Chapter Five

Legal Arrangements in Matters of Religion and State

The proposal

1. The agreements reached in the covenant are predicated upon painful concessions by both sides, with the ultimate aim of enabling the stable coexistence of religiously observant and secular populations within one national framework. These concessions mandate mutual trust between the sides, and a willingness to desist from introducing unilateral changes in a given part of the covenant's components. Any disruption of the delicate balance would undermine the entire covenant.
2. For this reason, the covenant's arrangements must be anchored in legislation. Moreover, the legislative process should be guided by an emphasis on the importance of the inner equilibrium that has been achieved within the covenant on every issue.
3. We make no recommendations regarding the specific legislative format. There are a number of possibilities, which are not mutually exclusive. For example: Basic Law: Religion and State; the addition of the clause "The contents of the Basic Laws notwithstanding", to the proposed legislation; the addition of a paragraph to the existing Basic Laws themselves exempting the proposed arrangements of the covenant from their purview.
4. The spirit of the covenant – which is no less important than its particular arrangements on the various issues – favors mechanisms of negotiation and agreement over decisions

that may or must be handed down by the courts. Rightly or wrongly, a court is perceived as leaning towards one side of an argument between two sides. Our proposed covenant attempts to strike a balance between the sides, yet if its legal interpretation appears to one party to be biased in favor of the other, it will lose its ability to win the faith of the public and its objective will not be realized. We therefore recommend stating explicitly that the courts will not be empowered to void legal arrangements stipulated in the covenant. The manner in which the covenant's arrangements are interpreted is also of great importance. We recommend entrusting such interpretation, as long as the need for it does not arise in the context of litigation, to a representative public body. This will serve to minimize the necessity for such litigation and enhance the likelihood of arriving at mutually agreeable interpretations.

Main Points of Ruth Gavison's Explanation

This enterprise favors mechanisms of negotiation and consensual arrangements over decisions that are handed down and must be handed down by the courts. The courts themselves appear to acknowledge that the domain of religion and state does not lend itself to judicial verdicts. Take, for example, the conflict over traffic on Bar Ilan St. on the Sabbath, which the courts referred to a public committee for decision, the arrangements regarding conversion and the drafting of yeshiva students which were referred to the Knesset, and the Women of the Wall issue, which was transferred to the executive branch. Furthermore, the judicial system as a whole is devoting much more attention now

to attempts to steer clear of litigation and encourage compromise and arbitration, with the declared intent of avoiding the need to settle conflicts by judicial decree. This is designed to save the courts time and reduce the interminable delays associated with protracted judicial proceedings, but is also grounded in a profound understanding that it is preferable to **resolve** a conflict than to **decide** it. A party that regards itself as a partner in resolving a conflict will be a better partner in future engagements than one whose case was decided **against** him in court. The goal of the social covenant is to create a situation in which there will be little or no incentive to refer decisions on these matters to the courts. In our opinion, such a state of affairs would be desirable both with regard to the issues themselves and from the standpoint of the courts. The prevailing lack of faith in the courts subverts the willingness of the public to reach an agreement (due to fears over how it will be interpreted), while damaging the courts as well.

Since the Basic Laws were promulgated in 1992 the High Court has voided Knesset legislation in three instances. This situation gives rise to fears that if the covenant's proposed arrangements are only anchored in regular Knesset laws, the High Court could nullify them or rule them invalid on the claim that this legislation is not compatible with the Basic Laws. Explicit sentiments to this effect were voiced by religious and ultra-Orthodox Knesset members who were shown the covenant. Particular cause for concern would arise if it were possible to void specific sections of the covenant while maintaining others. The courts tread lightly with regard to complex social arrangements, and grant them the appropriate weight when interpreting a law or contemplating its annulment.

We advocate (clause 4) confining the interpretation of the arrangements – so long as the need for such interpretation arises not in the context of litigation, but before a lawsuit is initiated – to

a public representative body, with the aim of minimizing the need for litigation and enhancing the chances of arriving at a mutually satisfactory interpretation.

In addition, the following legislative options might be worth considering:

First – Legislation of a Basic Law of Religion and State. This law would anchor the principles of the arrangements, affirming their immutability and the inner equilibrium among them. This option carries an important symbolic advantage.

Second – Admittedly less elegant, but more efficient: the addition of the clause "The contents of the Basic Laws notwithstanding" to every law pertaining to the subjects of the covenant, an addition that will impede a reductive interpretation of covenant arrangements.

Third – Amending the Basic Laws to remove legislation on the subjects of the covenant from their purview. The above options are not necessarily mutually exclusive. They could all be adopted simultaneously, primarily in cases where the legislative process proceeds in stages.

Main Points of Yaacov Medan's Explanation

Further to Prof. Gavison's legal analysis, with which I concur, I would like to elucidate the argument from my vantage point as a religious Zionist. When I show the covenant to leading religious Zionist figures, I feel that to a large extent their reservations stem from concerns regarding a future erosion of the remaining link between the state and the Torah commandments, once the ovenant has contributed to weakening this link.

This fear is founded on three main points:

One: A basic suspicion of the secular public. An analogous fear exists to a large extent on the secular side as well. I will only say that the covenant addresses itself precisely to this point, and that in order to break the cycle of suspicion, there is a need for mutual trust.

Two: A degeneration of the *status quo* in a manner that has weakened the link between the state and the Torah. Will the covenant be able to halt this trend? In my opinion, the covenant will indeed act as a braking mechanism in the deteriorating *status quo*, if it achieves the public status that we are seeking and if it is accepted willingly and with mutual trust.

Three: The composition of the High Court and the tenor of its judgments on matters of religion and state in recent years. I believe that the adoption of our recommendations in this chapter will reduce apprehensions concerning judicial intervention in the covenant's interpretation and possible annulment of its provisions. In any event, the more the social covenant succeeds in garnering the public's respect, the more the courts are likely to treat it with respect.