

**THE 23<sup>RD</sup> HUGO L. BLACK LECTURE**

**ON FREEDOM OF EXPRESSION**

**HUMAN DIGNITY AND FREE SPEECH**

Delivered by

**PROFESSOR AHARON BARAK**

**PRESIDENT OF THE ISRAELI SUPREME COURT (RET.), IDC HERZLIYA**

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Commentary by Eric Stephen '13



## THE HONORABLE AHARON BARAK, FORMER PRESIDENT OF THE SUPREME COURT OF ISRAEL

The honorable Aharon Barak is the former President of the Supreme Court of Israel, credited as “the most influential Justice Israel has ever known”.<sup>1</sup> Born in 1936 in Kaunas, Lithuania, President Barak and his family survived the Holocaust for three years in the Kovno ghetto before immigrating to Israel in 1947, eventually settling in Jerusalem. Barak received his Bachelor of Laws in 1958 from the Hebrew University of Jerusalem before being drafted into the Israeli Defense Forces from 1958 to 1960. After his discharge, Barak went on to receive his doctorate in 1963 and was appointed a professor at the Hebrew University of Jerusalem in 1968. He then served as the Attorney General of Israel from 1975 until his appointment to the Supreme Court in 1978. There, he served as a Justice between 1978 and 1995 when he began his service as the Court’s President until his retirement in 2006. Currently, President Barak is a Visiting Professor of Law and the Gruber Global Constitutionalism Fellow at Yale Law School.

As an honored speaker for the Hugo L. Black Lecture on Freedom of Expression, President Barak will explore the interrelationship between the freedom of speech and human dignity in a democratic society. However, because the United States and Israel differ dramatically with regard to both their governmental structure and also their conceptualizations of the democratic principle of free speech, this essay seeks to provide a framework with which to develop a working understanding of Israeli free speech jurisprudence. By first describing Israel’s constitutional model and the nature of the rights protected by it, the essay will ground Barak’s interpretations of free speech and human dignity in the context of Israeli law. Emphasis is placed on Barak’s method of judicial analysis and how it is applied to issues of free speech<sup>2</sup> as they relate to questions of human dignity in a democratic regime.

### **A Brief History of Constitutionalism in Israel**

In contrast to the United States and numerous Western democracies, Israel does not have a federally recognized Constitution, and thus most of Israeli law is statutory in nature. As a result of this difference, it is important to first provide a brief background on Israel’s legal system before exploring President Barak’s jurisprudence in relationship to it.

The genesis of the Israeli legal structure can be traced to the May 1948 Declaration of Independence, which not only formally established the State of Israel but also called for the drafting of a Constitution. However, as a result of the ensuing Arab-Israeli War and the discord among representatives as to whether the nature of such a constitution should predominantly reflect Western democratic values or Jewish legal tradition (*Halakha*), a formal constitution was never agreed upon.

In its stead, Israeli lawmakers accepted the Harari proposal, put forth in 1950. The proposal established a house of parliament, called the Knesset, and expounded the idea that, instead of a formal constitution, Israeli constitutional law would develop over time through the passage of super-legal Basic Laws. Although these Basic Laws would be passed by the Knesset similar to other legislation, they would deal primarily with basic constitutional concerns—such as governmental structure—and therefore hold a more privileged position to that of other Israeli

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<sup>1</sup> Shalev, Gabriela. “Interpretation in Law: Chief Justice Barak’s Theory”. 36 *Isr. L. Rev.* 123 (2002). At pp. 124-125.

<sup>2</sup> Rights similar to the freedom of speech, such as religious freedom and freedom of assembly, will not be considered in this essay, as they are not central to Barak’s lecture.

law. While no law formally recognizes Basic Law as superior to other legislation, there is general agreement among Israeli legal scholars that Israel's Basic Law collectively acts as an uncodified constitution and should be interpreted as such.<sup>3</sup>

For the purposes of this essay, the primary Basic Law of interest is the 1992 Basic Law: Human Dignity and Liberty, which is intended "to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state".<sup>4</sup> Enumerated among its protections are the rights to privacy, intimacy, travel, and "life, body and dignity". Although this legislation vastly expanded the civil liberties afforded to Israeli citizens, one may nonetheless note the explicit absence of various other basic rights, such as the freedoms of speech, religion, and assembly—all of which structure the core of the United States' First Amendment.

As we will come to see, however, President Barak believes that these and other such rights are implicit in Basic Law, embedded in the Human Dignity and Liberty's intentionally vague "right to dignity". Indeed, President Barak considers the passage of Basic Law: Human Dignity and Liberty alongside Basic Law: Freedom of Occupation in 1992 to be a "Constitutional Revolution" that has demarcated the basic democratic values of free speech, equality, and autonomy as primary legal concerns.<sup>5</sup>

As Barak writes, "[b]y virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status much like the situation in the United States, Canada, and many other countries".<sup>6</sup> President Barak grounds these implicit rights not only in transnational ideals of democratic order, but also in the basic values of the religion of Israel:

"The fundamental values of Judaism—which we bequeathed to the whole world—are our basic values. I am referring to the values of love of humanity, sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of the law-maker, and other such eternal values. The reference to these values is on a universal level of abstraction. The state is democratic, by recognizing institutions and organs built upon majority rule, by providing full equality among all its citizens and by its recognition of basic human and civil rights."<sup>7</sup>

In doing so, Barak contextualizes basic civil liberties into Israel's unique status as both a democratic and Jewish nation.

Regarding the freedom of speech specifically, Barak writes that, "since the enactment of the Basic Law: Human Dignity and Liberty, freedom of speech has ascended the legal hierarchy and today reigns supreme on the throne of rights set out in the Basic Law: Human Dignity and Liberty".<sup>8</sup> Barak makes similar claims as to the basic right of equality, suggesting it is also protected as an integral component of human dignity.<sup>9</sup>

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<sup>3</sup> Sharev at fn. 6.

<sup>4</sup> Basic Law: Human Dignity and Liberty. Art 8. §1.

<sup>5</sup> Barak, Aharon. "A Constitutional Revolution: Israel's Basic Laws" (1993). *Faculty Scholarship Series*. Paper 3697. <[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4700&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4700&context=fss_papers)>.

<sup>6</sup> *Id.* At pg. 83.

<sup>7</sup> *Id.* At pg. 84.

<sup>8</sup> 5 HCJ 6126/94. *Szenes v. Broadcasting Authority*. At §27.

<sup>9</sup> However, "[o]nly those aspects of equality that are closely and objectively connected to human dignity are included within the framework of the right to human dignity." See HCJ 7052/03. *Adalah v. Minister of Interior* at §60.

Thus, the Basic Law of Israel does not explicitly protect the freedom of speech or, more broadly, of expression in its uncodified constitutional structure. It is only through a specific reading and interpretation of Israeli Basic Law, one that President Barak unequivocally endorses, that the freedom of speech finds a privileged place within the super-legal text. Because of this, it is next important to develop a background on Barak's theory of constitutional interpretation in order to better understand how such a conclusion was reached.

### **President Barak's Method of Constitutional Interpretation**

President Barak makes intelligible the key components of his constitutional theory in his seminal work *Purposive Interpretation in Law*.<sup>10</sup> As the name implies, Barak takes what he calls a "purposive approach" to constitutional interpretation, one that gives primary regard to both the law's intent as well as the fundamental principles that undergird the law; in doing so, it places little emphasis on the law's exact language or the drafters' intent.

This is to say, the overall *purpose* of the law is what is analyzed with most emphasis. As legal scholar Gabriela Shalev explains,

"Barak holds a text's purpose to be a standard through which the choice of legal meaning from amongst the various possible linguistic meanings of the text, should be made. This purpose is not historical or psychological, but rather normative; it incorporates a particular balance made by weighing a series of considerations and theories, and reaching a normative conclusion."<sup>11</sup>

It is important here to note that the legislation's language and intent are not disregarded altogether—these components define the boundaries of analysis. However, at the same time, there is no legislation that, in Barak's eyes, is so unambiguous that it does not require some form of judicial interpretation.

According to Barak, the appropriate analysis of a given law entails a form of judicial balancing. This "balancing" places in conversation a statute's "subjective intent"—which is to say the drafters' intent—and its "objective intent"—which is to say the fundamental constitutional principles that underpin the law itself. When analyzing Israel's Basic Laws, Barak privileges the latter, placing more meaning on the values underlying the text rather than the intent of the framers. Under Barak's interpretive schema, the notion of fundamental values is to mean "values that reflect the deeply held beliefs of modern society, not passing trends... fundamental beliefs that have passed the test of time, changing their form but not their substance".<sup>12</sup> Under this construal, President Barak promulgates an interpretive theory that is "done in a way that realizes [a law's] social objective...[as] evaluated against the backdrop of the legal system".<sup>13</sup>

Similarly, President Barak's purposive interpretation also informs his understanding of judgeship. As he contends,

"A good judge is a judge who, within the bounds of the legitimate possibilities at his disposal, makes the law that, more than other law he is authorized to make, best bridges the gap between the law and society and best protects the constitution

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<sup>10</sup> Barak, Aharon. *Purposive Interpretation in Law*. Trans. Sari Bashi. Princeton, NJ: Princeton University Press, 2005.

<sup>11</sup> Shalev at pg. 127.

<sup>12</sup> Barak, Aharon. "A Judge on Judging: The Role of a Supreme Court in a Democracy," (2002) 116 *Harvard Law Review* 16, at pg. 71.

<sup>13</sup> *Id.* At pp. 124-125.

and its values...In the absence of means, he examines whether it is possible to create new means to help realize the judicial role".<sup>14</sup>

Here, President Barak places tremendous import on the role of a judge in a democratic form of governance. Under this interpretation, the judge acts as the caretaker of Israeli values, scrutinizing over whether they are sufficiently respected in the laws passed by the Knesset.<sup>15</sup>

From this interpretation, one may draw a marked contrast between the approaches of President Barak and American Justice Antonin Scalia, who spoke in this lecture series two years ago. For Justice Scalia, an ardent textualist, the framers' intent and the citizenry's understanding at the time of a law's passage should govern how a judge understands and interprets law. Whereas Justice Scalia would consider a law's interpretation to be unchanging over time, President Barak in contrast is more likely to understand the meaning of a law to evolve alongside evolving constitutional values, as can be seen in his exposition of the 1992 Constitutional Revolution. In contradiction to Justice Scalia's claim that the American Constitution is "dead, dead, dead!"<sup>16</sup> Justice Barak considers Israel's body of law to be a "living organism in a changing environment".<sup>17</sup>

It may also be interesting to note for contrastive purposes that President Barak spends some time in his work *Purposive Interpretation in Law* reflecting on the Basic Law's application to the private sphere. In contrast to constitutional interpretations of civil liberties in the United States, Barak views the human rights and freedoms underlying Basic Law to apply to myriad private sectors as well.<sup>18</sup>

### **Applying President Barak's Method to Freedom of Speech**

As aforementioned, President Barak views the 1992 passages of Basic Law: Human Dignity and Liberty alongside Basic Law: Freedom of Occupation to engender a fundamental shift in Israel's legal reality. This "Constitutional Revolution", as Barak terms it, places human rights and individual liberties in a dominant position as compared to questions of governmental authority, jurisdiction, and discretion. According to Barak, this also affects Israel's conception of judicial review: it is now in the hands of the judiciary to assure that the fundamental values that undergird the Basic Laws are not infringed upon by statute.

However, it is also important to note that President Barak's efforts to liberalize the Court began much earlier than the purported "Constitutional Revolution" of 1992. For example, in *Tnu'at L'or v. Knesset Speaker*,<sup>19</sup> then-Justice Barak suggested that the Court had the broad jurisdiction to strike down laws passed by the Knesset, even in the absence of statutory approval. In *Ressler v. Minister of Defense*,<sup>20</sup> also written by Barak when he sat as a Justice, he greatly expanded the Israeli Supreme Court's definition of justiciability, a tenet of law that defines what a given Court has the authority to hear. By dramatically dilating the Court's justiciability, Barak

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<sup>14</sup> *Id.* At pp. 307-308.

<sup>15</sup> For a critique of this role, see broadly Harel, Alon. "Skeptical Reflections on Justice Aharon Barak's Optimism". 29 *Isr. L. Rev.* 261 (2006).

<sup>16</sup> This statement was delivered during a speech at Southern Methodist University. A review can be found here: <<http://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-86853.html>>.

<sup>17</sup> Barak, "A Judge on Judging", *Ibid.* at pg. 75.

<sup>18</sup> See, for example, Shalev, Gabriela, "Constitutionalization of Contract Law" in A. Gambro and A.M. Rabello, eds. *Towards a new Ius Commune* (Jerusalem, Harry Sacher Institute for Legislative Research and Comparative Law), 1999. Cf. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), in American jurisprudence.

<sup>19</sup> H.C.J. 142/89.

<sup>20</sup> H.C.J. 910/86.

discarded a staunch notion of “separation of powers”, suggesting that the relationship between governmental branches should instead be conceived as “non-dependence by defined mutual supervision”.<sup>21</sup> However, he does concede that this mutual supervision must come with some restrictions. According to Barak, despite the judiciary’s expanded role, the Court must still respect the decision-making power of the legislature. Judicial interpretation on statutory law should encompass a “zone of reasonableness” in which the Court gives due deference to the role of the legislature.<sup>22</sup> Nonetheless, Barak’s decision in *Ressler* cast the net of the Supreme Court’s jurisdiction wider than it had ever been, in doing so passing to the Court the responsibility of protecting the individual rights of citizens.

The role of the judiciary became further expanded in 1992 with the passage of the two aforementioned Basic Laws. Out of Basic Law: Human Dignity and Liberty particularly sprung the need for the Court to adjudicate issues surrounding civil liberties, such as free speech and other basic values of democratic governance.

From the perspective of civil liberties, what is perhaps most intriguing about the Basic Law: Human Dignity and Liberty stems from its statement of purpose: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state”.<sup>23</sup> For interpretive purposes, questions arise as to what these “values” are. Are there tensions associated with defining Israel as *both* a Jewish and a democratic state? Does the use of “democratic state” imply Western values or a unique set of values informed by both the history of the Jewish people and also other nations’ constitutional experiments? Given the explicitly privileged place of Judaism, does the extent of certain rights and liberties differ among religious and ethnic lines? And, given the almost continuous conflict in the region since Israel’s founding in 1948, how do these values weigh alongside obvious questions of safety and national security?

As President Barak notes, “[e]xtensive case law dealt in the past with the character of the state as a democratic state...More difficult are the questions of what a ‘Jewish state’ is, and of the relation between the term ‘Jewish state’ and the term ‘democratic state’”.<sup>24</sup> Nonetheless, Barak proposed a synthesis:

“The content of the phrase ‘Jewish state’ will be determined by the level of abstraction which shall be given it. In my opinion, one should give this phrase meaning on a high level of abstraction, which will unite all members of society and find the common among them. The level of abstraction should be so high, until it becomes identical to the democratic nature of the state. The state is Jewish not in a halachic-religious sense, but in the sense that Jews have the right to immigrate to it, and their national experience is the experience of the state (this is expressed, *inter alia*, in the language and the holidays)...The basic values of Judaism are the basic values of the state. I mean the values of love of man, the sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of law over the legislator and the like, values which Judaism bequeathed to the whole world. Reference to those values is on their universal

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<sup>21</sup> Barak, Aharon. "On Powers and Values in Israel," *Hapraklit* 42:3 (March 1996), At pp. 447.

<sup>22</sup> Barak, Aharon. "Judicial Philosophy and Judicial Activism," in *Iyunei Mishpat* 17 (1992). At pp. 495.

<sup>23</sup> Basic Law: Human Dignity and Liberty. Art 8. §1.

<sup>24</sup> Barak, Aharon. "The Constitutional Revolution: Protected Human Rights," *Mishpat Umimshal* 1 (1992/3). At pp. 30.

level of abstraction, which suits Israel's democratic character, thus one should not identify the values of the state of Israel as a Jewish state with the traditional Jewish civil law. It should not be forgotten that in Israel there is a considerable non-Jewish minority. Indeed, the values of the State of Israel as a Jewish state are those universal values common to members of democratic society, which grew from Jewish tradition and history.”<sup>25</sup>

Although critics have upbraided Barak for what they believe to be an attempt to minimize Jewish values,<sup>26</sup> his interpretation of the Basic Laws appears to be predicated on the belief that Jewish theology and democratic principles prove to be fundamentally complementary.

Given Barak's understanding of the purpose of Basic Law: Human Dignity and Liberty, one can next better understand Barak's subsequent jurisprudence that touches on the law. His first articulation of his “Constitutional Revolution” can arguably be found in the 1993 case *United Mizrahi Bank v. Migdal Cooperative Village*.<sup>27</sup> As he begins his opinion,

“With legislation of [the new Basic Laws] a substantial change occurred in the status of human rights in Israel. They have turned into constitutional rights. They have been given supra-legal constitutional status. A "regular" law of the Knesset cannot change them. Regular legislation cannot infringe a protected human right unless the demands set out in the Basic Laws are met. Nonobservance of the constitutional demands turns the regular statute into an unconstitutional statute. This is a statute which bears a constitutional flaw. The court can declare its invalidity.”<sup>28</sup>

Under Barak's interpretation of Basic Law: Human Dignity and Liberty, the Court is granted broad authority to scrutinize any law that even ostensibly infringes upon certain democratic values. For a law to survive judicial scrutiny, according to Barak, the legislation must be “enacted for a proper purpose...befit the values of the State of Israel...[and infringe] to an extent no greater than is required”.<sup>29</sup> Barak terms this the “principle of proportionality”, which suggests that a statute cannot have an effect that is *disproportionately* large given its intent.<sup>30</sup>

With the elevation of Barak to the position of President in 1995, this soon became an established standard under which he reviewed laws. Thus, any law that militates against fundamental liberties inherent to a democracy must overcome an extremely high level of judicial review in order to be considered legally valid. As we will see, Barak views the freedom of speech to be one such democratic value and has made an active effort to expand free speech rights in Israel since the passage of the 1992 Basic Laws.

### **The State of Freedom of Speech and Freedom of the Press in Israel**

Because Israel is a relatively young state that lacks a codified constitution, the nation's jurisprudence with regard to the freedoms of speech and of the press is evolving. Placed within a

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<sup>25</sup> *Id.*

<sup>26</sup> For broad discussion, see Neuer, Hillel. “Aharon Barak's Revolution”. 3 Winter 5758, 1998. <<http://azure.org.il/include/print.php?id=395>>.

<sup>27</sup> CA 6821/93.

<sup>28</sup> *United Mizrahi Bank* at pp. 352.

<sup>29</sup> See Hillel at fn. 90.

<sup>30</sup> For a transnational interpretation of this principle, see Cohn, Margit. “Three Aspects of Proportionality”. Pres. VIII World Congress of the International Association of Constitutional Law. 2010. <<http://www.juridicas.unam.mx/wccl/ponencias/9/161.pdf>>.

global perspective, however, this evolution remains quite unimpressive. For example, the 2013 Reporters Without Borders Press Freedom Index ranks Israel as 112 out of 179 nations (the United States is at 32).<sup>31</sup> This ranking not only places Israel well within the bottom 50% of nations with regard to freedom of the press but also bears witness to a receding trend among Israeli press rights over time, as it is a 19 point drop from just four years prior.

Similar concerns arise as to the freedom of speech. Israeli legal scholar Guy Carmi, for example, has noted a trend within the Israeli Supreme Court that he calls the “dignitizing” of free speech.<sup>32</sup> Carmi suggests that the Court’s free speech rulings have moved progressively away from privileging civil liberties and instead toward a focus on dignity. Such an approach is often of concern for civil libertarians, as it is often seen to give the government broader latitude with which to reduce or eliminate speech on the basis of its purported “offensiveness” to an individual or to a community. This analysis reads to a common conflict in both Israeli and American free speech jurisprudence: in many cases, the question presented to courts concerns how to adjudicate tensions that arise between human dignity and the rights of the audience on one hand and freedom of speech and the rights of the speaker on the other.

This section seeks to analyze major issues of freedom of speech in Israel in the context of Barak’s jurisprudence. It will begin with a specific analysis of Barak’s conceptualization of Free Speech within Basic Law: Human Dignity and Liberty and then move on to examine how he applies that understanding on specific topics, such as libel, censorship, and artistic expression.

### ***President Barak’s Free Speech Jurisprudence***

The freedom of speech is not absolute: it may be limited by other competing interests and values, such as national security, human dignity, or incitement to violence. Thus, when a case regarding the freedom of speech is appealed to the Israeli Supreme Court, the question before the Justices becomes whether the professed goals advanced to limit the speech are sufficient merit such an infringement. As President Barak puts it, the “scope of protection given to [free speech] is a function of balancing between freedom of expression and other conflicting principles.”<sup>33</sup> The first question the Court must grapple with, then, is the interpretive method with which it will balance such competing democratic interests and what weight it should apply to each value respectively.

Over the Court’s history, Israeli Justices have advocate numerous different interpretive methods to deal with this question. For President Barak, the freedom of speech is privileged as a core value of Israel’s legal system and may only be infringed upon in the most dire of circumstances. He writes,

“[the] freedom of expression and creativity can be violated only if such violation is consistent with the values of the State of Israel, is for a proper purpose, and does not exceed the necessary means. The infringement is deemed to be consistent with the State of Israel’s values only if the probability of its materialization is nearly certain, and only if the harm to the public interest is harsh serious, and severe.”<sup>34</sup>

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<sup>31</sup> World Press Freedom Index 2013. < [http://fr.rsf.org/IMG/pdf/classement\\_2013\\_gb-bd.pdf](http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf)>.

<sup>32</sup> Carmi, Guy E. “‘Dignitizing’ Free Speech in Israel: The Impact of the Constitutional Revolution on Free Speech Protection”. McGill Law Jo. Vol. 57 Nbr. 4, June 2012.

<sup>33</sup> *Szenes* at §11.

<sup>34</sup> *Szenes* at §28.



This form of judicial scrutiny is often termed the “Near Certainty Test” because it allows for the infringement on speech only when there is a near certainty that the speech under question will cause grave and immediate danger either to an individual or to the public more broadly.<sup>35</sup> This “Near Certainty Test” closely resembles the strict scrutiny test found in American free speech jurisprudence.<sup>36</sup>

Given such a high standard of review, Barak’s judicial record reflects his belief that only the gravest of situations warrant a limitation on speech. Although the scope is narrow, Barak nonetheless has defined several situations in which this level of judicial scrutiny can be met, including instances of defamation,<sup>37</sup> an imminent threat to public safety,<sup>38</sup> and severe damage to public order.<sup>39</sup> Because the determination of whether an infringement is justified must, by definition, occur on a case-by-case basis, his rulings do not contain simple trump cards or hierarchical orderings of liberties; instead, a delicate balancing test is developed that reflects both the facts of the case and the specific tension that arises between the competing values. A few such instances will next be explored.

### ***Libel, Defamation, and Human Dignity***

The freedom of speech surrounding issues of defamation and libel is an interesting place to begin to analyze Barak’s free speech jurisprudence because it is where one can most explicitly see the tension between a speaker’s right to speech and the listener’s right to dignity. President Barak has repeatedly argued that the freedom of speech may be acceptably limited to protect against slander, libel, and defamation in some circumstances. As Barak writes, “[a] person’s right to his or her good name is a basic value in every democratic society.<sup>[40]</sup> It is a necessary condition for a freedom-loving society. It is predicated on the need for an internal sense of value, personal pride, and personal recognition among people”.<sup>41</sup> Barak understands this right to a reputation to be not only underwritten by the values of democracy but also by Jewish tradition, citing for example the Tractate Baba Metzia in the Babylonian Talmud.<sup>42</sup>

Nonetheless, concern for citizen dignity must be placed alongside the value of free speech. Although Barak is sympathetic to protecting Israeli citizens from libel and defamation, he nonetheless holds that “a democratic society is based on the recognition that the feelings of some will inevitably be offended by their fellows’ exercise of their respective freedoms”.<sup>43</sup> Thus, the question of speech rights must be placed in the context of the facts presented before a judicial decision can be determined.

Barak’s own jurisprudential analysis of free speech and libel can be traced most practically to 1989, before the passage of Basic Law: Human Dignity and Liberty. In the landmark case of *Avneri v. Shapira*,<sup>44</sup> then-Justice Barak set a high legal bar for the passage of temporary restraining orders on the publication of potentially libelous material. Here, Barak held

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<sup>35</sup> This Near Certainty Test was first established in Israel in *Kol Ha’am v. Minister of Interior*, (1953) H.C. 73/53.

<sup>36</sup> In the context of political speech, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>37</sup> See *Szenes* at §28.

<sup>38</sup> HCJ 2481/93 *Dayan v. Jerusalem District Commander*.

<sup>39</sup> In *Szenes* at §20, Barak cites Shamgar, P. in HCJ 257/89 *Hoffman v. Appointee over the Western Wall*.

<sup>40</sup> Strictly speaking, this is not true. The American Supreme Court does not consider reputation alone to be protected by the Constitution. See *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>41</sup> *Szenes* at §12.

<sup>42</sup> Babylonian Talmud, Tractate Baba Metzia, 58b. Cf. *Szenes* at §12.

<sup>43</sup> *Szenes* at §20.

<sup>44</sup> CA 214/89 *Avneri v. Shapira*.

that the right to a reputation can supersede the freedom of speech in only the narrowest of circumstances. However, much of Barak's holding rested on his interpretation of the freedom of speech and the right to a reputation as unenumerated within Israel's body of law. With the 1992 passage of Basic Law: Human Dignity and Liberty, however, the right to a reputation has arguably been explicitly codified into Israel's constitutional model, and thus critics question whether *Avneri* remains good law.<sup>45</sup>

Nonetheless, Barak's jurisprudence regarding free speech has changed little since the "Constitutional Revolution" of 1992, as exemplified by his majority opinion in *Szenes v. Broadcasting Authority*.<sup>46</sup> The case revolves around a screenplay written for television called "The Kastner Trial", which retells the story of the Kastner affair during World War II. In one episode it is claimed that Chana Szenes—a figure revered in Israeli history as a war heroine who died in Hungary attempting to save Jewish residents from the Holocaust—had actually betrayed her comrades during interrogation after her capture. The petitioners, who include familial descendants of Szenes, filed suit, charging the screenwriter with intentional defamation and contending that Israel's Broadcasting Authority should bar the show from airing unless the offensive and historically inaccurate lines were expunged.

Writing for the majority, Barak dismissed the suit. Although he acknowledged that the lines defamed Szenes and deeply offended many Israeli citizens, including Holocaust survivors (of which he is one), he found this to be insufficient to curb freedom of artistic expression as a function of free speech. He states that "[t]he offensiveness of the disputed paragraph, to the feelings of the public in general and of the Holocaust survivors in particular, does not exceed the level of tolerance which binds the members of a Jewish, democratic state".<sup>47</sup>

President Barak reached this decision by carefully reflecting on the facts presented. He notes specifically that the defamation in question occurred in the context of a televised docudrama that, in its opening credits, disavows itself of attempting to be a true historical documentary. Given that the screenplay was a piece of historical fiction, that the public here constitutes a non-captive audience,<sup>48</sup> and that the expression presented is artistic in nature, Barak did not find a strong enough argument for defamation.<sup>49</sup>

It is also important to note, however, that a sea change is arguably occurring in the Supreme Court of Israel. In 2006, for example, the Court held that the pejorative use of the term "Nazi" in describing someone constituted slanderous defamation.<sup>50</sup> In 2012, a bill was introduced in the Knesset that advocated the criminalization of the word "Nazi" in any context, a move that would further limit the freedom of speech in Israel. These examples, Carmi suggests, speak to the "dignitization" free speech in Israel, a move that has begun to privilege reputation over speech rights.<sup>51</sup> As a result, the future of free speech's expansiveness in Israel is uncertain.

### ***Government Censorship: Free Speech and Artistic Expression***

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<sup>45</sup> Carmi at pg. 47 cites Benish, J. in C.A. 10771/04 *Reshet Communications and Productions Ltd. v. Ettinger*.

<sup>46</sup> HCJ 6143/94, *Szenes v. Broadcasting Authority*.

<sup>47</sup> *Szenes* at §23.

<sup>48</sup> A captive audience is often defined as a group of people who will be almost guaranteed to hear a message, whether they want to or not. See for example, *Frisby v. Schultz*, 487 U.S. 474 (1988).

<sup>49</sup> Regarding the falsehoods in the speech, Barak found that "[s]peech which is false is contained within the freedom of expression and creation. Speech which is false and defamatory is included within the definition of freedom of expression". *Szenes* at §10.

<sup>50</sup> CA 10520/03 *Dankner v. Ben Gvir*.

<sup>51</sup> See fn. 31.

In *Szenes*, the petitioners not only filed suit against the screenwriter for intentional defamation but also petitioned the Court to order Israel’s Broadcasting Authority to censor the television program if the offensive text remained. The Broadcasting Authority exemplifies one of several federal organizations in Israel that are vested with the authority to act as a governmental censor. Although many other Western democracies also maintain various organizations that are able to limit speech—such as the Federal Communications Commission (FCC) in the United States—their capacities are much more limited in scope.<sup>52</sup> Furthermore, only a few of these nations allow for the possibility of prior restraint, which is to say governmental censorship *prior* to the expression in question taking place. In contrast, Israel has allowed various censorship boards and maintains a drastically divergent understanding of the legality of prior restraint. Two cases from 1989, *Schnitzer v. The Chief Military Censor*<sup>53</sup> and *Universal City Studios Inc. v. Films and Plays Censorship Board*<sup>54</sup> both touch on Barak’s understanding of these issues.

In *Universal City Studios*, Israel’s Film and Plays Censorship Board proscribed the screening of a film entitled *The Last Temptation of Christ*, directed by Martin Scorsese and starring William Dafoe. The film—not unlike “The Kastner Trial” in *Szenes*—blurs the line between fiction and history. Although much of the film’s plot follows a historicization of Christian gospel narratives, several scenes radically depart from scripture, such as Jesus’s marriage to Mary Magdalene and the eponymous scene of crucifixion in which Jesus interacts with Satan. The Censorship Board determined that “the film, which goes to the very foundations of Christianity, would be most offensive to the religious feelings and faith of the Christian community” and subsequently banned the film from screening in Israel.<sup>55</sup>

In a concurring opinion, Barak suggested that this case raises two fundamental legal questions, which he borrows from his opinion in *Laor v. Films and Plays Censorship Board*:

“The Board’s powers are determined by the need to preserve public order. This criterion raises two questions...first, what is the intensity of the harm to public order, and whether all harm, however slight, would allow use of the Board’s powers; and, secondly, what is the extent of probability which must exist between the [speech] and the harm to public order, and whether it is sufficient that there was a distant probability of this harm’s occurring in order to justify the use of the Board’s powers”.<sup>56</sup>

In essence, Barak is arguing that the Court has the authority to assure that a Censorship Board has acted within certain standards when deciding to ban speech such as a film. Next, Barak delineates what he views those standards to be:

“The Board does not have the discretion to choose a possibility which does not contain the elements of near certainty and serious danger. The Board’s subjective opinion that the danger is serious and that its occurrence as a near certainty is not relevant. The test of near certainty and serious danger is an objective one. The Court must be satisfied that a reasonable Board was entitled, on the basis of the facts before it, to reach the conclusion that the danger was serious and that its occurrence was a near certainty. To that end the Court has to be satisfied that the

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<sup>52</sup> A recent American decision concerning the FCC comes from *City of Arlington v. Federal Communications Commission*, 569 U.S. \_\_\_\_ (2013).

<sup>53</sup> HCJ 680/88 *Schnitzer v. The Chief Military Censor* (1989).

<sup>54</sup> HCJ 806/88 *Universal City Studios Inc. v. Films and Plays Censorship Board* (1989).

<sup>55</sup> Quoted from Shamgar, P. at §3.

<sup>56</sup> H.C. 14/86 *Laor v. Films and Plays Censorship Board*. At pg. 431.

Board gave proper weight to conflicting basic principles, that is, to freedom of expression on the one hand and public order on the other hand. ‘Proper weight’ in this case means weight that the Court is of the opinion would be consistent with the requirements of an enlightened democratic society.”<sup>57</sup>

After defining the role of the Court in judging the opinions of the Board, Barak goes on to determine that the offense that many Israeli Christians may take to the film was not sufficiently high to withstand the “Near Certainty Test”, and thus the Board could not justifiably prohibit the screening of the film.

Again, Barak’s decision was determined in the context of the film’s fictional nature, the fact that an individual must make a series of active steps in order to encounter the film, and the artistic freedom associated with filmmaking more broadly. This ruling may be contrasted with *Shinui Party v. Chair of Electoral Board Committee*,<sup>58</sup> in which Barak concurred in an opinion that barred an election commercial from airing because it depicted orthodox Jews as parasites. There he found the content to be so explicit and immediately offensive that it warranted proscription.<sup>59</sup> Thus, the screening of a fictional film in a movie theatre that must be patronized in order to be viewed had a much lower probability of causing social unrest than a commercial with Holocaust undertones that the Israeli citizenry will likely be exposed to.

### ***Government Censorship: Freedom of the Press***

As noted above, Israel’s freedom of the press is viewed internationally as lackluster at best. This is largely the result of the 1966 Censorship Agreement between the media and the Israel Defense Forces (IDF), which requires Israeli news media to submit articles on a variety of topics to a Military Censor prior to publication. According to the Agreement, the primary purpose of this is to assure that important information regarding state security is not released.

The role of the Chief Military Censor was examined in *Schnitzer*, when the Censor cited state security as a justification for prohibiting the publication of a newspaper article. The article, written by the petitioner, was intended to criticize the retiring head of Israel’s intelligence agency, the Mossad. However, due to the anonymous nature of the position and the fact that the piece related in detail to matters of national security, the Military Censor refused to allow its publication unless the article was heavily bowdlerized to remove any potentially revealing information. Specifically, the Censor was concerned that an article questioning the Mossad’s effectiveness in any capacity would compromise security policy and endanger national safety.

In his opinion, Justice Barak noted that, although a doctrine of prior restraint is not formalized in Israel, it is “especially important that the denial of information to the public should occur only in exceptional and unusual circumstances”.<sup>60</sup> Citing the American cases of *New York Times v. United States* and *Near v. Minnesota*,<sup>61</sup> Barak again calls upon a test of “Near Certainty”.<sup>62</sup> In the context of military censorship, Barak held that “the finding that if the publication will not be prohibited there will be a near certainty of substantial injury to the

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<sup>57</sup> *Id.* At pp. 438-439.

<sup>58</sup> H CJ 2194/06 *Shinui Party v. Chair of Electoral Board Committee* (2006).

<sup>59</sup> But cf. Barak’s suggestion that racial expressions constitutes free speech in *Universal City Studios* at §7. Also cf. H.C. 399/85 *Kahana v. Executive Committee of Broadcasting Authority*.

<sup>60</sup> *Schnitzer* at §16.

<sup>61</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971) & *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>62</sup> For a discussion of how Israel differs from the Anglo-American model, Barak cites Agranat, J. in H.C. 73/53 “*Kol Ha-Am*” *Company Ltd. v. The Minister of the Interior* at §16.

security of the State must be based on clear, unequivocal and convincing evidence”.<sup>63</sup> Although Barak gives substantial leeway to the Military Censor as a “competent authority” on matters of national security, he nevertheless argues that the Censor is circumscribed by a “range of reasonableness”.<sup>64</sup> It is the job of the Court to determine that the Censor has acted reasonably in making the subjective decision that an article is of grave security concern. Upon analyzing each of the specific issues that the Military Censor had with the petitioner’s article, the Barak concluded that the burden of Near Certainty was not reached, and thus the Censor could not rightfully ban the article from publication.

In 2003, however, the standard of Near Certainty appeared to have begun to shift to the less demanding test of “reasonable likelihood”. In *Tennenbaum v. HaAretz Publishing Ltd.*,<sup>65</sup> the Court examined a case in which the petitioners, family members of an individual who had been captured by members of Hezbollah in Lebanon, sought to restrain several news outlets from revealing details of the individual’s abduction for fear that they would endanger his life. Although the Court rejected the petition (on the basis that the media had already agreed to self-censor much of information that it had obtained) the test used to determine this was much milder than the Near Certainty Test would warrant. As a result, the state of this “Near Certainty Test” in contemporary Israeli censorship jurisprudence also appears to be standing on weak ground.

### **Justice Barak: An Activist Judge?**

As has been highlighted throughout this article, the jurisprudence of President Barak during the 28 years that he sat on the Court vastly expanded not only the role of the judiciary but also the ways in which Basic Law should be interpreted to account for certain unenumerated core principles inherent to a democratic regime, such a free speech. It should not be surprising then that much of the criticism directed toward Barak labels him pejoratively as an “activist judge”.<sup>66</sup>

In the realm of legal scholarship, judicial activism is defined as a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions”.<sup>67</sup> In his book *Judicial Discretion*, written in 1987, Barak lays out his interpretative theory in a way that lends itself to understanding him as activist. As legal scholar Yigal Mersel explains:

“The book features a number of bold concepts: the idea that any text requires interpretation; that the authorized interpreter is the judge; that in his interpretative world the judge can and must examine the underlying purpose of the text and not only the simple words; that in examining the purpose the judge is not confined to the framers’ intent or to the framers’ interpretation; and that the judge can and is indeed authorized to turn to the legal system’s basic values when determining the said purpose or deciding between various objectives.”<sup>68</sup>

From subjecting the government branches to judicial review to announcing a “Constitutional Revolution”, Barak has emplaced civil liberties as central to Israeli law. In doing so his judicial interpretations may easily be read as activist.

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<sup>63</sup> *Schnitzer* at §23.

<sup>64</sup> *Schnitzer* at §21.

<sup>65</sup> CA 9185/03, *Esther Tennenbaum v Ha'aretz Publishing Ltd.* (2003).

<sup>66</sup> Several issues, for example, emerged when Justice Elena Kagan noted that she considered President Barak to be a personal inspiration during her nomination hearings for the United States Supreme Court. <[http://www.nytimes.com/2010/06/25/us/politics/25kagan.html?\\_r=0](http://www.nytimes.com/2010/06/25/us/politics/25kagan.html?_r=0)> .

<sup>67</sup> Black’s Law Dictionary. “Judicial Activism”. New York: West Publishing Co., 2009.

<sup>68</sup> Mersel, Yigal. “On Aharon Barak’s Activist Image”. 47 *Tulsa L. Rev.* 339 (2011). At pg. 3.

However, at the same time, it is important to note that Barak's decisions have statistically more often favored the state than not.<sup>69</sup> Furthermore, the negative connotation of an "activist judge" may be too steeped in Western conceptualizations of democratic governance and separation of power. Indeed, questions arise as to whether it is even derogatory to call a Justice an "activist judge" in a fledgling, deeply divided democracy with no codified Constitution and where the threat of war and violence is incessant. Mersel, for example, suggests that the primary reasoning for Barak's purported "activism" was not in order to place his own personal ideals into Israeli jurisprudence but rather to imbue the Court with a powerful image that will help strengthen Israel as a democratic society with a system of checks and balances.

Barak himself has been historically unconcerned with the notion of judicial activism. In a 2002 article in the *Harvard Law Review*, Barak briefly considers the term, concluding that "I am not at all interested in whether my legal community thinks that I am an activist or that I show self-restraint".<sup>70</sup> It is the principles of Israeli democratic governance to which Barak is committed, and not his own judicial perception. And, using those principles as his guide, Barak has significantly altered the face of Israeli constitutionalism as a member of the Supreme Court.

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<sup>69</sup> See Baum, Ido. "Judges' Rulings Favor the State". *The Marker* July 5, 2010. Cited in Mersel at fn. 6.

<sup>70</sup> Barak, Aharon. "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy". 116 *Har. L. Rev.* 19, 217 (2002). Cited in Mersel at fn 1.