

ISRAEL AS A JEWISH AND DEMOCRATIC STATE

AN OLD ISSUE BECOMES A NEW CHALLENGE

Michael Mertes / Christiane Reves

The Declaration of Independence of 14 May 1948 defines Israel as a "Jewish State" established in the "Land of Israel" (*Eretz Israel*). Although the new State is not expressly described as "democratic", its charter specifies that Israel will ensure "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". It also appeals to the "Arab inhabitants of the State of Israel to participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions". An Israeli constitution was to be adopted by an elected Constituent Assembly "not later than 1st October 1948".

A written constitution as envisaged in 1948 does not yet exist, at least not in the form of a coherent document. The Constituent Assembly failed to adopt a constitution in 1949, not least because of disagreement over whether the State of Israel should be a secular democratic state, or one based on the principles of the Halacha.¹ Over time, several "Basic Laws" were adopted which, together with the principles laid out in the Declaration of Independence, established state practices and adjudications by the Supreme Court, coalesced into a kind of unwritten constitution.²

- 1 | Halacha is used to describe Jewish law with all its traditional oral and written commandments and rules. Halachic principles do not differentiate between the secular and the religious sphere, but are a comprehensive set of guidelines for the everyday life of Jewish people.
- 2 | Cf. Daniel J. Elazar, "The Constitution of the State of Israel", Jerusalem Center for Public Affairs, Jerusalem 1993, <http://jcpa.org/dje/articles/const-intro-93.htm> (accessed 15 Feb 2012).



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The latest version of the Basic Law "The Knesset" adopted in 1958 specifies that a candidates' list shall not participate in elections to the Knesset if it negates "the existence of the State of Israel as the state of the Jewish people" or the "democratic character" of the State of Israel.³ Both the "Human dignity"⁴ and "Freedom of occupation"⁵ Basic Laws, which refer to Israel as a Jewish and democratic state,⁶ are considered to be authoritative reference documents.

For the majority of Jews, the term "Jewish and democratic state" is a fitting description of the particular character of the State of Israel and of its commitment to universal values. But the precise meaning of this term has been interpreted in many different ways. The draft of a new Basic Law "Israel as the Nation-State of the Jewish People", drawn up by Knesset member Avi Dichter (Kadima) in August 2011, attempts a new interpretation, but it has been criticised by those on the left of the political spectrum and by Israeli Arabs as being discriminatory towards non-Jewish minorities.⁷

The formulation "Jewish and democratic state" was meant to bridge a gap left open by the Declaration of Independence. However, this conciliatory 'both/and' approach was not sufficient to resolve the tension that existed from the beginning between the notion of a secular-democratic and a halachic-theocratic state. A popular saying in Israel for a long time now jests that the country is in reality a federation made up of the "secular republic of Tel Aviv" and the "halachic theocracy of Jerusalem". Underlying this caricature is not only a sense of unease over a separate ultra-Orthodox parallel society, but also the fear amongst many secular and liberal religious Israeli Jews that they

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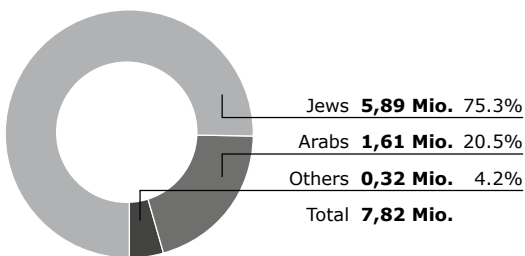
- 3 | "Basic Law: The Knesset", 1958, http://knesset.gov.il/laws/special/eng/basic2_eng.htm (accessed 15 Feb 2012).
- 4 | "Basic Law: Human dignity", 1992, http://knesset.gov.il/laws/special/eng/basic3_eng.htm (accessed 15 Feb 2012).
- 5 | "Basic Law: Freedom of occupation", 1994, http://knesset.gov.il/laws/special/eng/basic4_eng.htm (accessed 15 Feb 2012).
- 6 | "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." Leg. cit., n. 4.
- 7 | This can be found on Avi Dichter's website: http://scribd.com/fullscreen/71974524?access_key=key-k2mho7t40ti84bte51r (accessed 15 Feb 2012).

are likely to become permanently sidelined by the rapidly growing ultra-Orthodox (Haredim) Jewish and Israeli Arab minorities.

The balancing act expressed in the formulation “Jewish and democratic state” can be best understood by posing a series of questions. Is the word ‘Jewish’ used in an ethnocultural sense or in a religious sense? (The President of France, Nicolas Sarkozy, reportedly said in a cabinet meeting mid-2011: “It is silly to talk about a Jewish State. This would be like saying this is a Catholic table. There are 2 million Arabs in Israel.”⁸) Is it enough that a large majority of the Israeli people are Jewish, or it is also necessary that the Israeli legal system reflects the requirements of the Halacha wherever possible? Which values should be paramount in the event of a conflict – democratic principles or the halachic codes? And finally, what does the Jewish understanding of the State of Israel mean for the Arab citizens? At the end of 2011, 20.5 per cent of the Israeli population were Arabs (compared to 75.5 per cent Jews and 4.2 per cent others).⁹ Wouldn’t it be better, and more appropriate to a modern notion of a republic, to define Israel as simply a state of all those people with an Israeli passport, a “state of (all) its citizens”¹⁰?

Fig. 1

Population of Israel in late 2011



Source: Central Bureau of Statistics, n. 9.

8 | Lior Zilberstein, “Sarkozy: It is silly to talk about a Jewish State”, *Ynetnews.com*, 10 Jun 2011, <http://www.ynetnews.com/articles/0,7340,L-4132036,00.html> (accessed 15 Feb 2012).

9 | Cf. Central Bureau of Statistics (Israel) (ed.), Dec 2011, http://cbs.gov.il/reader/yarhon/find_e_new.html?CYear=2011&CMonth=12&FindWordYar=population (accessed 15 Feb 2012).

10 | The call for Israel to be a “state of (all) its citizens” and to waive any definitions based on ethnocultural or religious considerations has mainly been made by Israel’s “Post-Zionist”, leftist minority and, of course, by most Israeli Arabs.

THE FOREIGN POLICY DIMENSION

The answers to these questions are not only of significance to Israel's domestic policies. They also have an impact on the country's standing in the community of western democracies and its relationship with the Jewish diaspora, especially the liberal majority of America's Jewish population.¹¹ When referring to the interrelationship between Israel's domestic and foreign policies, Henry Kissinger's assertion that Israel has no foreign policy, only a domestic policy is often cited.

Sharon Pardo, Jean Monnet Chair in European Studies at Ben Gurion University of the Negev, points out that Israel would not be able to join the European Union, particularly due to notion of itself as a Jewish state, even though 81 per cent of Israelis surveyed in 2011 were in favour of the idea

81 per cent of Israelis surveyed in 2011 were in favour of the idea of their country joining the European Union.

of their country joining the EU.¹² Secular Europe, however, does not have good grounds for their concern about the particularism of Israel's defining Jewish culture, as long as the weekly and yearly cycles of its own public life continue to be structured around the Christian Sunday and religious festivals. And if similar regulations in countries with a predominantly Islamic culture seem to be acceptable, why should there not be at least *one* country in the world where the Sabbath is a day of rest and no-one is supposed to drive on Yom Kippur? Nevertheless, we cannot ignore the fact that specific interpretations of Israel's notion of itself as a Jewish State do have an impact on both the judicial system and policies towards minorities, which can be problematical for the country's understanding of itself as a democracy.

One of the key issues in the Israeli-Palestinian conflict is whether Palestinian recognition of the State of Israel should expressly include acknowledgement of Israel's Jewish character. This demand was first raised during the

11 | For a current example, cf. Joel Seltzer, "Israeli and U.S. Jews do not understand one another", *Haaretz.com*, 8 Dec 2011, <http://haaretz.com/jewish-world/israeli-and-u-s-jews-do-not-understand-one-another-1.400419> (accessed 15 Feb 2012).

12 | Michael Mertes, interview with Sharon Pardo, 18 Jul 2011, <http://kas.de/israel/en/publications/23431> (accessed 15 Feb 2012).

2007 Annapolis negotiations by the then Israeli Foreign Minister, Tzipi Livni.¹³ Since then it has become a permanent component of Israel's negotiating position. In what was seen by many as a landmark speech at Bar-Ilan in June 2009, Prime Minister Benjamin Netanyahu stressed the importance of the recognition of Israel as the nation state of the Jewish people.¹⁴ His view was supported, and continues to be supported, by many Israelis on the liberal side of the political spectrum. The liberal, secular columnist Carlo Strenger, for example, wrote an open letter to Mahmud Abbas, President of the autonomous Palestinian Authority, saying: "You must come to the Knesset and tell the Israelis that you recognize Israel as the Jewish people's homeland."¹⁵

In a landmark speech in June 2009, Netanyahu stressed the importance of the recognition of Israel as the nation state of the Jewish people.

What appears on the surface of it to be a purely theoretical dispute actually revolves around a simple, practical issue, namely whether the Palestinian side can legitimately claim that the Palestinian refugees of 1948 and their descendants have a "right of return" to what is now the State of Israel. If Israel were to accept this demand, a Jewish majority, and therefore the Jewish character of the State, could be endangered in the future. This is also an important issue with regard to other key questions, such as whether or not Jerusalem should be divided.

- 13 | Speech by Foreign Minister Tzipi Livni at the Annapolis Conference, 27 Nov 2007, http://jewishvirtuallibrary.org/jsource/Peace/Livni_Annapolis.html (accessed 15 Feb 2012). Livni attaches great importance to the fact that she was the first to demand that the Palestinians recognise Israel as the "Jewish homeland" and as a "Jewish and Democratic State." Cf. "The state we're in. Israel's Jewish identity", *The Economist*, 17 May 2011, <http://economist.com/node/21016810> (accessed 15 Feb 2012). The Palestinian's reaction became known as the "Palestine Papers" through the Arab broadcaster *Al Jazeera* at the beginning of 2011, cf. Seumas Milne and Ian Black, "Palestinian negotiators accept Jewish state, papers reveal", *Guardian Online*, 24 Jan 2011, <http://guardian.co.uk/world/2011/jan/24/palestinian-negotiators-jewish-state-papers> (accessed 15 Feb 2012).
- 14 | Speech by Prime Minister Benjamin Netanyahu at the Begin-Sadat (BESA) Center for Strategic Studies, Bar-Ilan University, 14 June 2009, http://mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2009/Address_PM_Netanyahu_Bar-Ilan_University_14-Jun-2009.htm (accessed 15 Feb 2012).
- 15 | Carlo Strenger, "Open Letter to Mahmoud Abbas for Yom Kippur", *Haaretz.com*, 7 Oct 2011, <http://haaretz.com/blogs/strenger-than-fiction/open-letter-to-mahmoud-abbas-for-yom-kippur-1.388763> (accessed 15 Feb 2012).

The historian Benny Morris suggested in his well-received monograph on the history of the two-state solution¹⁶ that the Palestinian leadership has never totally given up on the goal of a binational state in Palestine (in which the Arabs would have a majority by 2020 due to their higher birth rate¹⁷). From Israel's point of view, a two-state solution would be the best means of guaranteeing a Jewish state in the long term. During a cabinet discussion in June 2011 on a Jewish People Policy Institute report on demographic changes amongst the Jewish and Palestinian populations in Israel and the West Bank, Prime Minister Netanyahu suggested that it was more important to "preserve a solid Jewish majority inside the State of Israel" than to have an Israeli presence in the West Bank.¹⁸

A NEW KULTURKAMPF?

The unresolved differences between a secular and halachic notion of the State started to attract international attention when there were large-scale demonstrations in summer 2011 and when the Haredim started making much more aggressive attempts to impose halachic standards on everyday life. News reports suggested the demonstrations were little more than social protests, whereas in reality the main cause was most probably a sense amongst the demonstrators that the secular and religiously liberal middle-class on the one hand and the growing ultra-Orthodox section of the population on the other were not being treated equally, with the latter enjoying a number of privileges, including exemption from military service (normally three years for men, two years for women).¹⁹

The main cause for the demonstrations 2011 was the sense that the secular, religiously liberal middle-class and the growing ultra-Orthodox section of the population were not treated equally.

16 | Benny Morris, *One State, Two States*, New Haven/London, 2009, 174 et seq. inter alia.

17 | Cf. Sergio Della Pergola, "Jewish Demographic Policies. Population Trends and Options in Israel and in the Diaspora", The Jewish People Policy Institute, Jerusalem, 2011, 39, http://jppi.org.il/uploads/Jewish_Demographic_Policies.pdf (accessed 15 Feb 2012).

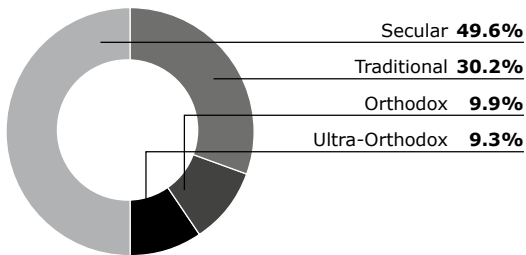
18 | Barak Ravid, "Netanyahu: Israel needs to separate from the Palestinians", *Haaretz.com*, 21 Jun 2011, <http://haaretz.com/print-edition/news/netanyahu-israel-needs-to-separate-from-the-palestinians-1.368795> (accessed 15 Feb 2012).

19 | Cf. Nadine Mensel, "Rothschild ist nicht Tahrir", *KAS Länderbericht*, 9 Aug 2011, http://kas.de/wf/doc/kas_23574-1522-1-30.pdf?111029074831 (accessed 15 Feb 2012).

For some years now, the Israel Democracy Institute (IDI), a think-tank that is highly respected by all parties has been conducting demographic research into the attitudes of Israeli Jews on the issue of Israel as a Jewish and democratic state. The IDI draws a distinction between four or five different groups: ultra-Orthodox, religious, traditional and secular²⁰ or orthodox, religious, traditional, non-anti-religious secular, and anti-religious secular.²¹

Fig. 2

Self-designation of Israeli Jews in terms of religion



Source: IDI, *The Israeli Democracy Index 2011*, n. 20.

According to the *Israeli Democracy Index 2011*, half of Israeli Jews (49.6 per cent) consider themselves to be secular; a third (30.2 per cent) see themselves as traditional and around one-tenth consider themselves to be Orthodox (9.9 per cent) or ultra-Orthodox (9.3 per cent). What is noticeable is the gap between the generations when it comes to classifying their religious affiliation. Twice as many young people surveyed define themselves as ultra-Orthodox compared to the average in the Jewish population (21.1 per cent), while there is a particularly high number of older people who see themselves as secular (57.4 per cent).²² These findings once again confirm the suggestion that the demographic balance in Israeli society is shifting away from the secular groups.

20 | Tamar Hermann et al., *The Israeli Democracy Index 2011*, The Israel Democracy Institute (IDI), <http://www.idi.org.il/sites/english/events/ThePresidentsConference/Documents/Democracy%20Index%202011.pdf> (accessed 15 Feb 2012).

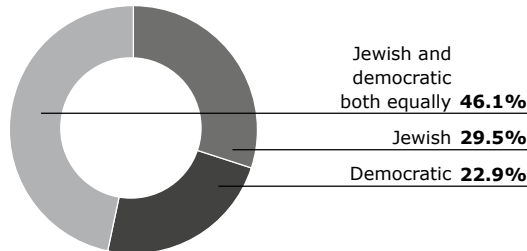
21 | Asher Arian, Ayala Keissar-Sugarmen et al., "A Portrait of Israeli Jews. Beliefs, Observance, and Values of Israeli Jews, 2009", Jan 2012, http://www.idi.org.il/sites/english/events/Other_Events/Documents/GuttmanAviChaiReport2012_EngFinal.pdf (accessed 15 Feb 2012).

22 | *The Israeli Democracy Index 2011*, n. 20, 292.

The question of the significance of the two defining characteristics "Jewish" and "democratic" shows that more than half of the Jewish population sees one of these characteristics as being the most important. In answer to the question "Which element in the expression 'Jewish and democratic State' is more important to you?" 29.5 per cent currently say "Jewish", 22.9 per cent "democratic" and 46.1 per cent "both equally".²³ This means that for 75.6 per cent of those surveyed, the Jewish character of the State of Israel is of key importance, while for 69 per cent it is the State's democratic character that is significant. The figures also of course highlight the polarisation between the more secular and the more religious segments of the population. This polarisation becomes even more apparent when we look at the answers provided by the four groups differentiated by the IDI in terms of religious affinity.

Fig. 3

Personal significance of the defining characteristics of the State of Israel as 'Jewish' and 'democratic'

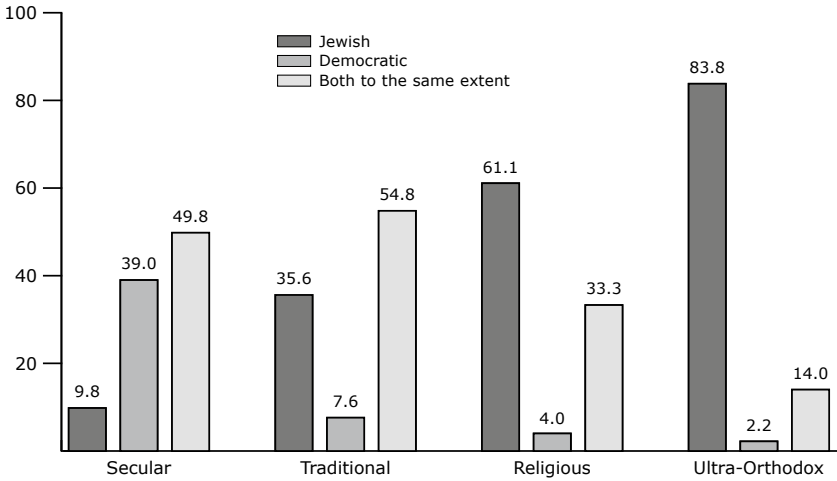


Source: IDI, *The Israeli Democracy Index 2011*, n. 20.

The distinctions become even clearer when the question is asked as to whether democratic principles or the halachic codes should be considered paramount in the event of a conflict. Half of all Jews surveyed say that democratic principles should have priority, 26.5 per cent believe it depends on the circumstances and 21 per cent think the halachic codes should apply. Here too there is a noticeable polarisation amongst the younger population (aged 18 to 34). While an absolute majority of younger secularists and traditionalists believe democratic principles should hold

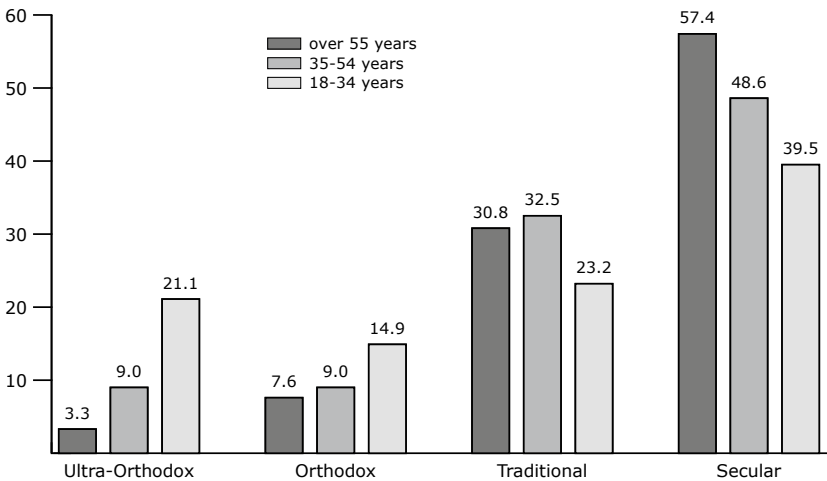
sway in normative conflicts between democracy and the Halacha, over 85 per cent of young ultra-Orthodox and Orthodox Jews believe the exact opposite.²⁴

Fig. 4
The formula “Jewish and democratic State” – Personal weighting of the elements according to religious affinity



Source: IDI, *The Israeli Democracy Index 2011*, n. 20.

Fig. 5
Religious self-assessment of Israeli Jews according to their age

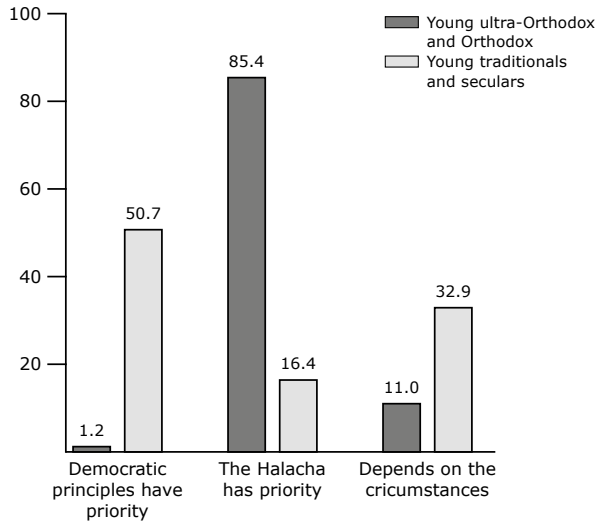


Source: IDI, *The Israeli Democracy Index 2011*, n. 20.

24 | Ibid., 57-62.

Fig. 6

**Democratic principles and rules of the Halacha –
Personal weighting in case of a conflict according
to religious affinity**



Source: IDI, *The Israeli Democracy Index 2011*, n. 20.

"A NEW ISRAEL IN THE MAKING"²⁵?

The polarisation of society and the tensions resulting from differing views on the importance of Israel's definition of itself as a Jewish and democratic state manifest themselves in many different ways, both in daily life and in the political sphere. Many recent headlines have been concerned with disputes between members of the liberal majority and representatives of the ultra-Orthodox minority, whose religious beliefs concerning the segregation of the sexes are in conflict with the principles of equality between men and women. TV crews were physically assaulted by Haredim when they sought to report on the tensions and riots in Beit Shemesh, an area that is almost 50 per cent ultra-Orthodox. Women's groups and human rights organisations expressed concern about this particular trend. In order to demonstrate their opposition, women boarded public buses that served ultra-Orthodox communities and took seats in the front rows normally reserved for men.

25 | Gideon Levy, "A new Israel in the making", *Haaretz.com*, 13 Nov 2011, <http://haaretz.com/print-edition/opinion/a-new-israel-in-the-making-1.395241> (accessed 15 Feb 2012).

The army is also a forum for heated debate. The army has traditionally been a secular organisation. When the Israel Defence Forces (IDF) were being established, there was general agreement that basic standards would be respected, such as in the preparation of food for religious soldiers. However, last year, ultra-Orthodox rabbis called on male soldiers to boycott official army functions where women were due to sing.²⁶ According to the Halacha, it is forbidden for men to listen to women singing.

THE SITUATION OF THE MINORITIES

Human rights organisations regularly point out that the non-Jewish minorities in Israel are discriminated against in many different ways. 50 per cent of Israelis do not dispute that there is discrimination in the country, especially against Arabs.²⁷

When the State of Israel was founded in 1948, those Arabs who stayed within the state borders were given Israeli citizenship. They have the freedom to practice their own religion, culture and language, as well as the right to vote. Arab minority political parties are represented in the Knesset. Therefore, the State of Israel does not believe defining itself as a Jewish state is a form of structural discrimination against Arabs.²⁸

Nevertheless, there are obvious differences in economic, social and cultural circumstances. Many Arab villages are not officially located in development regions, and therefore have no access to structural support.²⁹ Child mortality rates are two-and-a-half times higher amongst Israeli Arabs than amongst Jewish citizens. One in two Israeli Arab uni-

26 | Amos Harel, "The ultra-Orthodox are changing the face of the IDF", *Haaretz.com*, 18 Nov 2011, <http://haaretz.com/weekend/week-s-end/the-ultra-orthodox-are-changing-the-face-of-the-idf-1.396302> (accessed 15 Feb 2012).

27 | *The Israeli Democracy Index 2011*, n. 20, 194.

28 | Embassy of the State of Israel, Public Relations (ed.), *Diffamierungskampagne gegen Israel. Fragen und Antworten*, 2011, 12 et sqq., <http://embassies.gov.il/berlin/departments/offentlichkeitsarbeit/Pages/cultural-affairs.aspx> (accessed 15 Feb 2012).

29 | Benyamin Neuberger, "Israel-A Liberal Democracy with four flaws", in: Joseph E. David (ed.), *The State of Israel: Between Judaism and Democracy. A Compendium of Interviews and Articles*, IDI, Jerusalem, 2003, 368.

versity graduates is unemployed. National tests show that, on average, Arab children score more poorly in maths, science and English than Jewish children.³⁰

There are constant reports about incidents of discrimination that impact the minorities' freedom of movement and right of domicile. The Zabeidat family, for example, had been fighting for six years for the right to live in the predominantly-Jewish settlement of Rakefet. The young couple, both architects, who especially wanted to live there on account of its better infrastructure, were rejected by the admissions committee several times for being "socially unsuitable".³¹ This decision was finally overturned by a decision of the Supreme Court. However, a ruling passed in March 2011 will actually reinforce the admissions committee, allowing them to continue to regularly select new inhabitants on the basis of "social suitability".³²

In December several dozen publicly-funded town rabbis signed a religious ruling that would prevent Jews from renting or selling apartments, houses or land to non-Jews.

The Orthodox Rabbinate in Israel is partly in favour of such policies. Only last year, in December, several dozen publicly-funded town rabbis signed a religious ruling that would

prevent Jews from renting or selling apartments, houses or land to non-Jews, including Muslims, Christians or members of other religious groups.³³ It was believed that the rabbis were attempting to deter Arab students from enrolling at a university in the town of Safed, which is considered very important to religious Jews. One of the initiators of the ruling, Rabbi Schmuel Eliahu, is currently the subject of a criminal investigation into incitement to racism on account

30 | Gershom Gorenberg, "Is Israel a Democracy?", *American Prospect*, 4 Dec 2009, http://prospect.org/cs/articles?article=is_israel_a_democracy (accessed 15 Feb 2012).

31 | Jack Khouri, "Israel's High Court orders Jewish Galilee town to accept Arab couple", *Haaretz.com*, 14 Sep 2011, <http://haaretz.com/print-edition/news/israel-s-high-court-orders-jewish-galilee-town-to-accept-arab-couple-1.384296> (accessed 15 Feb 2012).

32 | Edmund Sanders, "New Israeli law will discriminate against Arabs, critics say", *Los Angeles Times*, 24 Mar 2011, <http://articles.latimes.com/2011/mar/24/world/la-fg-israel-arab-laws-20110324> (accessed 15 Feb 2012).

33 | Jack Khouri and Yair Ettinger, "39 municipal rabbis issue ruling against renting homes to non Jews; PM, minister up in arms", *Haaretz.com*, 8 Dec 2010, <http://haaretz.com/print-edition/news/39-municipal-rabbis-issue-ruling-against-renting-homes-to-non-jews-pm-ministers-up-in-arms-1.329411> (accessed 15 Feb 2012).

of anti-Arab remarks he made in the media, which, while not directly related to the religious ruling itself, provided ample evidence of the underlying motivation behind it.³⁴

The "Citizenship and Entry into Israel Law"³⁵ is said to be particularly discriminating in nature. It makes it considerably more difficult for spouses of Israeli Arabs coming from the Palestinian Territories to enter Israel and to acquire Israeli citizenship. Amos Schocken, the publisher of the liberal *Haaretz* newspaper who is known for his trenchant op-ed articles, criticized this law several years ago as being an "apartheid" regulation.³⁶ In January 2012 the Israeli Supreme Court confirmed, by a narrow 6:5 majority, that the law was constitutional.³⁷ The Court ruled that the infringement upon equality rights of Arab citizens of Israel was outweighed by the public security interest. It is indeed the express purpose of the law to prevent the infiltration by Palestinian terrorists through (alleged) family reunification. One court justice put it this way: "Human rights are not a prescription for national suicide." A second purpose of the law had been articulated directly by Member of the Knesset Ze'ev Boim in 2006: "We have to maintain the state's democratic nature, but also its Jewish nature."³⁸

Most people in Israeli society are well aware of the problem of unequal treatment of minorities. Politicians, intellectuals and human rights organisations are keeping a close eye

34 | Tomer Zachrin and Eli Ashkenazi, "Prominent Israeli rabbi faces probe over anti-Arab remarks", *Haaretz.com*, 22 Nov 2011, <http://haaretz.com/news/national/prominent-israeli-rabbi-faces-criminal-probe-over-anti-arab-remarks-1.397057> (accessed 15 Feb 2012).

35 | Cf. "The Citizenship and Entry into Israel Law (temporary provision) 5763 - 2003", http://knesset.gov.il/laws/special/eng/citizenship_law.htm (accessed 9 Mar 2012).

36 | Amos Schocken, "Citizenship law makes Israel an apartheid state", *Haaretz.com*, 27 June 2008, <http://haaretz.com/print-edition/opinion/citizenship-law-makes-israel-an-apartheid-state-1.248635> (accessed 9 Mar 2012).

37 | Cf. Hassan Jabareen and Sawsan Zaher, "The Israeli Supreme Court's Decision in the Citizenship Law Case HCJ 466/07, MK Zahava Galon v. The Attorney General, et al.", *Jadaliyya*, Arab Studies Institute (ASI), 31 Jan 2012, <http://jadaliyya.com/pages/index/4205> (accessed 9 Mar 2012).

38 | "We have to maintain the state's democratic nature, but also its Jewish nature." Vgl. Sheera Claire Frenkel, "Left appalled by citizenship ruling", *The Jerusalem Post Online*, 15 May 2006, <http://jpost.com/Israel/Article.aspx?id=21791> (accessed 9 Mar 2012).

on the situation and regularly call upon the government to address this issue in conjunction with the affected minorities.³⁹

THE SIGNIFICANCE OF THE HALACHA FOR CASE LAW AND LEGISLATION

Legal experts have been debating intently to what extent the Halacha should be allowed to have an influence on democratic case law and legislation.⁴⁰ Aharon Barak, former President of Israel's Supreme Court, is of the opinion that the Jewish and democratic elements can work in harmony.⁴¹ Not everyone agrees: law professor Ruth Gavison points out that a halachic state is contrary to a democratic state: "Even an enlightened and righteous religious Jewish state will not be democratic."⁴²

Menachem Elon, also a former judge and Vice-President of the Israeli Supreme Court, believes case law should cite both secular and religious Jewish law in order to maintain the Jewish identity of the State.⁴³

The ultra-Orthodox community residing in the Mea Shearim area of Jerusalem cited religious reasons to justify their wish to ban women from certain streets during the Tabernacles Feast in 2011.

Some rabbis go even further, believing that it is justifiable to take actions that are contrary to democratic principles if it is justified in the Halacha.⁴⁴ For example, the ultra-Orthodox community residing in the Mea Shearim area

of Jerusalem cited religious reasons to justify their wish to ban women from certain Jerusalem streets during the Feast of Tabernacles⁴⁵ in 2011. The Supreme Court prohi-

39 | Ruth Gavison, "Democracy and Judaism: Between Conceptual Analysis and Public Discourse", in: David (ed.), *The State of Israel: Between Judaism and Democracy. A Compendium of Interviews and Articles*, n. 29, 340.

40 | For a more detailed discussion of this topic cf. Ruth Gavison, *Israel as a Jewish and Democratic State: Tensions and Prospects*, Tel Aviv, 1999; idem, "Jewish and Democratic: A Rejoinder to the Ethnic Democracy Debate", *Israel Studies*, 4, 1999.

41 | Ibid.

42 | "Even an enlightened and righteous religious Jewish state will not be democratic." Gavison, "Democracy and Judaism", n. 39, 335.

43 | Melachem Elon, "Derekh Hok be-Hukah: Arakheha shel Medinah Yehudit ve-Demokratit le-or Hok Yesod: Kevod ha-Adam ve-Heruto", *Iyyunei Mishpat*, 17, 1992, 700.

44 | Gavison, "Democracy and Judaism", n. 39, 336.

45 | The seven-day Feast of Tabernacles (Hebr.: *Sukkot*), is one of the three pilgrimage festivals that commemorate the exodus from Egypt. Traditional Jews build a tabernacle (*Sukkah*), in ▶

bited this ban on the grounds that it was a breach of the laws on gender equality. But the Haredim carried on regardless, partitioning off the sidewalks and blocking off certain streets.⁴⁶

When making its decisions, the Supreme Court regularly rules in accordance with democratic principles. This is why those who are seeking stricter adherence to the Halacha are making every effort – so far without success – to have more influence on the appointment of Supreme Court judges.⁴⁷

IMMIGRATION AND THE QUESTION OF "WHO IS A JEW?"

Debates about who should be recognised as a Jew are caught between the religious and ethnic definitions of Jewishness. The majority of Jews living in Israel define themselves along national lines.⁴⁸ The trend among

The majority of Jews living in Israel define themselves along national lines. The trend among Orthodox Jews is towards measuring their Jewishness along more religious lines.

Orthodox Jews – particularly in the younger age groups – is towards measuring their Jewishness along more religious lines. However, these two different perspectives are not starkly opposing views. Rather, the majority of Israeli Jews take a “both/and” rather than an “either/or” view, with some leaning towards a more national, ethnic emphasis and others placing more importance on the religious aspect. Zionism considers the Jewish people to be a nation with the right to self-determination within a sovereign state which welcomes Jewish immigrants from all over the world. The

which they eat their meals and even sometimes sleep. The end of the festival is marked by the *Simchat Tora* holiday (the “Joy of the Torah”). This also acts as a harvest festival.

46 | Oz Rosenberg, “Mea Shearim to ban certain Jerusalem streets for women during Succot”, *Haaretz.com*, 11 Nov 2011, <http://haaretz.com/print-edition/news/mea-she-arim-to-ban-women-from-certain-jerusalem-streets-during-sukkot-1.389237> (accessed 15 Feb 2012); idem, “Court limits Mea She’arim’s separation of the sexes on Sukkot”, *Haaretz.com*, 17 Oct 2011, <http://haaretz.com/print-edition/news/court-limits-mea-she-arim-s-separation-of-sexes-on-sukkot-1.390322> (accessed 15 Feb 2012).

47 | Jonathan Lis and Tomer Zarchin, “Vote on bill for betting Israel Supreme court candidates to be pushed off”, *Haaretz.com*, 13 Nov 2011, <http://haaretz.com/print-edition/news/vote-on-bill-for-vetting-israel-supreme-court-candidates-to-be-pushed-off-1.395211> (accessed 15 Feb 2012).

48 | *The Israeli Democracy Index 2011*, n. 20, 52 et sqq.

Declaration of Independence states: "The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles."⁴⁹ In the wake of the Holocaust, the first president of Israel, David Ben Gurion, said that anyone who had

In order to regulate immigration, the "Law of Return" was enacted in 1950, giving all Jews or descendants of Jews the right to settle in Israel.

been in danger of persecution by the Nazis for being Jews would be granted refuge in Israel.⁵⁰ In order to regulate this immigration, the "Law of Return" was enacted in 1950,⁵¹ giving all Jews or descendants of Jews the right to settle in Israel. This included the children, grandchildren, spouses, children's spouses and grandchildren's spouses of Jews.⁵² However, the Orthodox Rabbinate contends that, according to the Halacha, a Jew is exclusively someone who is born of a Jewish mother and who has not converted to another religion.⁵³ This Orthodox definition was added to the Law of Return as an amendment.⁵⁴ Reform Jews also recognise as Jewish those who have a Jewish father but not a Jewish mother.

The lack of a clear definition means that the Supreme Court is repeatedly called upon to adjudicate, and its decisions set precedent for future judicial decisions. Some historical decisions still have a bearing today:

In the 1960s, Daniel Rufeisen, known as "Brother Daniel", wanted to emigrate to Israel. He was a Jew who had been persecuted by the Nazis and had worked to save the lives of many other Jews, before later converting to Catholicism. Despite the fact that he was recognised as being ethnically Jewish, his immigration application was rejected because of his conversion to Catholicism.⁵⁵

49 | Declaration of the Establishment of the State of Israel, 14 May 1948, <http://mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> (accessed 15 Feb 2012).

50 | David Clayman, "The Law of Return Reconsidered", Jerusalem Letters of Lasting Interest, 16 Jul 1995, <http://jcpa.org/jl/hit01.htm> (accessed 15 Feb 2012).

51 | The Israeli Law of Return, http://mfa.gov.il/MFA/MFArchive/1950_1959/Law+of+Return+5710-1950.htm (accessed 15 Feb 2012).

52 | Ibid.

53 | Ibid.

54 | Amendment to the Law of Return, http://mfa.gov.il/MFA/MFAArchive/1950_1959/Law+of+Return+5710-1950.htm (accessed 15 Feb 2012).

55 | The case of "Brother Daniel", <http://adl.org/israel/conversion/testing-principles.asp#1> (accessed 15 Feb 2012).

In the Shalit Case, the debate was whether the child of a non-Jewish mother and a Jewish father could be registered as Jewish under the 'Nationality' designation on the application form. The Supreme Court wanted to avoid giving a verdict on this, and proposed that a new law should be passed to remove "Religion" from the list of necessary attributes, but this was not implemented.⁵⁶ In the end, it was decided in favour of the parents that the child should be registered as "Jewish". After pressure from the National Religious Party, an amendment was added to the Law of Return, decreeing that only people born of a Jewish mother or who had converted to Judaism could be registered as "Jewish".⁵⁷

After pressure from the National Religious Party, an amendment was added to the Law of Return, decreeing that only people born of a Jewish mother or who had converted to Judaism could be registered as being "Jewish".

The fault line between Orthodox and Reform Judaism becomes even more evident in the "Miller Case". American born Shoshana Miller converted to Judaism in the USA under the auspices of a Reform rabbi. She then emigrated to Israel and automatically became a citizen based on the Law of Return. However, when applying for an identity card designating her as a Jew, this was refused because her conversion in the USA under a Reform rabbi was not recognised by Orthodox rabbis in Israel. The Supreme Court ruled in favour of Miller, but implementation of the decision was delayed and Shoshana Miller left Israel just days after the court decision. Other immigrants who seek to avail themselves of the "Miller precedent" encounter difficulties in doing so.⁵⁸

BOUNDARIES BETWEEN STATE AND HALACHA: ISRAELI MARRIAGE LAW

The boundaries between the secular state and the Halacha also become blurred in the area of Israeli marriage law. In Germany, the civil ceremony takes precedence over the religious ceremony, but in Israel the Orthodox Rabbinate has sole jurisdiction over marriages between Jews. Reform and Conservative rabbis are not allowed to

56 | High Court of Justice (BaGaTz) Case 58/68, Shalit vs. Minister of Interior et al., 84, 23 (2), 447, <http://adl.org/israel/conversion/testing-principles.asp#1> (accessed 15 Feb 2012).

57 | The Anti Defamation League, <http://adl.org/israel/conversion/testing-principles.asp#1> (accessed 15 Feb 2012).

58 | Ibid.

officiate marriage ceremonies, divorces or conversions.⁵⁹ A marriage is only valid if both parties are adherents to Orthodox Judaism or have been converted in accordance with strict rules.⁶⁰ Muslim and Christian marriages are performed within their religious communities. Mixed marriages between followers of different religions are de facto not provided for by law.

Israelis whose Jewish status is challenged by Orthodox rabbis are often not allowed a religious marriage ceremony. One result of this is that many Jews are forced to travel abroad in order to get married. In 2008, over 5,000 marriages were performed outside Israel, which amounts to some 10 per cent of all marriages.⁶¹

OUTLOOK

The current debate over Israel's future as a Jewish and democratic state is symptomatic of Israeli society's increasing awareness of the mutability of the hitherto seemingly permanent nature of the status quo. The political uprisings of the Arab spring have played their part in this, along with the realisation that tectonic plates beneath the bedrock of Israeli society are shifting.

There has been a certain alarmism on the part of liberal secularists⁶² who hyperbolize that Israel is in the midst of a "culture war"⁶³ which will lead to "Iranianisation" and "Talibanisation", equating Halacha with Sharia. This can be countered by the fact that, for more than 60 years, Israel has managed to overcome many challenges and has

59 | Yonatan Shapiro, *Democracy in Israel*, Ramat Gan, 1977, 24.

60 | Neuberger, n. 29, 366.

61 | Yair Ettinger, "Rights activists: Israeli government should finance couples forced to wed abroad", *Haaretz.com*, 30 Aug 2011, <http://haaretz.com/news/national/rights-activist-israeli-government-should-finance-couples-forced-to-wed-abroad-1.381430> (accessed 15 Feb 2012).

62 | Secularism is nowadays not predominantly restricted to the left. Over the last twenty years, the right side of the political spectrum has also seen a considerable increase in secularism, thanks to the immigration of non-religious Jews from the former Soviet Union. This kind of conservative secularism has found its main political home in the Yisra'el Beiteinu party.

63 | One of many examples is the article by Gideon Levy, "Israel is in the midst of a culture war", *Haaretz.com*, 11 Dec 2011, <http://haaretz.com/print-edition/opinion/israel-is-in-the-midst-of-a-culture-war-1.400736> (accessed 15 Feb 2012).

remained an island of democracy⁶⁴ and religious freedom in an ocean of autocracy and religious oppression. Why should it be any different in future?

However, there is no doubt that domestically, Israel is facing the increasingly urgent question of how to deal with the social and economic isolation of an ultra-Orthodox minority that is growing in both numbers and self-confidence. The Governor of the Bank of Israel, Stanley Fischer, recently warned that the Haredim needed to be much more integrated into the labour market.⁶⁵ In view of the fact that only 37 per cent of ultra-Orthodox men are currently employed,⁶⁶ this would appear to be a good means of countering the parallel society of the ultra-Orthodox Jews. Current plans to revise the "Tal Law" so as to put an end to the exemption of young Haredim from military service are leading in this direction.⁶⁷ This is one of the main results of last summer's secular and liberal religious protests.⁶⁸

When Israel was established, secularists within the Zionist movement believed that ultra-Orthodox numbers would dwindle as Israeli society and economy progressed. But this oversimplified equation that "modernisation equals secularisation" has been proven wrong in other parts of the world. What makes Israel different from other Western democracies is the fact that a religious component will continue to play an important part in determining its national identity as a "Jewish state".

64 | In the international democracy rankings, Israel comes somewhere in the middle; for specific indicators cf. *The Israeli Democracy Index*, n. 20, 209 et sqq.

65 | Ram Ozeri, "Fischer: Israel's ultra-Orthodox must start working", *Haaretz.com*, 2 Feb 2012, <http://haaretz.com/business/fischer-israel-s-ultra-orthodox-must-start-working-1.410515> (accessed 15 Feb 2012).

66 | Hila Weisberg, "Measures on Haredim vanish from labor reform", *Haaretz.com*, 27 Jan 2012, <http://haaretz.com/business/measures-on-haredim-vanish-from-labor-reform-1.409444> (accessed 15 Feb 2012).

67 | Cf. Adi Singer's overview of that debate: "Military service in Israel – mandatory for all?", 2 Mar 2012, <http://kas.de/israel/en/publications/30354> (accessed 2 Mar 2012).

68 | Yossi Verter, "Haredi army enlistment may cost Netanyahu precious political capital", *Haaretz.com*, 3 Feb 2012, <http://haaretz.com/weekend/week-s-end/haredi-army-enlistment-may-cost-netanyahu-precious-political-capital-1.410808> (accessed 15 Feb 2012).