bind any pubic agency, and he is not authorized to force it on the public, if it violates basic rights.

Justice I. Englard

1. The Talmudic Sages knew the reason for tragedy: "Jerusalem was destroyed only because … they based their judgments [strictly] upon the Biblical law and did not go beyond the letter of the law." Tractate *Baba Metzia*, 30B [50]; [… trans.] "Why was the Second Temple destroyed, seeing that in its time they were occupying themselves with Torah, [observance of] precepts, and the practice of charity? Because therein prevailed groundless hatred." *Yoma* 9B [51]. As it is explained: "Going beyond the letter of the law means compromise and since there was groundless hatred among them the litigants did not want to compromise." Etz Yosef, *Ein Ya'acov*, Tractate *Baba Metzia* 30 [52]. The obligation to go beyond the letter of the law is the ethical duty of the individual. As Rabbi Shmuel Eliezer Edels interprets the source [53]: "Tell the litigants that each one of them must allow themselves to be placated beyond the letter of the law and that the matter is dependent on them because the judge cannot go beyond the letter of the law." *Shulchan Aruch*, *Hoshen Hamishpat* 12b [54], with commentary by Rabbi Moshe Isserlis [55] and the standard commentators. The Court has often begged litigants to reach a compromise, but if they do not, the judge must follow the letter of the

law. Similarly, in the matter before us, which is not a new dispute, the courts have in the past asked litigants to behave with tolerance.

2. Unfortunately, on this occasion, the problem is much bigger. As opposed to our Sages, today we can't agree on the letter of the law, let alone what lies beyond the letter of the law. Of course, all agree that we must behave with tolerance in order to reach compromises – but this is always the duty of the other litigant, because he or she is the one who is being stubborn about every little detail and making unreasonable demands. But me? I am facing a mortal blow to fundamental principles, basic rights, principles of public law, human dignity, public policy, feelings and sensibilities, freedom of choice, the private domain. But you! You are just shameless. Your actions are arrogant and coercive paternalism; and your feelings are those of an extremist and abnormal Jew.

3. These are the kinds of things that have been said in the context of this case. Why is this dispute so bitter? Is it really all for the sake of the dates of birth and death inscribed on the gravestone of a dead person who lies in the cemetery, but who cannot rest in peace? The judges have been dragged into this dispute, which at root is a purely ideological clash. It is known that a legal ruling has no power to solve the ongoing ideological conflict regarding the Jewish character of Israel and the relationship between religion and state in this Jewish democratic country. The carving of dates is only one aspect of this dispute. Thus, my colleague, Justice M. Cheshin, need not be surprised that our nation involves itself continuously on the subject of inscriptions on gravestones and cannot set a standard – because in these sorts of disputes, there is no standard, there is no clear ruling, and there is no golden path to follow. New aspects of this dispute are continuously arising.

4. As I will show in the course of my remarks, in the past, this court has decided these sorts of disputes by "balancing" the basic principles, in the attempt to apply a test of reason to gauge the respective sensibilities of the litigants. I believe that where beliefs and opinions are concerned, there is no possibility of measuring sensibilities objectively. We

face an ideological clash focused on symbols, and their importance to different people cannot be measured by any external yardstick of reason. Any ruling on the logical weight of a symbol will certainly be an expression of subjective values. Furthermore, the standing of a certain symbol in society is not fixed for any length of time. It can change according to social and political factors, which are ever dynamic. Often, zealousness in guarding a certain symbol is simply a reaction to the zealousness of others who seek to destroy it. Take, for example, the Torah commandment of sanctifying God's name. The principle is: "If in every law of the Torah a man is commanded: 'transgress or die,' he must transgress and not suffer death, excepting idolatry, sexual immorality, and murder." But the Talmud continues, "This was taught only if there is not a royal decree but if there is a royal decree, one must incur martyrdom rather than transgress a minor precept … Even without a royal decree, it was permitted only in private, but in public one must be martyred even for a minor precept rather than violate it. What is meant by a 'minor precept'? Rava, son of Rabbi Yitzhak, said in Rav's name: Even to change one's sandal strap." Tractate *Sanhedrin*, 74A-B [56]; *see* Maimonides *Basic Laws of the Torah*, 85, laws B-D [57].

It is possible that even the date carved on a gravestone can turn into the strap of a sandal, for the sake of which a Jew would give up his life …

5. First, I will examine the path this court took in a dispute over carving dates on gravestones in Jewish cemeteries. In CA 280/71 (*Gideon* [1]), heard more than a quarter of a century ago, Justice Etzioni called the matter a "Jewish war," whose cause, in his opinion, was the "stubborn refusal" of the Jewish burial society to allow the only son of the deceased to inscribe Gregorian birth and death dates alongside the Hebrew dates. In his ruling, which Justice Berenson joined, Justice Etzioni wrote the following regarding the stance of the Jewish burial society:

> This decree is a serious breach of the natural, elementary and acknowledged right of everyone in Israel to run his or her life

> according to the standard calendar, the very same calendar according to which our legal rights are set. The Interpretation Ordinance (New Version) clearly establishes that "a year" and "a month" are calculated according to the Gregorian calendar, and the fiscal year consists of twelve months ending on March 31 every year (sec. 1). A person lives his or her whole life within the framework of this calendar: on birth and death certificates the standard date is always listed in addition to the Hebrew date; official identity cards record the standard birth date; in every kind of transaction, whether in the realm of private or public law, the relevant documents always bear the standard date, not to mention statutes and ordinances. As has been noted, even the official documents of the rabbinate do not lack a space for the standard date. Is this not a case of discrimination? It is the arbitrary negation of a person's right to use the standard calendar to record his or her dates of birth and death, though all the events of his or her life were marked by this calendar!

Gideon [1] at 23.

Of course, in that case, the Jewish burial society relied on the ruling of Rabbi Ovadia Yosef, who wrote that:

> It is absolutely forbidden to erect a gravestone with a non-Hebrew date because there is a Biblical prohibition that says: "Make no mention of the name of other gods", and the Gregorian calendar recalls the number of years since the Christian birth.

*Id.*at 19.

To this Justice Etzioni responded that "it is difficult … to treat this opinion as the final word on the matter" for the following reason:

> As has been proven, standard dates appear in many cemeteries which are managed by Jewish burial societies. Suffice to mention the cemetery on Trumpeldor Street in Tel Aviv and the Haifa and Tzfat cemeteries. Additionally, the leaders of the Torah world and

> the nation who are buried in the Diaspora were buried in cemeteries where it was acceptable practice to erect gravestones carved with standard birth and death dates. If this is not enough, the visitor to the Mount Herzl cemetery in Jerusalem, where the great soldiers and luminaries of Israel are interred, will see with his or her own eyes that birth and death dates are carved according to the standard calendar. Among them: the graves of the family of the visionary of the state, Theodor Herzl, and the graves of the Zionist leaders Wolfson, Sokolow and others.

Id.

This was Justice Etzioni's conclusion:

> It is clear, therefore, that the claim that recording of standard dates in Jewish cemeteries would cause a transgression of Jewish Law or harm to the religious sensibilities of Jews is without basis and utterly unfounded.

Id.

6. Cited above are Justice Etzioni's remarks regarding what he saw as "the letter of the law," and below are his words regarding what lies "beyond the letter of the law":

> It would have been nice, had the respondent granted the appellant's request and foregone this entirely unjust restriction. Indeed, I believe this "Jewish war" is absolutely unnecessary. Unfortunately such wars often come before the Court, and their source is the opposing ideologies regarding the ideal structure and content of our national life. Of course we cannot forbid these wars, as long as they are related to matters of substance, and are not just petty issues, mostly secondary to a primary principle. We are not the only ones in the world in this situation; similar arguments are fought elsewhere. *See* Basil Mitchell, *Law, Morality and Religion in a Secular Society* at 134. But obviously, it is always appropriate to differentiate between the main principle

> and that which is secondary, between the heart of the matter and the peripheral trivialities. It seems to me that if we wish to safeguard our uniqueness and unity as a nation, there is no fleeing from mutual compromise, at least when it does not affect fundamentals. The war that the respondent is fighting is not a war over fundamentals but rather over secondary issues which are needlessly propagating strife and contention in the country.

Id. at 24.

7. As mentioned, Justice Witkon held the minority opinion in *Gideon* [1]. Disagreeing with the above approach, he said:

> It seems to me that when faced with the respondent, the appellant has nothing to say. The Jewish burial society runs its affairs in the spirit of its ideology and sets the rules for gravestones as it sees fit in cemeteries under its management. It is immaterial if we agree or disagree with its views. It is not our place to argue if they are well-anchored in law or in Jewish Law or the spirit of the Jewish religion in our times. It is true that the ban on the standard calendar is not one of the 613 commandments of the Torah, and it is possible that the respondent is being too rigid. It is also true that even the document bearing the ruling of the honorable Chief Rabbi, Rabbi Ovadia Yosef, upon which the respondent relies, displays the Gregorian date. Not only are these dates used on every official and ceremonial document issued in the State of Israel, but they are often found even on documents issued by the Rabbinate. Similarly, it has been determined that in the past, Jewish burial societies allowed Gregorian dates on gravestones, and it seems that they did not then consider it an affront to the sensibilities of religious Jews. Today, we consider testimony offered on the respondent's behalf, that in the public domain of which it is in charge – and we are referring to a public domain and not a private domain (see HM 545/67 (Jer) *Arnon v. Israel Lands Administration*, IsrDC 67 284) – there must be one standard custom, and that is to carve birth and death dates on gravestones

> according to the Hebrew calendar only. In this sensitive issue, who can tell us if one approach is 'reasonable' or not?

Id. at 15-16.

8. In CA 294/91 (*Kestenbaum* [6]), the issue arose again, again the justices' opinions were divided, and again the dispute was to a large extent ideological. The central questions are: What are the sensibilities that need to be defended? Who has the burden of being tolerant? And who must give in? Of course, for the sake of finding a solution to the problem, the Court uses legal principles and conceptual tools through which it can adjudicate the opposing demands of the litigants. Here, briefly, is a list of those tools: public law that overrules the general Contracts Law; a discriminatory condition in a standard contract; human dignity and freedom; and public policy. But these conceptual tools cannot succeed in getting to the root of this ideological dispute.

9. President Shamgar aspires to be objective, and he says it beautifully in his judgment in *Kestenbaum* [6]:

> As long as the issue is the essential nature of the harm, which would make it a legitimate reason to limit personal liberty, its extent will be measured from the viewpoint of the average rational person, that is using objective criteria and not subjective sensibilities and reactions.

Id. at 482.

President Shamgar goes on to apply his "objective" test in the following way:

> We can't conclude from what has been said above that someone who erects a gravestone should be allowed to do whatever he or she likes. Supervision is necessary so that the character of the cemetery and the sensibilities of others will not be harmed. Nevertheless, as mentioned above in a general way, when evaluating the harm to others, the appropriate path is to establish

> criteria based on logic and tolerance and not extremism. The right of the individual to erect a monument which will allow him to commune with his loved one, and record upon it whatever is significant in his eyes or, in his opinion, the eyes of deceased, must retreat before the sensibilities of another *only* if it is clearly inevitable that the inscription will arouse the strong and justified opposition of a reasonable person. One who erects a gravestone and another who comes to visit a different grave in the cemetery do not occupy the same position. The general model needs to be that one who enters the space of a neighbor may not interfere needlessly with the neighbor's life and sensibilities. Everyone must allow others the right and the freedom to do as they please, according to their own feelings and sensibilities, and tolerance is mandatory. People should not meddle in others' business which does not pertain to them, though of course this does not refer to terms that a reasonable person could not accept … This raises a question in our case: Is what the appellant is requesting so extreme and unusual that it has the ability to harm the sensibilities of others in an essential way? My answer to that question is no.

Id.

10. In the same spirit, my colleague, Justice Barak, also balanced the opposing interests, deciding that at the center of the Jewish burial society's concern was the social value of the exclusivity of the Hebrew language. To his thinking, the test case in the "balance of sensibilities" should not be the sensibilities of an unusual and exceptional person, but rather – as per the definition of Justice Etzioni in *Gideon* [1] – "the opinions and sensibilities of the majority or significant portion of the public and not the polarized views of people who make up an extremist minority.'" *Supra* [6] at 502. My colleague, Justice Barak, concluded, regarding *Kestenbaum* [6]:

> Permitting non-Hebrew writing (alongside the Hebrew writing) does not constitute a serious violation of the human dignity of those who object to this writing. This sense of violation is the

> product of unusual and extraordinary sensitivity. On the other hand, insisting on the exclusive use of Hebrew writing causes a serious violation of the human dignity of those who object. This sense of violation is the product of natural and normal feelings in a person who is sensitive to human dignity (his or her own dignity or that of another person.

Id. at 523.

11. Is this comparison of sensibilities based on an objective test, or perhaps, does it simply express a subjective worldview? Deputy President Elon, in his minority opinion in *Kestenbaum* [6], addressed this question:

> "It is not at all clear to me what in the prohibition of non-Hebrew writing constitutes *serious and severe harm* to the principle of *human dignity*. And as to the differentiation my colleagues make between those whose sensibilities are natural and normal and those whose sensibilities are abnormal and extraordinary, if I were to adopt this kind of test, my conclusion would be different from that of my colleagues. It is also difficult for me to accept that the myriads who have only Hebrew writing on their gravestones and who are interred in cemeteries where there is no non-Hebrew writing, and who followed this path knowingly and with the knowledge of their families, believing this to be dignified for both the dead and the living – that all these people are not "regular people" but rather "abnormally and extraordinarily sensitive" people.

Id. at 513.

Deputy President Elon concludes his opinion as follows:

> The Jewish burial society considers Hebrew inscriptions one of its basic principles, and an essential value to the thousands of deceased who have found their eternal rest in the cemetery for over fifty years. It espoused this principle in the past and continues to

> stand by it today. It has been weighed on the scales of public norms which bind the Jewish burial society, and it is valid according to the principles of private law through the contract signed by the Jewish burial society and the appellant. That is how the heads of the Jewish burial society and the cemetery's board see the matter, and that is how it should be viewed from legal, social, Jewish and democratic standpoints. Perhaps the appellant, the husband of the deceased, who has no doubt as to the rightness of his cause, will reconsider, and give up his request for the sake of the dignity of all those who have found eternal rest in this burial place, secure in the knowledge that Hebrew is the only script found on the gravestones located there, and for the dignity of the cemetery, which must be managed with caution so as to not open a new era in which the gravestones located there will display all the foreign scripts that the dead brought home from the lands of the Diaspora in their lifetimes – Latin, Cyrillic, Chinese, Amharic, Japanese letters – lest the cemetery become a Tower of Babel of languages and scripts. It is fitting and desirable that this superior valuation of the Hebrew language, acceptable to all those buried in this cemetery, will continue to unite all those who have found and will find dignified rest there. Like the dignity of the dead, the dignity of the living and the dignity of Israel, as well as the dignity of his late wife, also obligate the appellant to willingly take upon himself this "burden" of the language of the Jewish state.

Id. at 515-16.

This is what is meant by "the letter of the law" and "beyond the letter of the law," and it is completely different from the opinion of Justice Etzioni.

12. Since this is an ideological dispute, is it really surprising that district court judges have also failed to reach consensus? For example, Judge Dr. G. Kling in *Burgman* [42] maintains the following:

> From the outset, the harm done to the relatives of the deceased whose gravestone will be carved in Hebrew only is not as serious

> and severe as that done to those other people who live by their religion and who, when they visit the graves of their loved ones, will have to encounter foreign writing.

On the other hand, Judge Goren in HM (TA) 1275/93 *Kagan v. Rishon Lezion Jewish Burial Society* [43] reaches the conclusion that:

> With all due respect to the rabbis of the city of Rishon Lezion, and I say that with sincerity and humility, it seems to me that the plea of the plaintiffs does not diverge from that which is acceptable in other cemeteries in the country, where the rabbis are not as strict as the rabbis [of the Jewish burial society of Rishon Lezion – I.E.].

Before making these remarks, Judge Goren noted that he had been very impressed by Rabbi Tarovitz's testimony, offered by the Jewish burial society, that he had no doubt that his words reflected real pain that would be caused, and yet still the Court granted the request.

13. Everyone agrees that there is a threshold of sensitivity among the religiously observant public that should not be crossed. Even my colleague, Justice M. Cheshin, recognized such a threshold when he noted that "in the future, we might encounter a case of someone who wishes to carve on a gravestone a symbol of a cross, for example," and he continues, "a cross should not be carved on a Jewish grave, since a cross can harm – to intolerable degree – the dignity of the dead neighbor and the feelings of his family." I question if it is the role of the Court to establish the "legitimate" boundaries of the sensibilities of believers in general, and of the religiously observant public in particular. In addition, the definition of the boundaries of "reasonable" sensitivity is based largely on subjective views, as illustrated by the differences of opinions among the judges themselves.

14. I will return to the judgment of this court. In both *Gideon* [1] and *Kestenbaum* [6], the assumption was that carving standard dates is not against Jewish Law. Justice Etzioni did not hesitate to conclude this

through his own interpretation of Jewish Law, as part of his rejection of the ruling of Rabbi Ovadia Yosef that it is forbidden by the Bible. The conclusion that it is permissible according to Jewish Law also guided the Court in *Kestenbaum* [6]. This assumption arose even Deputy President Elon's opinion:

> Regarding the aforementioned ruling on the use of non-Hebrew dates, *and the reasons it is allowed*, see Responsa *Yabia Omer* (by Rabbi Ovadia Yosef), part three, Yoreh Deah, 9, and Responsa *Tzitz Eliezer* (by Rabbi Eliezer Veldinberg) part nine – two of the most important Jewish legal authorities of our time.

Kestenbaum [6] at 489 (emphasis mine – I.E.).

However, he obviously did not examine the matter very thoroughly, since he failed differentiate between the use of Christian dates on everyday letters and business correspondence and their inscription on gravestones. In Responsa *Tzitz Eliezer*, part nine, chapter 100B [58], on which Justice Elon supposedly relied, the writer rules explicitly that, regarding gravestones, "… this borders on a desecration of God's name." Despite the assumption that guided this Court in *Gideon* and *Kestenbaum*, no dispensation to carve Christian dates on gravestones is found in Jewish legal literature. All the authorities who were asked forbade the inscribing of Christian dates, as the rabbi of Rishon Lezion ruled in the case at bar.

15. In order to clarify the Jewish legal problem, I will cite in full the response of the Chief Rabbi, Rabbi Ovadia Yosef, in Responsa *Yabia Omer*, part seven, Yoreh Deah, 32 ch. 100B [59]:

> Regarding the question of the permissibility of carving on a gravestone the name of the deceased in foreign letters and the date of death, Rabbi Moshe Shick (*Choshen Hamishpat*, ch. 56) was asked about this in a case where someone went against the local custom and erected a gravestone for a family member on which he carved the name of the deceased in the Hungarian script. Rabbi Shick condemned this act for several reasons. Firstly, a cemetery

has the legal status of a 'shared courtyard', and even in the most mundane matter one of the partners is not allowed to change anything without the agreement of all those who share the courtyard, as was established for us in *Choshen Hamishpat* (ch. 154). This is all the more true regarding a custom that our forebears have followed from time immemorial. In such a case, not even the management of the Jewish burial society is licensed to make a change without the agreement of the local rabbi and the majority of the community. Even if the custom is changed for sake of the dignity of one particular deceased person, that person may end up causing disgrace and harm to the dignity of other deceased … The rule is that the customs of Israel are like Biblical laws, and it is forbidden to change them in any way.

Secondly, a cemetery is a holy and pure place, as it is written in *Elia Raba* (ch. 581) in the name of Rabbi Yaakov Molin. We need to treat a cemetery with respect, as it is written in Yoreh Deah (ch. 368) that it is forbidden to engage in frivolous behavior there, that one may not eat or drink there, or stroll there for leisure. Even the group that looks after the dead is called the *hevra kadisha* [Jewish burial society, lit: the holy brotherhood – trans.], because the world of the dead is the world of truth, and it is called the world of clarity where the righteous are exalted and the wicked cast down, as it is written in Tractate *Baba Batra* (10). Therefore, the custom in the Diaspora is that gravestones are inscribed only in the Holy Tongue, the language with which the world was created, in which the Torah and all the Holy Writings were given and in which God spoke to all the prophets of Israel. An inscription on a grave in another language causes disgrace to the dead, and indicates that he belongs to the world of falsehood.

There is also a concern lest the law against acting like non-Jews be transgressed, and thus the Jewish burial society must be on guard not to allow any change in the holy customs of the Jews. Responsa *Shaare Tzedek* (Yoreh Deah ch. 199) was asked about this and

answered that it is simple and clear that there is a serious prohibition against changing the ancient Jewish custom of carving the name and the epitaph on a gravestone in the Holy Tongue alone. One who changes this custom and carves in non-Jewish writing transgresses the law 'you shall not erect for yourselves a stone pillar [modern Hebrew: gravestone – trans.] which the Lord, your God, hates." Such a gravestone is hateful in God's eyes, it falls into the category of accoutrements of the non-Jews, and it is an abomination.

It is a Jewish custom to pray at the graves of the dead on behalf of the living, as is written in Tractate *Ta'anit* (16) and in the *Shulchan Aruch* (ch. 591). Also, as it says in the Holy Zohar (Parshat Shmot), were it not for the prayers of the dead on behalf of the living, the living could not continue to exist even half a day. If this important prohibition regarding gravestones is transgressed, how will the dead stand up to pray for the living who brought about this disgrace to the Holy Tongue in which the Bible was given? Thus there is no doubt that there is a very important and serious prohibition against doing so, and in no case should gravestone inscriptions in languages other than the Holy Tongue be allowed. I have seen that the illustrious Rabbi Shlomo Kluger forbade this, and this is an eternal prohibition. The same conclusion was reached in Responsa *Pri Hasadeh* part one (ch. 3) and in that author's book *Dudai Hasadeh* (ch. 19).

Also, Rabbi Moshe Shick (*Yoreh Deah* ch. 171), after he wrote a prohibition of substituting the Holy Tongue with a foreign language, also prohibited recording the year according to foreign calculations. This is a far greater transgression, and in my opinion, the Bible itself prohibits it, as it says "Make no mention of the name of other gods." The use of their calendar is a transgression of this prohibition because the calendar brings to mind the birth of Jesus. Thus, if it were possible to get rid of this kind of gravestone completely, it would be best, but if that is

impossible, at the very least clay or plaster should be smeared over the writing and dates so that no hint of the foreign writing and dates remains.

The Rabbi Moshe ben Haviv in *Gat Pashut* (ch. 127, subsection 130) cautions against using the Christian date even on everyday letters, saying you should use only the date commemorating the creation of the world, and not as some people behave, people who lived in foreign lands who dated their letters with Christian years and names of the months. It is improper to do so. Responsa *Pri Hasadeh* part one (end of ch. 3) quotes the book *Imrei Yosher* by the illustrious Rabbi Meir Arik, may his name be as a righteous person, who wrote a response on this issue, and mentioned in his conclusion that you should only inscribe a gravestone in the Holy Tongue and record the year from the creation of the world, and this should be changed in no way. This is written very concisely in Responsa *Dudai Hasadeh* (ch. 19).

Despite this, in my book *Yabia Omer* part 3 (*Yoreh Deah* ch. 9), I tried to be lenient about writing the year according to their calendar on everyday letters, because in truth, the calendar does not accurately count from the birth of Jesus, as Rabbi Shimon ben Tzemach proved in his book *Keshet U'Magen* (p. 11), showing that the calculations of the Christians do not fit the real birth of Jesus. *See also* the book *Kol Bo* of Rabbi Greenwald part 2 at 147. When the Chatam Sofer [Rabbi Moshe Schreiber] cautioned against this in *Torat Moshe* it was only because he thought at the time that this date was connected to the birth of Jesus, while in truth, it has no connection whatsoever, as it is written in *Otzer Yisrael*. Later, he also retracted his ruling, and wrote his responsa using their dates several times. This was also the position of Rabbi Yosef Yozpa and the illustrious Rabbi Akiva Eiger.

This was also the position of the illustrious and righteous Rabbi Joshua Freund in Responsa *Meor Joshua*. He quoted the words of

> Rabbi Shick, who was insistent in this matter, and he disputed that position on several grounds, including because it nullifies all business and banking transactions in our time, since all banknotes and checks are dated according to their calendar, and almost no one refrains from doing so. It was brought down thus in the book *Az Nidberu* (part 12, ch. 38). One rabbi did dispute my abovementioned response in *Yabia Omer*, and my brother rabbi, the illustrious Rabbi Eliezer Veldinberg in Responsa *Tzitz Eliezer* part 9 (ch. 14, subsection 3), correctly refuted his words. Later, I saw that Responsa *Be'er Moshe* part 8 (ch. 18) also criticizes our position. However his comments are not at all clear.
>
> *In any case I acknowledge that when it comes to gravestones in cemeteries, we must be stringent, and carve only the year calculated from the creation of the world. There is absolutely no changing the custom followed by all the dispersed of Israel. A gravestone is a testimony to the remains of the soul, as it is written by Rabbi Shmuel Vital in* Sha'ar Hamitzvot *(Parshat Veyehi) and in Responsa* Hayim Sheal *part 1 (ch. 71 subsection 6). The soul is recognized only by the true date, and the true expression is fitting for the world of truth. Responsa* Tzitz Eliezer *part 9 (ch. 14 subsection 2) also differentiates between dating everyday letters and the carving on gravestones in a cemetery. Thus, the Jewish burial society must steel itself in order to stand its guard and not change the custom of Israel from time immemorial, and so God should be with them to overcome all encroachments, to magnify the Torah and make it exalted* (emphasis mine – I.E.).

16. Certainly, it not this court's place to draw a conclusion on a matter of Jewish Law that is different from the ruling of the Chief Rabbi of Israel and the local rabbi of Rishon Lezion. The question here is different in one central point from that which this court adjudicated in earlier cases. This time, we must decide whether to force the Jewish burial society to permit inscriptions on gravestones that have been prohibited by

the ruling of the local rabbinic authority, whose rulings the Jewish burial society must follow to qualify for its license. This problem did not come before the Court in previous cases, since the Court then made the (erroneous) assumption that the prohibition is not based in Jewish Law. Now we find that the clash is between the appellant and the religiously observant who abide by Jewish legal rulings. The Court noted the fact that other Jewish burial societies behave differently and that in printed matter, old and new, and also on letters, the standard date appears – these facts are irrelevant. The important principle in Jewish Law is that the public is bound by the rulings of the local rabbinic authority, in this case the rabbi of Rishon Lezion. This principle is set out in explicitly in the license of the Jewish burial society. Since it is based in religious sources, this Jewish legal ruling cannot simply be dismissed.

17. It is not up to the Court to gauge feelings that are impossible to measure objectively. My colleague, Justice M. Cheshin, complains that the Jewish burial society has made itself "caretaker" of those buried in Rishon Lezion, without hearing from the relatives of those dead people it claims to represent. Do my colleagues really have any doubt that they could find many fine God-fearing Jews who wish with all their hearts for the Jewish burial society to follow the orders of the rabbi of the city, and who believe that there are grounds to a religious prohibition originating in the ruling of the chief rabbi of Israel?! Is it "never-ending conjecture" to assume this? I wonder!

18. The major question at issue now is the relationship between the basic freedom of religion of the Jewish burial society and the religiously observant relatives of the dead, on one hand, and, on the other hand, the basic freedom of other relatives of the dead to behave according to their ideology. All these must be addressed within the bounds of the definition of a cemetery, which all agree is a sacred place under Jewish law (if only in the framework of King's Order in Council on the Land of Israel (Holy Places), 1924). Far be it from me to belittle the values and feelings of either group. To my mind, we have no right to measure the emotional or essential weight of the opposing demands, using a hierarchy of values that

is personal in nature. To a religiously observant Jew, transgressing a religious prohibition can be as serious as carving a real cross, while the prohibition of standard dates is, for the appellant, a grave violation of her fundamental values. The real struggle is outside the boundaries of the cemetery; behind this dispute, forces are warring for the character of Judaism and the State of Israel. This is the real issue that stands before this Court, and there is no ignoring it.

19. I have said that a judicial ruling cannot, and even should not pretend to be able to decide an ideological dispute. It would be nice if the litigants could come to a mutual compromise and prevent this clash from further splintering this already divided society. It would be nice if those Jews buried beneath the ground could rest in peace together in a Jewish state that is not afflicted with strife and contention among the living. But this is not the situation. The Alternative Burial Law shows the future path chosen by the legislature: the dead will be separated from each other; everyone will be buried according to the ideology that he or she espoused in his or her lifetime. The new arrangement brings a solution to the problem for individuals, but I fear that it will create new problems for society.

20. What, therefore, is the legal solution to the case we discuss? The two principles mentioned – the freedom of religion of the Jewish burial society and the freedom of the relatives of the dead – are both important. The problem is that when the litigants can't reach an agreement, one principle must be overruled. This is the problem of true justice: in a situation where, unfortunately, it is impossible to safeguard all the legitimate interests, there is a need give preference to one over the other. It is great in theory to talk about balancing opposing interests. I am not convinced that this metaphor accurately describes the judicial process under which we are bound, at the end of the day, to reject the right of one in favor of the right of another.

Be that as it may, I am of the opinion that in the matter at hand, the right of the relatives of the deceased to carve the gravestones as they

like must retreat in the face of the right of the Jewish burial society to act in accordance with the local rabbinic authority's ruling. Why is this so? The Jewish burial society is, as its name reveals, holy. It is an institution performing a religious function that is known in the Jewish tradition as "the true kindness." The Jewish burial society must act according to Jewish law as ruled by the local rabbinic authority; this takes precedence. This is laid down in the terms of its license, this was the expectation of many of the deceased of the city, and this is demanded many of the relatives of the deceased.

21. In my opinion, this court is not authorized to force a religious body – be it public or private – to act in contravention of religious law. This coercion seriously violates freedom of religion. Such a violation is allowed only by the express order of the legislature, as in cases where the religious body transgresses the penal code or where the legislature forbids the body to act according to religious precepts for important reasons. In the absence of an express order, a person cannot be forced to transgress a religious precept, be it minor or serious.

Furthermore, this Court is not authorized to question the legitimacy of the Jewish legal ruling of an authorized institution. The Court is not a Jewish legal authority, and the personal view of a justice on the worth of the religion as a whole and a religious ruling in particular is irrelevant, as was justly noted by Justice Witkon in *Gideon* [1]. If a Jewish legal ruling infringes on the ideology of people who need the services of a religious body, it is appropriate to find a solution that satisfies all parties. But forcing the body to transgress religious law cannot be the correct solution in a democratic country that respects freedom of religion. The solution of coercion is especially problematic when the Court assumes the task of evaluating the importance of a certain religious precept and the degree of damage that its transgression will cause to the sensibilities of the religious public.

Thus, if my opinion were heard, this Court would refrain from forcing the Jewish burial society to transgress the ruling of the authorized

local rabbi. Therefore, the appeal must be denied.

President A. Barak

I concur in the opinion of my colleague, Justice M. Cheshin. His reasoning and conclusion are acceptable to me. I wish to add several comments.

1. Under the district court's rationale, the precedent of CA 294/91 (*Kestenbaum* [6]) is no longer applicable in light of the Alternative Burial Law. As my colleague, Justice M. Cheshin, noted, nothing in this law detracts from the rationale of *Kestenbaum* [6]. The obligations of the Jewish burial society – as a "dual-character body" – did not change with the passage of the Alternative Burial Law. This law did not create a new balance between the conflicting considerations and values. Therefore, I do not find a need to decide whether, in constitutional terms, the Alternative Burial Law changes the balance between the Hebrew language as a value and the values of human dignity, freedom of conscience, thought and expression, and tolerance. That is to say, we have no need to decide this question. All we can say is that it is an open question, and we leave it at that. In any case, on the interpretative plane – a plane on which we seek, to the extent possible, to avoid an interpretation that risks rendering a provision illegal – the conclusion at which my colleague, Justice M. Cheshin, arrived is a necessary conclusion. That conclusion is that the appropriate balance between the Hebrew language as a public value and human dignity (of the deceased and his relatives), as was ruled in *Kestenbaum* [6], remains unchanged.

2. My colleague Justice Englard introduced the value (and liberty) of freedom of religion into the pool of values requiring attention. *Kestenbaum* [6] did not address this issue. The assumption in that case was that "the ruling of the Jerusalem Community Jewish Burial Society not to allow foreign writing was not done for reasons of a Jewish legal *prohibition*." *See* Deputy President Elon's comments in *Kestenbaum* [6] at

499. My colleague, Justice Englard, noted that the prohibition against writing in foreign letters has a Jewish legal basis of which Deputy President Elon was unaware. This basis is the issue of the religious obligation of the Jewish burial society and the God-fearing people of Rishon Lezion to follow the rulings of the local rabbinic authority. No arguments on this matter submitted in this case. I assume, for the purposes of this judgment, that the ruling of the local rabbinic authority creates a religious obligation to be borne by the members of the Jewish burial society and the religious community alone. What influence does this new factor have?

3. In *Kestenbaum* [6], we ruled that a Jewish burial society – every Jewish burial society – is a body of "dual character." In addition to its private law obligations, it bears the burden of public law. Given this framework, the Jewish burial society must act fairly and reasonably. It must act as the faithful servant of the public. It may not take external considerations into account. It may not discriminate. It must realize the sense of purpose that lies at the foundation of public status. This sense includes, among other things, the principle that it must carry out its role for the good of the whole community, and not just for the good of the religious populace. When the values and principles of these two groups clash, it must act in a way that realizes its purpose and reflects an appropriate balance. What are these values and principles, and how do we evaluate the clash between them□

4. In *Kestenbaum* [6], the Court ruled – and this aspect of the ruling was acceptable to all the justices of the panel – that the values and principles coming into conflict were these: on one hand, the Hebrew language as a value; on the other hand, human dignity as a value. The Court weighed these opposing values and principles. It ruled, by majority opinion, that human dignity takes precedence. I wrote there:

> A government authority in Israel is not licensed to deal a serious and severe blow to human dignity in order to advance the value of the Hebrew language. In this clash between

> considerations of the Hebrew language and human dignity, human dignity has the upper hand. Of course, a government agency in Israel which provides burial services to Jews is authorized to consider the need to safeguard and promote the Hebrew language. It has this authority even if doing so will cause serious and severe harm to individuals of abnormal and extreme sensitivity. It is not authorized to cause serious and severe harm to the human dignity of an "ordinary" and "average" individual in Israel. This conclusion is drawn from the central importance the value of human dignity holds in Israel.

Kestenbaum [6] at 523-24.

Yet now my colleague Justice Englard comes and enlightens us that in the case at bar, we must consider an additional factor: the ruling of the local rabbinic authority of Rishon Lezion. How does the picture change with the introduction of this "factor"?

5. The ruling of the local rabbinic authority obviously adds complexity to a situation that was never simple. My colleague, Justice Englard, holds that to the overall picture, we must add the "…basic freedom of religion of the Jewish burial society and the religiously observant among the relatives of the dead …" Para. 18. But I doubt that the harm done is to freedom of religion. No one is forcing the members of the Jewish burial society to carve foreign writing on a gravestone. They personally will not act contrary to the order of the local rabbinic authority. The inscriptions will be done by professionals and not members of the Jewish burial society. Similarly, no one is saying that foreign writing will be inscribed on the gravestone of a religiously observant person, against his will or that of his family. A non-Hebrew inscription will be made only on the gravestone of a person who requests it (in his or her lifetime) or if his or her relatives request it (after his or her death). Thus, it seems to me that freedom of religion is not violated.

Nevertheless, I accept that even if there is violation of freedom of

religion, harm is done to the religious sensibilities of the members of the Jewish burial society and to religiously observant relatives of the dead. I made this differentiation in HCJ 5016/96 (*Bar-Ilan Street* [15]), at 58 {212}, when I said:

> The desecration of the Sabbath on Bar-Ilan Street is offensive [to the religious population residing close to Bar-Ilan Street] and infringes on their observant lifestyle. Indeed, from their perspective, the offense is both bitter and severe. This is the interest in question on one side of the issue. This having been said, let it be emphasized that I am not convinced that Sabbath traffic on Bar-Ilan Street violates the freedom of religion of the residents. These residents are free to observe the religious commandments. Sabbath traffic does not serve to deny them this freedom … Even so, traffic on the Sabbath does harm the residents' religious sensibilities and their observant lifestyle.

One can obviously claim that the order of the local rabbinic authority is to remove all non-Hebrew writing. In this case, preventing a religiously observant person – who sees himself or herself as bound by the rulings of the local rabbinic authority – from removing the writing would violate that person's religious freedom. This is the way my colleague, Justice Englard, views the case at bar. He asks, if we "force the Jewish burial society to permit inscriptions on gravestones that have been prohibited by the ruling of the local rabbinic authority …" Para. 16. As I noted, this issue was not raised in this case at all. However, I will assume that we are indeed concerned with the value (and liberty) of freedom of religion, in the context of the non-fulfillment of the order of the local rabbinic authority.

6. In *Kestenbaum* [6], on one side of the scales of justice, weighed the value of safeguarding the Hebrew language, and on the other side weighed the value (and liberty) of human dignity. Now we must add to one side, the value of safeguarding the Hebrew language, and the value (and liberty) of freedom of religion, which to my mind is really an aspect of

human dignity (see HCJ 3261/93 *Manning v. Minister of Justice* [21] at 286). Simultaneously we must add, on the other side, an additional aspect of harm to human dignity, specifically the harm which occurs when human dignity is violated for religious reasons. Actually, in my view, freedom from religion is also an aspect of human dignity. Therefore, one person enjoys freedom of religion, but another has the freedom to act according to the autonomy of his personal desires. This is the freedom of an individual not to be bound by a religious prohibition in which he or she does not believe. This is the freedom of the individual to choose his or her own path – in life and in death – according to his or her ideology. Indeed, just as the considerations in favor of exclusively Hebrew writing include language and freedom of religion, so the opposing considerations include free will and preventing religious coercion. Yet my colleague, Justice Englard, completely abandoned the consideration of the Hebrew language in his judgment. This is how he describes the dilemma in the instant case:

> The major question at issue now is the relationship between the basic freedom of religion of the Jewish burial society and the religiously observant relatives of the dead, on one hand, and, on the other hand, the basic freedom of other relatives of the dead to behave according to their ideology.

This framework assigns consideration of the Hebrew language no role. Indeed, if the case against non-Hebrew writing is religious, then anyone who seeks to engrave this writing and is forcibly prevented from doing so is a victim of religious coercion. Therefore, we face a case of conflicting values. Freedom of religion is clashing with freedom from religion. Human dignity provides the conceptual bounds for this clash. How can the Court resolve the conflict?

7. The answer that has been given to this question since the founding of the State is that the Court must weigh the opposing considerations on the scales of justice. It must balance the conflicting values and principles. It must reach a balance according to the weight of the opposing considerations at the point of decision. This is how the Court

has behaved from its inception until this very day. This is "the balancing doctrine as practiced in our public law." *Bar-Ilan Street* [15] at 37 {187}. To the best of my knowledge, only once did this Court refuse (in a majority opinion) practice the "balancing doctrine." This was when the state's very existence was placed on the scales. EA 1/65 *Yardor v. the Chairman of the Central Elections Committee of the Sixth Knesset* [22]. When we were asked to apply this approach to the democratic character of the state, we refused to do so. *See* EA 2/84 *Neiman v. the Chairman of the Central Elections Committee of the Eleventh Knesset* [23]. Thus, since the founding of the State, the Court has engaged in balancing opposing values and interests. This is "… a process of placing competing values on the scales and deciding, under the circumstance, which one to prefer." *See* Justice Agranat's opinion in HCJ 73/53 *Kol Ha'am v. Minister of the Interior* [24] at 879. The common denominator throughout our constitutional jurisprudential theory is that:

> In the organized life of society there is no "all or nothing." There is "give and take" and balancing different interests.

HCJ 148/79 *Sa'ar v. Minister of the Interior and the Police* [25] at 178.

At the basis of this view stands the recognition that values and principles – and the liberties that are derived from them – are not absolute in nature. Values, principles and liberties have no "absolute" weight. Their weight is always relative. Their status is determined in relation to other values, principles and freedoms with which they conflict. CA 105/92 *Re'em Engineers v. Municipality of Upper Nazereth* [26] at 205.

8. This court applies the balancing doctrine where one of the values or principles is linked to freedom of religion or religious sensibilities. *See Bar-Ilan Street* [15] at 38. Thus, for example, in every case where religious sensibilities clashed with freedom of expression, we balanced the conflicting values. HCJ 351/72 *Keinan v. Film and Play Review Board* [27]; HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [28]. Similarly, when religious sensibilities (regarding

the Sabbath) clashed with the public interest (the supply of gas or freedom of movement), we balanced these conflicting values. CrimA 217/68 *Izramax Ltd. v. The State of Israel* [29] at 364; *Bar-Ilan Street* [15].

Religious sensibilities and freedom of religion are, of course, values and liberties of great importance but they are not absolute. We must always attempt to balance them with any conflicting values and liberties. *Bar-Ilan Street* [15] at 38. Justice Zamir established this principle:

> Religious sensibilities do not enjoy absolute protection. There is no law that provides absolute protection to any right or value. All rights and values, whatever they may be, are relative. Necessarily, the protection they are offered is also relative. This applies equally to the protection extended to religious sensibilities …

HCJ 7128/96 *Temple Mount Faithful Movement v. The Government of Israel* [30] at 521.

> Freedom of conscience, beliefs, religion, and religious rituals, as much as they flow from belief to action, are not absolute liberties … Freedom of conscience, faith, religion, and religious ritual are relative liberties. They must be balanced with other rights and interests which are also worthy of protection…

HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Police Commander* [31] at 455.

This approach was adopted by Deputy President Elon when he balanced the conflicting demands for the prayer arrangements at the Western Wall plaza. HCJ 257/89 *Hoffman v. Western Wall Superintendent* [32] at 274. Justice Tal adopted a similar approach in *Bar-Ilan Street* [15].

9. Against this background, we must decide the appropriate balance in the case before us. Regarding the balance between the Hebrew language as a value and human dignity as a value, I can only refer to what was said in *Kestenbaum* [6]. All that is left for me to do is to decide if that conclusion is altered in light of the new values and principles introduced into the equation by my colleague Justice Englard. From *one point of view* I assume that the value (or liberty) of freedom of religion is an aspect of human dignity; from *the other point of view* there is the value (or liberty) of freedom from religion, which is also an aspect of human dignity. How will the balance be struck in this case? Is it possible to find a balance between conflicting values and principles that are within the boundaries of the same liberty? The answer is in the affirmative.

This is not the first time we have weighed different aspects of the same liberty. We did so, for example, when freedom of expression clashed with religious sensibilities – both of which are protected under the right to human dignity, in my view. *See* HCJ 243/81 *Yeki Yosha v. The Film and Play Review Board* [33]; HCJ 806/88 *supra* [28] at 38. Similarly, we sought a balance when freedom of expression clashed with freedom of movement within the country – both of which are aspects of human dignity in my view as well. *See* HCJ 148/79 *supra* [25]. In this example, the conflict was, at root, between two aspects of freedom of expression. Thus we also behaved when the right to one's good name (which is part of human dignity) clashed with the right to freedom of expression (which, in my view, is another aspect of human dignity). *Cf.* CA 214/89 *Avner v. Shapira* [34].

Thus, in cases of clashing values and principles that fall within the bounds of the same liberty – just as in cases of clashes between different liberties – the way to solve the problem is not the "all or nothing" approach, but rather by finding a balance between the conflicting values and principles. Therefore, we cannot say that, in a conflict between freedom of religion and freedom from religion, one always has the upper hand. If we said that, we would be undermining the constitutional standing of one of these freedoms.

The appropriate practice is to balance conflicting values and principles that fall within the bounds of the same liberty. In the framework of this balancing, we must aim to preserve the "core" of each of these liberties so that any damage will only affect the "shell." Compare clause 19(2) of the German constitution which establishes that "the essence of a basic right should never be violated." We must contemplate the seriousness of the violation and its essence. The decision itself needs to be made from considerations of reasonableness, fairness and tolerance.

10. We will return, therefore, to the case before us. *On one side* of the scales rests the human dignity of the deceased and her family, who seek to inscribe Latin lettering on her gravestone. This liberty protects them from harm to their sensibilities. It protects them from religious coercion. This liberty is damaged in a serious, severe and essential way if they are not allowed to carve the deceased's name or birth date in the writing they choose. I took this view in *Kestenbaum* [6], when I said:

> The "ordinary person," who does not have special sensibilities is seriously harmed if he or she has no power to engrave a loved one's gravestone with the language that he or she decides memorializes the deceased in an appropriate way … The negation of this freedom and the insistence on the exclusive use of Hebrew writing is a serious and severe violation of the fundamental value of human dignity.

Id. at 523; *see also* HCJ 5688/92 *supra* [7] at 827.

This violation is exacerbated when the restrictions are perceived as religious coercion.

11. *On the other side* of the scales, we find the freedom of religion of the members of the Jewish burial society to follow the ruling of the local rabbinic authority. Also weighing on this side is the dignity of the dead and the feelings of their relatives, which are harmed by the presence of foreign languages on gravestones in the cemetery – even though not on the gravestones of their loved ones. This harm must also be taken into

account. It is a part of the human dignity of the deceased and their relatives.

12. How do we balance these conflicting considerations? It seems to me that in the present circumstances, the deceased and her relatives who wish to carve Latin lettering on the gravestone must be given the upper hand. The reasons for my approach are twofold: First, the harm to the deceased and the relatives – who are prevented from having writing in the language they choose – is direct and serious. On the other hand, the harm to the other deceased and their relatives when others are allowed non-Hebrew writing is indirect and not serious. The latter are not harmed by writing on the gravestones of their loved ones. They are harmed by writing that is on the gravestone of others – writing that has existed in this cemetery for many years. The harm to the first group is certainly not the same as the harm to the second group, if we weigh these violations on the scales of tolerance. President Shamgar ruled thus in *Kestenbaum* [6], where he remarked:

> One who erects a gravestone and another who comes to visit a different grave in the cemetery do not stand on the same plane. The general model needs to be that one who enters the space of his neighbor may not interfere needlessly with his life and sensibilities. Everyone must allow others the right and the freedom to do as they please, according to their own feelings and sensibilities, and tolerance is mandatory. People should not meddle in others' business which is not relevant to them, though of course this does not refer to conditions that a reasonable person cannot accept.

Id. at 482

My colleague, Justice M. Cheshin, made the same ruling when he differentiated between the "private domain" of the gravestone of the deceased and the "public domain" of the other graves. Para. 22 of his opinion.

13. Second, the prohibition against foreign writing for religious reasons – to differentiate from the prohibition for the sake of the Hebrew language – constitutes religious coercion. It violates the free will of the deceased and her relatives. It violates their autonomy of personal choice on one of the most sensitive points – the relationship with a loved one who has passed away. It damages the bond connecting the living with the dead. This violation is serious and severe. It is exacerbated by the fact that the cause is religious coercion. On the other hand, the harm to the religiously observant populace – harm which I acknowledge and take into consideration – in that they are not able to fulfill the ruling of the local rabbinic authority is not as serious or severe.

We should recall that the issue here is "local" Jewish Law, as every local rabbinic authority makes its own rulings. We have been presented with the fact – and my colleague, Justice M. Cheshin, developed this extensively – that many other cemeteries in Israel allow foreign writing on gravestones. The local rabbinic authorities of these cemeteries do not see fit to ban this writing. Even in the Rishon Lezion cemetery – the cemetery at issue here – there are many gravestones inscribed with foreign writing. The local rabbinic authority of that time did not see fit to prevent it. These same members of the Jewish burial society, who in the past did not object to the writing, have suddenly changed their minds because of the change in identity of the local rabbinic authority. Furthermore, they are not being required to actively do anything – such as make an inscription that goes against the ruling of the local rabbinic authority. All that is asked of them is to refrain from actively doing anything – such as the erasing of inscriptions – as the local rabbinic authority demands.

In the final analysis, it seems to me that the issue of Hebrew writing on gravestones, with all its importance from the Jewish legal aspect, is not at the "core" of Jewish Law but on its margins. It is assumed that, on core issues, all local rabbinic authorities rule in a similar fashion. The plethora of opinions on this issue indicates that it is a "local" matter, not one of the central tenets of Judaism. In any case, we have not gotten to the bottom of this claim, because it was not raised in the instant case. *Cf.*

HCJ 465/89 *Ruskin v. Jerusalem Religious Council* [35]; CrimA 217/68 *supra* [29] at 356 (raising similar evaluations).

14. I have therefore reached the conclusion that in the clash between freedom of religion – of the members of the Jewish burial society, the dead, and their relatives who seek exclusively Hebrew writing on the gravestones of others as per the ruling of the local rabbinic authority – and the freedom from religion of the dead and their relatives who seek to carve a foreign script on the gravestones of their loved ones – the latter's freedom is to be preferred. If we add this to the decision in *Kestenbaum* [6], in which the court arrived at a similar conclusion regarding a clash between the Hebrew language as a value and human dignity as a value, the final conclusion is that non-Hebrew writing must be allowed on gravestones in the Rishon Lezion Cemetery.

15. Some may claim that the viewpoint which gives preference to values and principles allowing foreign writing on gravestones is a secular viewpoint. They may claim that if we conducted the balancing from a religious viewpoint, the outcome would differ. I cannot accept this claim. Balancing is neither secular nor religious. It weighs the conflict between values and principles from the appropriate perspective of the state's general values as a democratic and Jewish state. This is an integrative viewpoint, based on a synthesis between Jewish and democratic values. The Court is neither secular nor religious. The Court considers the feelings of everyone; the Court takes into the account the liberties of everyone; the Court expresses the values of everyone – Jewish values and democratic values. To the best of its ability, it balances the conflicting feelings, liberties and values.

16. One might claim, of course, that the balance that I have conducted reached the wrong conclusion. It could be maintained – as Deputy President Elon ruled in *Kestenbaum* [6] – that in the appropriate balance, the ruling of the local rabbinic authority is to be preferred. This is a legitimate position, and it finds expression in many judgments of this court, with which the majority opinion agrees. Note that in this appeal, my

colleague Justice Englard adopts a completely different stance. In his view, even if it wields public authority, a religious body that operates according to the norms of Jewish Law must be allowed – based on its freedom of religion – to follow religious directives. My colleague writes:

> As a matter of principle, this court is not authorized to force a religious body – be it public or private – to act in violation of the religious law which it believes in. Such coercion seriously violates the principle of freedom of religion. Such violation is permitted only by express order of the legislature ... In the absence of an express order, the body cannot be forced to transgress a religious precept, be it minor or serious.

Para. 21.

In my colleague's view, the "balancing doctrine" does not apply to a case where the liberty in question is freedom of religion. In my colleague's opinion, "in the matter at hand, the right of the relatives of the deceased to carve the gravestones as they like must retreat in the face of the right of the Jewish burial society to act in accordance with the local rabbinic authority's ruling." Para. 20. At the basis of my colleague's stance lies the view that the balancing doctrine does not necessarily apply in a case when the dispute is "to a large extent ideological." Para. 8. My colleague writes:

> The central questions are: What are the sensibilities that need to be defended? Who has the burden of being tolerant? And who must give in? Of course, for the sake of finding a solution to the problem, the Court uses legal principles and conceptual tools through which it can adjudicate the opposing demands of the litigants … But these conceptual tools cannot succeed in getting to the root of this ideological dispute.

Para.8.

In my colleague's view, comparisons between feelings are inappropriate,

since they are not based on an objective test. Subjective points of view differ from judge to judge. My colleague writes:

> I question if it is the role of the Court to establish the 'legitimate' boundaries of the sensibilities of believers in general, and of the religiously observant public in particular. In addition, the definition of the boundaries of "reasonable" sensitivity is based largely on subjective views, as illustrated by the differences of opinions among the judges themselves.

Para. 13.

He adds:

> It is not up to the Court to gauge feelings that are impossible to measure objectively…
>
> … we have no right to measure the emotional or essential weight of the opposing demands, using a hierarchy of values that is personal in nature …
>
> … a judicial ruling cannot, and even should not, pretend to be able to decide an ideological dispute.

Paras. 17, 18, and 19.

I cannot agree with this approach. It constitutes a grave violation of the liberties of individuals in general, and freedom of religion and freedom from religion in particular.

17. My colleague, Justice Englard, holds that in cases such as this, when we are dealing with a religious body or a religious law, the Court has no authority – in the absence of an express order of the legislature – to enforce behavior that contravenes any religious precept, be it serious or minor. This approach is worth considering in a case where the religious body imposes its religious authority on a group of believers who accept its instructions. Yet even in that situation we must take into consideration – as *Kestenbaum* [6] teaches us – general principles, such as public policy and

good faith.

This approach is certainly not acceptable – and becomes religious coercion – when we find that a religious body imposes its public authority on a group of the population that does not subscribe to its beliefs but is subject to the body's authority only because it has no other choice. In a long line of rulings we have made regarding such bodies, including the rabbinate, the religious councils, and the rabbinical courts, which all have statutory authority, the scope of the applicability of religious law depends on the purpose of each individual statute. This purpose is decided through the appropriate balance of the values and principles related to the case. *See e.g.* HCJ 465/89 *supra* [35]; HCJ 47/82 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs* [36]; HCJ 3944/92 *Marbek Slaughterhouses v. Chief Rabbinate of Netanya* [37]; HCJ 1000/92 *Bavli v. The Great Rabbinical Court* [38].

This case concerns the Jewish burial society, so our point of departure is not that the Jewish burial society is a private body that may impose its authority with the consent (explicit and implicit) of the religiously observant. Our point of departure – as was ruled in *Kestenbaum* [6] – is that the Jewish burial society is a public body that operates in the realm of public law. The obligations of public law are incumbent upon it.

18. The approach of this court, since the day of its inception, has been based on the need to balance conflicting values and principles. This has been true in cases of clashes between values and principles in general (see paragraph 7); and particularly in clashes between values and principles concerning freedom of religion and freedom from religion (see paragraph 8). This balancing is rooted in the values of the State of Israel as a Jewish and democratic state. *See* Para. 1a of the Basic Law: Human Dignity and Liberty. Only this balancing can allow our country – which is not run by Jewish Law – to fulfill the values of the State of Israel as a Jewish and democratic state.

19. Negating the power of the Court to set appropriate boundaries to protect religious sensibilities will ultimately lead us – in a State of Israel that is not a theocracy (HCJ 3872/93 *supra* [19] at 506) – to fail to consider these sensibilities. The end result will be damage to freedom of religion itself. Thus, it is actually the need to protect religious sensibilities and freedom of religion that necessitates balancing different values and principles.

These balances – which are based on the relative weight of the principles and values – entail assessing the varying degrees of harm to sensibilities. This assessment is also necessary to ensure tolerance. Only through tolerance can we maintain communal life. A healthy society is based, in essence, on mutual compromise and tolerance. CA 105/92 *supra* [26] at 211. Tolerance is essentially the rejection of the "all or nothing" approach, and the promotion of mutual compromise by assessing varying degrees of harm to sensibilities. *See* HCJ 257/89, *supra* [32] at 354; HCJ 806/88, *supra* [28] at 30. Indeed, a democratic society that seeks to recognize and protect the human rights of all its citizens must acknowledge people's sensibilities and balance them by considering degrees of harm to sensibilities. Only harm that crosses the "threshold of tolerance" will warrant protection. I remarked on this in an earlier case:

> [It is] our duty to recognize a certain "threshold of tolerance" regarding harm to sensibilities, which every member of a democratic society accepts as part of the social contract upon which democracy is predicated. This being the case, only when an offense exceeds this "threshold of tolerance" will restricting human rights in a democratic society be justified.
>
> …
>
> Clearly, the "threshold of tolerance" is not uniform, but rather a function of the right and infringement in question
>
> …

> It is possible to infringe on human rights for the purpose of protecting feelings – particularly religious sensibilities and lifestyle – in a society with democratic values, provided that the harm exceeds the "threshold of tolerance" accepted in that society.

Bar-Ilan Street [15] at 47-48 {200-201}.

A different approach will not only fail to safeguard the freedom of religion that my colleague Justice Englard bases himself on, but it will also seriously damage it.

20. Granted, the balancing doctrine is not simple to implement. We have no "scientific instruments" to do so. The expressions "balancing" and "weighing" are no more than metaphors. Behind them lies the perception that the values, principles and liberties do not have absolute significance. *See* 3 A. Barak, *Parshanut Bimishpat [Interpretation in Law] Parshanut Chukatit [Constitutiona]* [46] at 215. Establishing the relative societal significance of values and principles is a complex process. *See* HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing* [39]. However, it is wrong to draw the conclusion that, because of the difficulties, we should abstain from this process. There are many legal principles that are based on the need for balancing. It would never occur to us to abstain from them on account of the difficulties that they carry. Take principles like reasonableness, fairness, good faith, proportionality, and public policy. All these and many other principles reflect the balance between conflicting values and principles. *See* HCJ 935/89 *Ganor v. Attorney-General* [40] at 513-14. Should we abstain from working with these principles simply because of the difficulties they entail?

21. My colleague, Justice Englard, complained that using balancing to measure the degree of harm to sensibilities is subjective for every judge. He dismisses the consideration and evaluation of the different sensibilities because of their personal and subjective nature and because the dispute at hand is a matter of "personal ideology." I do not argue with the conclusion that, at a certain stage, subjective perspectives become considerations. *See* Aharon Barak, *Judicial Discretion* [47] at 124-25. I

do not ignore the personal nature of the decision. Nevertheless, it is important to remember that only a small proportion of the considerations are subjective. The principle work of a judge is dictated by a stratified system of objective considerations. These are required by the foundation documents; these were used in previous judgments; these are shared by each and every judge.

In truth, a ruling is always value-based, but this does not mean that it is subjective. Most value-based judgments are objective, and they are mandated by the values of the system. A competent judge is able to implement this system by differentiating between objective considerations and his or her personal, subjective views. That is how it has always been done.

The many difficulties bound up with the personal perspective versus the occasional need for a subjective decision do not diminish the standing of legal values and principles and the need to balance them at the point of friction. We do not want to regress to a jurisprudence of concepts (Begriffsjurisprudenz) in which the conclusion supposedly arises, as if on its own, from objective considerations. We prefer the jurisprudence of interests (Interessenjurisprudenz) and the jurisprudence of values (Wertungsjuerisprudenze) in which an "ideological" decision is required. *See* HCJFH 4601/95 *Saroussy v. National Labor Court* [41]. We prefer substance over form. All these allow us to arrive at an objective decision, which is not personal to each and every judge, even if it is based in "ideology." In any case, this needs to be the model, while at the same time we acknowledge that sometimes there is no avoiding a subjective ruling. This is the "price" – it is worthwhile to pay it in order to ensure justice.

22. At the beginning of his opinion, my colleague lamented that the litigants in the instant appeal – and the litigants in similar petitions that have been brought in the past – could not reach an agreement. I share my colleague's sense of regret. Everything must be done to broker understandings and agreements based on give and take, on compromise and tolerance. Even we, in the framework of this hearing, have proposed

different suggestions to the sides, in order to promote a mutually acceptable solution. Unfortunately, our efforts have failed. We have no choice, then, but to issue a court ruling. It is appropriate that the legal ruling should reflect, as much as possible, the spirit of compromise and tolerance, since only through these principles can the unity of society be preserved. Indeed, in a societal framework like ours, in which a significant sector of the public does not hold by the rulings of the local rabbinic authority, there is no escaping a standard framework based on tolerance and compromise.

In a legal reality such as ours, in which people who are not religious sometimes need religious services provided for the most part by religious people, there is no avoiding the search for criteria which are not just "all or nothing" and which draw distinctions between major laws and minor ones. Indeed, the balancing doctrine, which relates to all aspects of law, is especially applicable to the relationship between religion and state, between the values of Israel as a Jewish state and its values as a democratic state. Only the attempt to find a synthesis between the conflicting values will allow society to function. Emphasizing the conflicts and the differences will divide and sunder our society. Therefore, a rigid ruling that leaves no room for compromise, which allows the members of the Jewish burial society to act according to the ruling of the local rabbinic authority in minor matters as in major ones, regardless of the sensibilities of the non-religious, is a recipe for societal division and disintegration. Those who seek compromise and understanding need to continue to try and find balances between conflicting values and principles.

23. For these reasons, I cannot agree with the position of my colleague, Justice Englard. These are not subjective reasons. These are objective reasons. They are drawn from our legal system, from its Jewish and democratic values, from many years of this court's rulings and from the need to ensure mutual patience and tolerance. For these reasons, I concur in the judgment of my colleague Justice M. Cheshin.

It is decided, by the majority opinion of President Barak and

Justice M. Cheshin, with Justice Englard dissenting, to accept the appeal, as per the judgment of Justice M. Cheshin.

July 6, 1999.