

## Days of Worship and Days of Rest

Ruth Gavison



**Regulating days of rest by choosing as the shared day of rest the day identified as day of rest and worship by the hegemonic religion is not a matter of religious coercion and is not even a matter of human rights. The issue should be decided by the political system to suit the special needs of society. Such matters should not be decided by courts as aspects of freedom from religion. In fact, in modern societies, the rights involved in these matters are rights of workers more than rights to freedom from religion.**

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Days of Worship and Days of rest: A View from Israel

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At least two governments in Israel fell over debates on state and religion issues. In one case the issue was an alleged desecration of the Sabbath . Another government was significantly weakened over that issue .

On the Sabbath the 25th of June 2005 a large number of religious people protested the decision to open for traffic a central route in a religious neighborhood which had been closed for decades. As the volume of traffic increased, the alternative routes used on the Sabbath were not adequate, and many accidents were taking place. The Ministry of Transportation decided the road needed to open until an alternative route is prepared. As a result of the protest, PM Ariel Sharon decided the road will remain closed, as it did July 2nd. Tommy Lapid, the chair of the opposition and of the 14 members Shinuy (Change) faction elected mainly on an anti-religious coercion ticket, declared this was an instance of giving in, again, to the religious establishment and its coercion .

The two excerpts above should be enough to illustrate that the debates concerning state and religion in general, and the status of religious 'days of worship', are anything but marginal in contemporary Israel.

States in which there is a uniform and religious society where there is a tradition of a weekly day of rest coupled with special religious meaning and ceremonies often find it very natural to establish a legal order in which the religious days of worship are also the social days of rest. In fact, such an identity of religious and social practices may be natural and does not even require laws. This indeed was the case in most Western countries before the onset of deep secularization and before trends of massive immigration has made most of them multi-cultural. Thus, most Christian countries had 'Sunday Laws' which limited commerce and other

forms of work on Sundays, thus creating a religious, cultural and legal continuum. Some had the same social reality without needing laws to enforce it. Similarly, Moslem countries that adopted the tradition of a shared weekly day of rest often made Friday that shared day of rest. Minority religious communities had to respect the norms of the majority. If their day of religious worship and rest did not coincide with that of the majority, religious communities sought to at least get permission to keep their own holidays in addition to the general ones. Preferably, they sought permission to keep their own day of rest and worship and work on the religious day of rest maintained by the majority.

There are two main challenges to this natural way of doing things. The first comes from multi-religious societies in which there is no clear majority or minority, or which are committed to multiculturalism in the strong sense, which includes an equal status to all cultures and religions, or neutrality among them. Each religious group then wants not only the freedom to keep its own holidays, but also to have them affect, and be reflected in, the public sphere. The second is from groups that become secularized and sometimes resent the identification of mandatory days of rest with religious days of worship, because they resent religious limitations on their freedom and see them as violations of their rights to freedom from religion or freedom of conscience.

Many societies witness a combination of both challenges. This is also the case in Israel.

I will start with a short account of the social and legal situation re days of worship and days of rest in Israel. The story reveals many different complexities. I will then describe a proposed new arrangement of the issue of the regulation of the Sabbath. This new arrangement is deeply resisted by some liberal and commercial forces despite the fact that it is much more liberal than the present legal arrangement, because the legal arrangement is extensively violated and enforcement is very limited. They often invoke rights to freedom of conscience and freedom from religion. Another anomaly is the objection of religious groups to the proposed new arrangement, although the present reality 'violates' the Sabbath more than the proposed one. Some of them also invoke rights, claiming that religious people who observe the Sabbath are effectively discriminated against if others are allowed to work and trade on that day. I will argue that these anomalies reveal important points about the relations between religion, culture, society and state. They also illustrate the limits of law, and the fact that the very popular rights discourse has only very limited application to what is often called state-and-religion issues. Most of these controversies are not matters of rights and should be regulated through the social, cultural and political system. It follows that most of these issues should be a matter of political and social negotiation and not of judicial determination, and that they should have important local elements and should not be decided once and for all by courts as if they are dictated by universal principles of human rights.

Because the visibility in Israel of internal Jewish debates on these issues is much greater than issues stemming from the fact that the population includes many religious groups, I will mainly discuss them. They have been the subjects of legislation, litigation and public debate. This fact should not lead us, however, to disregard the complexity of these issues in the non-Jewish sectors of Israeli society.

## A. History

Israel was established in 1948, at the end of a British Mandate, and as a consequence of the UNGA resolution 181 which determined that Palestine/Israel should be divided into two states, one Jewish and one Arab. In fact, a war erupted after that resolution was made, and as a result the Jewish state was indeed established, while the Arab parts of the territory not occupied by Israel were held by Jordan and Egypt respectively. My paper will deal with Israel alone.

Regulation of the question of days of rest and worship was one of the very first things the Israeli government did. The decision reflected a broad consensus within the Jewish Yishuv (community) and a famous agreement between the Zionists and the leaders of Agudat Yisrael on maintaining the status quo between religious and secular Jews in Israel. In 1951, a labor

relations law contained a detailed regulation of days of rest: Working and Resting Hours Act, 1951. These arrangements and laws reflected an agreement based on a firm distinction between private and public. Jewish days of worship and rest would be the official days of rest in Israel. There will no obligation on anyone to observe religious commandments. Nonetheless, employing others on a day of rest was declared a criminal offence. The laws all explicitly exempted non-Jewish communities from the application of the law, and specified that people of other religions were entitled to rest on their religious day of rest . According to the legal arrangements adopted, people were allowed to use their cars and drive on the days of rest, but public transportation was not available . While the radio operated on the Sabbath, it too was closed on Yom Kippur, the holiest day in Jewish law.

While declaration of days of rest was regulated by national legislation, regulating hours of opening of businesses and shops was delegated to local authorities. Most Jewish cities had laws requiring that all businesses and shops be closed on the Sabbath.

Initially, this arrangement worked pretty smoothly. Most of the 150,000 Arabs who were left in Israel lived in their own communities and were not affected by the Jewish practices. Secular Jews often accepted that singling out the Sabbath in this way was not 'religious coercion' and reflected a shared cultural tradition . Israel maintained the millet system, and recognized the establishments of the many religious groups within it. The major holidays of the Moslem and Christian communities were recognized by the State, but there was no special break of the regular life rhythm in Jewish communities for them. The laws did cover the issues, but one did not really need legal norms to maintain social stability. The general atmosphere was one of acceptance by secular Jews of the limitations as natural and right. Obviously, there were differences among communities. But even in secular Kibutzim there was a distinctly different aura to the Sabbath . The internal debate among Jews on the meaning of the Jewishness of the state was intense. Many of the Zionists were secular Jews who were even anti-clerical. There were struggles that reached the courts concerning attempted efforts to prohibit or seriously limit the sale of pork in Jewish communities . There was a debate concerning the 1953 decision to maintain the religious monopoly over matters of marriage and divorce. But a general day of rest on the Saturday seemed easy.

Slowly, the mood changed. The first noticeable change came towards the end of the 1960s. We have an interesting accumulation of public debates and court cases. It is the time after the 1967 war. Some secular Jews grew more impatient with limitations of their freedom on the Sabbath. Some religious Jews became even more convinced that the existence of Israel was a matter of religious miracle. Many of these court cases concern the Sabbath . It is interesting to note different clusters of Sabbath litigation.

The first cluster concerned challenges of attempts to enforce the Sabbath prohibition against working on the Sabbath when applied to gas stations . In 1968 the Israel Supreme Court acquitted a person who was charged with violating the law by operating a gas station on Saturday . The Court held that a law closing gas stations on Saturdays, especially since there was no public transportation on that day, was unreasonable . One of the Judges, in dissent, wrote a lengthy opinion explaining how Sunday (or Saturday) Laws were not an instance of religious coercion, based on an extensive comparative study of other countries. As a result, Israel has joined all places, and the availability of gas stations now depends on the community. Many are closed, but some are always open. And this is the case even in very religious cities such as Jerusalem.

At roughly the same time, in 1969, the Hours of Work and Rest Law was amended: section 9A now states that it is prohibited for a person to work on the Sabbath in their own shop or plant. The amendment was intended to close a gap that existed under the old law, which only made it an offence to employ others on the Sabbath. If gas stations can now be opened, at least Jews should not be allowed to work in them unless the business has a special permit.

A second cluster of litigation came from the opposite direction: It involved the legal-political drama around the decision to move TV programming from 6 to 7 days a week in the end of 1969 . At first petitioners sought to challenge the decision to broadcast on Saturday as a matter of principle, and were rejected based on the claim that they did not have standing .

Petitioners then argued that religious workers will be discriminated again because they will not be able to work as their colleagues. Now standing was OK, and the petition was presented as one involving rights and not just policies, but the petition was nonetheless rejected. The bottom line was that the court refused to help those who objected the decision, and contributed to the fact that TV broadcasts have operated, since then, 7 days a week. In terms of the public sphere, however, it was usually accepted at that time that there was hardly any shopping or even commercial entertainment activity on Saturdays. In most Jewish settlements, including towns, even restaurants were hard to find.

A bit later on, in the mid 1980s, a third cluster of public debate concerned the operation of commercial movie theatres on Friday nights. The fights also related to the relationships between local authorities and the minister of Interior, who has the power under the law to approve or decline to approve local bylaws. In the mid 80s there was a lengthy social struggle on this in Petach Tiqva, with a lot of political activity and demonstrations. The municipality allowed the opening of the theatre, but the minister of Interior (an orthodox man) declined to approve the law. Ultimately, the Supreme Court permitted the operation of the theatre, holding the minister was not acting within his powers. In 1987 the operators of a movie house in central Jerusalem were prosecuted for violating the local bylaw that prohibited such operation. The court acquitted the defendants, holding the laws were too sweeping and thus reflected an unreasonable balance between religious sensibilities and other interests and that freedom from religion was beyond the power of local legislation in the absence of explicit authorization. The decision, which was criticized by religious circles, was not appealed, but a special Authorization Law was enacted in 1990, explicitly authorizing municipalities to regulate the opening of places of entertainment on the Sabbath. While the law explicitly authorizes regulation of movie houses and other places of entertainment, most municipalities, including Jerusalem, allowed some such places to be open on Sabbath.

At about the same time, another central issue concerning the Sabbath that had mainly been regulated through social negotiations and conventions reached the courts: the closure of certain roads so that cars cannot use them during the day. These debates arose in various places in Jerusalem, as well as in religious areas near the Tel Aviv region. The most recent and prolonged debate concerned a main artery in Jerusalem – the Bar-Ilan Rd., connecting the entrance to Jerusalem to the Northern part of the city, including the Mt. Scopus Hadassah hospital, which passes neighborhoods which had become populated mostly by ultra orthodox families. For weeks the inhabitants closed the road and demonstrators came to make a point of passing, with the police seeking to keep order and allow cars to pass. After many attempts to negotiate the issues and regulate it through public committees, this matter too was decided by the court. For my purposes it is important to note that the decision was cast by some judges in terms of rights – the balance between the right to freedom of movement and the religious sensibilities of the religious residents of the region. As we saw, that issue is still a very lively issue in Israel to this very day.

Horev, the decision on the Bar-Ilan Rd., was decided after the 'constitutional revolution': In 1992 two basic laws dealing with human rights were enacted in Israel. Based on these laws the Israel Supreme Court held it now has the power to invalidate statutes which violate rights included in these laws. One of these laws establishes a right to freedom of occupation, and naturally Sabbath laws were challenged as inconsistent with these laws. Both the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Freedom state that they are designed to protect the values of Israel as a 'Jewish and democratic state'. Interestingly, Horev does not discuss the question whether closing the Bar-Ilan street is either required by or consistent with Israel as a Jewish and democratic state. The analysis is based on universal rights discourse, with the right of secular people to freedom of movement balanced against the wishes and sensibilities of the orthodox residents of the street.

While struggles over traffic in religious neighborhoods are still common, Sabbath de facto limitations in Israel have been dramatically reduced despite the fact that the laws have not changed (or even became stricter). In addition to entertainment and restaurants which are now available in most places, including Jerusalem, there are now many shopping malls outside the main towns, whose busiest day of trade is the Sabbath.

This commercial activity generated differing responses, depending in part on the identity and ideological affiliation of the person serving as Minister of Interior or the minister of Commerce and Industry (who are in charge of the enforcement of the relevant laws). Some ministers sought to enforce the laws by using Druze officers to prosecute those who open their shops on Saturdays. At times, courts found creative ways to acquit the defendants, who were represented by NGOs who were ideologically committed to 'fight religious coercion'. Mostly, those convicted of offences pay the fines and continue to do business on Sabbath. Recently, one such defendant chose to make a principled challenge to the law itself. While the court upheld the laws restricting work on the Sabbath and making it an official day of rest, it did not make any statement concerning the extensive non enforcement of the law and the resulting extensive infringement of the prohibitions.

This reality, with the great gap between legal arrangement and actual practice, triggered a wave of attempts to reach agreements on the Sabbath. The hope was that it should be possible to reach an agreement on a law that will not be seen as a form of religious coercion but that will maintain an effective shared day of rest and a special character of the Sabbath as part of ancient Jewish culture. I was a party to one such attempt in the framework of the comprehensive Gavison-Medan New Covenant for State and Religion Issues among Jews (2003) . In addition, religious groups now seek new ways of fighting commerce on the Sabbath. Notably, they are issuing a Hareidi Card – a card to identify shops and businesses that do not operate on Saturday. The belief is that their growing number will create an economic incentive for businesses to stop commercial activities on the Sabbath. To date, the initiative has not led to a reduction in the commercial activity on Saturdays.

There are additional aspects of the Sabbath regime that should be noted. Many special activities are planned for the weekly day of rest because most people are available then. Most Sports events in Israel are held on Saturdays, because this is the shared day of rest. Athletes as well as spectators often have to desecrate the Sabbath. The result is that orthodox people in Israel cannot be serious, professional, competitive athletes. Orthodox people also complain that they cannot effectively compete in the job market or in business because their competitors operate on the Sabbath. These claims are made in political debates but have not reached the courts. But at least in one case, the Bar-Ilan Rd., orthodox residents also petitioned the court, seeking to obtain a holding that the road should be closed throughout the Sabbath (and not only during prayer times).

We can take stock now. Gas stations and movie houses, together with restaurants and bars, are no longer an issue. Many gas stations still are closed on Saturdays, but this is a function of choice and demand, not of legal coercion. Demands to close, or to refrain from opening closed streets, are very much with us. But these issues are raised mainly in main roads within or close to very religious neighborhoods. Internal roads within these neighborhoods are anyway closed. Main roads in other places flow with traffic. At the same time, it is fascinating to see that the struggle over the absence of public transportation never reached the courts, and was not very visible on the agenda of anti-clerical politicians. It is also interesting to note that on all the current issues, public positions cut across the religious-secular divide.

The main issue is Sabbath commerce. On this issue, the law provides full protection to workers and imposes prohibitions on employing people. Nonetheless, about 20% of the work force is employed on the Sabbath regularly or occasionally. And it is now possible to find open shopping malls both on the highways and within some cities. Advocates of freedom of commerce on Saturdays and advocates of Sabbath as a shared day of rest both talk in terms of rights. The matter has now been determined as one of rights by the Supreme Court in both the context of traffic in religious neighborhoods and in the context of commerce on Sabbath. In both contexts, the court reached the conclusion that the rights invoked by the secularists do not support the overruling of the decision to close Bar-Ilan St during hours of prayer, or the statute prohibiting work and employment on Sabbath. The rights discussed in the courts, however, were not the right to freedom of religion or from religion but rights to freedom of movement, freedom of occupation, and the right to have one's sensibilities respected by others.

## B. A Matter of Rights?

The legal and social situation in Israel is a complex combination of arrangements and patterns. It may be used as a fascinating study of the interaction between law and society in a country with many religions and many attitudes to religion. In the case of Israel, the interaction between national culture and heritage, viewed as central to the modern nation-building of Jewish civilization and self determination, and religious traditions of various intensities, present special complexities.

Yet I want to devote the rest of this essay to a single question: can these matters be reduced to discussions about rights? Should they be conceived in this way? It is known that starting in the second half of the 20th century, many controversial issues of public policy have been discussed in terms of rights discourse, especially human rights discourse. The choice of discourse has important implications. Notably, matters of rights are decided by courts, as the 'forum of principle' and not by the political system as a matter of policy. Moreover, human rights are seen as pre-legal constraints on majorities, so that if something is defined as a human right, it may defeat not only a policy determination by a competent authority but even a statutory arrangement enacted by a majority in the legislature. This is as it should be. Human rights are seen in this way so they can function effectively as constraints on the power of states, and of majorities within states, to violate the dignity of individuals and groups. At the same time, individuals and groups often use the special strength of rights to promote their own vision of the good life. There is also the danger of 'imperialism of rights' and a resulting impoverishment of politics and the processes that usually go with political determinations. It is thus important to analyze issues in a way that helps identify whether they should be seen as matters to be decided by the analysis of rights, typically best done by independent courts; or whether they are the proper matter of policy determinations by political forces .

Indeed, in the two clusters of matters that have reached the Israeli courts in the last decade – the closure in (part of the) Sabbath of Bar-Ilan Rd. in Jerusalem and the constitutionality of the laws prohibiting the employment of people on the Sabbath – the court conducted a full rights-based analysis. In both cases, the court upheld the challenged arrangement. Yet when we examine these situations more closely we can see that it is not at all clear that this is indeed the most productive conceptual scheme of dealing with the issues involved. It is not clear, in other words, that the rationales that make human rights such an important element of international law and morality, and such an important element of liberal democracies, apply to the kinds of issues and situations that we have been discussing so far.

## C. International Human Rights Law

Since we are talking about days of worship and about issues of state and religion, let us start from rights connected with religion. International human rights law of course recognizes freedom of religion and of conscience as rights. We can say that these two rights were ones of the first rights to emerge in the struggles of individuals and groups against persecution. These rights require that people are allowed to perform their religious duties. It implies that people should be legally free to keep their religious day of rest even if it is not the day of rest recognized by the society in which they live . Obviously, having one's day of worship (and one's mandatory religious day of rest in Judaism) recognized as the general mandatory day of rest of the state (or even as one of the two days of the weekend in a 5 days work week) helps religious people exercise their freedom of religion. It means that their burden due to keeping their religion is reduced, and it is easier for them to meet their religious duties or customs. It is therefore in the deep interest of religious people to live in a society that generally treats their religious day of rest and worship as an official day of rest. It also helps religious people (and traditional people) to identify with that society and feel at home in it. It may further help that cultural group maintain its cultural cohesiveness. Yet none of these seem to be required by the rights of freedom of religion under international human rights law.

Thus, international human rights law seems to be silent as to the question whether it is permissible to impose a burden on persons who wish to keep their own day of rest by for instance refusing to hire them or promote them or grant them welfare. It does not seem to include duties imposed on employers not to take into consideration the fact that certain workers would not work on their religious day of rest .

Furthermore, international HR law does not prohibit the choice of a day of rest of public offices on the religious day of rest and worship of the majority religion and does not see this practice as a violation of freedom of religion or conscience. On the other hand, it also does not demand that the day of rest will be general or that it should be the day of rest identified by the culture of religion of the majority. It seems to be agnostic on this question.

International human rights law recognizes some rights of minorities, among them the right to keep their religion. However, there is no specification whether this only means that people will be allowed to pursue their religions without interference, or whether the state has to recognize their customs in any way or to positively facilitate their ability to maintain their culture.

In fact, the worship aspect of these days does not seem to be protected by human rights law. But there is a second element of our subject – days of rest. This belongs to the realm of rights of workers. While the details of the rights of workers are not among classical human rights, international law has developed to include significant international standards in this field. The Convention of Weekly Rest in Industry of 1921 of the ILO, establishes that any worker in private or public industry should enjoy a weekly rest of no less than consecutive 24 hours. App. 2 of the convention recommends that this weekly rest will be common to all workers and be granted in the customary or traditional day of rest in that state or region. It is in fact recommended that the weekly rest will be extended to 36 hours where possible. The convention was signed and ratified by 113 states, including Israel.

Another convention that deals with the rights of workers is The Convention concerning Weekly Rest in Commerce and Offices of 1957, which was also signed and ratified by Israel. Article 6 of the convention states that (almost) every worker is entitled to an uninterrupted weekly rest period of at least 24 hours, and it recommends that the weekly rest period will be common to all the workers in one working place. It also recommends that the weekly day of rest will be the day of rest according to the traditions or customs of the country, while respecting the traditions and customs of religious minorities.

It is interesting to note that in November 1993, the European Council has published a directive concerning the organization of work time. Section 5 provided:

#### Article 5: weekly rest

Member states shall take the measures necessary to ensure that, per each seven days period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

The minimum rest period referred to in the first par shall in principle include Sunday.

Yet the second paragraph was nullified by the European court of Justice , saying that "the council has failed to explain why "[it] more closely connected with the health and safety of workers than any other day of the week". Nonetheless, 9 of the then 15 EU states had Sunday as their weekly day of rest.

The indeterminacy of international human rights law on this subject can be seen by the fact that legal arrangements of this issue vary widely among states .

We can conclude that the constraints of international human rights law on our questions are very limited: people should not be legally required to violate their religious law and work when their religions forbid them to work. Workers are entitled to a weekly rest of 24 to 36 hours. It follows that arrangements which require by law that persons will work on days in which their

religion forbids working, or arrangements not allowing workers the minimal weekly rest, can be faulted as violations of human rights. It also follows that other arrangements are all permitted in terms of human rights. It is permitted to specify that the country will have shared days of rest – but it is also permitted to let social and cultural forces determine that. It is permitted to set a 5 days work week or a 6 days work week. And it is permitted, but not required, that the shared day(s) of rest will coincide with the weekly day of rest and worship under the majority religion or according to the majority culture.

Yet many states specify that there is an official day of rest, and many states choose that day according to the day of rest of their majority religion. Moreover, even in the states that do not have such declarations, it is often the case that there is a clear social distinction between the day of rest identified by the majority religion and other days of the week. This situation may be clearer in countries and communities which are more deeply religious, but it is usually quite noticeable in all countries and all communities.

For my purposes, it is important to note that the enforcement of an official day of rest involves much more than protecting people's rights to freedom of religion or workers' rights to a weekly extended rest. It means that on a certain day, all or most working activity ceases. This includes private businesses operated by their owners, or workers who prefer to work either 7 days a week or to work on the day of rest of most others. Families can spend the day together, and parents are at home on the same days that their children are off from their schools. The cultural significance of these facts is very strong. It goes much further than the question of the protection of rights. We saw that the Israeli Supreme Court held that this arrangement does not offend human rights. At the same time, the court did not mention the fact that the law is honored in its breach.

#### D. Should the Situation in Israel be Changed?

As we have seen, debates about the nature of the Sabbath in the public sphere are many, and often deteriorate into violent clashes between religious groups and those who resent the limitations that are imposed by them. In addition, these debates often are translated into legal debates and taken to the courts as either criminal prosecutions or petitions against the authorities.

Many Israelis feel that tensions between religious and non religious Jews are among the deepest and most dangerous rifts in Israel. Some Jews are willing to be violent in support of freedom from religious coercion in the form of closing streets or prohibiting cinemas on Sabbath while other Jews are willing to be violent in order to stop others from driving or shopping on the Sabbath. Days of worship and of rest do not converge in Israel not just because of intense debates about the meaning of the Jewishness of the state, but also because of cultural and economic tensions between religious and secular Jews. Those who do not worship and therefore are not limited in their conduct on the Sabbath often advocate that all legal limitations on freedom of commerce will be removed.

These tensions also create great gaps between the law on the books (which on the whole respects the Sabbath and seeks to prohibit commerce and trade during the day, although it does not command worship of any kind) and social reality.

Against this background, the debate concerning the proper regulation of the Sabbath has become more complex. While orthodox Jews clearly hoped to have full observance of the Sabbath in Israel, they were willing to accept the original distinction between private and public, and accept that the law would only seek to structure the different nature of the Sabbath in public. Now the observance of the Sabbath in public has been seriously eroded, and they debate whether to just let go and concede the new reality, accepting that their lifestyle on Sabbath was going to become very different from that of the non-observant, or seek to enact and enforce laws that may be impossible to enforce. In particular they have an internal debate whether they should seek to reach agreements on say culture yes and commerce no, or whether they should not even enter into agreements like that since as far as



religion goes culture and commerce are identical as violations of religious law. And they do not trust that the new laws will be enforced more effectively than the old ones. Moreover, some see those agreements as a forbidden cooperation with the violations of the Sabbath. Non orthodox on the other way debate whether they should cooperate in maintaining the distinctness of the Sabbath as a cultural form of Jewishness by agreeing to some legal limitations of action on the Sabbath, or whether they should seek to maintain full individual freedom to treat that day of rest as one wishes, refusing to accept any limitation of freedom that is imposed for religious reasons. Interestingly, both sides are very suspicious of each other, each feeling that the status quo has been eroded against it. So the road towards a social agreement that might make the enforcement of the laws easier seems not to be too easy. On the other hand, many feel that the tensions on these matters are extremely unfortunate. They create an antagonism and alienation among the groups, and they generate not necessarily a decrease in religious coercion, but also a weakening of a strong cultural depth of Israeli culture, tending to make it more individualistic, commercialized, and inattentive to the interests of weak populations which are the ones that have to work 7 days a week or to miss on the benefits of resting with their families and friends.

The challenge is this both to find the best arrangement and to find a way to persuade the various groups that this arrangement is indeed better for them than the status quo with its great gap between the law on the books and the law in action.

There have been a number of attempts to deal with this issue. I want to present here the arrangement proposed in a special covenant on state and religion issues among Jews in Israel proposed by myself and an orthodox Rabbi – the Gavison-Medan proposal. I will then discuss the forces preventing the adoption of this (or a similar) proposal, and compare them with the rhetoric of the Design 22 opinion. I will conclude this section with an analysis of the Israeli situation (within the Jewish community) on the relationships between religion and state, society and culture, and rights and policies.

## 1. The Gavison-Medan Proposal

The chapter dealing with the Sabbath is presented in its full form to exhibit the special structure of the document and the texture of its reasoning. The basic tenets of this proposal are shared by most attempts to reach an agreement on the Sabbath. What is unique about the Gavison-Medan covenant is its scope, comprehensiveness, detail and structure.

### Chapter Three: The Sabbath

1. A Basic Law will establish the Sabbath as the official day of rest of the State of Israel.
2. Government offices, educational institutions, factories, banks, services and commercial establishments will be closed on the Sabbath. The prohibition will apply in all places. Essential industries, hospitals and essential services will operate under a limited regime.
3. Employees have the right not to work on the Sabbath. Non-Jewish employees have the right not to work on their religious days of rest. No Sabbath-observing individual will be discriminated against in terms of hiring or promotion in the workplace. A self-employed person will not ask employees to work on the Sabbath. Workplaces operating on the Sabbath will engage employees to work on that day on a rotating basis, and to the extent possible will give Sabbath-observing employees the opportunity to perform higher-paid work during the week.
4. It will not be forbidden for restaurants and places of entertainment to operate on the Sabbath, provided they do not disturb public peace. It will not be forbidden for a limited number of small grocery stores, gas stations and pharmacies to operate on the Sabbath. A permission to operate on the Sabbath will be awarded on a rotating basis, for a special fee. Restaurants, museums and other places of entertainment that are open on the Sabbath will close on another day of the week.
5. Transportation routes will remain open during all hours of the day and all days of the week. In towns or neighborhoods having a solid majority of Sabbath-observing residents, or in other locations where traffic should be limited to certain times, transportation routes may be closed for all or part of the Sabbath as per an authorized decision of the local authority.

Transportation arteries will not be closed for reasons of Sabbath observance.

6. Limited public transport will be permitted on the Sabbath on a reduced schedule, in order to afford mobility to those who depend on public transport while preserving to the extent possible the character of the Sabbath in the public domain and restricting the need to work on the Sabbath. It is recommended that Sabbath public transportation will not be operated by the companies operating it during weekdays, and that the car used will be smaller than regular buses.

7. The possibility of transferring sporting and other events which are currently held on the Sabbath to weekdays will be examined.

8. A comprehensive effort will be made to move the entire economy over to a five-day work week, in order to enable joint social, family, sporting and cultural events on days other than the Sabbath. An employee required to work on the Sabbath will not be required to work on the other general day of rest as well.

9. Sabbath arrangements will not apply to local authorities with a majority of non-Jewish residents.

10. Particulars of the arrangements, the specification of essential institutions and Sabbath frameworks will be determined by special local committees. For arrangements on the national level, the committee will be chosen by the prime minister. With regard to local arrangements, the committee will be chosen by the head of the local authority and the interior minister, in consultation with representatives of all municipal parties. The above arrangements will be strictly and systematically enforced in order to effectively preserve the character of the public domain on the Sabbath.

#### Main Points of Ruth Gavison's Explanatory Notes

I do not see the proposed Sabbath arrangements as a form of religious coercion. My reason for assenting—as a secular Jewish woman living in a state that wishes to preserve its Jewish-Hebrew public culture—is my own independent wish for a prominent and significant expression of the uniqueness of the Sabbath within the Israeli public domain. I concede that in this matter the proposal is paternalistic. The proposal does limit people's freedom. But the limitation is not based on religious grounds, but on a combination of cultural concerns and the rights of workers.

The proposed arrangement is important because it bases the legal rules on a social agreement rather than on laws and determinations of a court. This is important as a part of the attempt to regulate matters concerning state and religion by agreement rather than adjudication. In addition, there are five key gains for the non-observant public:

One— It is made clear that the public discussion of the Sabbath in the public sphere in Israel is a matter of shared culture and not of the enforcement of religious law.

Two—There is an explicit agreement that Sabbath arrangements are not designed to compel Sabbath observance.

Three—This is the first time there is an agreement that those who do not own a private vehicle are also entitled to freedom of mobility on the Sabbath (clause 6).

Four—There is an explicit recognition that the operation of restaurants and commercial places of entertainment on the Sabbath is not anomalous, but appropriate in view of the character of the day (clause 4).

Five—Decisions regarding the form of the Sabbath in a given town or neighborhood are made by residents and their local representatives, so that they do not become pawns of national politicians.

True, the secular public will be obliged to organize their purchases somewhat differently and to forgo shopping on the Sabbath (other than at a small number of convenience stores that will be open), but from my perspective the gain in this case far exceeds the loss. Large scale commerce on the Sabbath is inconsistent with my view of workers' rights and the cultural importance of the Sabbath.

Does the proposed arrangement offend Israel's Basic laws on human rights? I do not think our proposal is inconsistent with the basic laws. There is no right to conduct commercial activity seven days a week or 24 hours a day. Even if there is such a right, the restriction for

purposes of enforcing a general day of rest, which is at the same day as the traditional Jewish day of rest and worship, is for the sake of a worthy objective, and the proposed limitations do not exceed that which is required. There may be those who take issue with one or another component of the restrictions, but there is no sweeping constitutional claim here.

Would it be appropriate to designate a different general day of rest? The argument has been made that in a multi-cultural society a religiously "neutral" day of rest should be selected, in order to encourage 'civic nation building' as against tendencies to emphasize ethnic or religious 'nations'. It may well be that in principle this is indeed the appropriate solution for strong multi-cultural societies, but it does not seem practical for any existing society. In all such societies, it is not practical to have a "neutral" day of rest because, probably, many people would not work on both that day and on their cultural day of rest, and the working week might be divided into two short working parts. The solution does not seem fitting for the only country in the world with a Jewish majority and which was established in order to enable Jews to live in the only society having a Jewish-Hebrew public culture.

In my view the proposal is also advantageous from the standpoint of the religiously observant: They are not required to approve or validate the activities of others on the Sabbath, only to accept that the common legal framework is not designed to enforce religious commandments on those who do not wish to keep them. While our proposal is more liberal than the current legal situation, it keeps the uniqueness of the Sabbath much more than the present social reality, in which there is extensive commercial activity on the Sabbath.

#### Main Points of Rav Yaacov Medan's Explanatory Notes

The importance of the Sabbath for the religious public is clear. For the secular public, the Sabbath can have at least three values: One – Time out from the daily involvement in work and the pursuit of money and a livelihood; Two – A central mode of expression of an overall Jewish—not necessarily religious—identity. Even Ahad HaAm, a thoroughly secular Zionist thinker, viewed Sabbath observance as a national value, coining the phrase: "More than the Jewish people kept the Sabbath the Sabbath kept them" ; Three – Mutual concessions on the issue of the Sabbath, which has been a perennial stumbling block in religious-secular relations, may actually serve as an opening for a renewed healing process in Israeli society.

As an observant Jew, I accept the fact that the value of keeping the Sabbath in the public arena does not nullify, at least from a practical point of view, the value of respecting the individual's freedom to act in accordance with his own beliefs on the Sabbath, or in any other disputed sphere (clause 4). Nevertheless, the Sabbath should take precedence over the economic interests of commercial bodies—and factories and commercial establishments will be closed on the Sabbath (clause 2).

In order to prevent discrimination against salaried or self-employed observant individuals in favor of the secular, the amana stipulates that in principle employees will not work on the Sabbath – and in workplaces that do operate on the Sabbath, such as places of entertainment, as specified in clause 4, Sabbath employment will be conducted on a rotating basis (clause 3).

When formulating the proposal regarding the Sabbath, I had three principles in mind: First principle – To instill in the mind of the public the conviction that there is a solution to the perpetual war between observant and secular Jews in Israel that is not oppressive and coercive.

Second principle – To refrain as much as possible from violating the religious prohibition against 'creating pitfalls for others'. Nowhere does the covenant grant permission or exoneration for desecrating the Sabbath. What it does do is reduce state intervention in the form of imposing restrictions on the Sabbath. Accordingly, in my opinion, the proposal does not pose a distinct halakhic problem.

Third principle – To weigh the damage the proposal inflicts on the character of the Sabbath, not only against the ideal image of the Sabbath but also against existing reality. This reality can be measured on two planes: The situation in the street reflects the present – and already today there are extensive amounts of Sabbath desecration; and the situation in the courts

reflects the future – where contemporary judicial decisions presage a trend towards expanded Sabbath desecration.

I was aware of the serious concerns regarding the future if the proposal on the Sabbath is adopted (the price is high, in terms of Sabbath observance) and I had given them a careful consideration, while weighing them against the dangers of a future in which no effort is made to reach an agreement with the secular public, and affairs are allowed to proceed at their own momentum. The fears are great in both scenarios, but my conclusion was that the hazards of quietism are not only more palpable, they are more severe .

## 2. Prospects and Arguments re the Gavison-Medan proposal

The Gavison-Medan proposal in general, and the one concerning the Sabbath in particular, was received very warmly by many secular and religious leaders who shared the view that it was important to base regulation of these issues on agreement rather than laws and judicial determinations. One private bill called for the implementation of the Sabbath proposal , and it was endorsed by the Forum of Mayors. The Israel Democracy Institute (IDI) has advanced a similar Sabbath Bill as a part of its proposal for a constitution for Israel .

Despite this activity, and despite the apparent broad agreement, it seems unlikely that the proposal or a similar one would be enacted in the near future. The religious parties are mostly interested in the initiative but are reluctant to appear to be the sole or main movers. For them, pushing for this kind of legislation is legitimizing what should not be legitimized. They would much rather accept this as law initiated by others. Secular forces are mostly not willing to bargain for a law limiting commerce for the sake of gaining legality to culture and entertainment simply because the status quo in reality gives them both, albeit via the non enforcement route, or through fines which are anyway much less than the gains out of Sabbath trade. The official recognition of the legality of restaurants and entertainment on Sabbath is not worth the political concession in terms of commerce. As Medan indicates, it is not so much the secular liberal politicians as the economic interests standing to lose their best day of trade. Interestingly, the Labor Union has not joined in with this 'culture' war.

So we do not have here a real debate concerning the legal arrangements. Rather, it is a debate about social reality. The 'state' gave the religious sector a great 'victory' by enacting laws that restricts work and commercial activities on Saturdays. Now the same 'state', via its enforcement mechanisms, undermines the legal arrangement that it has itself enacted. This may suggest that the past reality, too, was not really a matter of state enforcement but on the willingness of the public to maintain the social practices involving limited activity on Sabbath.

This situation gets to be even more intriguing when we look closely at the Design 22 opinion given April 4th, 2005.

## 3. The Design 22 opinion

When I was writing my explanatory notes to the Gavison-Medan proposal in 2003, the question of the relationship between the statutory Sabbath regime in Israel with the human rights basic laws was still a theoretical question. Basic Law: Human Dignity and Freedom only applies to new legislation, and Basic Law: Freedom of Occupation had a long grace period. The Design 22 decision was the first in which this challenge was faced squarely.

Petitioner, a company convicted for employing people in violation of the Work and Rest Hours Law 1951, claimed that the law was inconsistent with the right to freedom of occupation, and that it did not meet the conditions of the limitation clause. Petitioners claimed that indeed workers were entitled to a weekly day of rest, but argued that they should be allowed to choose their day of rest in a flexible way and that there should not be a shared day of rest for (Jewish communities) in the country as a whole. Alternatively, petitioners asked that their business be recognized as deserving of a special permit to work on Sabbath based on their need to withstand competition.

President of the Israel Supreme Court Aharon Barak delivered the main opinion of the court. He traced the fact that the right of a person to choose his occupation unless restricted by law had been recognized by Israeli law before 1992 (par. 5). That after the 'constitutional revolution' the right became of constitutional status (par. 6). And that the grace period under the law has elapsed (par. 7). He therefore moves on to an examination of the case through the mechanism established by the Basic Law, consisting of three questions:

1. Does the arrangement infringe on the right?
2. If so, is its purpose legitimate?
3. Is the infringement proportional?

When the answers to the second and third questions are negative, Barak asks what the constitutional remedy is.

1. Barak gives a quick positive answer to the first question in pars 9-10. The law states that "every citizen or resident of the state has the right to practice any occupation, profession or business". His test for this conclusion is quite broad. Anything that limits the freedom of a person to pursue an occupation, even if we are dealing with hours and places of such practice, may have relevance to freedom of occupation.

2. Barak then moves on to discuss whether having one day of rest, and letting people choose the one that fits their religion, fits the values of Israel as a Jewish and democratic state. Barak affirms that Israel is indeed Jewish as well as democratic, and states that the choice of the days of rest fits the values of the state as both Jewish and democratic, because within the Jewish tradition itself the rationale of the Sabbath is both religious AND social. Barak also refers to the international agreements and the customs of other nations in which the national day of rest is determined by the majority's religion with recognition of the freedom of people to choose as their day of rest the day under their own religion or culture.

The combination of the social and the religious-national goals of the legal arrangement, says Barak, meets the requirement of a legitimate goal of the legislation. (par. 19-21). He adds that the wish to maintain a national, shared, day of rest beyond giving workers the right to have a day of rest each week is also legitimate, and reflected in the legal arrangements of many countries. (par 22). Finally he rejects the claim that designating the day of rest by the religion of the majority constitutes religious coercion (par. 23).

3. Barak further finds that the arrangement of the law is proportional. (pars. 24-26)

Finally, Barak rejects the claim that petitioners are entitled to get a special permit to operate on Sabbath.

Judge Miriam Naor concurs and adds that a flexible weekly day of rest is in fact unacceptable because it will in fact relegate the power to determine the workers' day of rest to the employer, and will create potential for discriminating against observant Jews who will be less likely to be hired by an employer who operates their business on Saturdays .

Judge Procaccia (the judge who had given the decision in Kaplan) also concurs and adds that the two goals of the legislation – the social and the national-religious – need themselves to be balanced so that people will have the effective liberty to give their day of rest a content of their choice, suitable to a pluralistic and tolerant society. In fact, Procaccia recommends that something like the Gavison-Medan proposal be implemented via the section of the law authorizing the minister to give permissions to operate on Sabbath to various businesses connected with culture and entertainment. She agrees that commerce on Sabbath should not be included under that section.

While all the judges rely on the fact that the Sabbath laws serve a combined cultural, religious and social function none of them addresses the fact that the social aspect is in fact disregarded in practice, and they do not really address the petitioners' claim that Sabbath limitations create an unfair advantage to those who employ people seven days a week!

#### 4. Analysis

Design 22 and the other petitioners will continue to trade on Sabbath and pay fines. Alternatively, they will look for non-Jewish workers. The law, held constitutional in the opinion, is simply irrelevant for out-of-town shopping malls and for a growing number of malls within cities.

It follows that the goals held worthy and justified are not achieved – and the law and its enforcers do not enforce it. The goals which are undermined by non enforcement are not only the national-religious-cultural goal of maintaining the Jewish character of the public sphere, but also the aspect of the rights of workers and the interest of the community in a shared day of rest devoted to matters other than toil and routine and harassment.

It seems that the holy flag of the fight against religious coercion is being mobilized here to promote a consumer commercial society whose shared public culture is impoverished. It is not a matter of religion, not even of Jewish particularism, but simply a matter of the ever growing power of market forces and commercial interests.

Litigation cannot change the patterns of enforcement . The present situation is not in fact a struggle between state and religion or between religious and secular militants. It is a decision by default of a cultural quest for identity in Israeli society. Religious people may resent a busy street in their midst. It is unlikely that a shopping mall will be opened in their neighborhoods. So this is not about people's right to practice their religion or about people's right to spend their day of rest the way they choose. It is about whether or not Israel will maintain a distinct cultural public sphere, and whether this distinct public sphere will include a weekly cycle that gives the Sabbath a special place.

In a way, the mere fact that Saturday is Israel's official day of rest means it is different. Children do not go to school, and most parents are also home with them. The debate is on whether it should be different in additional ways. All agree that the law should not force anyone to observe. But should it undertake the somewhat paternalistic function of structuring the Sabbath in a way that will facilitate a consistent difference between the work days of the week and the one day which is different? Should it be permitted, or obliged, to spend resources on enhancing the feasibility and the availability of specifically Jewish ways of making the day distinct?

I believe these are important questions. But they are not legal questions at all. They have to do with the role of the state, as the political framework, in maintaining or encouraging not only individual (and even collective) rights but also the fabric of society and its cohesiveness. It is not surprising that the court in its Design 22 decision does not address them. What is needed here is not the declarative upholding of the laws as not inconsistent with the right to freedom of occupation. We do need a much more decisive analysis of the situation in terms of social rights and the rights of workers. But we also need the recognition that a central issue of the identity and nature of the shared day of rest is cultural. Most cultures, Judaism included, are at least strongly connected with religions. Yet a public culture cannot exist without social practices. Most social practices cannot endure if they are not enforced even against the wishes or interests of some who want to change them. In Israel, at least on this matter, this is not a matter of rights or of religion. It is mainly a matter of the decision of society, a majority of which is no longer religious, about the kind of social norms and public culture it wants.

#### E. Some Notes for Further Thought

I have mainly discussed legal and social issues stemming from the fact that within the Jewish majority in Israel there is a long and complex debate about the identity of Jewish society in Israel. Orthodox Jews keep the Sabbath because this is a part of their religious way of life. The debate about the public character of the Sabbath is not about religion or about the sensibilities of orthodox people. Orthodox Jews have lived for hundreds of years among non-Jews, and they are well accustomed to living among people who do not observe the Sabbath. The practices in Israel, even as they are now, are more suited to the interests and needs of observant Jews than life in any other Western democracy. They do not claim that

their situation in the USA or in Europe is a violation of their rights. It is obviously true that life in Israel is more limiting on the Sabbath than life is on Saturdays in the West. But life in Israel on the Sabbath is not more limited than life is on Sundays in a number of Christian countries. The countries who decide to keep strict Sunday laws do not violate the rights of their residents, including those who are not Christians or those who do not observe. This, too, suggests that this is not really a matter of human rights or freedom of religion or from religion.

The intensity of the debate in Israel is connected both to the strength of economic forces and individualistic tendencies but also to the political undercurrents of the debate among Jews about the implications of the Jewishness of the state, and the very legitimacy of maintaining this distinctness. While most Jews – orthodox and secular alike - believe that Jews have a right to national self determination in Israel, it is not always clear what makes non- orthodox Jews distinct, and whether they do belong to the same nation as orthodox Jews. Ethnic nations must have some primordial, cultural, historical characteristics that make them distinct from other nations. In part, the debate about the Sabbath is also one about the cultural identity of non-orthodox Jews and the nature of their ties with other Jews, in Israel and abroad. This context gives the debate about culture an additional dimension, both among Jews and in the relationships in Israel between Jews and non-Jews.

The limits of law and the inapplicability of rights discourse are relevant when debates are among people of the same culture, identified in our context by the same accepted weekly cycle. They are doubly relevant in states, including Israel, where there are a number of distinct cultural and religious communities. If