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Can Israel be Both Jewish and Democratic?

Or:

Israel Between Jewishness and Democracy

Adaptation of Israel as a Jewish and Democratic State: Tensions and Prospects
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Foreword

This book is based on three lectures delivered in Jerusalem in June 1996, just after the elections that have brought Benjamin Netanyahu to power, a bare half year after the traumatic assassination of Yitzhak Rabin. The issues discussed in this book seemed then to be at the center of the quest for Israel’s future. But the Oslo process seemed to be heading towards a Palestinian state next to Israel, with both nation states struggling to form their identity. Five years later, in June 2001, the issues seem even more central than they had been then. The Oslo process has all but collapsed. Some say this outcome has always been written on the walls. Others say that the agreement was an historic gamble, that failed because of the behavior of both parties. Whatever the case may be, the process did not end the way its protagonists had hoped it would. The prospects of the Jewish state, and the possibility of justifying it, seem more complex and fragile now than they seemed to many in 1996.

It is quite clear that the forces and hopes driving the founders of Israel included a strong wish to establish a democratic country, but that the prime mover of the movement was the dream of a Jewish state. The founder of the state did not want to establish yet another state like all others, that will provide its population with democracy and justice. They wanted to establish a Jewish state, that will be democratic and just.

As we shall see, there have always been those who argued that this dream was, in principle, both impossible and immoral. But even those who challenge this position must show that Israel in fact succeeds in maintaining an acceptable balance
between its democratic nature and its Jewishness, and that it has the structures that may guarantee that it maintains a stable existence as a country, which is both Jewish and democratic in the future. I believe that the Zionist dream of a state that is both Jewish and democratic is conceptually possible and justifiable in principle. I also believe we must think seriously about the implications of the wish to maintain Israel as a just and democratic state which is also Jewish, to examine whether these conditions are in fact met in contemporary Israel, and to study what needs to be done in order that they are.

What I do in this book is to sketch the way in which Jewishness and democracy may be combined within Israel in principle, and to examine the way this compatibility can be concretized for some of the central controversies in Israel’s public life. I believe strongly that these issues are at the heart of the Zionist enterprise. I do not present a systematic, comprehensive theory; I do not mean my words to be the end of a normative quest. My hope is that this small book will make a contribution towards a more serious and deeper public debate of these issues. Such a debate is essential if Israel is to continue to exist as state that is Jewish and democratic.

This is not a subject that one is likely to write about from ‘nowhere’, looking at the facts with impersonal detachment. All such writing will be ‘biased’. Instead of denying the effects of this emotional bias, I prefer to concede it at the outset. This book is a part of my attempt to make sense of, and support, the fulfillment of the wish of Jews to exercise their right to political self-determination in their homeland. I want Israel to provide a stable and fair home to its population, irrespective of its
ethnic or religious affiliation. Naturally, this wish is alien, maybe even unworthy and illegitimate, to those who reject it and would like it frustrated. This book is unlikely to be meaningful to them. It is addressed mainly to those who share the wish that Israel stays, in some sense, a Jewish state. At least, the readers must accept this possibility as legitimate. Once this condition is met, I expect the book to be relevant to readers whose conceptions of democracy, the Jewish people, the conditions necessary for its survival, and the features of a just society, are very different than mine.

I write this book as a secular Jewish woman, with a firm commitment to humanism and human rights, who is also a Zionist. By ‘Zionist” here I mean only the belief that the Jewish people has a right to political self-determination, and that this right is now exercised in Israel. There are tensions between parts of this identity, but I do not see them as contradictory. These ingredients of my identity are not the result of laziness, inertia or convenience. They are a choice I have made. And I expect they are also the choice of a large part of the Israeli Jewish population. I also expect that other parts of the Israeli population – orthodox and haredim among the Jews, and Arabs and other non-Jews, will not disappear, and continue to form important parts of Israeli population.

I come from a family that lived in this country for many generations, living here alongside Arabs and members of other nations. We did not lose family members of Europe. My maternal grandfather and uncle were sepharadi rabbis. They spoke Ladino and Hebrew. My father’s family was traditional, not orthodox, with a strong commitment to Hebrew, and with familiarity with Arabic. My father and his siblings
all had the rich, nuanced Hebrew in which the differences between letters are clearly noticed. In my home we did not observe, but the house was full of traditions, prayers, songs. There was no process of ‘secularization’, a revolt against religion, the religious way of life, or its prophets and teachers. My parents grew in a multicultural society. They knew many languages, travelled to many places. Life was, at one and the same time, very Jewish and communal, but very open and responsive to a non-Jewish society and its charms.

Background alone does not decide the ‘voice’ or the ‘tone’ in which a book is written. I started thinking about the tensions between Jewishness and democracy not as the center of the existential problems of my country, but as a result of the fact that Israel was defined as “Jewish and democratic’ in the basic laws enacted in 1992. I started, therefore, with the legal meaning of the term, and with the implications the enactment had for the role of law and the judiciary in Israel’s public life. Very soon it became clear that the legal-professional dimension was but the tip of the iceberg. Today it has become fashionable to talk about all the issues in Israel in terms of the tension between democracy and Jewishness. So much so, that the invocation of the tensions between the two has become misleading. Many real issues in Israel are not related to either democracy or Jewishness or their combination. But many other real issues in Israel are either generated by, or at least intensified by, these tensions. And many of these tensions are generated by the fact that various groups in israel’s population see democracy and Jewishness in very different ways; and that the dreams and hopes of one group are often the fears and the threats of the other.
For this reason, the prescriptions I discuss in these pages for ways to combine Jewishness and democracy are not the description of my ideal state, the state that might have been possible if all people in Israel shared my identity, opinions, beliefs and emotions. I do not take for granted the continued stable existence of Israel as a Jewish and democratic state. Such an existence seems to me a huge challenge, whose prospects are not self-evident. My purpose is to identify courses of action that will improve these prospects, against the background of a diversity of groups, which will persist and even increase.

This kind of an attitude, which builds into itself an awareness of the wishes and needs of others, may involve giving up some consistency and coherence. Taking into consideration, as part of one’s own analysis, the perceptions and aspirations of others, even when these are inconsistent with one’s own, is necessary in order to sketch possible compromises between these views, so that their holders can live together without the need to be victorious. To me, this is the true meaning of liberalism – creating the political conditions, which permit the coexistence of different groups, without requiring them to lose their distinctness. But the adoption of a position of compromise in one’s own analysis may entail costs – personal, theoretical and political. The personal costs result from the fact that a strong willingness to be attentive to the needs and perceptions of others may blur one’s own place and identity. Concentrating on the need to compromise may compromise in turn one’s most basic commitments. The theoretical costs come from the fact that political compromise is rarely as neat and clear and coherent as an ideological position that is structured with coherence and elegance in mind. Most frightening and discouraging may be the political dangers. Political compromise is not an innocent game of
making theoretical points. The parties are trying to resolve a basic conflict of interests. The deal will be good if each party maintains what is essential for its continued, dignified existence. But this is not always possible. In addition, the sides may try each to get their best deal. Not being careful may result in the failure of one’s side to maintain the conditions necessary for its survival and flourishing. There is always the fear that points one yields as a sketch of a possible compromise will be seen as conceded ground, so that the negotiations now start from that point. Once one seeks not to move any further, there is the risk that I can be presented as obstinate and combative, while the other side presents itself as generous and reasonable. It may be safer, therefore, never to concede anything that is not joined to a symmetrical concession by the other side.

These costs are real and serious. Nonetheless, my road will be to sketch what I see as possible compromises. In fact, I do not think there is an alternative way for someone like me. I am interested in the sketching of scenarios for the improvement of Israel’s chances to survive as a country both Jewish and democratic, with a real commitment to the equal dignity and liberty of all the communities in its population. The deep rifts and divisions between the main communities of Israel mean that any political framework designed to permit them all a dignified existence must take into consideration, to some extent, their different goals, fears, aspirations and beliefs. Only a willingness to do this on my part will justify the demand that other groups do so as well. The willingness to see that the all groups in a society share the interest that their society works well is, to me, a central aspect of democracy: I see democracy as a form of government committed to solving problems and controversy by public discussion and an agreement about a shared political framework. I prefer
this mode of conflict resolution to most other available ways. If there is no willingness to accept the differences among groups and accommodate it to some extent – the only way to deal with deep differences is by force. This mode of conflict-resolution will generate a society, which is neither democratic nor just.

Some look at the tension between Jewishness and democracy at the abstract level. They examine the concepts of ‘Jewishness’ and ‘democracy’, and decide what their relation is. This is frequently done by those who reach the conclusion that the two are in fact inconsistent. I beg to differ. I find this approach unhelpful, since I believe that the tensions are not at the conceptual level, but at the empirical, social and political one. These, of course, are contingent and changing. It follows that one cannot really discuss the relations between Jewishness and democracy without some basic facts about Israeli society, and especially about the changes it has undergone in recent years. True, the tensions between the democratic form of government and between seeing Israel as the state in which the Jewish people implements its right for political self determination have existed, in different forms, from the inception of the state and before. In some sense, these tensions are immanent to the attempt to combine Jewishness and democracy in a state. Nonetheless, the formulation of these tensions and their visibility and mode of resolution are in flux. In other words, the combination between Jewishness and democracy is dynamic. There are changes in our analysis of democracy and its implications, as there are changes in our understanding of the implications of the Jewishness of the state. When we analyse Israel’s contemporary problems, it is important to understand why the debate about these concepts and the tensions between them has returned now to the center of public debate in such an intense way.
I Shall start with a short description of the background conditions against which the discussion is taking place. Conceptually and ideologically, there is an immanent tension between Jewishness and democracy, and between a universalistic attitude to all citizens, irrespective of religion or ethnic origin, and cultural or national particularism. This tension becomes a challenging political problem because Israeli society is deeply divided society, and two of its main rifts relate to this tension. One is the intra-Jewish debate concerning the nature of Judaism (Is it national-religious, or secular-ethnic and cultural). The other is the Jewish-Arab divide (between Jews, with their varying conceptions of Judaism, and Arabs, with their own variety of religious affiliations, and their different conceptions of their own identity and its components). The two rifts are serious enough to threaten the stability of Israel. Identifying Israel as a Jewish and democratic state is in fact one possible cluster of answers, whose possibility and desirability are highly controversial, to the question of the appropriate structure the rifted Israeli society should adopt.

The Arabs in Israel are a large minority: They number about 17% of its population. When Israel was founded, Palestinians formed a majority of about 65% in the area of mandatory Palestina-Eretz Yisrael. They were supposed to be a minority of about 45% in the area given to the Jewish state in UN resolution 181 of 1947. The understanding was that the Jewish majority in that part of the country will increase quickly once limitations over Jewish immigration would be removed. This picture changed dramatically in the wake of the 1948 war. It is not surprising that this war is called ‘The War of Independence’ by Jews, and the ‘Naqba’ (the disaster) by Palestinians. The Jewish majority was indeed increased by Jewish control over
immigration, and massive Jewish immigration to Israel. The numbers are less accurate for the Jewish groups. The ultra religious (haredim) are between 8 and 10 percent of the Jewish population, national orthodox are about 15 percent. Non-orthodox Jews are a large majority. But they consist of a small number of Reform and conservative Jews, of about 25% to 30% ‘secular-by-conviction’ Jews, and by a large group of ‘traditional’ Jews.

From the very beginning, and to a lesser extent to this very day, there is no symmetry between the two great divides. The Jewish-Arab rift has been systematically ignored by many. It did not have a high visibility, and it was regulated mainly by Jews, without cooperation and structured consultation with representatives of the Arabs themselves. There has not been a systematic public discussion of the status of the Arabs citizens of Israel, and its representatives have not commonly participated in decisions concerning Arabs and their interests. The intra-Jewish debate enjoyed constant discussion and elaboration. For many years, it was generally accepted that controversial issues among Jews must be regulated by power-sharing mechanisms. This acceptance led to the fact that for many years, state-religion issues in Israel were controlled by the principle that the ‘status quo’ be maintained, and only changed by agreement.\(^1\) Despite the many differences between the visibility and the mechanisms of resolution of issues pertaining to the two rifts, they did have something in common. Both clusters of issues were handled within ‘ordinary politics’. Often, issues were not even resolved by statutes of the Knesset. Many of them were handled by low-visibility administrative directives, or by laws reflecting

\(^1\)For a more detailed analysis of the rifts in Israeli society and differences in attempts to deal with them see Horowitz and Lissak (1990).
the existing social reality. Principled declarations and constitutional understandings seemed too hard to obtain, and were not even sought.²

One by product of this was the relative low profile that the courts, especially the Supreme Court, kept on both the debates and the arrangements adopted to deal with them. Here, too, there is a difference in the attitude of the Court to the two rifts. On all matters of review of administrative action, the court was intent to look at the procedures used by the authorities. If these were seriously flawed, the court invalidated the action based on them. However, there was a consistent attitude of deference to the substantive judgements of decision-makers. As a result, the protection of Arab interests and rights against government action that met procedural requirement was very weak. In many of these decisions, the discourse is emphatically neutral. The court refused to address the fact that the lands appropriated, or the people whose freedoms were denied, were Arab.³ In the intra-Jewish debate, the low profile took a different form. The court was not neutral. It was very consistent in sounding a voice against religious coercion, and against limitations of people’s freedom from religion. It demanded that all violations of such freedoms be enacted in primary legislation. However, once such legislation was enacted, the court respected the arrangement and applied it. When the review of administrative action required taking a stand between the religious and the cultural-historical interpretation of the Jewish nature of the state, the Court tended to avoid the substantive decision.⁴

²See Chapter II, below, for a discussion of the reasons why Israel never enacted the constitution it planned to have.
³See chapter 3 below for some important exceptions to this statement.
⁴The court was asked by orthodox petitioners to stop the working of TV on Saturdays. It decided not to intervene on the basis of the absence of standing. See also Chapter II below for the way most of the non-orthodox judges decided a notable ‘Who is a Jew’ petition without addressing the question on its merits.
The new visibility and intensity of public discussion of the tensions between democracy and Jewishness stems in part from the erosion in the ways Israeli society addressed the two rifts. One reflection of this erosion is the fact that all the three major groups we are discussing here – non-orthodox Jews, orthodox Jews and Arabs⁵ – feel today less comfortable with their situation than they had felt earlier. Interestingly, this is not because their situation had worsened. All three groups benefited from the lapse of time.

The Arabs in Israel enjoy now a much higher level of education and freedom than they did when the state was founded. For almost twenty years, most Arabs were subject to military rule. Their elites have mostly fled the country. Gradually, the blatant limitations of Arabs’ freedom of expression, association and movement were removed.⁶ After 1967, Arabs in Israel strengthened their connections with the Arab world, and with their Palestinian brethren. The political power of Arabs grew, and in 1992 they were part of the parliamentary block that enabled Rabin to form the government which initiated the Oslo process. At the end of the 20th century, there are 13 Arab MPs, most of them in Arab parties with explicit Arab agendas. All these processes raised significantly the level of hopes, demands and expectations of Arabs in Israel. The growing vocality of their demands, in turn, raised the visibility of the rift and some fear, resentment and opposition in Jewish circles.

⁵The division of Israeli society into the three groups mentioned above is of course an oversimplification, which may be very misleading. About 5-6% of Israel’s population belongs to neither group, and their number is likely to grow. They consist mainly of non-Jews who came with the immigration wave from the former USSR. And of a growing number of foreign workers. The orthodox Jews contain many sub-groups, as do the secular Jews. The ‘traditional’ group consists mostly of people from Islamic countries, the Mizrahi, who form a distinct group on other grounds as well. The complexity of these groups may affect the arrangements that can and should be enacted. Despite these facts, which I will refer to when needed, the division to the three main groups seems useful.

All Arabs want more equality and object to discrimination against them. As a group, Arabs are among the weakest groups in Israeli society. Their political weakness has resulted in the fact that in many contexts, allocation in the Arab sector are significantly lower than they are in the Jewish sector. Arabs are under-represented in all senior political, academic, professional and economic positions. Arab demands and aspirations are less clear on the symbolic and ideological level. Until recently, some of them advocated the solution of ‘Two states for Two Peoples’, indicating that Israel could be the Jewish state, but there should also be a state for Palestinians. More recently it appears that at least the leadership now promotes the idea that Israel itself, even if there is a Palestinian state, must be ‘A State of All Its Citizens’; or, in other words, they want Israel to give up its Jewish particularity. While the slogan sounds as if the demand is that Israel becomes neutral, so that all non-civic identities will be equally privatized, it appears that the Arab demand is that Israel will give equal public recognition to Arabs, so that it will become a bi-national state (or a multicultural one).

The practical implications of these demands are also unclear. Some demand integration into Israeli society in all ways, but most insist on significant measures of autonomy, and would like to maintain separation in education and in housing arrangements. Among Arabs in Israel there is also a variety of attitudes to religion and to tradition. Arab intellectuals express doubts concerning the right of Jews to political self-determination in Israel. They also hold different views about the ways in which the Palestinian ‘Right of Return’ should be recognized and implemented. Arab leaders in Israel express strong identification with the Palestinian struggle for independence and with Arab regimes in the region. And their criticism of Israel and its policies is blatant and aggressive.
There are also changes in the attitudes of Jews towards Arab demands. There is a growing willingness to concede the principled demand that Arabs are entitled to civic equality, and to pay it at least serious lip-service. There has been some progress towards more equality in allocation and access.\textsuperscript{7} Israel’s Supreme Court has declared the principle of non-discrimination, and applied it to the controversial issue of land allocations.\textsuperscript{8} On the other hand, there is also a growing sense among many Jewish circles that the Arab citizens of Israel are a serious and growing threat. As a result, there are periodic suggestions that the political power of Arabs should be limited.

Both these trends came to a dramatic high point in October 2000, when 12 Israeli Arab youngsters were killed by Israeli police during a few days of demonstrations and riots. The events are now being reviewed by a Commission of Inquiry. The Arab demonstrations started together with the beginning of the second Palestinian uprising. The events shattered the delicate fabric of Arab-Jewish relations in Israel. While the violence ended after a few days, the repercussions of the events are still unfolding. In February 2001, the Israeli Arabs boycotted the elections for Prime minister, thus expressing their anger and disappointment with Ehud Barak, and their unwillingness to vote for Ariel Sharon. I

The heightened tension among Jewish groups is, similarly, the result of a growing sense of being threatened by the other groups. The orthodox feel that the status-quo arrangement was eroded against them: There is less observance of Shabbath laws and practices, more avoidance by many of the rabbinical courts monopoly over matters of marriage and divorce, and a general weakening of the consensus concerning the orthodox monopoly generally, in favor of religious

\textsuperscript{7}See the discussion of equality in Israel’s report to the Human Rights Committee, 1998, and Israel’s report to the committee on Social and economic Rights, 1999.
pluralism and recognition of the non-orthodox versions of Judaism. Some of these trends have been helped or encouraged by decisions of the Supreme Court. Interestingly, secular Jews too feel that the status quo was eroded against them. There is more presence of religion in public life. The political power of the religious and ultra religious parties is growing; Jewish particularism, which was quite pluralistic and amorphic, is becoming more religious and halachic. In addition, both parties now seriously doubt the status quo itself. The orthodox are not happy any more to accept the deal of Shabbat, control over Kosher food, educational autonomy and money for their needs in return for a willingness not to participate in matters of foreign policy and security, or in general matters of education and welfare. They continue to demand autonomy and allocations, in increasing measures. But they now want a say on all matters relating to Israel’s decisions, and insist that they should participate in the decision concerning its priorities and the construction of its public sphere(s). In addition to the struggles between secular and orthodox (reforms and conservatives often join the side of the ‘secular’ in these debates), there is also a growing tension between the national-religious camp and the haredi groups. The secular majority, in turn, lost much of their patience with the arrangement granting an orthodox monopoly over matters of personal status, conversion and burial. They are also increasingly resentful of the large allocations given to the haredim, despite the fact that they do not serve in the army and do not participate in the work force. The situation becomes even more charged because of the frustration of the non-orthodox majority, who feels exploited and ‘blackmailed’ by the haredim due to the fact that they have become almost essential to form a government. Clearly, the political situation is unstable. All groups wish to improve their situation, by both maintaining
parts of the status-quo eroded against them, and by the adoption of new arrangements more suited to their interests.

Both rifts deepened with the developments that started with the Oslo process in 1993. Moreover, the Oslo process also highlighted the complex relationships between them. The Oslo process has further polarized Israeli population. While the pro-Oslo vs. anti-Oslo polarization is independent of the religious-secular divide (and even of the Arab-Jewish divide), the broad division is clear. Most religious Jews identify with the Right, which originally rejected the Oslo accords, whereas a large majority of Arabs supported the Oslo process.\(^9\)

Almost inevitable, the struggle of the Jewish right against the Oslo process took, for some people, the form of fighting the legitimacy of Arab participation in the political decisions concerning Israel’s borders and its agreements with its neighbors. These forces sounded the demand that these decisions be made by a “Jewish majority”. Furthermore, the struggle against Oslo was presented as a vindication of Judaism and Zionism. It was based on a deep reluctance to consider giving up political control over parts of the Jewish historic homeland, with the host of Jewish holy places found in it. A strong group in this struggle was the ideological settlers, most of whom are orthodox. This Right-Left divide now took over, and blurred to some extent the principled differences between secular and orthodox. As we shall see, it created strange alliances, and produced a complex dynamic for the two rifts under discussion here.

\(^9\)Some radical Jews, and some Arabs, objected to the Oslo process because they saw it as a cooptation of Arafat to perpetuate occupation and Israeli superiority.
The Jewish ‘peace camp’ was not depicted simply as a group willing to take the risk of negotiating and settling with the Palestinians. They were described as ‘Arab lovers’, as ‘anti-orthodox’, and as people without any deep and serious ties to the Jewish people and its homeland. They, in turn, saw those who opposed Oslo as sectarian, indifferent to the high costs paid by the Palestinians for their dream of a Greater Israel, and coercing all Israelis to defend and fight for the continuation of the occupation. Clearly, this bitter controversy colored the debates between secular and orthodox, and attitudes to the possibility of the co-existence of democracy and Judaism.¹⁰

This sharpening of ideological debates within Israel was combined with some new trends in the institutional structure of Israel. Complex processes brought more petitions – such as equality in allocation, education and housing for Arabs, the political representation of Arabs, non-orthodox conversion, Shabbat arrangements, and prayer next to the Western Wall - to the Supreme Court of Israel, and the Court started to adopt a more activist stance towards them. In terms of bottom lines, the court was usually very careful. Yet the change created more uncertainty and instability in the system.

Until now, the understanding was that most of the important decision concerning the Arab-Jewish rift and the divide between secular and orthodox Jews will continue to be made by the political system itself. This assumption was challenged by the growing involvement of the court. First, the court now undertook

¹⁰The polarization around the Oslo process helped blur some important differences of attitude within the two groups. There are some haredi leaders, notably Ovadia Yoseph, the leader of the large Shas party, who support an agreement with the Palestinians, because they believe that only such an agreement can bring an end to the loss of Jewish life. On the other hand, many in the secular peace camp oppose the idea of full equal rights and integration of Israeli Arabs.
the authoritative interpretation of arrangements in the state-religion area, as well as in the Jewish-Arab divide. Furthermore, the court analyzed these cases in terms of the protection of human rights, which made legislation to ‘amend’ the court’s interpretations very difficult. No legislature wants to appear to enact laws that were declared by the high court of their own system blatant violations of human rights. Finally, the 1992 basic laws, declared as a ‘constitutional revolution’, and interpreted as giving the court the power to review even Knesset laws inconsistent with these laws, created a real danger that the immunity of the political arrangement in these sensitive areas has ended. The danger became even more pronounced since these laws make the description of Israel as a “Jewish and democratic state” a part of the authoritative legal material in Israel. The courts may thus be invited to develop their own interpretations of what the combination mean, and to use it to invalidate governmental policies or even laws.

This development may thus transfer some of the power to make decisions in these sensitive areas from the political system to the courts and the legal community. This is a significant development for at least three reasons. First, judicial decisions enjoy higher visibility then many governmental deals and decisions. They are seen as based on principles, rather then on the interplay of powers and interests; secondly, judicial decisions may have an all-or-nothing aspect, supported as they are by the power of the state. This is very different from the working of the political system, which may allow for negotiations and compromise; Thirdly, members of the judiciary are very different in their ethos and commitments from members of the political system.
An additional relevant factor is the increasing interest, in Israel as well as all over the world, in the politics of identity and of membership. This interest is typically raised when societies within the liberal-individualist tradition encounter societies different than themselves. In these different societies, membership and group identity are seen as more central and important to one’s welfare. Such encounters generated, among other things, a large literature concerning criticism of liberalism from communitarian and republican perspectives. They now have generated a large and growing literature about the meaning and the benefits, as well as the dangers, of multiculturalism. In Israel, the struggle of minorities who are fighting against individualist liberalism centers round seeking the contribution of the state to their collective group needs, in addition to the demand that it protects individual human rights. As a result, many groups are interested in an active involvement by the state in a variety of measures helping them to maintain and even strengthen their communities, and help them transmit their culture and values to their children. It is ironical that this quest may be strongest among the majority group – the non-observant Jews, who have lost the sense of their uniqueness, and seek ways of enriching it.

We can now proceed into the body of this essay. In the first chapter I examine various claims, coming from different theoretical and political perspectives, that a Jewish and democratic state is either logically impossible or cannot be justified in principle. As I reject these claims, some features of the Jewishness and the democratic nature in Israel will emerge. In the second chapter I describe a few dimensions of the combination between Jewishness and democracy in Israel. I look at a number of central arrangements, and at some decision-making mechanisms. I argue
that some of these arrangements are very hard to justify, while some others are a reasonable and acceptable illustrations of the way Jewishness and democracy may go together. Building on the first two chapters, I examine in the third chapter some of the implications of the requirement that Israel be both Jewish and democratic. I argue that many of the issues usually presented as tensions between Jewishness and democracy are in fact well-known internal tensions within democracy itself. Nonetheless, there are indeed serious and deep tensions between the implications of Jewishness and those of democracy, applying to both the intra-Jewish divide and to the Jewish-Arab one. There are also meaningful weaknesses in the ability of Israeli society to handle these tensions well. Consequently, the prospects for a stable combination of Jewishness and democracy in Israel are neither simple nor self-evident.
Chapter One: Compatibility and Justifiability, in Principle, of a Jewish and Democratic State

In this chapter I wish to defend the thesis that the ideal of a state both Jewish and democratic in Israel, under some specifications, is both coherent and feasible. Furthermore, such a state can be morally justified.

Some may wonder why I choose to devote the first chapter of my book to a question the affirmative answer to which enjoys such a broad consensus among Jews in Israel. The breadth of this consensus is not reflected only in the fact that this description of Israel was included in the 1992 basic laws, which are seen by many as parts of Israel’s constitution. The validity of this statement is taken for granted by most of Israel’s Jewish political leaders. It was presupposed by the UN declaration of November 1947, to the effect that Palestine should be divided into two states, both democratic, one Jewish and one Arab. It forms part of the most basic political intuitions of most citizens of Israel, Jews and non-Jews alike. And it is well grounded in the minds of people whose commitment to democracy is questionable.

However, broad consensus often hides serious internal tensions and even incompatibilities. In Israel, it does lead to our reluctance to take seriously attitudes, from all sides of the political spectrum, that challenge these assumptions. These voices claim that the two features – Jewishness and democracy – are not compatible in principle. They advocate bold recognition of this fact. Practically, they advocate
that, at least when the two features contradict each other, Israel should openly declare its commitment to one of them, and give up on the second.

I believe this reluctance is both unwise and dangerous. This is why I set out, at the beginning, to put the idea of Israel as a state both Jewish and democratic on grounds that are more solid than mere repression or denial of the difficulties.

It is not surprising that the tensions between the Jewishness of the state and its democratic commitments have been subdued in Israel’s declaration of Independence. This is a celebratory document, drafted by the leaders of the Jewish community. The drafters and signers intentionally cooperated in masking the fierce intra-Jewish debate on whether Jewishness is national or religious identity. Less intentionally, they all cooperated with the very low visibility of the tension between the Jewish state and the rights of its non-Jewish population.

The asymmetry in visibility between the two tensions becomes very clear in the debate over the constitution in 1950. All speakers address the danger of a ‘cultural war’ between those who see Jewishness exclusively in terms of the Jewish religion, and those who see their Jewish identity as a matter of national and cultural affiliation. Some wanted to use the moment of constitution making to decide the issue, once and for all, against the religious conception of the Jewishness of the state. They wanted to

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11 There is no explicit reference in the Declaration to God. The relationships between the Jewish people and their homeland are based on history, the Zionist return, and the UN resolution. At the end, there is reference to ‘The rock of Israel’ (Zur Yisrael), which may be interpreted as God, but also as the bedrock of the Jewish people. The choice of this ambiguous term was a deliberate compromise between religious and non-religious Jewish leaders.

12 The Declaration opens up with affirmation of the Jewish state. It then goes on to declare that the state will respect the rights of all to freedom, language, and welfare irrespective of national origin or religion. The declaration calls on Arabs to participate in the effort to found the state, and enjoy ‘appropriate representation’ in its institutions. The democratic institutions of the two states were a requirement of the UN resolution.
entrench some form of separation between state and religion in the constitution. Others, including most of the religious representatives, presented the controversy as a good reason against making a constitution. To some of them, Israel did not need a constitution because its eternal constitution should be the Torah. All joined in emphatically distancing themselves from the point raised by Eri Zabotinsky, son of Zeev Zabotinsky, who served as a Herut MK. Zabotinsky argued that we needed to decide in the constitution the question of the status of the Arabs in the Jewish state; and that the resolution of this question was not simple. For a variety of reasons, the Knesset decided in 1950 not to enact a constitution. In the first years of the state, devoted to war, mass immigration and consolidation of the state, there was hardly any political visibility to tensions between the particularistic Jewish character and the implications of universal values. Efforts were all devoted to building the Jewish state.

What may be quite understandable in the first years is very surprising today. Israel is now a secure, developed country. Moreover, the challenge that Israel cannot be both Jewish and democratic at the same time is now heard explicitly and vocally from all sides of the political spectrum, in Israel and around the world. Ignoring these challenges seems both unwise and dangerous. Such an attitude may make Israeli youngsters more vulnerable than they should be to allegations that the whole idea of a Jewish state is, in principle, unjustifiable. On the other hand, dismissing such challenges as mere anti-Israeliness may obscure important features of internal tensions within Israeli public life.
A telling example of this tendency to over-simplify the problem can be found in the way the then President of Israel’s Supreme Court, Meir Shamgar, responded to the claim of Meir Kahane that his party should not be banned under the law specifying that anti-democratic parties should be banned, because the same law also specifies that Israel is a Jewish state, and the two are inconsistent. Shamgar dismissed Kahane’s claim by saying that Israel’s Jewishness should not interfere with its democratic nature any more than France’s Frenchness interferes with its democratic nature. On one level, this may sound a very persuasive answer. But this appearance of analogy weakens considerably when we recall that French citizenship is open to all, irrespective of religion or ethnic origin. Clearly, this cannot be said for Jewishness. True, the particularity of Frenchness is not merely civic. There is an obvious cultural distinctness to it. And recent developments in France, and in all developed countries, suggest that the bonds of citizenship may not be enough to assimilate one into the culture of the host country. In France, too, there may be tensions between French citizenship and membership in the French cultural community. These tensions, indeed, should not detract from its democratic nature. While Shamgar’s analogy is not totally wrong, a lot of its appeal is lost when we recall that the different non-Jewish groups within Israel are not small groups of immigrants, who may be expected to assimilate into French culture while maintaining some ‘privatized’ communal features like religion. Non-Jews in Israel are large indigenous populations, most of whose members lived here before massive Jewish immigration, and before the foundation of the state. These communities have their own ethnic, cultural and religious affiliations, and they have no intention or wish to assimilate into Jewish culture. Moreover, Jews and Arabs in Israel are still

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13 I will return to this matter below, in Chapter 2.
involved in a persistent conflict, with many violent spells, whose end is not in sight. The conflict is fuelled by serious allegations of violence, dispossession, persecution and oppression, made by Arabs in Israel against Jews and the Jewish state. Israel is in the midst of a region with a huge Arab majority. In addition, since 1967 Israel controls the area between the sea and the river Jordan, which had originally was to be divided into a Jewish and an Arab state. Jews are still a small majority in this region, but it is expected that Arabs will become a majority in it within one generation. Against this background, it is hard to accept that the Jewishness of Israel, especially Greater Israel, is as simple as the Frenchness of France.

The tendency of many Jews to hide and distance these tensions between the Jewish particularity of the state and its commitment to civic equality has serious theoretical and practical implications. These in turn facilitate some faulty conclusions. These implications are the reasons I have decided to take the conceptual and political challenges presented to the idea of a Jewish and democratic state more seriously than others. I end up rejecting the challenges. Moreover, I conclude that the Jewish character of Israel cannot only be justified despite its tensions with democracy. In large part, it is based on the very democratic nature of the state. Nonetheless, my analysis shows that there are practices which are sometimes justified by the Jewishness of the state which are indeed inconsistent with democracy. And there are some ideals of the supporters of liberal democracy that are indeed incompatible with the idea of a Jewish state. This analysis will thus highlight the costs that the state imposes on its population to maintain its double-identity as both Jewish and democratic; will help us decide if we can and want to pay them; and will
identify what needs to be done to help Israel survive as a just state which is both Jewish and democratic.

The challenges to the consensus that Israel can be both Jewish and democratic share the belief that the combination is incoherent, conceptually and morally. They all reject the practical possibility that a democratic country, especially one with a large non-Jewish local population, can maintain a solid affiliation with Judaism and the Jewish people, and serve as the nation-state of Jews. They all conclude that Israel must choose between these elements of its identity. The polar difference between these two groups of challenges lies in their choice of the preferred element of identity. Kahane and his followers think Israel should be, first and foremost, a Jewish state. Among members of the critical left, Israeli Arabs, and radical supporters of Western liberalism many advocate the priority of democracy. The assessment of these challenges requires an examination of the concepts of ‘democracy, and ‘a Jewish state’. There are senses of ‘a Jewish state’ that all concede are incompatible with democracy, just as revolutionary Islamic Iran cannot be a democracy. When political decisions are made by religious leaders, according to religious law, what we have is theocracy. Theocracy is inconsistent with the most basic tenet of democracy: the consent of the ruled gives the governments its legitimacy. But there are senses of ‘a Jewish state’ which may well be compatible with democracy. After all, the US Supreme Court, while affirming the First Amendment with its separation between church and state, described the US as ‘a Christian country’. Most European countries

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14As we shall see, countries whose populations include strong religious groups may have a variety of attitudes to religious traditions and establishments. Many of them are quite consistent with democracy. Indeed, a total denial of the right to participate in the political life of the country to such religious groups may itself run counter to democratic principles. The matter depends, among other things, on the way particular religions treat the political rules of the game. Even in Iran we can see mechanisms which may suggest a development towards democratization within theocracy. I return to these matters in Chapters 2 and 3 below.
are still seen as the ‘nation states’ of their particular peoples. This fact does not make them, by definition, not democratic.

The controversies concerning the tensions between Jewishness and democracy stem from both the ambiguities in the conceptual analysis of the terms, and from disagreement about the actual and the possible realities of present-day Israel. Let me start with the conceptual analysis.

1. A Jewish State

There are at least three clusters of meanings to the expression ‘a Jewish state’. The first, and weakest, concerns the identification of the state’s population. Israel is a Jewish State, according to this sense, because a large and stable majority of its population, since its inception, is Jewish. This sense of the Jewishness of the state leaves out the complex relationships between Jews in Israel and outside it, as well the deep questions of the relationships between national and religious aspects in Judaism. The factual truth of the statement applies irrespective of debates concerning “Who is a Jew’, and has been a constant feature of Israel in the last 53 years. It is worth mentioning that many thought that the Jewish majority will be smaller and may disappear even within the 1967 borders. This has not happened. In fact, the Jewish majority never went lower than 80% throughout Israel’s existence, despite a much higher birth rate among the Arabs in Israel. This trend may not continue. Some
scholars have argued that the numbers should be seen differently, and that we should look at them in the area under Israel’s control, i.e. on Israel/Palestine from the sea to the river. Even in that area, Jews are still a slight majority in 2001. But, more important, so long as the notion of ‘two states for two people’ still seems the one preferred by most residents of the region, of both peoples, it makes sense to identify pre-67 Israel as the political entity described as ‘the Jewish state’.

Some argue that the best way to signify this cluster of senses is not ‘the Jewish state’ but ‘The state of the Jews’. Some of these further argue that this is precisely why Herzl called his vision by the latter name. According to this analysis, Herzl’s vision was that the problem of the Jews in Europe was created by the fact they have been a minority everywhere, and the only way the problem could be solved is by establishing a political entity in which they would become the majority.\(^{15}\) Be this as it may, it should be clear that the mere fact that Jews are a stable majority in a country does not, in itself, suggest that the regime in this country cannot be fully democratic. Most Western democracies are nation states with a large ethnic majority, and in many of them there is a majority of one religious groups, and these facts do not threaten, in principle, their democracies. It may be claimed that Christianity is more conducive to democracy than other kinds of religion, and that Judaism and Islam, in particular, are inconsistent with democracy because of their totalistic visions of life. This is a controversial claim, and in any event it cannot support a principled inconsistency between a state being Jewish in the sense of having a Jewish majority, and its having a democratic regime.

\(^{15}\)See the debate on this point between, among others, Claude Klein and Yoram Hazoni.
In fact, democracy seems to suggest that the identity of the large majority of a country’s population should legitimately affect its culture and nature. As we shall see below, democracy is based, in a central and significant way, on taking seriously the actual preferences of the population. In many instances, decisions in democracy are made by a majority-vote. When the majority in a country is Jewish, it is just natural that Jewish interests and concerns will be affirmed, defended and supported. In this sense, Herzl was right: A Jewish majority in Israel is, in itself, an effective guarantee against persecution or genocide of Jews as such by the state in which they live or with its permission or tacit encouragement. Yet we should remember that this ideal of the Jewish state is quite minimalistic, and it applies only to existential concerns shared indeed by all Jews in Israel. This is a very ‘thin’ sense of the Jewish state. A Jewish majority, for example, does not require a dominance or hegemony of Hebrew or of Hebrew culture, or of Israel’s heritage, or of Jewish law. Indeed, this was the center of Ahad Haam’s vicious critique of Herzl’s book. Ahhad haam pointed out that Herzl’s vision does not guarantee that the state of the Jews will have any culture which will be distinctively Jewish, and that it may secure a solution to the problem of the Jews, but not a revival of Judaism.

The relationship between the Jewishness of the state, even in this weak sense, and democracy, gets more complicated once the Jewish majority is not only a description of a stable state of affairs at a given point in time, reflecting a stable state-of-affairs throughout a long period of time. Today, even countries with stable and long standing national majorities are facing serious debates over immigration. Israel is in a much more fragile situation. First, its Jewish majority may not last if Israel does not implement a strict immigration policy welcoming Jews and discouraging and even
excluding non-Jews. Secondly, the creation of the Jewish majority in Israel was itself a controversial political process.

I will return to these issues below. At this stage, suffice it to say that the creation and the maintenance of the Jewish majority in Israel raise serious concerns about the interests of non-Jews living in the region.

The second cluster of meanings of ‘a Jewish State’ generates more complex issues. This cluster connects the Jewishness of Israel to the right of Jews to self determination. Under this cluster of meanings, Israel is the state in which the Jewish people exercises its right to political self determination. In other words, Israel is the nation-state of the Jewish people. This is one of the important senses of the term in Zionist thought and in the Declaration of the Establishment of the State (often misnamed The Declaration of Independence). It seems this is the cluster evoked by President of the Supreme Court Shamgar when he said that the ‘Jewishness’ of Israel did not affect its democratic nature more than did the Frenchness of France. We saw, however, that Shamgar’s statement relied on a central ambiguity in the term ‘nation-state’. In one important sense of the term, a nation-state is merely the state of its body of citizens, since the nation is civic society itself, and ‘nation building’ is the process of strengthening the civic connection between citizens and their states. These citizens may be members of many ethnic, religious and cultural groups. This is the process we know in countries of great mass-immigration. Yet even in these countries, there is a different sense of ‘nation-state’. Under this sense, the nation-state is the result of a deliberate attempt to draw the state’s borders so that they contain most and mainly members of the same ethnic-cultural-religious-national group. When this is the sense of a ‘nation-state’ problems of the relationships between the group whose
national home the state is and members of different groups may arise. While France and the US may be regarded as paradigmatic cases of neutral nation-states for their civic bodies, it is important to recall that they have a strong cultural assimilationist tendency, reflected among other things in the requirement of one language. The ‘American way of life’ and ‘Frenchness’ are, despite everything, more than just the passport one keeps. Nonetheless, the difficulties that non-English speakers and non-French speakers encounter in the US and France respectively are much less serious than those encountered by ethnic groups living in countries defined as the national homes of a people different from them. When Israel is described as the nation-state of Jews, the implications to the status of its Arab citizens is very different than the issues raised for a Moslem French citizen. For one thing, the Moslem can be described as partaking in Frenchness by being a citizen. The Israeli Arab does not partake in the Jewishness of the state by virtue of his being an Israeli citizen. Shamgar’s analogy would have had more force it he had discussed the ‘Israeli’ nation. But the scholars who do talk about the Israeli nation usually advocate that it will indeed include all Israeli citizens.\(^\text{16}\)

Historically, as we saw, there is no doubt that Israel was indeed founded as a nation-state in the second, particularistic sense.\(^\text{17}\) Clearly, Israel was not established to provide a political home for the population, which in fact inhabited its territory in 1947-48. So the questions facing us are, taking into account the historical

\(^{16}\text{For one attempt to argue along this line see Agassi, Between Religion and Nation: Towards a National Israeli identity. However, Agassi concedes that Israeliness and in a way Jewish, and does not give an adequate answer to the way how The legitimacy of ethnic Jewish feeling can be squared with a civic nation-building that will tend to weaken this affiliation. A Palestinian analysis along these lines is given by Azmi Bishara. However, Bishara describes himself as a Palestinian patriot. It is unclear how this can be squared with asking that Israel will give up its Jewish affiliations.}\)

\(^{17}\text{It is significant to recall that this conception of Israel is not limited to the Zionist movement. This is the way Israel was conceived of by the 1947 UN resolution, and this is the way most people in the world see it to this very day.}\)
circumstances of the creation of Israel, can it be a democracy? And can it be justified in principle? Can it be just in fact, and has it succeeded in creating a justifiable state? I shall return to all these questions below. At this stage, all I want to do is identify senses of ‘a Jewish state’. The first sense I mentioned above, that of a state with a Jewish majority, is best described by the term ‘The state of the Jews’. The second sense, that of a Jewish nation-state, is best captured by ‘The state of the Jewish people’.

A third cluster of meanings of the Jewishness of the state relate to its religious affiliation. In its strongest meaning, Israel as a Jewish religious state is a halakhic state. Some say that the term ‘a Jewish state’ fits this sense most naturally. In a halakhic state, all political questions are internal religious ones. In such a state, decisions are made according to Jewish law, as it is interpreted by the authoritative interpreters of Jewish law. Moreover, decisions are made by people who are authorized by religion itself, and religious norms are the ones invoked by the citizenry to evaluate the performance of the rulers. In other words, in a state like this, all public debate is truly religious. It is hard, if not impossible, to think how there is a debate within such a state about the nature of religious law itself, or about the nature of Judaism and whether or not it is exhausted by religion. A Jewish state in this strong sense is a theocracy.

I am not sure there is in the modern world a pure theocracy in this sense. But a state may have religious affiliations which are weaker and nonetheless substantial. These may take the form of incorporating into the legal system some parts

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18Iran after the revolution may be the closest, but even in Iran there is a constitutional debate about the proper role of Islam and Moslem decision-making in public life.
of religious law, or of giving limited powers to religious decision-makers. As we shall see, this situation does exist in Israel, based on democratic decisions of the political system itself. Notably, Israel’s laws give religious courts a monopoly over matters of marriage and divorce.\(^{19}\) In other matters, such as Kosher food certification and burial, laws give official powers to specific religious establishments.

I mentioned above that some people stress alleged differences between ‘a Jewish state’, ‘the state of the Jews’ and the ‘state of the Jewish people’. In other contexts, the three expressions are often used as if they are co-extensive, and people move from one to the other without paying attention to these possible differences.\(^ {20}\) Now that these terms are in the law, it is important to leave the ambiguity, and to clarify issues as they arise. This ambiguity has important political functions, and it will be a pity to give them up by enforcing one authoritative interpretation. Similarly, the ambiguity may permit broad agreement on the idea of Israel as a Jewish state in some sense, despite serious disagreements as to the legitimacy of some aspects of this complex idea. For our purposes, however, it is important to emphasize the distinctions between the various clusters of meanings, and the complex relationships between them. Thus, there may be agreement between the advocates of a Jewish nation-state and those who want a Jewish theocracy, that efforts should be made to maintain and strengthen the Jewish majority in Israel. At the same time, they may

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\(^{19}\)See below. This arrangement is in fact a remnant of the Ottoman millet system, which was retained by the British authorities at the request of the non-Jewish communities. Israel has not changed the laws granting authority to non-Jewish religious authorities over all matters of personal status. For the Jewish community, a 1953 law gives rabbinical courts exclusive jurisdiction over marriage and divorce of Jews in Israel, and concurrent jurisdiction on other matters of personal status.

\(^{20}\)The history of legislation is itself ambiguous on this question. The Declaration of Independence used ‘a Jewish state’, presumably in the nation-state meaning of the term. In 1988, the election law banned a party which ‘denies that Israel is the state of the Jewish people’, in order to avoid the interpretation that Jewish here meant religious. Yet the Basic laws of 1992, and The Parties Act of the same year use ‘Jewish state’. It was said that this change was not meant as a change of meaning, but that the latter term would be less alienating to the non-Jewish citizens of the state.
disagree vehemently about who should be considered ‘Jewish’ for this purpose, what the public sphere in Israel should look like, and what are the implications to political questions such as the borders of Israel or the continued settlement in the areas occupied in the 1967 war. Arabs may agree that Israel is and may remain a Jewish state in terms of its cultural identity, but object to seeing it as a nation-state with a claim to a monopoly over all the public and symbolic spheres in the state. It is therefore important to see that the mere support of, or the objection to, the idea of a Jewish state, may not say much about the positions of the parties. We need to see, in each case, what specific positions and arrangements the parties support or reject.

2. **Democracy**

As we saw regarding the notion of the Jewish state, the characterization of democracy is also very controversial. Unlike the first case, however, the controversy may be described as a movement on a hierarchical spectrum of meanings, starting from a ‘thin’ conception of democracy and moving up to ever ‘richer’ ones. Consequently, we should not talk about ‘democracy’ as an ‘all or nothing’ matter. While some societies are clearly below the mark of democracy, and some are clearly democratic, in many cases it is more fruitful to talk about societies as being ‘more democratic’ or ‘less democratic’ than others. It is also possible and interesting to examine the measure of democracy in a given society over time. Democracy is an ‘ideal type’ of a political regime. The primary question in stipulating a conception of democracy is which questions – theoretical
as well as practical – should be discussed in terms of the democratic nature of the state, and which should better be discussed in other terms.

The thinnest conception of democracy, agreed to by all scholars, is the basic principle that the legitimacy of the government is conferred by the consent of the people. Many institutional and structural questions are left open by this characterization. Who is included in ‘the people’? Is democracy direct or is it representative? How are representatives elected? How frequently are elections held? England, the mother of all democracies, gave the right to vote to women only at the beginning of the 20th century, while Switzerland gave them the right to vote only at the end of the century. The fact that women did not vote was a serious flaw in the democracy of these nations. Happily, it was put right. Nonetheless, it does not mandate the conclusion that they only became democracies when this right was granted. The legitimacy of government, even before women were given the vote, was based on the consent of the governed. Often, this conception of democracy is labeled a ‘formal’ democracy, or a democracy of the rules-of-the-game.

Many scholars tend to argue that formal democracies do not deserve the name ‘democracy’. They are willing to describe a regime as a ‘democracy’ only if it includes additional elements, such as a written constitution, a constitutional protection of human rights, a basic commitment to equality and to social justice, liberalism, or a commitment to deliberation as the source of public decision-making. Indeed, the addition of some or all of these elements will yield a richer characterization of democracy than the one I have suggested above. The
argument supporting this broader characterization of democracy usually rests on the claim that the formal conception of democracy is too thin; and that such a regime may often produce arrangements and decisions, which may be blatantly immoral. The critics mention that ‘democracy’ in our world is not a mere descriptive tool of regime taxonomy. It has a very strong emotive and justificatory ring to it. Consequently, they argue, the characterization of democracy should reflect this fact. It should identify a regime that is justifiable, not a formal type of regime that is neutral.

I concede, of course, that ‘democracy’ has a strong emotive ring to it. Furthermore, I believe the characterization of democracy will be deficient if it does not give an account to this emotive ring. Nonetheless, I reject strongly the alleged implication that the characterization of democracy should define it as a just regime, or that it must broaden the characterization of democracy to include ‘non-formal’ elements.

This is because I believe the formal element of basing the legitimacy of a regime on the consent of those ruled by it is an extremely important element, with both theoretical and practical significance. It is important to have a term that will center on this aspect of regimes. This was the consideration that led Plato and Aristotle to use the term ‘democracy’ to describe government by the demos – by the people. True, democracies may generate, and have generated, very bad policies. But so have ‘thick’ democracies. Besides, we can identify additional elements, which may make democracies more valuable and less prone to injustice. In many cases, these elements will limit the democratic nature (in the formal sense) of the regimes. It is
better, therefore, to identify these elements in a way other than including them within the very definition of democracy itself.

An additional advantage of the formal, ‘thin’ characterization of democracy is that it is inclusive – it covers all the regimes that have a claim to be called democracies. Any additional element may exclude some of these regimes. England does not have a written constitution, and its constitutional protection of human rights is incomplete and recent. India, the largest democracy in the world, is not very liberal. And the US does not have a firm commitment to social justice. Israel, too, is still struggling with the questions of a constitution and a bill of rights. If we include these elements in an definition of democracy – all these countries may be excluded from the family of democracies. I believe this implication of the broad characterization of democracy should lead us to reject it.

But most important is the fact that the formal element of requiring the consent of the people to legitimate their government is very far from a neutral, incidental feature of democracies, which cannot justify the strong emotive significance of the term. The requirement of consent as the basis of political power indicates that democracy is committed, first and foremost, to **humanism**. It takes seriously the **actual** preferences and wishes of the public. It gives individuals the **positive liberty** and the legal power to participate in the decisions affecting their lives and to choose their leaders. This principle, and its moral significance, are far from being self-evident or trivial. Often, political leaders who lose elections argue that the results are anti-democratic. Often they mean that the public was wrong. It may have been. But democracy is, at least in part, about respecting what the public in fact wants, not what
it should have wanted. There is in a democracy a structured deference to the actual wishes of the electorate, in preference to the preferences and choices of its representatives, philosopher-kings, rich people, priests or noblemen. This deference is a very meaningful choice, and it has never been free of controversy. True, many democracies contain structured elements, which are designed to limit the impact of the populist preferences of the public on specific issues. But such limits, important as they are, should not obscure the basic commitment in a democracy to let the people themselves decide.

I can return now to a point I made above: many of the elements, which are advocated as necessary requirements of democracies, such as liberalism or the protection of human rights, are not mere additions to democracy, making it richer and broader. Often, these elements are a well-designed limitation on the free play of the democratic principle. Many such limitations are in fact justified and necessary. But it will help us keep our thought clear if we see them as independent elements of the regimes in question rather than as a part of the definition of democracy itself.

In Israel, and in other divided countries, there is an additional reason for adopting the thin, formal characterization of democracy. The commitment to democracy is supposed to unite all segments of society. It should be a part of the shared rules of the game. This will be made much more difficult if we add to the definition of democracy notions such as liberalism, which may be alienating to important parts of the population who do not share this world view. We saw that Israel has serious and complex rifts between parts of the population. These rifts mean that there are structured conflicts of interests and preferences between these groups.
In such societies it is of special importance to the adoption of rules of the game that will stress a distinction between a shared framework within which political power is controlled and divided, and between the political decisions generated by this political structure – which will often be very controversial. Democracy is one of the central elements of the shared framework, since it emphasizes the equal right of members of the public to participate in the decisions concerning them and their lives. However, if we enrich the characterization of democracy to include questions of values and preferences, we may turn many of the controversies in societies to debates about whether or not it is a democracy. This does not help the commitment to democracy to be a unifying force. An enriched democracy may lose its claim to the allegiance of all segments of the population. As a result, some groups within society may find the idea of democracy itself as excluding and oppressive. Under such circumstances, democracy cannot establish a decision-making framework which will legitimate the government.

It must be stressed that the advocating the adoption of the narrow conception of democracy as rules-of-the-game as a part of the shared framework for thought, discussion and political activity is very different from the attempt to grant formal democracy the halo of necessary, definitional moral justification. The argument does not ignore the fact that respecting the actual preferences of the population may in fact yield terrible, even atrocious results. A society following only formal democracy may very well dominate, oppress or even exterminate its minorities, all in the name of the wishes and preferences and interests of the majority. In other words, saying that a
society has effective formal democracy does not say that its policies and practices are just. Yet many criticize the initial move – the adoption of the narrow sense of democracy as a part of the shared political commitment – precisely because of its alleged contribution to the legitimation of regimes which only have a formal democracy.

This is a complex matter. A similar move has often been made against positivistic theories of law, arguing that they generate a tendency of people to obey laws even if these laws are patently unjust. The conclusion of the critics was that it is better to adopt characterizations of law that will make it a definitional matter that all laws are justified, or that, in other words, immoral ‘laws’ are not really laws at all. People do have an obligation to obey the law, claim the critics, but this obligation is only justified if the laws are just. Hence, to buttress the tendency to obey the law, we need to define it so that all laws will indeed be norms that ought to be obeyed.

I cannot enter this fascinating debate here, although it is relevant to our concerns, and I will return to it in Chapter 3 below. Here I shall only say that I accept the fact that formal democracies may generate laws and practices with are blatantly unjust. My preference for adopting the narrow conception of democracy as the shared political framework is in fact strengthened by this awareness. As far as I can see, the misleading and dangerous tendency to think that democracies can do no wrong is encouraged by the rich characterization of democracy, precisely because such democracies claim that they have built-in mechanisms which guarantee against immoral laws and practices. The belief in these mechanisms may thus enhance the

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21For a discussion of this point, and an explanation of the power of the non-justificatory characterization of law see Gavison (1982).
tendency to think that such regimes can in fact confer on their actions the moral legitimacy which makes obedience justified. The narrow, formal, conception of democracy explicitly leaves the question of the morality of its products open. It presents the question of the morality of the regime’s actions, and hence of the duty to obey them, as a primary moral and political question. It does not confuse us by presenting these matters as necessary implications of conceptual analysis of our basic concepts. The morality of our institutions does not usually benefit when we present it as a conceptual matter. Thus no major institution of society, be it the form of regime or law, should be characterized, apriori, in a way that presents them as worthy of our obedience and respect.

At the same time, it is also important to note that formal democracy, despite its ‘thinness’, is not completely value-neutral. It has significant moral and institutional implications, in addition to the fact that it reflects humanism and a commitment to the ‘positive liberty’ of individuals. First, there are basic human rights that are required by democracy in its narrow sense: Notably, they include the rights to vote and to be elected, as well as rights to freedom of expression, access to relevant information, and freedom of association to promote political goals. Secondly, democracy involves a structural commitment to equality, at least in the form of the principle that each person has one vote. Without these elements we do not have democracy in its narrowest conception. In other words, even in this conception of democracy there is a structural protection of some human rights. Hence, even in this conception, there may be internal tensions between elements of democracy. Can democracy limit the freedom of expression of anti-democratic forces? Can it ban anti-democratic bodies from participation in its elections? Nonetheless, the narrow conception of democracy
does distinguish between tensions which are immanent to the notion of democracy itself, and between tensions and even conflicts between elements of democracy and other things that we cherish and value. The latter may include values such as the wish to protect human rights, or conceptions of the good life such as liberalism, nationality, religion or socialism. In this it is different from richer conceptions of democracy, which present these tensions as well as internal and immanent to democracy itself. I see this difference as an advantage of the theoretical exposition advocated by me. I prefer to talk about tensions and conflicts between elements of democracy and other values to the conflation of all these various values under the emotively charged term ‘democracy’.  

Against the background of the discussion of this subject in Israel, I want to mention three elements, which are NOT a part of the conception of democracy, which I am advocating. The first is a commitment to human rights, other than those required by the narrow conception of democracy itself. The second is that conception of the neutral liberal democracy advocated by some of the Western scholars. The third element is the presence of an entrenched constitution, including a Bill of Rights, and judicial review.

According to my analysis, democracies may include an institutional protection of human rights, constitutional or otherwise, and they will tend to include such effective protection more than non democratic regimes. Nonetheless, the absence of such explicit protection should not exclude formal democracies from the family of

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22Human rights, too, may conflict. We do not see this possibility of conflict as a reason against endorsing the ideal. But liberalism and socialism, for example, may be inconsistent. Conflating both of them under ‘democracy’, or even arguing that just one of them is a part of ‘democracy’, may turn all serious political debate into a debate about the meaning and scope of democracy. I join the many scholars, like Bobbio and Parekh, who invite is to resist this result.
democracies. Similarly, democracies may well be liberal, and they may even tend to be liberal if they are stable democracies. Nonetheless, a country who exhibits the features of a formal democracy, and has generated, at times, illiberal policies, should not be excluded for that reason from the realm of democracies.

Two important points should be made on the relationships between democracy and human rights. I have already mentioned that even formal democracy requires the effective protection of some human rights, including the rights to vote and be elected, freedom of expression and freedom of political association. For these rights, democracy and human rights are indeed one and the same. Secondly, the incorporation of human rights as a part of the definition of democracy may in fact weaken their force. Typically, we believe that human rights are binding on all regimes, democracies and non-democracies alike. In fact, their power to defeat the preferences of majorities stems precisely from the fact that their validity is NOT derived from the preferences of intelligent judgement of social majorities. Basic human rights, like the right to human dignity and freedom, equality before the law, due process, freedom of religion and conscience, all derive from moral principles that we deem universal. The Universal Declaration of Human Rights was not intended to apply only to democracies. In fact, it is quite clear that protection of human rights is more needed in non-democratic regimes, where the powers of public scrutiny and free press are more limited. This alleged universality of human rights should be an argument against making it a definitional element of just one form of political regime.

Critics may concede that human rights should be binding on all regimes, but that it is nonetheless a defining mark of democracies that they make this commitment
a part of their chosen political regime. Indeed, the question whether human rights issues should be seen as internal or external to democracy is primarily a theoretical one. It relates to issues such as clarity of thought and the usefulness of conceptual frameworks and not to the issues of practical political morality themselves. The impact of the choice on practical politics is indirect and indeterminate. I have explained above why I prefer to see human rights as external constraints on democracy and not as internal elements of it. My preference is strengthened by observing the dynamics of human rights struggles in contemporary societies. Often, groups within societies with competing visions of the good life enlist the human rights rhetoric for their political struggles. In many such societies, part of the public controversy concerns the very nature of the good life and the purposes of the state, as well as the limits and implications of democracy. In such rifted societies, it is important for human rights Not to present them as a part of the (contested) vision of democracy, but to give them the elevated status of a constraint on democracy itself. This presentation of human rights as demands entitled to protection within non-democratic and non-liberal orders as well may strengthen their appeal within groups which resist some conceptions of democracy or liberalism.

The claim of human rights to universality is one of their sources of strength. At the same time, it imposes of their implications serious limits. A commitment to human rights must be shared by all societies and regimes, and by all groups within societies. They must therefore be an element unifying society, and not a divisive one within it. The claim of human rights to universality is of course normative and not empirical. The very fact that some segments in society do not recognize these entitlements does not, in itself, detract from their claim to being universally binding.
Nonetheless, the very claim of universality itself must be widely shared, lest human rights rhetoric can be seen by some groups as mere tools in the hands of their opponents.

This dual nature of human rights may be clear in principle and hard to apply in practice. The Universal declaration of human rights contains, mainly, rights that have indeed gained universal acceptance. Nonetheless, there are many debates about the concrete arrangements, which are required by a commitment to these rights. In part, these debates are based on the fact that almost none of these rights is absolute, and that perfect protection of one right can only be achieved at the cost of denying another. It is not hard to find individuals and groups committed to human rights who debate bitterly on issues of how to resolve conflicts between these rights. It follows that the requirements of human rights should be interpreted in a minimal way, letting the institutions and processes of each society find the concrete arrangements suiting their situation. If every public debate becomes a controversy about protecting rights and infringing them – we leave no space for legitimate debate in which neither of the sides is the ‘enemy’ of human rights, and both are seeking to find an arrangement that meets both their value preferences and human rights constraints. The expansion of human rights discourse obscures the distinction between the things I believe in and want to fight to promote, but on which I accept the fact that a different democratic decision is legitimate and binding, and those situations in which I feel the power to reach an opposite decision either does not or at least should not exist at all. If all my preferences are required by the commitment to human rights, none of the preferences of my opponents are legitimate. This framing of human rights discourse may, in the
long run, be bad for my preferences and for the power of human rights discourse itself.

It follows that we should explicitly acknowledge that a rule-of-the-game democracy may well generate different arrangements in areas such as social justice, welfare rights, enforcement of morals, and state and religion(s) relations. Different societies may reach a variety of arrangements on the status of women or the scope of the autonomy of important sub-cultures. Such a conception of democracy is called ‘formal’ because it contains very little constraints on the content of the arrangements adopted by its institutions. Its guarantees are mainly structural, not substantive and material.

Most Western democracies are liberal. Many define liberalism as a broad protection of human rights, and identify this element as the one giving liberal democracy its justification. This is a huge subject, and I cannot enter it here. For my purposes, suffice it to say that that the meaning of liberalism and its rationale and desirability are both the subject of great debates. I will characterize liberalism as that political morality which gives individuals and their autonomy a place of pride. In this sense, one of the basic justifications of democracy, in all its senses, is indeed liberal. However, many scholars and advocates of liberalism have developed a theory that liberalism requires state ‘neutrality’ vis-a-vis the conceptions of the good of their citizens. The idea is that liberal democracy give primacy to the ‘right’, which is the framework dealing equally with all citizens, while abstaining from evaluating the ‘good’, which can be interpreted differently by individuals and groups. We can say that ‘neutral’ conceptions of liberal democracy ‘privatize’ the conceptions of the good
and the non-civic affiliations of their citizens. This privatization permits the liberal state to disregard the ‘private’ and particularistic visions and aspirations of their citizens, or at least to be indifferent to them in its deliberations. The state may choose between two possible attitudes to these ‘privatized’, non-civic affiliations and preferences. It may create a ‘wall of separation’ between the state and these activities and preferences, prohibiting the state’s involvement or financing of them in any way. Or it may adopt a more moderate attitude, under which it treats all private preferences of the citizens with ‘equal concern and respect’. Neutrality under this weaker conception does not prohibit support or financing, but it requires that such support itself be neutral, not involving the preference or the hegemony of any private preference over another.  

One of the great contemporary debates within liberalism concerns the question whether neutrality is either possible or desirable, and whether it should be seen as a defining feature of liberalism. I tend to the view that liberalism does not require neutrality, and that neutrality, even if possible (which I doubt) is not necessarily desirable. But for my purposes here, I do not need to take a stand in this debate. The mere fact that the debate exists suggests that it will be a mistake to define democracy in terms of the neutral conception of neutrality. Liberalism is an important theory of political morality. I am a liberal who is happy that liberalism exerts such a powerful influence on contemporary societies. However, as a particular theory of political morality it cannot be a defining feature of democracy, which is a type of regime. While democracy may be more likely and stable in liberal societies, it is quite possible and desirable to have democracies in non-liberal societies as well.

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23The USA tried to take the first approach towards the establishment of religion, whereas many European counties have adopted the latter one.
I’ll return to this issue below, as I discuss the question whether a particularistic nation-state may be justified in principle.

3. A Jewish and Democratic State?

I can now use the conceptual clarifications I provided to return to my main question: can a state be both Jewish and democratic? And can such a state be justified in principle?

A. Is the combination conceptually possible?

I mentioned above that the claim that it is impossible for Israel to be both Jewish and democratic come from voices within the intra-Jewish divide and from advocates of the Arab side in the Arab-Jewish divide. In fact, two types of claims are often grouped under this heading. The first is that the combination is conceptually impossible: no state may be democratic and at the same time be affiliated exclusively with one particular religion or nation. The second is that it is politically impossible that Israel, with its special historical features, be such a country. I will treat the two challenges together, but it is important to see that the claims are different. The first is much weaker than the second, but it is invoked since the strength of conceptual impossibility is much easier to show than that of a contingent, political one.
Let me start with the internal Jewish challenge. Meir Kahane and some of the ultra religious streams, as well as some radical secular Jewish critics, claim that democracy and Jewishness contradict each other and are therefore incompatible. All challengers take ‘Jewishness’ here as signifying religion and religiosity. They debate on whether Israel should prefer the Jewish element, or whether it should accept the primacy of the requirements of democracy. It is quite clear that this challenge is justified if we interpret ‘Jewish State’ as a torah state in the strong and full sense of this term. A state whose decision-making is made by religious authorities and according to religious laws is a theocracy, and its presuppositions are indeed incompatible with those of any democracy. Yet we saw that, even if we accept that part of the Jewishness of the state is a special connection between it and Jewish religion, it does not follow that Israel must be a theocracy. Some even claim that Jewish religion itself, in its eternal wisdom, has developed models under which a Jewish sovereign society should be, or at least may be, democratic. A decision by the majority to undertake arrangements which may give public stature to religious symbols and rituals, or the willingness of the majority to give legitimacy and public sanction, in some areas, to religious institutions, are not necessarily anti-democratic. It may well be argued that an obstinate refusal to do so may itself be inconsistent with the commitment of the state to freedom of religion.\(^\text{24}\) Such arrangements are based on the consent of the governed, in decisions made by their elected representatives, and not on the religious beliefs of part of the population. Democracy may indeed define the state as secular, as was done in Turkey and France. Under such circumstances, religious parties may indeed be unconstitutional in many countries. Nonetheless, as

\(^{24}\)These subjects, of course, are not unique to Israel. Even under the First Amendment there is a fierce debate about the relations between freedom of religion and the non-establishment principle. The USA legal system has accepted the legitimacy of various types of ‘accommodation’ of religions, which is in effect a willingness to give religious authorities public space. And it has official financing and role for religious officers in all parts of public life, including the army.
the examples of both Turkey and Algier attest, the banning of religious parties in deeply religious states may itself raise serious issues of democracy. Anyway, many Western democracies have not chosen to do so, and their government often include parties which are explicitly Christian.

The conceptual challenge interpreting Jewishness as theocracy, therefore, is either too powerful or not powerful enough. Even Iran, self-defined as an Islamic country, with religious authorities in most positions of power, has democratic features. And most Western democracies define themselves, at least culturally, in religious terms. To assess the challenge we need to go beyond conceptual analysis and look at Israel’s concrete arrangements. Israel does have religious education which is financed by the public; it has a religious monopoly over matters of personal status; and the definition of “Jewish” in the Law of Return is now religiously based. I will discuss all these arrangements below. While all of these arrangements are debated, and some are deeply flawed, I fail to see how they undermine the democratic nature of the Israeli regime. Kahane invoked the normative and conceptual claim of non-compatibility, and was rejected, precisely because all the elites in Israel, including religious ones, concede that Israel at present is NOT a theocracy. Some praise this and want to strengthen non-religious features of the state and its public spheres, others lament the situation and seek to change it in the other direction. The political struggle in Israel presupposes that these arrangements will be made by the people, including many non-Jews and non-orthodox Jews. At present, the Jewish nature of the state does not make Israel a theocracy.
The challenge, however, does not stop here. We can now turn to the Jewish-Arab divide. Arabs usually do not challenge the legitimacy of connections between states and religion. Even non-theocratic Arab regimes, who are struggling against Islamic fundamentalism, usually affirm a strong affiliation between the state and Islam. Their challenge therefore concerns the consistency of Jewish particularism with democracy, when Jewishness is not necessarily only religious. Indeed, we saw that there are at least two further, and related, senses to the Jewishness of Israel: a state with a Jewish majority, and the state where the Jewish people exercises its political self-determination.

Again, in conceptual terms it is hard to see why these senses of Jewishness may conflict, in principle, with democracy. Most of the European countries were founded as nation-states, with a deliberate effort to fit political borders with ethnic concentrations. Full citizenship was not only a matter of a legal-civic affiliation, but included aspects of history, religion, language and culture, all of which were particularistic. Cultural and ethnic minorities within these states were recognized as vulnerable groups, and various mechanisms of their protection were developed. Moreover, all this is not a mere matter of obsolete history. In fact, it is the center of public debate in many different societies all over the world. After the disintegration of the Soviet Union, many central and Eastern European countries are struggling anew with these issues. In some parts of Europe, as in the former Yugoslavia, these issues have generated long and bloody conflicts. Furthermore, globalization and intensive waves of immigration mean that almost every country, especially in the developed world, is now facing task of squaring democracy with new multi-ethnic and multi-cultural realities. In many places, ethnic groups are considering and
favoring a quest for political self-determination, often in separate states. This takes place even in states which have a long tradition of dealing with ethnic and cultural differences within one political framework, such as Canada, Belgium and the former Czechoslovakia. The wish to exercise national self determination, often in a separate state, is not an idea foreign to the 20 century, and it will probably follow us into the third millenium.

Indeed, the interpretation of ‘Jewishness’ adopted by most of the Jewish elites in Israel, and that is reflected in the UN resolution 181 of 1947, and in Israel’s constitutive Declaration of the Foundation of the State of 1948, is quite clear. Israel is a Jewish state in the sense that it has a Jewish majority, which will enable it to control immigration and security in a democratic state. Giving Jews their own state was seen as an implementation of the universally recognized principled of national self-determination. At the same time, Israel undertook to grant its non-Jewish citizens full and equal rights in the emerging state.

In principle, this conception of a Jewish and democratic state is not different than many other nation-states. Therefore, the challenge of the possibility of a state that is both Jewish and democratic must turn to specific, contingent facts about the history and the present reality of Israel. In Chapters 2 and 3 I analyze some of these factors and indicate the complexity that they add into the picture. We’ll see how the complex interrelationships between religious and ethnic identity do create tensions within the Israeli regime and democracy. In addition, internal rifts among Israeli citizens may create an inability to secure majorities to some of the contested elements of Israel’s regime, both those related to Jewishness and those related to democracy.
Here we must address another semi-conceptual challenge raised against the compatibility of democracy and Jewishness, one that treats Jewish particularism together, irrespective of its religious or national or cultural origins. In a nutshell, the challenge is that a country dedicated to a particular tradition, and is defined as the ‘home of the Jewish people’, cannot, by definition, give equal status and rights to its non-Jewish citizens, as is required by the idea of democracy. In a sense, it is claimed, non-Jews will be second class citizens in the Jewish state even if their civil and political rights are protected to the full (which they are not and unlikely to be). While this is allegedly true for all non-Jews, the main grievance is that of the Arab indigenous population, which is ‘excluded’ out of its own homeland.

Responses to this challenge vary. Most of those who accept the major premise (non-Jews are by definition second-class citizens in a Jewish nation-state) seek to either justify this state-of-affairs, or to seek to change it. Patterns of justification usually center on the claim that denying Jews a state of their own will undermine their right to national self-determination. Many of those who seek changes, Jews and Arabs alike, advocate that Israel should become ‘the state of all its citizens’, thus stressing its commitment to democracy and civic equality of individual citizens, ‘privatizing’ their non-civic identity. Others concede that community structure is important, and seek to gain recognition for the fact that Israel should have a public commitment to the other communities in it, especially the Arab one. Radical writers of this persuasion talk about Israel becoming a bi-national state. For our purposes here we need to stress one point. These challengers argue that Israel can be a ‘real’ or a ‘full’ democracy only if it gives up its Jewish distinctness. To do that, it may become either
a state in which all non-civic affiliations are privatized, or a state in which the state
treats all ethnic and religious groups equally and neutrally. Clearly, this vision is
unacceptable to a large majority of the Jewish citizens of Israel. Some of them do not
care if Jewishness indeed undermines democracy, but many others argue that some
Jewish distinctness is fully compatible with, indeed it may be required by, democracy.

To evaluate this challenge we need to look more closely at its substance. There are many variations to this challenge, but it crux is always the same. Citizenship is more than holding a country’s passport and having political rights within it. Membership in a society has cultural, historical, economic, and political aspects as well. One scholar distinguished between a ‘liberal’ citizenship, which consists only of individual civil and political rights, and between ‘republican’ citizenship, which includes also membership in the collective ethos and its definition and development. A state actively devoted to the cause of Jewish self-determination leaves its non-Jewish citizens, especially the Arabs, excluded from the sense of participation in the larger national aspirations and debates. They are alienated from the country, they do not feel that they belong, and that the country is ‘theirs’. In fact, they often feel as if they, Israeli citizens, are less central to the country’s well being than Jews who are citizens of other countries.

This feeling of alienation gets worse when one recalls the historical and political background. Before the Zionist immigration to Israel, at the end of the 19th century, Arabs were the majority in Palestine. Arabs consistently objected to the idea of establishing a Jewish state in any part of Palestine. They rejected the 1947 UN partition plan, and tried to conquer the whole of the mandatory Palestine. When the
Jews won the 1948 war, hundreds of thousands of Arabs left their home within what would become Israel, thus creating the seeds of the problem of the Palestinian refugees. As of this day (beginning of 2002), Palestinians do not have a state of their own. Attempts to reach some kind of a political agreement between Israel and the Palestinians failed, and collapsed into a long period of violence starting in October 2000. The Arab citizens of Israel need to negotiate their status against the background of the absence of political self-determination for Palestinians, and while they are seen by many Jews as fifth column and potential (if not actual) supporters of their enemy. Consequently, neither Arabs nor Jews were eager to have Arabs join Israel’s security forces, and so Arabs are excluded from one of the main melting pots and generators of mobility of Israeli society – military service. It is not only that Arab citizens do not feel they ‘belong’ as equal citizens in Israel. In many ways, they feel their Israeli citizenship was forced on them, and that ‘their country’ is in constant conflict with ‘their people’. Moreover, their country is the power that dispossessed their communities, and that destroyed, or seriously weakened, their majority and their hold on the land.

It is important to draw this picture in some detail to show that the challenge here, despite appearances, is contingent and not conceptual. The intensity of the conflict and the alienation created by the Jewishness of Israel is not only the result of the incompatibility, in principle, of democratic citizenship and being an ethnic minority in a nation-state. It is primarily the result of the past and the present of the conflict in the region. Two distinct questions are involved here: First, in the foreseeable future, is it likely that there will continue to be a major difference between the way Jews and Arabs feel about Israel and each other? Secondly, if the answer to
the first question is ‘yes’, does that mean that Israel cannot be a democracy? Many who care deeply about the democratic nature of Israel, wish to belittle or deny the significance of the affirmative answer which must be given to the first question. I will argue below that the persistent difference between Jews and Arabs, and the wish to deny it, are both important ingredients of the deep tensions between the Jewish nature of Israel and its commitment to democracy. Nonetheless, I do not believe that these facts prevent Israel from being a democracy.

A strong sense of equality and of membership in one civic society is a strong and important ingredient of social cohesiveness and ‘nation-building’. Its presence means that the prospects of stability of the society and its political structures are good. But these factors are not related only, or even mainly, to the character of the regime, so they are unlikely to affect, in themselves, the characterization of society as democratic. In many divided and plural societies, democracy is the regime found most suited to help in bridging deep gaps between groups within the political community. Under such circumstances, it is quite probable that some parts of the population may feel alienated from the country, and especially the government, when the latter upholds policies and values which are anathema to the views of the opposition. Such feelings do not necessarily indicate a weakness of democracy. To the contrary, they may indicate its strength and robustness. The crucial question here is not the nature of the regime, but the relationships between the various groups. In all countries, democratic and non-democratic alike, the situation of minorities may be vulnerable. This is especially true when we are looking at ‘chronic’ minorities, that is groups which remain weak minorities on most issues and at all times. Such groups, often ethnic or religious minorities, exist in all countries. Often, they do feel alienated
from the state and the government. This is especially true if members of the group are discriminated against, and if they are excluded from the centers of power. So long as the members of minority groups have civil and political rights, and so long as their basic political rights are effectively protected, we cannot conclude from the very existence of minorities, even alienated minorities, that their state is not a democracy.

Jews (and Moslems) in the USA, for example, are a chronic minority. The large majority of Americans are Christian. Most Americans, even those who do not observe, see themselves as Christian, and the country itself defines itself as a Christian society despite the official constitutional separation between Church and State. Jews who actively maintain a Jewish identity may thus feel some alienation from the American public culture. Similar issues of membership and identity exist in all countries, and they should be attended to. In themselves, they do not shed a doubt on the democratic nature of the country. We can see this point clearly when we compare the situation in the USA and in SA before and after blacks were granted civil and political rights. In both countries, the status of blacks once did raise serious doubts about the integrity of democracy. Blacks lived in the country. In SA they were the large majority in the country. But they did not count as citizens. Yet many blacks in the USA and SA today still feel deep alienation and discrimination. This is a very serious problem for both countries. It is not a good idea to suggest that it can be remedied by making the countries more ‘democratic’. The problem goes deeper and higher than that.

In Israel, too, it is not only Arabs who feel alienated and excluded. Quite a lot of the cultural tensions within Jews stem from the fact that the Zionist settlers feel
superior to new immigrants, especially those coming from Islamic countries. Similarly, Zionists, especially secular ones, used to feel superior to the a-zionist or anti-Zionist ultra religious. One of the most fascinating phenomena of contemporary Israeli life is that these feelings are now challenged from many quarters within Israeli society. As a result, different groups feel ‘members’ and ‘alienated’ at different times. Political struggle about these aspects of life in Israel is one of the dominant aspects of Israeli democracy. All this just proves that feelings of alienation, at least when they are temporary, do not indicate a flaw in the country’s democracy. In fact, one part of the vulnerability of Israeli democracy is the very fact that the gaps and divides are very deep, so that any change of government may make the losing half feel ‘excluded’ and ‘alienated’. As a result, Israel tends to have quite a lot of attempts to de-legitimate the government, instead of constructive criticism aimed at changing it at the next elections.

But I do not want to belittle the complexity of the predicament of the Arab citizens of Israel. The facts described above do create a unique picture. The Arab citizens of Israel are a chronic and permanent minority. The background of the persistent conflict makes their feeling of alienation deeper and more structured than most of the other groups in Israel. They have never been a part of Israel’s ruling coalition government (although during the Rabin/Peres government in 1992-1996 they were a part of the bloc on which the government was based). Nonetheless, the Arab citizens of Israel enjoy significant civil and political rights. They have vocal and able political representation. They also enjoy reasonable levels of welfare, education and security. I therefore do not think that their feelings of alienation, justified and understandable as they may be, justify the conclusion that israel is not a democracy.
Finally, a third challenge of the conceptual compatibility of a Jewish state and democracy may come from those who define democracy as liberal and neutral. Under such a definition, Israel indeed cannot be Jewish in any sense (other than the factual existence of a Jewish majority, and the nature of public culture following naturally from this fact) and still be a democracy. A neutral liberal democracy, by definition, privatizes all the non-civic affiliations of its citizens. A country dedicated to the self-determination of the Jewish people and to maintaining the ties between Jews the world over is not a democracy in this sense. However, this conception of democracy is not inevitable and necessary. In fact, the main challengers of Israel, the Arabs, do not seek to live in a neutral state. They lament the fact that they are forced to live in a state in which their preferred tradition and public culture is not hegemonic as it used to be. This is why I rejected, above, the liberal-as-neutral conception of democracy. The fact that this rejection creates a conceptual place for nation states, including the Jewish nation-state, seems to me an advantage of my analysis of democracy.

I can now conclude that the conceptual challenges of the compatibility of democracy and a Jewish distinctness must be rejected. This is so because there are significant senses of both democracy and a Jewish state, which can co-exist. Yet the analysis did disclose senses of ‘a Jewish State’ and of ‘democracy’ that indeed are not compatible. Those who wish to advocate any of these senses will have to argue that Israel cannot be both Jewish and democratic, and to justify their preference for one over the other. Israel can have a Jewish majority and a Jewish public culture, be a Jewish nation-state, and even have a special relationship to the Jewish diaspora and some legal status to Jewish religious establishments and still be a democracy. It
cannot be both a democracy and a theocracy. On the other hand, Israel cannot do almost any of those things and maintain its democratic status under neutral-liberal conceptions of democracy.

My discussion from now on will be conducted, therefore, within the range of the senses of democracy and Jewishness which are indeed compatible.

B. Can a Combination Between Jewishness and Democracy be Justified?

Many Jews reach this stage of the analysis with a sigh of relief, and stop here. For them, the conclusion of the foregoing analysis permits them to disregard the challenge that Israel cannot be both Jewish and democratic. Their relief is premature. A state should be democratic. But democracy is not enough. Not all democracies can be justified. The interesting and the important question is not whether Israel can be both Jewish and democratic, but if a state that seeks to be both can be justified in principle. Further, even if the answer to this question is in the affirmative, Israel must be judged by its ability, in practice, to live by political arrangements, which can be justified. The third chapter will look at the last question. Here I want to sketch an argument supporting my claim that the idea of a state with a distinct Jewish affiliation may be justified in principle.
A person may well think that, in principle, a nation-state may be a democracy, so there is no incompatibility in principle between democracy and an ethnic state. He may nonetheless argue that, under the special historical and demographic circumstances of Israel, the injury to non-Jews, especially Arabs who lived in the country for generations and used to be a majority in it, is so harsh - that Israel cannot be a justified enterprise. True, it is easier to justify a state that is neutral to the non-civic affiliations of its citizens than it is to do so for a state, which inevitably and by definition treats different groups differently. There is in democracies a strong presumption in favor of civic equality, and anyone seeking to justify a deviation from such equality carries the burden of persuasion. A possible justification must refer to at least three components: the intensity and strength of the claim of the majority group to a preferred position; the nature of the arrangements granting members of that group such preference; and the nature and the intensity of the burdens and costs imposed by these preferences on other groups.

The claim of Jews to a state in which they will be a majority, and enjoy the freedom to make arrangements based on this majority, is based on a combination of general and particular factors and considerations. The 20th century recognized, morally as well as through international law, the right of nations to self-determination. The implications of this right to self determination are far from clear, but there is a growing consensus among political theorists that membership in groups and communities is an important aspect of the welfare of individuals, and that the right to hold public community life is a basic human interest. Self determination is not necessarily political. Clearly, not every national or ethnic group with a legitimate

25 The right to self determination appears in the UDHR of 1948 and in both human rights covenants of 1966.
claim to some communal public life can or wants to have its own state. At the same time, the recognition of the importance of such claims is a strong component in the justification for a Jewish state.

The critics of Israel challenge, among other things, that Judaism is not a national identity, but a religion. Religions may have some claim to a public life, but they do not have a claim to territorial or political self-determination. It is important to note that this claim about Judaism is not made only from the outside – some ultra orthodox Jews, and many of the Reform Jews in the 19th century and even the beginning of the 20th century believed firmly in the exclusively religious nature of Judaism. That belief generated the legitimacy for assimilation in the period of the enlightenment, when Jewish leaders advocated that Jews should be French or German when they leave their private spheres, and Jews within their homes. They described themselves as French or German of the Jewish religion. However, throughout the ages, most Jews and most non-Jews rejected this perception of Judaism and Jewishness. I shall therefore simply join them here in assuming that there is a Jewish people, which is not totally co-extensive with the believers of the Jewish faith. In fact, this belief is one of the central elements of the persistent divide between orthodox and non-orthodox Jews concerning the nature of the Jewishness of Israel. Only the acceptance of the independence of the Jewish people from religion gives meaning to the national Jewish identity of Jews who are not observant or those atheists in principle.26

Two points are worth making. First, there is a marked difference in the attitudes of various Jewish communities to this question of the relationship between Jewish religion and Jewish identity. In the West, most concede the religious tie is basic and central. In the FSU, on the other hand, Jewishness tends to be in principle divorced from religion. Secondly, the Jews treated the Palestinian claim for self-determination with equal suspiciousness. For long years they argued that the Palestinians were Arabs, and were not entitled to distinct self-determination in Palestine. One does not need to evaluate this claim now, since even if it had some truth to it at the beginning of the 20th century, it clearly is not the case today.

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The very fact that a Jewish people exists does not give it, in itself, a claim of political self-determination in any specific place. A state is an entity defined, first and foremost, by its territorial boundaries. A people may claim a right to self-determination in that territory in which it is, and has been for some time, a majority. Even under these circumstances, one people’s right may be defeated by the interests and rights of members of other peoples living in that territory. One of the distinctive features of modern Zionism was that, at its inception, it did NOT have a justified claim to political self determination in Palestine, simply because Jews did not form a majority or even a significant part of its population. In fact, one of the distinctive features of the Jewish people was that it was dispersed among 5 continents, whose members speaking different languages and often saw themselves as nationals of the countries where they lived. Some even gave this fact a theological justification. This is the background that permitted the serious consideration of the Uganda option. Since there was no place where Jews formed a majority or a significant part of the native population, it seemed reasonable to seek to establish a home for the Jews in the place most suitable by international and demographic conditions. A condition precedent for the establishment of a Jewish state was the creation of a massive Jewish community in some territory. A territorial basis was a necessity. The only question was where this base could be created. A territorial basis was also crucial for forms of self-determination weaker than states.

The insistence of Herzl and others (notably Zabotinsky) on the idea of a Jewish State, rather than on weaker forms of self determination, was based on their analysis of the Jewish problem: the fear of persecution and anti-semitism. They held that only Jewish control over the state mechanisms of security and its other resources would
guarantee effective prevention of pogroms or of persecution by the state or by civil groups which the states had neither the wish nor the ability to restrain. Ironically, this rationale for a state rather than other forms of self determination held in Palestine itself due to the Arab resistance to Jewish immigration and settlement.

It is reasonable to speculate that, had there not been a settlement basis of Jews in Palestine before the WW2, a Jewish state could not have been established. One of the great achievements of Zionism is the fact that such a settlement basis was indeed created. It could thus serve as the basis of the decision – by international commissions as well as the UN in 1947 – that a partition of Palestine between a Jewish and an Arab state was the appropriate solution to both the problem of the Jews and the issue of Palestine. In a way, by 1947, Jews did have a right to self determination in at least a part of Palestine. The growing number of Jews living in Israel since then has strengthened this claim.

These facts mean that at this stage, one does not need to resolve the question of the morality of Jewish settlement in Palestine at the turn of the century. Even if the Arabs are right that Israel was created in sin because the very Jewish settlement in the region was wrong – the reality that has been created since then has a force of its own. Today, the question is not whether a Jewish state should be established. Today, the question is whether it is justified to undermine the wish of Israeli Jews to live in a state in which they exercise their right of self-determination.

Nonetheless, some argue that the history of the creation of Israel still undermines the legitimacy of maintaining Israel as a state with a distinctive Jewish affiliation. A
short look at the historical claims is therefore useful. The moral question about Jewish settlements arises because Palestine was not an empty country ‘waiting’ for the Jews returning from exile. The Zionist slogan that Israel was a state without a people waiting for the people without a state was simply not true. Not surprisingly, all Zionist thinkers have struggled with this fact, and with its implications. By definition, no Zionist thought that the very fact that the country was populated was, in itself, a reason against seeking to settle it and make it a home for the Jews. A notable example is Ahad Ha-Am, who points out that the Jewish settlers are not sufficiently attentive to the significance of the local population. In his famous ‘Truth from Eretz Yisrael’ he does not suggest that Jews refrain from ‘returning’ to Zion. He only insists that they should settle in those parts of the country not heavily populated by Arabs. Jabotinsky, too, is very aware of the local population. In fact, he rightly predicts that they will resist Jewish settlement with all their might. Both he and Buber base their advocacy of a Jewish return to Zion in terms of the principle of ‘necessity’: Jews have no other the place which is for them safe and theirs. Their cultural links and heritage, the only place that was ever ‘theirs’ was Zion. Longings for Zion form a central aspect of the Jewish civilization. To deny the rights of Jews to seek to have a home in Zion is to doom them to a fate of homelessness. Both Buber and Jabotinsky do not advocate dispossessing of the Arabs or discriminating against them. The main difference between them is that Buber argues that the Jews should seek to minimize the harm done to the local Arab population, and form a partnership with them in the form of a bi national state with equal and extensive autonomy for both communities. Jabotinsky insists on Jewish majority and sovereignty (on the whole of mandatory Palestine), thinking that only in this way the Arabs will accept Jewish presence. Once
the Jewish state is accepted, however, it should grant all its Arab citizens full equality of rights.

In terms of the politics and international law of self-determination, Jews indeed did not have a right to self-determination in Palestine in the turn of the 20th century. But they did have the liberty to seek to establish a population-base that will give them the right. Just as the local Arab population had the liberty to try and resist this settlement, predicting full well the implications of the enterprise for their life. In any event, the practical question now is very different. It is no longer the question of the right of Jews to try and establish a Jewish center in Palestine. Rather, it is the question of the price that it is just and reasonable to demand of others – especially the Arabs of Palestine – to secure the right of the Jewish community that has been created here to live in security and enjoy self-determination.

It must be conceded that there was an element of ‘imperialism’ in the international recognition of the right of Jews to establish a state in part of Palestine. Palestine did not belong to the international community, and its was not theirs to give away. Moreover, part of the intensity of the wish to establish a Jewish state in Israel was the background of the genocide against Jews in WW2, and the history of persecution and anti-semitism in Europe. 27 But this does not mean that the Jews settling here were colonialists or imperialists themselves. Jews did not come here from their own homelands because this place was rich, convenient and easy to exploit. Those who came here felt they were not at home, the countries where they were born were in fact

27 Similarly, the Balfour Declaration, and the resulting British mandate, granted promises, which affected the fate of other people, without consulting them. However, at that time many countries and borders were established quite arbitrarily by European powers. Palestine is in this sense no great exception.
exile, and Zion was the only homeland they had and could have. Furthermore, the same history that inclined Western powers to support the Jewish state illustrated very clearly the vulnerability of Jews in places where they are a persecuted minority.

Furthermore, once we concede, with Jabotinsky, that it is unreasonable to expect the Arabs to agree to the establishment of a Jewish state in their midst, the matters can be decided either by force or by some form of international arbitration, or by a combination of the two. This is especially true now, after a strong Jewish community has been created in the region.

Is the burden on the local Arab population so great that it defeats, in principle, the Jewish claim for a state where Jews are a majority? As indicated above, the answer to this question is time-dependent. The Arab claim was never conclusive. While Arabs were indeed a majority of the population in the region, the country never enjoyed political independence. The local population never controlled their own life in the political sense. Had they done so, they would have prohibited Jewish settlement, and the question would never have arisen. Jews relied on this fact, and managed to immigrate to Palestine in large numbers. But they came like Abraham, not like Joshua. They sought to buy land and settle it. They did not come to conquer, and they did not use force. Moreover, they never tried to conceal their purpose. Unlike the steady and small stream of Jewish religious immigration to Eretz-Yisrael, Zionism was a national movement, with a clear ideology of ‘returning to the land’ and working on it. The Arabs opposition was understandable and legitimate, but the Jewish necessity was quite enough to balance it. Jews had the liberty to come and settle. Arabs had the liberty to use political means to oppose this trend. Ironically, it
was the decision of Arabs to use force to prevent Jewish immigration that generated the need that Jews will have here a state, not just cultural self-determination.

It is easy to understand why Arabs resisted resolution 181 of 1947 under which Palestine had to be divided into a Jewish and an Arab state. They were the majority, and with all understanding to the plight of the Jews in WW2, they did not create it and it was not clear why they should be asked to pay for it. On the other hand, at that time there was already a large Jewish community in Palestine. It seemed that the Jewish community could not expect a life of dignity and security, and this is why the two-states decision was adopted. Arabs could have resented the fact that the Jewish community was created, but they could not expect that the Jews and others would just look from the side as they seek to undermine Jewish hopes for a life in their homes. So long as Arabs are committed to using force to expel the Jews, Jews are more than justified using force to defend their life and welfare.

This is quite clear today, when there are 5 million Jews in Israel, most of whom born here and having no other place in the world they can call home. Jews living here have rights to life and security, just like everyone else. They also have rights to live a full community Jewish life. A Jewish nation-state is thus a justifiable option. It is not the only option. A bi-national state on the area from the sea to the river is also an option. On paper, it even seems the more attractive one. However, under present circumstances, the need to give peoples in the region the power to control their territory and life outweighs the abstract attractions of neutral states caring equally for all their citizens.
One could stop at this juncture and rest here. However, the reality of our region, especially as it has been unfolding since the collapse of the Barak-Arafat-Clinton talks in the summer of 2000, makes this impossible. The 1947 resolution envisaged independence for both peoples of the region, each in their own state. While both peoples claimed rights to the whole land, each was to establish political sovereignty over a part only, while members of their group could live at peace wherever they chose. It was a Solomonic decision, supported by Jewish sources as well: If two parties claim the same object, each claiming it is all his, they should divide it among them.

In the spirit of Altneuland, the story could have gone very well: both states would have celebrated their independence from foreign rule on the same day. Economic cooperation and mutual respect would have created a momentum, which may have led to the foundation of a stable and developed Arab-Jewish federation in this part of the world.

However, this was not to be. The Arabs resisted the partition plan. As a result of the ensuing war, the Israeli army managed to gain control over a part of the area designated for the Arab state, the Jordanians captured the other part near the Jordan, and Egypt controlled the Gaza strip. In addition, many Arabs left their homes, either fleeing the fights or being deported by the Israeli army, thus creating the Palestinian refugee problem. Furthermore, in 1967 there was another joint Arab effort to oust the Jewish state. This one resulted in Jewish control over the whole of Palestine.
In other words, what we have now is not only a Jewish State within an Arab region, in a territory where Arabs used to be the majority for generations. We also have a situation under which most of the former Palestine is controlled by Israel, and where Palestinians do not enjoy any measure of self-determination. I argued above that a Jewish State can be justified. The present situation, however, of political self-determination for Jews and no self determination for Palestinians, cannot be justified.

In the demographic givens of the region, only three political options seem possible: A bi-national Jewish-Arab state in Palestine; Partition of the area between the sea and the Jordan river into two independent states, one Palestinian and one Jewish; and extension of the political borders of the agreement to include Jordan, which would negotiate its borders with Israel, with Palestinian self determination within it. The radical Israeli right wing still wants a Great Israel between the sea and the river, and it now concedes quite explicitly that this will require a transfer of Palestinian population. Its arguments combine biblical right and defense considerations. Some factions within the Palestinian national movement, both secular and Islamic, still advocate an ousting of the Jewish State from the region. Many radical intellectuals in both communities advocate the bi-national state. But within the constraints of the present political situation, it seems the only feasible solution is partition.

It follows that those Jews who are interested in the continuation of a Jewish State, and are eager to maintain the benefits that Jews have derived from their long-won independence, must stop their attitude of indifference or agnosticism towards the idea of a Palestinian State. If their attitude is objection – they should revise it. The
principled agreement to the establishment of a Palestinian nation-state alongside Israel is a critical component in the justification of the continuation of a Jewish nation-state in the region. All my arguments in support of the right of Jews to self-determination in their homeland apply with equal, if not greater force, to the claims of Palestinians to political self-determination in at least a part of their homeland.

States and nations need not agree to commit suicide. It is legitimate for Israel to seek guarantees and assurances, the best one can have, that a Palestinian state will not be allowed to continue to challenge Israel’s right to exist in peace and in secure borders. This is the essence of the UN resolution 242. Palestine should be required to protect the civil and political rights of the Jews who seek to continue to live in it or to visit it and their holy places within it. Negotiating the arrangements may take time. But the principles of the acceptable outcome must be clear. And Israel should not seek to ‘create facts on the ground’, which may make the acceptable solution unlikely or even impossible.

More than that. I have argued that the price Palestinians are required to pay, in principle, for the continuation of a Jewish homeland for its Jewish population, does not justify the abolition of Israel as a Jewish state. However, the fact that they are paying a price for it, and that the cost paid by them is persistent, does impose special obligations on those who wish to maintain Israel as the one state in the world where Jews have political self-determination. If these costs – in the past, present and future - are not conceded, and if systematic efforts are not made to mitigate them – it might be that the in-principle justification of the Jewish State will not be strong enough to justify the actual reality in Israel. This will be one of the main subjects of Chapters III
and IV. At this stage I want to emphasize that in this book I am talking only about Israel in its 1967 borders (more or less). I am talking about the status of Arab citizens in Israel, and not about the relationships between Israel and Palestinians outside its borders. Some scholars challenge the legitimacy of this approach. They argue that the reality in the region has been, for too long, one of Israeli control over all of Palestine. Of course, the issues of the status of Arabs in Israel and that of the Israeli-Palestinian conflict are closely related. Nonetheless, I think it is a mistake to preempt a discussion of the prospects of Israel as a state with a Jewish majority. This is especially true for those who advocate that Israel should do everything in its power to keep it this way.

I conclude that a state that is both Jewish in important respects and democratic is possible, conceptually and politically. It is also justifiable. I can now turn to the difficult questions opened up by this conceptual and moral space: Has Israel succeeded in establishing a state, which is Jewish, democratic and justifiable? What needs to be done in order to facilitate this situation and stabilize it? Can Israel do it? Is it likely to?
Chapter II: Some Central Arrangements

In Chapter I I have reached the conclusion that, in principle, Israel can be both Jewish and democratic, and that this combination may be justified. It is now time to look at the actual arrangements adopted by Israel in fact. In this Chapter I will look into these arrangements, their content, their background, and the decision-making processes involved in creating them. This description will provide the background to the discussion in the third Chapter: Identification of the conditions and the directions which are necessary to guarantee that the combination between Jewishness and democracy will be stable and justifiable, so that there will not be a persistent danger that one of the elements will be lost in the attempt to protect the other.

In this Chapter I will provide a schematic sketch of the developments in attempts to balance Jewishness and democracy. I will be looking at developments because one of the important features of the situation is that arrangements and attitudes are not static. Interesting developments can be traced both before the foundation of Israel and in the 53 years that passed since it was founded. At this stage suffice it to say that the picture is complex and mixed. In many ways, Israel is now much more democratic than it was when founded. In many ways, it is also more Jewish. At the same time, both the Jewish-Arab rift and the internal Jewish rift have intensified over the years. Today, their regulation has become much more difficult and challenging than it had been. This fact is both troubling and reassuring: People are much more aware now that these issues need to be addressed and dealt with.
I. Background

In 1948, in the festive declaration of the Foundation of the State of Israel, Israel was described as a ‘Jewish state’, stressing the long yearning of the Jewish people to its old homeland. In this, the Declaration followed the UN resolution of 1947, specifying that the area of the British mandate would be divided into a Jewish and an Arab state. Since then, many other expressions reflecting the fact that the governing elites saw Israel as a Jewish state were made in laws, judicial opinions, and various official pronouncements. The Declaration itself does not mention the word ‘democracy’, but it does include an explicit obligation to allow all residents participate in Israel’s political life on the basis of full equality. Again, many laws, judicial opinions and official pronouncements celebrated the democratic nature of the state and its implications.

The reference to the two elements in the description of the state was introduced into a law for the first time in 1986, when a law required banning political parties if they denied that Israel was the state of the Jewish Nation; were anti-democratic; or incited to racism. Finally, in the basic laws of 1992, dealing with human rights, and in the Parties Law of the same year, Israel is explicitly defined as a “Jewish and democratic state”.

Despite the high visibility of this dual description of the state, we do not find a systematic discussion of the tension between these two components of the state, or an exploration of the arrangements which may promote their stable combination. To the
contrary. Many of the initial decisions about basic structures in the state were made in
times of emergency or even outright war. Often, they were based on understandings
among the Jewish groups, but involved no negotiation with the Arabs. For these
reasons, most of these initial decisions lacked visibility, and were made without any
serious discussion, either in the government and the Knesset or in any public forum.
Moreover, many of the arrangements adopted were not even based on deliberate and
orderly decisions made by the authorized organs after the state was founded. Rather,
they reflected continuity with decisions and arrangements made by the Jewish Yishuv
prior to the establishment of the state. Many of these decisions simply involved not
changing social and legal realities that existed when the state was founded, and these
realities were often created without any prior thought or planning.

The absence of a comprehensive and systematic framework of analysis characterizes
the way these issues are approached to this very day. Often, dealing with local
problems as they emerge is preferred to long-term policy. Frequently, a low-visibility
local administrative agreement is preferred to a more comprehensive arrangement of
higher visibility. There may be advantages to this attitude. However, it must be
remembered that changing an existing reality may be much more difficult than
designing a coherent approach when we first seek to regulate an issue. This is why it
is important to sketch some of the initial understandings reached when the state was
founded.

In part, the low visibility of decisions and arrangements stemmed from the constraints
of the time. This was clearly the case in the first years of the state, when initial
arrangements had to be made in the midst of a war and mass immigration. Even in
quieter times, the government itself and its political leaders often do not have the time and the tranquility required for a systematic and comprehensive examination of central issues. However, politicians did not have to do the work themselves. They could have relied on extensive work done by academics, or to encourage and request the preparation of a data base and a study of alternative scenarios which would have facilitated a more comprehensive approach to decision-making. The problems we can identify in the Israeli mechanisms of decision-making are probably mostly related to regular fallacies in democracies, and are not related to the tensions between democracy and the Jewish nature of the state. But, as we shall see, some of the decisions adopted at the initial stages of the state were made against the background of that tension. They reflect an attempt to avoid explicit declarations and symbolic moves which may have highlighted that tension, and generated friction and even conflict, in both the internal Jewish divide and in that between Jews and Arabs.

One notable example of such a decision, whose implications have been with us since 1948, is the fact that Israel’s law never included a reference to the borders of the state! In terms of Israeli internal law, this has been a very important fact in the debate about the future of the territories occupied in the 1967 war. Israeli law only specifies the territories in which it is deemed to apply. The extension of Israeli law may be done by a mere decision by the government, (as was initially done for unified Jerusalem in 1967) or by a Knesset legislation (as was done for the Golan in 1982). Israel never declared its borders because the issue came up during the 1947-48 war. The territory Israel controlled at the end of the war was different from the one allotted to the Jewish state under UN decision 181, usually in favor of Israel. Israel’s effective borders were only armistice lines. And Israel’s leaders sought to avoid the need to
decide what the borders of the state were, in order to circumvent the tricky internal Jewish debate about the relationships between the state of Israel and Eretz Yisrael.

Similarly, Israel has never made a declaration concerning its official language or languages. This is especially surprising in view of the fact that the struggle for the Hebrew language was one of the central aspects of the life of the Jewish community in Palestine. Furthermore, the revival of the language, making it a live language of then people of Israel, is by far one of the most impressive victories of Zionism. One would expect that one of the first declarations of the newly born state, together with establishing a hymn and a flag, would be the declaration of Hebrew as the official language of Israel. Instead, Israel kept the framework of the system inherited from the British mandatory period, with the adaptations required by its ending. During the British Mandate, Palestine had three official languages: English, Arabic and Hebrew. Once the British left, England stopped being an official language, so only Hebrew and Arabic remained, by law, official languages. Despite the legal symmetry between the languages, Hebrew is clearly the hegemonic language of the country, and anyone not fluent in it will find it very hard to integrate into its social, economic and political life. In the Arab school system within Israel, however, the teaching is done in Arabic, while the students are required to learn Hebrew as well as English.  

Israel’s attitude to the regulation of its flag, hymn and symbol is also of interest in this context. In fact, all three are deeply Jewish, carrying a strong national significance. In 1949, very early on, Israel enacted the Flag and Symbol Act, establishing a duty to show respect to these symbols of the state and regulating their use. The Act refers to

28Recently, as a part of the growing vocality of Arab demands for a recognition in the public space, a few demands are made to allow Arabic signs in Arab cities, or to require Arab translations for all signs in cities with a mixed population.
the flag and to the symbol, but it does not determine their form or content. The
decision as to the form and colors of the flag and symbols has been made by a
decision of the government. In other words, the level of this charged arrangement is
rather low. The flag and symbol of the state can be, in principle, changed by the
government, without any public debate or even notice.  

An interesting decision was made, even before the Declaration of the Foundation of
the State, concerning the name of the new state. Not many recall that this was a hotly
controversial subject. Two proposals that seemed quite natural, and were rejected,
were Zion and Judea (Yehudah). Both were rejected for sensitivities in the Jewish-
Arab divide and within the Jewish community itself. The reasons had to do with the
implication of the name of the state to the way its citizens would be called. Both
‘Zionists’ and ‘Jews’ would have been unacceptable to both non-Jews and to some
segments of the Jewish population. The name ‘Israel’ was chosen because it
reflected Jewish national particularism, but at the same time permitted a ‘semantic
space’ between Israeli citizenship on the one hand, and membership in the Jewish
people or in the Zionist movement on the other. Calling all citizens of the new states
‘Jews’ would have made the ‘Who is a Jew’ question even harder than it turned out to
be. Calling all of them ‘Zionists’ would have made the symbolic plight of the ultra
religious Jews (the hareidim) almost unbearable.

Both decisions may have been impossible to make today. If we had faced them now,
both Jews and non-Jews may have had a hard time with the arrangements that were

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29 In many countries, flags and symbols are specified in the state’s constitution! See, for example, the French constitution.
adopted. Arabs would have found it extremely hard to accept that their state would be given a particularistic name, and that its primary symbols would all be ones that exclude them. Zionist Jews would find the low visibility of the flag and the symbol unacceptable. They probably would have demanded an explicit declaration and entrenchment of them in a law or even in the constitution. A-Zionist or anti-Zionist Jews might have joined the Arabs in objecting to the Jewishness of state symbols.\(^{30}\)

In all of these debates, the difference between the centrality and visibility of the internal Jewish divide and that of the Jewish-Arab divide is very clear. The Arab voice is sounded by Jews. Arabs themselves are absent from all the deliberations leading to the initial decisions. Within the internal Jewish divide, on the other hand, the understanding is that such major decisions should be made by consensus and not by majority vote. A clear example of this difference is the decision not to enact a constitution (see below). The debate shows that a main reason for not enacting a constitution was the internal Jewish debate on whether the Jewishness of the state is religious or national-cultural, and the wish to avoid the cultural war that might have resulted had the constitution voted for one or the other. In distinction, the question of the status of the Arabs as citizens in a Jewish state was not on the minds of most of the legislators.

Within the Jewish community, the explicit attitude was an attempt to avoid confrontation, and to prefer ambiguous formulations, which could enlist the support of the main groups. The idea was that the laws should seek formulations that all could live with, and that low visibility implementation could be used to deal with the

\(^{30}\)In fact, in 1996 a law was passed in Israel, over the objections of Arabs and the Hareidim, imposing a duty on all public institutions, including schools, to fly Israel’s flag. The law has not been enforced.
controversies which may develop. A good illustration of this technique is the Law of Return, which was enacted unanimously in 1950, giving every Jew the right to immigrate to Israel and become its citizen. ‘Jew’ was not defined in the law deliberately, so as not to open up the controversy concerning who is a Jew. Consequently, the law was passed in an extremely festive atmosphere, without an hint to the debates concerning Jewishness and conversion which now threaten the fabric of social and political life in Israel (see below), and throw a heavy shadow on the relationships between Israel and the non-Orthodox Jewish communities abroad. Similarly, the issue of religious pluralism within Judaism was not raised, despite the fact that it was a known issue among Jewish communities in the world. All Jewish legislators made this tacit agreement not to open up the controversy because the Law of Return was seen by all as representing the essence of Israel as a Jewish state. Ben-Gurion, when presenting the law to the Knesset, even declared that the Law of Return was not a law granting Jews a right. Rather, it was a law recognizing their right and implementing it.

We saw that a tendency to avoid the tensions and the conflicts is apparent for both major divides. Yet this same tendency was generated by a very different background and political reality. In the internal Jewish divide, the tendency to cover-up the differences stemmed from a mutual recognition of the depth of the controversy, and a common decision that despite the controversy, joint action was crucial. Therefore all groups decided to try and strengthen the elements shared by all, while designing decision-making mechanisms that will guarantee the essential interests of the different groups. The decision is made by representative of all the major groups, who identify both a shared interest and important conflicts of interests. The situation is very
different when decisions were made concerning the Jewish-Arab divide. The decisions are made by the leaders of the Jewish community. The Jewish majority seems to ignore completely the problematic nature of the existence of the Arab minority within the Jewish state. The decisions seem to be exclusively concerned with the interests of the Jewish majority in consolidating its hold over the territory on which Israel was established, and coping with the security threat posed by the Arab minority.

An illustrative issue is that of the Citizenship Act of 1953. This law deals with methods of acquiring Israeli citizenship other than return. Due to the special phrasing of the law of Return, under which Jews residing in Israel when it was established nonetheless became citizens by return, the Citizenship Act dealt with all naturalization of non-Jews (this situation was changed when the Law of Return was amended in 1970. See below). The law grants Israeli citizenship to those whose domicile was in Israel, and specifies a very complex process of naturalization which is subject to the discretion of the Minister of Interior. However, domicile was not determined by a substantive test of permanent residence. Instead, the test of domicile for purposes of citizenship was presence in the country in the day in which the census was taken. Many Israeli Arabs, who were absent from Israel on that day, lived in Israel for years without citizenship (the law corrected this anomaly in 1980). In addition, for almost twenty years after the establishment of the state (until 1966), most of the Arab rural population lived under military rule, with severe limitations on their freedom of movement, employment and association. 31 Finally, in the first years of the state Israel consolidated its control over the main resources, such as land and water. Land laws

31 For detailed descriptions see Lustick (1980) and Kretzmer (1990).
were interpreted in a way that permitted the transfer of more than 90% of the land to the ownership and administration of the state, which regulates their use through the Israel Land Administration Authority. Until very recently, there was no Arab representation in the ILAA bodies, while the Jewish Agency and the Israel Permanent Fund were heavily represented despite the fact that they are not state bodies.

This is the background against which I want to review some central issues in Israel’s public life. My purpose is to look more closely at the arrangements we have inherited and developed in the areas of tension and conflict between Jewishness and democracy in Israel. I also want to examine the developments in these arrangements, and the decision-making mechanisms used to make the relevant decisions. This is, of course, a sketchy and incomplete analysis. My choice of issues is dictated primarily by the arrangements, which I deem central to the implementation, in Israel, of the balance between democracy and Jewishness.

2. The Right of Political Participation

I mentioned in Chapter 1 that even the formal conception of democracy, despite its ‘thinness’, has some important substantive implications. One such paradigmatic implication is respect of the right to political participation. Political participation includes, first and foremost, the right to vote and the right to be elected. In this sense, Israel was a democracy from its inception. From the very start, all its citizens – irrespective of national or religious affiliation – were allowed to vote and to be elected.
This legal inclusiveness, however, did not reflect significant political participation of the Arab Sector. In the early years, the Knesset did not have a party that gave systematic expression to the national aspirations of the Arab citizens of Israel, and to the alienation they felt when they were forced to live in the Jewish state. The Arabs voted mainly for the Zionist parties, through processes of ‘deals’ and cooptation. At times, they voted for sham Arab parties, which were really linked with the Zionist parties. As we saw, the provisions of the Citizenship Act 1953 meant that many Arabs who lived in Israel were not citizens, and thus not entitled to vote. The limitations on freedom of movement and association imposed by the Military Rule regime contributed to the weakness of real political participation by the Arabs. It was further strengthened by the fact that many of the local Arab elites fled Israel, leaving the Arab population in Israel shattered and demoralized. The early years saw practical limitation on the political freedoms of Jews as well: Social services were usually provided by the parties, and they claimed a proportional ratio of the new immigrants that came into Israel. To complete the picture we should note that from the very beginning Israel had parties whose programme included the establishment of a ‘torah state’ in Israel. Finally, Israel had a ‘classic’ communist party, with international commitments and strong affiliations with the USSR and its leaders.

This picture of political participation started to change after the first decade. Ben-Gurion’s commitment to destroy factionalism meant that the hold of the parties on the choices of those dependent on them weakened. Many new immigrants started to

32 A small group of radical, anti-Zionist ultra-religious Jews has boycotted Israeli elections from the start.
33 These parties did not specify what was meant by this ideal, and it is not clear what are the relationships between the torah state in these platforms and the halakhic state described in Chapter 1.
desert the ruling labour party, seen as arrogant and snobbish, and found a political home with the Herut opposition. Israeli Arabs started to organize after the 1948 devastation. In the early sixties, even before the end of the Military Rule, the first Arab national movement – el Ard - started its activities. The leaders of el-Ard claimed that they were only interested in equality to the Arabs within Israel, and that they did not challenge the existence of Israel or even its Jewish identity. Despite these clarifications, the neighboring Arab states supported the new movement, and called on the Arabs in Israel to support it. El-Ard’s request to register as a voluntary association was denied by the registrar, and the decision was upheld by the High Court of Justice (HCJ). In addition, the movement was declared an illegal association under the Mandatory Defence Regulations.

In the 1965 Knesset elections, El-Ard sought to present its candidacy. The law regulating these elections specified some formal criteria that any new party should meet, and El-Ard met them. It did not specify any substantive constraints, permitting the elections committee to ban a party because of the context of its political positions. Nonetheless, the central elections committee (a statutory body composed of representatives of the parties, and headed by a Supreme Court Judge) decided not to allow the party to run. The committee was then headed by Justice Moshe Landau, later the President of the Supreme Court. El-Ard challenged that decision before the HCJ, which upheld the decision in a 2:1 opinion. The majority saw El-Ard as a threat to Israel. President Agranat suggests that the threat is to the Jewish character of the state, while judge Sussman (who would also be a president of the court)

\[34\] Jereis. See also the discussion in Kretzmer, 1998.
Indicated that this was a case of self-defence analogous to that required in the Weimar republic, or even a realm threat to the very existence of the state. The dissent (by judge Haim Cohn) reasoned that, in the absence of an explicit law, there is no power to ban a political party on the basis of its platform.\footnote{For an analysis of the decision see Gavison 1987 (in Hebrew).}

It is quite possible that in 1965, had the court decided differently, the Knesset would have amended the law to include substantive reasons for banning parties. It is quite possible that El-Ard would not have passed the threshold rate for elections, and the Knesset would have preferred to leave the legal situation unchanged. Even if El-Ard would have won one or more Knesset seats, it is quite possible that the political reaction would have depended on the way the party operated. Be this as it may, it is quite clear the Knesset could live with the court’s decision, and accepted the result that an Arab national party was not allowed to participate directly in the political game in the Jewish state. Criticism of the decision and the result in the press was almost non-existent. The Yardor decision did not directly limit the right of Arab citizens of Israel to vote. But it did mean that they could not vote for an Arab national party. It also meant that those who wanted to raise an Arab national voice could not run explicitly and candidly under their real political platform.

Despite the fact that El-Ard was banned, the national Arab voice started to be heard in the Knesset. This was achieved by re-defining the message of the existing communist party, since only new parties were subject to the challenge.\footnote{See the fascinating description of the process in Reches (1993) (Hebrew): Initially, there was one communist party, with Jewish and Arab membership, that exhibited hostility to all national ideologies. At a certain stage, some of the Jewish members felt they were interested in a party affirming both communism and Jewish self-determination. The party split into Maki (the Jewish party, led by Moshe}
eligibility of political parties was not examined on its merits again in the court for 20 years.37

In the 1984 Knesset elections the central elections committee banned two new parties: Kahane’s Kach, and the national Arab Progressive List for Peace (PLP). The HCJ overruled both decisions, and both parties won Knesset seats. The PLP was a Jewish-Arab party whose explicit platform was complete civil equality to Arabs in Israel. Nonetheless, among the leaders of the party were individuals who clearly advocated the abolition of the Jewish character of the state and of the Law of Return. Kahane’s Kach party explicitly advocated that Arabs should not be granted equal rights in Israel, and that Israel should be made a halakhic state. In fact, the arguments against equal rights for the Arabs were based on an interpretation of Jewish law itself.

The political system did not respond immediately. For some time, it seemed to accept the fact that the two parties became legitimate players in Israel’s political system. This willingness started to change when Kahane exhibited a very blatant and provocative style of parliamentary activity. Kahane did not cooperate with the old attitude that preferred that the deep tensions between Jewishness and democracy be muted and minimized. His explicit purpose was to highlight them, and to show conclusively that Israel could not be both Jewish and democratic, so it should give its Jewishness preference. It seems that this message seemed too threatening and

Sneh) and Rakah (led by both Jews and Arabs). Gradually, Rakah became the political home of the Arab citizens who were looking for a national voice.

37In 1980, Meir Kahane’s Kach party presented its candidacy for the first time. There was a heated debate in the elections committee, but it decided not to ban the party. A number of citizens challenged that decision, arguing that the Yardor rationale meant that an anti-democratic party should be banned, and that Kach was anti-democratic. The court denied the petition saying that it had no power to review approvals by the elections committee, since the law gave it jurisdiction only over decisions to ban a party: HCJ Negbi. The Kach party did not gain a Knesset seat in the elections.
unacceptable to large parts of the central political establishment in Israel. Consequently, the election law was amended. First, substantive criteria for eligibility were added: Parties which denied Israel as the home of the Jewish people, or that were racist or anti-democratic could be banned. In addition, old parties as well as new parties could now be challenged under the law. Finally, the new law specified that decisions upholding a party could also be appealed, and not just decisions banning it.

In the 1988 elections, the central elections committee had no difficulty banning Kach. The committee confirmed the PLP by the single vote of the chair of the committee. The court upheld both decisions, but significant differences between the opinions are noteworthy.

In a very short judgment, the banning of Kach was unanimously upheld. The Court simply stated that the party was anti-democratic since its platform contained the idea that non-Jews should be deprived of their political rights. The Court held that a blatant incompatibility between the platform of a party and the law was sufficient for

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38Kahane presented private bills that seemed to remind one deliberately of Nazi laws against the Jews, including laws prohibiting open access to beaches and public places to Arabs, a mandatory 5 years imprisonment to any Arab who had sexual intercourse with a Jewish woman, even if she consented to the act. Shlomo Hillel, the then speaker of the house, refused to even present these bills to a vote, claiming that nothing will make him put to the vote an Israeli version of the Nuremberg laws. He based his decision on a provision in the Knesset Rules which empowered the presidium, in general, not to admit a private bill for a vote. Kahane, who was very skilled in using the legal system to promote his political goals, challenged this decision in court. In a controversial decision, the High Court of Justice overruled the speaker’s decision. It reasoned that a sweeping power to exclude private bills because of their subject-matter is extremely dangerous, so that the general power should not be interpreted to permit such a decision. However, a crisis seemed to develop since the speaker refused to obey the court, preferring to resign. To avoid this development, a compromise was reached in the Knesset, and the Knesset rules were amended in a way similar to section 7A. The new Rules required that private bills involving racism, or denying the Jewish nature of Israel, be excluded by the presidium. This ruling was applied to Kahane’s bills. Since then, the presidium was asked to exclude a number of bills, mainly from Arab MKs seeking to declare that Israel is a democratic and multicultural state. The argument was that ‘multicultural’ was a denial of the Jewish nature of the state. Others responded that the Bills did not explicitly specify that Israel was NOT a Jewish state. The Bills were not excluded, but they failed to be enacted.
banning it, and there is no need to prove that the party had reasonable chances of materializing its goals. For our purposes here it is important to note that Kahane argued that the law itself contained a logical inconsistency. A state cannot be both Jewish and democratic. Hence the Court could not ban his party simply because it was trying to implement policies necessary to ensure the Jewish nature of the state. He further claimed that the legislation itself was invalid because it was inconsistent with the entrenched requirement that elections be equal. President Shamgar dismissed the latter claim summarily. He insisted, however, that there was no inconsistency between the Jewish and the democratic nature of the state. The opinion of the court in this matter squares well with our approach: Democracy is characterized ‘thinly’, as comprising the recognition of civil and political rights. Even under this thin characterization, however, Kach’s platform is inconsistent with the requirements of democracy due to its denial of political rights to non-Jews. Notably, the opinion does not discuss the relationships between democracy and Kahane’s vision of the Jewish state as a Jewish theocracy.

Concerning the PLP, the issue was, of course, whether the list denied Israel as the home of the Jewish people. The Court upheld the party’s right to participate in the election in a 3:2 vote. The reasons given by the judges are important for our concerns. Two of the majority judges gave the Jewishness of Israel a minimalistic interpretation (a state with a Jewish majority, connections between the state and the Jewish diasporas, and the justification of Jewish self-determination). Consequently,

39 The Basic Law: The Knesset 1958 does contain a provision that the elections should be, among other things, equal, and that the provision can only be changed by a 61 MKs majority. In the past, the court had held that laws violating the requirement of equality (in financing) were invalid. However, in this case legislators were aware of the possible difficulty, and the amendment was passed with a majority larger than 61.
40 See the discussion in the first Chapter of the analogy drawn by Shamgar between the Jewishness of Israel and the Frenchness of France.
41 Elections Appeal 2/88, Ben Shalom
they tended to analyze then position of the spokesmen for the PLP charitably: Their declaration of support to the principle of ‘Two States for Two Nations’ (i.e. their willingness not to demand that Israel be seen as a bi-national state, or that its Jewish affiliation will be privatized) was seen as adequate. This attitude by the majority thus permitted the avoidance of a detailed analysis of the sense in which Israel is deemed Jewish by the statute.

The dissenting judges did just that. Judge Menhaem Elon elaborated in great detail the centrality of the Law of Return and the idea of Jewish return to the Jewishness of Israel. Judge Dov Levin stated that a platform demanding full equality between Jews and Arabs was in itself inconsistent with the Jewishness of Israel. This is because such full equality requires recognition of the equal status of the relationships between Jews in Israel and the Jewish diaspora, and those of Arabs in Israel and their fellow-Palestinians abroad. For our purposes it is important to note that even a few of the majority judges stated that had the PLP explicitly vowed to abolish the Jewish nature of Israel, even if it committed to try and do so only in peaceful and non-violent ways, the party would have to be banned under the statute. In other words, a large majority of the judges sitting in the case agreed that the statute required the exclusion of a party committed to changing the Jewish nature of the state within the constraints of democracy.

Section 7a of the Basic Law: The Knesset still exists as part of Israeli law. In 1992, the political culture of Israel was changed by the Parties Act, which states that only a registered party can take part in the elections. One of the conditions for registration under the law is that the party’s goals or activities do not include, explicitly or
impliedly, the denial of Israel as a Jewish and democratic state (section 5(1)). It follows that from now on most of the discussions of the eligibility of parties to participate in elections will take place before the Registrar of Parties (whose decision can be appealed to the Supreme Court). 42

Before the elections of 1996 (in which Netanyahu was elected PM), two such discussions took place. One related to Ahmad Tibbi’s party (that ended up not running). The Supreme Court held unanimously, in an opinion by judge Cheshin, that the fact that the party was committed to make Israel ‘the state of all its citizens’ did not prevent it from running. All democracies, said the court, are in an important sense the states of all their citizens. This commitment, in itself, did not deny that Israel was, in addition, a Jewish state. The court was more concerned with allegations that Tibbi served as personal advisor to Yassir Arafat, but was willing to accept Tibbi’s statement that these ties would stop once the party participated in the elections. 43 The second judicial discussion related to the registration of a radical national-religious party called Yemin Israel. The party stated that its goal was the establishment in Israel of a Jewish religious state, and advocated some harsh measures against Arabs, and the challengers argued that this meant the party was undemocratic. The registrar accepted the party’s application, arguing that the idea of a ‘Halakhic state’ was quite vague, and it was possible to interpret it as consistent with democracy if it amounted to wishing to adopt arrangement inspired by Jewish law. The Supreme Court, in an opinion by President Barak, upheld the Registrar’s

42It is plausible that the registrar will adopt the guidelines developed in the election cases, but the discussion before the registrar will be held some time before elections, and will be free from their political overtones and constraints. Furthermore, the registrar’s decision will be legal-political, rather than the political decisions made by the representative election committee. The differences between the formulation of section 7a (Israel as the home of the Jewish People) and section 5(1) (Israel as a Jewish and democratic state) have not yet received official judicial interpretation.

43CA 2316/96, Issakson
decision. Barak accepted the idea that some wishes to have a torah state could be consistent with democracy. He nonetheless added, in an obiter, that had the party been explicitly committed to a Jewish theocracy, that might have justified its exclusion, based on the doctrine of the ‘Democracy in Self-Defence’.\(^4^4\) This statement generated a heated and critical response from religious leaders.\(^4^5\)

Before the 1999 elections there was an additional challenge of Balad, a national Arab party headed by MK Azmi Bshara. Again, the challenger argued that the party’s platform is inconsistent with the Jewish nature of the state. Again, the court rejected the plea. However, the court bases its conclusions on the weakness of evidence connecting the party to the denial of the Jewish nature of the state. (check!)

The collapse of the political process between Israel and the Palestinians in the wake of the second Camp David talks in summer 2000, the second Palestinian uprising, and the unfortunate violent demonstrations in the Arab sector of Israel in October 2000 leaving 12 dead from police fire, made relations between Jews and Arabs in Israel much more tense. Some Arabs MKs made public statements which were interpreted by some as support for the armed struggle of Palestinians and the Hizbollah against Israel. In November 2001, the Kneseet has voted, for the first time in its history, to suspend the Parliamentary immunity of MK Azmi Bishara to allow the AG to prosecute him for support of a terrorist organization. At the same time, Bills are considered that may permit the exclusion of parties and of candidates who support armed struggle against Israel. It seems that this area of the limits of political

\(^{44}\) ACA 7504/95, Yassin.

\(^{45}\) See Haaretz 5.5.96, page A!, and the response of the Chief Rabbinate in Haaretz 14.5.96. page A5.
participation is undergoing now a very serious modification. At this stage, it is too early to say how these matters may develop. I’ll return below to the normative aspects of these matters.

3. Religion, Nation and State: Jewish Identity

There is no doubt that the focus of the tensions within the inter-Jewish rift between Jewishness and the democratic nature of the state is based on the relationships between the state and Judaism – as both a religion and as a culture and nation. As we saw, the tensions between Jewishness and democracy7 within the Jewish-Arab rift are also connected to the way the state envisions, and can envision, Palestinian nationality and its claims. I noted above the prime importance of resisting the differences in visibility and centrality of the two concerns. Nonetheless, in this chapter I will concentrate on the arrangements concerning the inter-Jewish tensions. I will add a short discussion at the end relating to non-Jewish religious and national affiliations in Israel.

The reason for this choice is that, until very recently, the picture of both the arrangements and the decision-making processes concerning the Arab sector was more or less clear and stable. Their examination was not central to the stability of the social and political regime of Israel. The inter-Jewish tensions, on the other hand, were quite volatile, and have persistent and pervasive effects on Israel’s political reality. Furthermore, the attitudes of Israeli society and its major institutions to these tensions have undergone important changes and developments.
On the face of it, the internal Jewish tensions include a large number of different issues, including personal status, kashrut, burial arrangements, Sabbath, Return, pathology, education and archeological activity. In fact, all these apparently disparate issues are linked by the great debate about the proper and desirable relationships between the state and the Jewish identities and aspirations of its population.

It should therefore come as no surprise that one of the most central and charged issues is that of ‘Who is a Jew’ and, in particular, who should have the authority to decide who is a member of the Jewish collective. Answers to questions of identity – be it personal identity or collective one – may well be rather vague and allow quite a lot of ambiguity. We all learn to leave with that. Usually, it is neither necessary nor possible to dispel this ambiguity. However, when one’s identity is necessary for the application of some rule, especially rules regulating the use of power by state organs, we need operational criteria which will enable us to make binding and authoritative judgements about a person’s identity or affiliation. This is what happened in Israel. We saw that the Law of Return declared that ‘Every Jew has the Right to Return to His Homeland’. On the face of it, the law presupposed an ability to determine, for each and every candidate for immigration under the law, the candidate’s Jewishness. In fact, at the early stages, there was a lot of flexibility, which allowed an avoidance of debates on this issue. People who saw themselves as Jews, especially if they had been persecuted as Jews, were allowed to immigrate under the law of Return. In matters of personal status, the law was applied by the rabbinical courts, which used varying degrees of strictness. The least significant context in which a determination of Jewishness was necessary was the Residents Registration Act, which required
specification of both ‘religion’ and ‘nationality’. The purpose of this law is primarily statistical, and the registration is not binding in contexts of either immigration or personal status.

Historically, the determination of Jewishness in the various contexts depended primarily on the identity and ideology of those in charge. At least in the early years of the state, these matters were considered internal matters of the relevant ministries and institutions. In those early years, the Ministry of Interior was controlled by a liberal-secular party, and the guidelines for registrations of Jewishness (and for return) were, in consequence, quite liberal. This flexibility ended in 1958, in the wake of a serious coalitionary crisis over the registration of children of Jewish fathers and non-Jewish mothers. The determination of Jewishness for marriage and divorce, on the other hand, was allocated to the exclusive jurisdiction of the rabbinical courts under the Rabbinical Courts Act of 1953. Occasionally, a person who was considered a Jew by all, who lived among Jews and like Jews, turned out not to be Jewish under Jewish law. The attitude of the rabbinical courts varied. At times, they required conversion. At others, they cooperated and treated the person as a Jew (or disregarded the fact that some were, presumably, mamzerim). Similarly, responsibility for burial arrangements in the cities was given to religious burial groups. Usually, the local rabbis and the hevrot kadisha found ways to solve the practical problems that emerged, so that those who lived among Jews and were considered Jews despite the fact they were not Jewish under Jewish law could be buried decently. These personal problems were usually solved without public discussion and awareness, and away from the courts. However, the mechanisms that permitted and facilitated such low-visibility treatment started to fail. More and more often, people were not just
interested in the decent resolution of a pressing personal problem. They were interested in the symbolic significance of such decisions.

The first dramatic case came up in 1962, when Father Daniel, who was born a Jew and converted to Christianity, wanted to settle in Haifa. Israel had no objection to that wish, and was quite willing to grant him citizenship, but Father Daniel insisted that he be allowed to Israel under the Law of Return, and that he be recognized as a Jew despite his conversion and his lifestyle. The Supreme Court upheld the position of the state. The majority judges stated that even if under Jewish law there was some support for the view that a person born a Jew is always a Jew, the Law of Return is a secular law, and its goal is not religious. ‘A Jew’ in this law should not be interpreted according to religious law. A Jew who converted to Christianity is not eligible for immigration under the Law of Return.⁴⁶

Once the court started being involved in such matters, it did not take long for the next case to come up. Benjamin Shalit, a Jewish officer in the IDF, who was married to an agnostic woman, sought to register their children as Jews in their nationality (the parents did not want to register their children as members of any religion). We need some background and context to understand the significance of this case. The days were just after the 1967 war. The guidelines of registration were, that no one can be registered as a Jew in their nationality if they are not also Jewish in their religion. These guidelines were the result of a governmental crisis that took place in 1958. At that time the Minister of Interior was a secular man, who instructed his staff to register people based on their declaration alone. When these guidelines became

⁴⁶HCJ 72/62, Ruffeisen v. Minister of Interior. Judge Silberg, close to the religious, joined in this judgment. Haim Cohn dissented, saying that the definition of a Jew for purposes of Return should be subjective.
known, the religious parties left the government. Ben Gurion, the PM, sought the advice of some 50 Jewish notables, religious and non-religious, on how this matter should be resolved. He was surprised to find out that while no religious person supported flexibility, there were many non-religious persons who supported a religious definition of Jewishness. Since then, the Ministry of Interior was usually held by a religious party.

According to Jewish law, a Jew is a person born to a Jewish mother, or who was converted to Judaism. Shalit’s children were clearly not Jews under this definition, and the Shalits did not claim that they were. They did claim that nationality should not be co-extensive with religious identity, and that their children should be registered as Jews in their nationality. Since this claim was against the official guidelines, it is no surprise that the registrar refused to register them as applied. The Shalits challenged that decision in the High Court of Justice. After an initial hearing, the court did two unprecedented things. First, it asked the Knesset to preempt the petition by deleting the category of ‘nationality’ from the registration. Once the Knesset refused, the Court decided to sit in full bench (as distinguished from the usual panel of three). The Court decided, 5:4, to order the registrar to register the children as asked.

Most of the judges of the majority tried to avoid questions of high principle. They talked about then powers of registration officers, not about Jewish identity, seeking to keep their decision in low profile. The dissenting judges divided. Two of them, close to religion, Silberg and Kister, explicitly relied on the ideological position that in Judaism religious and national identity are one and the same thing. One cannot
be a member of the Jewish people without also being a Jew according to Jewish law. The secular dissenting judges – President Agranat and judge Landau – gave a second-order opinion. They reasoned that the question of membership in the Jewish collective was too controversial for the court to decide it. Under these circumstances, the court should defer to the arrangements adopted by the political organs.

Those in the Knesset who hoped the court will legitimate the political judgement could not now live with its decision. Consequently, in 1970 the Law of Return was changed. The declaration remained that Every Jew has the right of Return. But the law now defined a Jew as a person born to a Jewish mother or a person who was converted, and is not a member of another faith. In addition, section 4A broadened eligibility for immigration under the law of return to non-Jewish family members of Jews for three generations. The ‘package deal’ explicitly accepted the religious definition of ‘a Jew’ (without specifying what form of conversion may count), but prevented the practical difficulties that might have been generated by this narrow definition. It seems that the assumption was that section 4A will not cause a massive immigration of non-Jews. The expectation was that only those who feel truly connected to Jews or to the Jewish state will come, and that most of them would choose to convert, so as to avoid the practical difficulties of personal status and burial arrangements. In fact, during the seventies and the eighties, it was quite common for non-Jews who were married to Jews and wanted to live in Israel to complete the conversion arrangements abroad, so that by the time they immigrated they were considered Jewish.
This expectation proved wrong, and the matter is quite clear by the end of the 20th century. Israel succeeded in transforming a third world region into a state enjoying standards of living of the developed world. As a result, Israel has become a preferred immigration destination for many from less fortunate places. Ease of immigration for those entitled to come under the Law of return, coupled with generous economic help, strengthened this tendency. It is estimated that in the last decade of the 20th century, about 30% of the large immigration wave are not Jewish. Furthermore, in many cases the immigrants are practicing Christians. Often, whole families arrive in Israel while the Jewish member of the family has either died or was not interested in immigrating. At times, families send to Israel their older and weaker members, while the younger and stronger choose to immigrate to other countries. The 1970 amendment of the Law of Return thus generated consequences that had not been foreseen when it was enacted. Nonetheless, the great sensitivity of the law means that it is extremely hard to change it. One of the consequences of this situation is an intensification of the political struggle over the Ministry of Interior. In the 1999 elections, Sharansky’s main election slogan was that his party should replace Shas in that ministry. Barak indeed gave the Ministry to Sharansky’s party. On the other hand, when the ministry is controlled, as it usually is, by the ultra-religious parties, there is a tendency to check and double-check the ‘credentials’ of non-Jewish immigrants under the Law of Return. In some cases, individuals who have been living in Israel for years are subjected to a re-examination of their grounds for naturalization.

47 A number of changes were suggested. The then Minister of Welfare Orah Namir suggested in 1994 that the law be changed so that old immigrants would not tax the Israeli welfare services. Her suggestion was presented as embarrassing. Other changes were presented as directed against non-orthodox, and rejected for this reason. For another proposal for change see Ruth Gavison and Yaakov Medan, A New Social Covenant Between Religios and Secular Jews in Israel (IDI, 2002) (Heb).
The situation makes the issue of conversion even more charged than it could have been. A lot can be learnt about the processes that the Jewish society in Israel went through from comparing the way this issue was treated in the 60’s and 70’s to the way it was treated starting in the 80’s. In the first period, the question of non-orthodox conversion arose mainly because of individual predicament: People who converted in a non-orthodox conversion realized that under the orthodox interpretation they were not considered Jewish. This may have affected their personal status for purposes of marriage or burial. A dramatic case of this sort was that of Helen Seidmann. It is unclear what would have happened had the case reached the courts (the then AG Meir Shamgar thought the orthodox position could not have been defended), but the need for judicial decision was avoided by a courageous intervention by the Chief rabbi Shlomo Goren, who had Seidmann agree to a hastened orthodox conversion.

Starting with the 80’s, the question started to be raised by both individuals and movements motivated by an ideological challenge of the orthodox monopoly over matters of conversion. The non-orthodox Jewish movements challenged the fact that their conversions were not recognized by the religious establishment in Israel. This difference is central, because the new challengers are not interested in a solution to a personal problem, which can usually be achieved by some flexibility in an orthodox conversion. These movements seek an explicit recognition that their interpretations of Judaism and of ways of joining the Jewish people are legitimate and of equal status with the orthodox interpretations. Furthermore, these movements seek to ‘break’ the orthodox monopoly over decision-making on such issues. They thus seek representation in all public bodies dealing with religious issues. Since the non-
orthodox movements had to struggle against the power structure of ‘regular politics’ in Israel, where religious parties usually have veto power, they sought an alternative basis of power, which will not be subject to the same constraints. The legal system, and in particular the Supreme Court, seemed ideal candidates to serve as vehicle of this social change.

The Supreme Court did step into the field. Although it conducted itself with extreme caution, its intervention contributed to criticisms leveled against the court from both sides of the political spectrum, but especially from religious and other circles. The 1970 amendment of the Law of return, as we had mentioned, does not specify what kind of conversion may count. Orthodox forces tried for years, without success, to specify that only orthodox conversion would count. Nonetheless, Ministers of Interior, usually orthodox, created great difficulties to those converted by non-orthodox courts.

The first judicial intervention in this charged matter came in 1985 (check!). Mrs. Miller, who converted by a reform court in the USA (although her conversion may have met orthodox requirements as well in terms of the studies demanded), asked to be registered as a Jew in her religion and nationality in the State’s Registrar. The state objected. After some hesitation, the court came down with two decisions. In the Miller case, it created a precedent in requiring the Minister of Interior to register Mrs. Miller as a Jew. At the same time, apparently to ‘compensate’ the orthodox establishment, it published a long-awaited decision holding that reform rabbis could not perform marriages in Israel.
The decision created a coalitionary crisis, but the political system seems to have accepted that non-orthodox conversions abroad would be recognized as bases for registration. In fact, civil servants continued to present difficulties to people who underwent such conversions, but the principle seemed settled. An attempt to insert into the registrar a distinction between converted and non-converted Jews was rejected. As a result, the non-orthodox movements developed the practice known as ‘jumping conversions’: students would undergo their studies toward conversion in Israel, but would actually complete the conversion in a non-orthodox court abroad. At the same time, these movements continued to struggle to change the practice, and should an explicit recognition of their conversions even if done in Israel itself. Most legal commentators believed that Israeli law did grant a monopoly over conversion in Israel to the orthodox chief rabbinate.

In 1995, the Supreme Court shook this understanding by stating that the law as it is existed did not grant the chief rabbinate any such monopoly. Nonetheless, in view of the complexity of the question of recognizing conversions, the court did not rule that non-orthodox conversions should all be recognized. Instead, it referred the question to the legislature. At the same time, the court did not leave the question open, and suggested that an arrangement that may prolong or re-instate the orthodox monopoly over conversion will be a violation of people’s freedom of religion. The lone dissent came from the orthodox member of the court. He believed the court should not have intervened in the issue to begin with.

HCJ 1031/93, Passero (Goldstein) v. Minister of Interior, PD 49(4) 661.
For a number of years, the subject was the center of political controversy. The regulation of conversions and the maintenance of the status quo in this matter were central features of the Netanyahu government elected in 1996. The orthodox parties, who formed a crucial part of his government, started a new offensive: They presented a Bill granting full orthodox monopoly over matters of conversion (some proposals even sought to cancel the rule concerning recognition of conversions abroad). The Bill passed the first reading, and political constraints secured it a majority within the Knesset, but the Bill was not enacted because of very strong pressures from non-orthodox movements abroad. To break the impasse, a public committee was founded, chaired by orthodox Minister of Finance Yaakov Neeman, in which all major Jewish movements were represented. At the same time it was agreed that all pending litigation would be suspended.

The Neeman committee generated a ‘big compromise’, described by some of its members as ‘an historic turning point’. The committee proposed, that all officially recognized conversions in Israel will be performed by a single, orthodox, court. At the same time, the state would establish schools for conversion, in whose administration all Jewish movements will cooperate. The proposals were extensively endorsed by the Israeli Knesset, and the schools for conversion were indeed founded an funded, run in the spirit of cooperation. However, the chief rabbinate only approved the part of the recommendations dealing with the unified orthodox court of conversion and its exclusive jurisdiction. The non-orthodox movements claimed this undermined the compromise because it denied them the legitimacy they sought. In consequence, they started re-activating the petitions. The state, on the other hand, claimed that the state does respect the Neeman compromise de facto, and that the
court should not upset that compromise. Some religious activists threaten to re-activate their own Bills seeking to give statutory force to the orthodox monopoly. Thus the case of conversion provides a fascinating example of the complex processes generated by deep ideological and institutional conflicts.

It is important to see that the debates around conversions take place on a number of different levels. One such level is the principled quest for ‘religious pluralism’, reflected in the demand that the state does not endorse a monopoly or a privilege to then orthodox establishment. In Western terms, this is a plea for non-establishment. In fact, the non-orthodox movements, as a rule, do not advocate the strong non-establishment of the US or the French type. Rather, they seek the soft non-establishment principle of equal status, the type that is accepted in Germany. But the disagreement between the various movements in religious Judaism obscures the a-religious conception of Judaism to allow ways of joining the Jewish collective that will not take any religious form. A third level is the predicament of individuals, who wish to live as Jews in the Jewish state, and object to the difficulties imposed on them. Yet a fourth level is that of those who want to acquire Israeli citizenship, and find that the easiest way of doing so is by converting to Judaism. The fact that the problem is discussed and debated on so many different levels, and from so many different perspectives, makes it hard to take a simple and clear-cut position, since the different contexts may require different adjustments. An answer that may be adequate to one of these concerns may generate unacceptable consequences on others. It follows that it may be the case that it is an interest of the state to distinguish between different questions, and seek to address them separately, without aspiring to provide a definitive answer to the question: Who may convert? And Who is a Jew?
For our purposes, it is important to stress the institutional aspect of recent developments. We now face demands that Israel make explicit ideological choices, and that it should let go of its long-time habit of sweeping these under the carpet, while devising low-visibility compromises to practical needs. As a part of this change, the court is now a much more active participant in the decision-making processes than it used to be. Not surprisingly, the involvement of the court makes a strong contribution to the new objection to low visibility compromises.

It is important to see that the debate about religious pluralism may tend to obscure the fact that the struggle of the non-orthodox movements is directed mainly (although not exclusively) against the orthodox monopoly and not against the religious monopoly. In terms of the state-religion relationships, then, they are leading the state towards an awkward position. A state may, indeed it must, decide not to aspire to settle internal religious issues. At the same time, the state must regulate and provide for the lives and rights of its population, irrespective of their religious affiliation. It seems to follow that the state must find a way to regulate, for example, matters of personal status, without deciding religious questions. The same conclusion seems to follow from the commitment to freedom of religion. The state may well choose to refer or to invoke religious affiliations. Many countries, even those committed to a firm separation of state and religion, may do so. But they cannot create a situation where secular courts of law are required to make decisions which may be interpreted as internal religious ones. This conclusion goes both ways. It means that the state should not aspire to decide religious questions, but also that
religious groups, orthodox or non-orthodox, may not enlist the state and its laws to create a monopoly for their own religious interpretations.

There is, then, a combination of factors that together contribute to the new tendency to seek explicit public and principled resolution of issues that in the past were dealt with through compromise and agreement. We saw how the old ambiguity around ‘who is a Jew’, together with a willingness to be flexible, permitted a smooth application of the principle of Jewish Return. Now that the willingness to live with the ambiguity is eroded, each side feels compelled to struggle for a public recognition of its own answers to the questions of the relationships between religion, nationality and citizenship. Consequently, the tensions between these answers become more visible and potent. The old ambiguity generated a somewhat superficial sense of unity and solidarity. It was easy for Jews of all attitudes to unite behind a principle of Jewish return. The present divisive conflict sharpens the fact that this unity cannot support specific arrangements that go beyond the principle, because each of them contains an affirmation of a specific interpretation, which is not consistent with others. It appears as if the success of the Jewish State means that Jews in Israel and the world are less willing now to pay a price for the appearance of unity. Rather, they hope they can enlist the state to their own vision, relying on the state frameworks to provide the solutions required for keeping the solidarity among various parts of the Jewish population.

I want to remind the reader that the Jewish preoccupation with the internal Jewish ramifications of this issue obscure the impact of these arrangements on the Jewish-Arab rift: The apparatus of Return creates a structural and significant
difference between Jews (and members of their families) and Arabs in terms of their right to settle and naturalize in Israel. And for many Palestinians, the wish to settle in Israel is no less a ‘Return’ than it is for many of the Jewish immigrants to Israel. Their sense of Return is clearly stronger than that of non-Jews who are eligible to immigrate under the Law of Return. The easier it is for those eligible to immigrate under the Law of Return to do so – the deeper and the more painful the difference created by it between them and Arabs who seek to immigrate to Israel. Not surprisingly, the less sensitive this apparatus is to these concerns, the more vulnerable it becomes to arguments challenging its very justification. The situation becomes even more sensitive when Jews seek to defend the Law of return for Jews, but deny the practical implementation of a Right of Return to Palestinians who used to live in Israel and their families. I shall return to this issue below.

The clusters of issues related to return, personal status and related matters, have now become urgent practical concerns not only because individuals and groups are now more willing to fight publicly, and invoke the courts, to defend what they see as their rights. The new urgency is also the consequence of a new social and demographic reality. Until the 1970’s, Israel had two ethnic, non-assimilating, communities: Jews and Arabs. There were divisions within these groups, and there were individuals who did not belong to either of them. But they attached themselves to one of these groups. This is no longer the case in the 21st century. While Jews are still about 78% of Israeli citizens, with Arabs being about 18%, there are now in Israel growing groups which do not belong, and mostly do not wish to belong, to either of these groups. In the last decade of the 20th century, a large group of non-Jews came under the Law of Return from the former USSR. In addition, the number of foreign
workers in Israel is now estimated at about 200,000. Many of them do not wish to return to their countries of origin, and experience show that some of them will eventually build their homes in Israel. These facts put very serious new strains on legal arrangements that coped relatively well under the old conditions. Conversion is now an issue not for few individuals who want to be married to Israeli Jews and make their membership in Israel more complete. It may be an issue for whole groups, who may consider this avenue as a way of strengthening their membership. The old millet system, granting religious monopoly over marriage and divorce, which was suitable to the traditional and nation-building Jewish and Arab populations when Israel was founded, does not fit a modern, multicultural society. It is expected that a growing number of individuals will have to seek ways to build their families not permitted by current Israeli law. The same holds for burial arrangements, when the issue comes up traumatically and dramatically when non-Jews, who live within the Jewish community, need to be buried.\footnote{The drama becomes even more painful when a large number of such people is involved, as was the case when a suicide bomber hit a night club where Russian new immigrants used to go, or when a plane crashed on its way from TLV to Siberia.}

Burial is a good example of another low visibility arrangement, which had been adopted almost without thinking at the early stages of the state. Unlike in matters of personal status, there is no law granting a monopoly to orthodox or religious ceremonies or arrangements. Nonetheless, the structure of institutions authorized to provide burial services, de-facto creates such a monopoly in most parts of the country. In Israel, burial services are provided by the local authorities. Where there are a number of religious communities in the same local authority, each usually has its own local or regional burial ground. In small secular local authorities, like the Kibbutzim, a variety of burial ceremonies is allowed. The IDF conducts a military-religious service. In Jewish towns, the monopoly over burial is in the hands of various
orthodox burial groups (hevra Kadisha). In the old days, they too were flexible, and permitted the burial of non-Jews living in Jewish communities in their graveyards. But in the last decades, the orthodox monopoly strengthened, and these groups allow only orthodox ceremonies, and exclude those who are not considered Jews by their lights. The result is that those who are not Jews and are not connected with another Jewish community in Israel may have serious burial problems. In addition, those who have ideological objections to the orthodox monopoly over burial may find it hard to avoid it when their time comes.

This small story may teach us a few lessons. Initially, the arrangement of burials raised many questions of principle, but a very small number of serious practical problems. The matters of principle were ‘solved’ away by systems of avoidance (those who really cared arranged to be buried in secular cemeteries). In recent times the willingness to ignore the issues of principle decreased, and the practical hardships grew dramatically. More and more often, Israeli society had to face the fact that it did not provide decent burial arrangements for those that lived and died with it and were not recognized as Jews by the orthodox establishment. The orthodox, while reluctant to give away their monopoly, realized that they can only insist on their freedom of religion to exclude those they do not see as Jews if these people are given decent public arrangements. Consequently, a momentum for change was created. After a long public struggle, and a few court cases, the Knesset legislated in 1995 the Alternative Burial Law, specifying that arrangements should be made so that people wishing for a non-orthodox burial can have it. However, the implementation of the law has been very slow. It appears as if the religious reluctance to weaken their monopoly means that, allocations of land for alternative burial is
extremely slow. At this time, there is one ‘alternative’ cemetery in Beer-Sheba, and another is supposed to be opened up in Jerusalem.

Against this background, it is interesting to have a second look at the orthodox monopoly over personal status. It, too, was created despite serious problems of principle, when practical difficulties were few and small. It survives till this very day (despite some strong criticism from many sources) because many of the practical problems can still be solved.

The orthodox monopoly over marriage and divorce for Jews was enacted as a compromise between the Zionist secular leadership and the religious parties. The matter was included in the famous ‘status quo’ letter written by Ben-Gurion to the leaders of Agudath Yisrael before the state was established, but it was only enacted into law in the Rabbinical Courts Law of 1953. It seems the compromise would not have been reached had the system not been a continuation of the millet system applying in the country since the period of Ottoman rule, and incorporated by the British mandatory authorities. The system granted to people’s religious communities the power over their matters of personal status. The central government thus respected the communities by granting them religious autonomy. The 1953 law both narrowed and broadened the mandatory arrangement. It only granted the rabbinical courts exclusive jurisdiction over matters of marriage and divorce, whereas the mandatory arrangement granted all matters of personal status to religious courts. The 1953 law gave them only concurrent jurisdiction on matters not relating to marriage and divorce (such as heritage, custody and maintenance). On the other hand, the Rabbinical courts got exclusive jurisdiction over marriage and divorce of all Jews in
Israel, irrespective of their citizenship or domicile, or of their explicit decision to join the Jewish community.

The compromise has not been an easy one. Secular and non-orthodox forces all agreed that those who wanted to conduct their personal status by Jewish religious law should be allowed to do so, but they preferred that the state also provides a system of civil marriage for those who preferred it. In fact, the Jewish leadership took this position when asked by the Mandatory authorities about their preferences. The decision to maintain the millet system reflected the preferences of the majority Arab population. Some argue that the secular leadership, headed by Ben-Gurion, just yielded to the political power of the religious parties, and that in later years Ben-Gurion himself regarded this agreement as a bad mistake. Others state that the secular majority respected the argument that any other arrangement might create a division between parts of the Jewish people, who will not be able to freely intermarry. Yet others claim that for many secular Jews, an orthodox marriage is their natural preference for themselves and their children. Be this as it may, the orthodox monopoly over marriage and divorce in Israel is today an established fact. Some scholars even take this fact as a basis for arguing that Israel is not a democracy, since it has built-in theocratic elements.

An orthodox monopoly over marriage and divorce is indeed an arrangement inconsistent with the most basic features of liberal democracy. It does not respect the rights of non-believers and members of non-orthodox movements to freedom of conscience and freedom of and from religion. It seems completely at odds with the

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50 See Porat, 1998.
51 See e.g. Kimmerling 1996.
modern, free atmosphere of Israel. And indeed, one of the main reasons for the relative stability of this surprising arrangement is the fact that the social reality in Israel is much more flexible than the legal arrangement would suggest. The Israeli legal system recognizes a host of forms of unions, and thus facilitates family life for those who cannot, or will not, marry within the constraints of Israel’s legal system. People may marry in civil marriages abroad, through the mail, or in private ceremonies. People may also choose to live together, and they are entitled to most of the benefits of marriage through the institution of ‘common law marriage’ (yedu-im be’tzibur).\(^{52}\)

This very broad recognition of forms of family unions outside of marriage was facilitated by the heavy constraints imposed by the Israeli orthodox monopoly over matters of marriage and divorce, and by the widely-shared realization that society must provide its population ways of forming families outside those constraints. Consequently, while the legal situation offends against human rights, the social reality provides many openings that permit to work around these problems relatively easily. This situation is good, in that many personal problems can be alleviated. It is bad, because it helps the maintenance of an unacceptable status quo.

Some hope and believe that the introduction of civil marriage will solve all the personal status problems in Israel. It is important to see that this is not the case. First, most of the couples in Israel now, and for many years to come, will have been married under religious laws. More important, religious people will still have to struggle with the implications of religious law to their lives. For them, this reality is not a

\(^{52}\)Recently, these benefits have been extended, in both legislation and in courts’ decisions, to same-sex couples. One of these decisions (HC 721/94, Danilovitch v. El-Al) was one of the sources of tensions between the Court and the religious establishment.
consequence of a coercive state law, but of the legal system and community structure that they have elected for themselves. They will have to work out these tensions, and their community and their state should aid them in doing so.\textsuperscript{53} In addition to issues raised by freedom from religion, we should mention the issues connected to the fact that at times the religious laws themselves can be seen as violating human rights. This is especially true concerning the status and the rights of women under religious laws under some of their interpretations.\textsuperscript{54}

Not all the problems of the orthodox monopoly over marriage and divorce connect to these matters, in which the rabbinical courts have exclusive jurisdiction. In addition, parties can ‘connect’ other personal status matters, such as custody or joint ownership with matters of divorce, and thus ‘acquire’ for them the jurisdiction of the courts. These courts apply to all such matters the provisions of Jewish religious laws. Often, when the parties are not themselves observant, these norms are very alien to the expectations and norms of the parties themselves. This may well generate great gaps between the population whose matters are decided by the courts, and the norms of the people making the decision. A case that illustrates this problem in a dramatic way, and gives us insight into the resulting tension between the rabbinical court and the Supreme Court, is the matter of Bavli. In that case the husband ‘tied’ matters of property in his file for divorce. The parties have been married for many years, and the husband earned a living as a pilot while the wife was a homemaker and took care of...
the children. The couple’s property was all registered only on the husband’s name, and he claimed that it was his property and should go to him upon the divorce. Israeli civil law creates a presumption of joint ownership in such cases. In principle, a 1973 law imposing these principles is applicable to the rabbinical courts as well. But the Bavlis got married before 1973, and the rabbinical court decided that all property belonged to the husband. The Israeli legal system does not grant parties to proceedings in the rabbinical courts a right to appeal their decision before the civil courts. Yet rabbinical courts are subject, like all bodies exercising powers under the law, to administrative review before the high court of Justice. The grounds of review before the court are explicitly limited, however, to cases where the rabbinical courts either exceed their jurisdiction or deny parties due process. The high court returned the case to the rabbinical court, stating that its judgment amounted to acting in excess of jurisdiction. The high court reasoned that the rabbinical courts could only apply Jewish religious law to matters of marriage and divorce. On matters of property they had to enforce the law of the land, under which wives share in their husbands’ property. The rabbinical court found a way to change its decision and grant the wife rights to some of the property. At the same time, it objected to the court’s opinion that the rabbinical court judges were bound by the civil law of property. For my purposes here, the details of the legal debates are not that interesting; central is the fact that the case exemplifies deep differences of opinion between the judicial systems on normative evaluations of family law, so that the identity of the court authorized to make the decisions becomes a major element of the arrangement which will be adopted.

55 Jewish law experts were quick to note that there was ample authority within Jewish law itself to reach a different conclusion. But this is besides the point.
A different aspect of the contested relationship between the state and Jewish identity, not directly related to the Jewish identity of particular individuals, is the struggle over the nature of the public spheres in Israel (at least in Jewish areas). Clearly, the questions are not fully distinct. If all or most Jews in Israel had been observant, there would have been no need to enforce laws of Sabbath or kashrut by the law enforcement authorities of the civil law of the state. If there had been such enforcement, it would have been criticized mainly from the outside. The debates on the public nature of the Sabbath, or on the regulation of medical research, transplantation, and archeological excavations are not ones between supporters of democracy and supporters of the Jewish distinctness of the state. These are debates among supporters of religious and conservative approaches to life and public spheres, and advocates of liberal, secular and modern conceptions of them. The centrality of this debate stems from the fact that in Israel there exists a majority of Zionist non-observant Jews, and that this sector in Israeli society contains most of the economic and cultural elites of the state.

It is clear that debates over these issues have gained in visibility and intensity in recent times. This fact stems from a series of complex social processes that have been taking place in the last two decades. More important, they reflect the growing feeling, of all relevant groups, that these processes pose serious threats to their ways of life, system of values, and even to their ability to survive in the long term. This feeling, in turn, makes them believe that they must now mobilize to stop these dangerous processes.
Developments of arrangements in the Sabbath provide a useful illustration. Orthodox people feel that there has been serious erosion in the tacit understanding that controlled the public characteristics of the Sabbath in Israel. That understanding was based on a strong distinction between private and public. There has always been complete freedom for individuals in their life styles, coupled with serious limitations on commerce and paid entertainment. Clearly, the compromise gave neither of the parties all they wanted. Non observant individuals were limited in their ability to rely, for their Sabbath entertainment, on shops, movies etc. In many places, public transportation is not available. Orthodox people did not have the support of the state in prohibiting all public activities regarded by them as breaking the Sabbath. On the other hand, non-observant people had a reasonable, even if limited, freedom to live their life as they wished. And orthodox people had a Sabbath that was publicly very different from the other days of the week. One of the reasons the compromise was made was that many non-observant Jews shared the wish to keep Sabbath as a day different from 'regular' weekdays, for a variety of national and cultural reasons.

The once stable compromise indeed lost its stability. In part, the changes were generated by demographic and economic changes. The ultra religious communities in some parts of the country grew and expanded significantly. For years, streets within these neighborhoods populated mainly by haredim were closed over the Sabbath. However, when these neighborhoods started to expand to main arteries, debates began. One such argument broke out in Jerusalem over the main roads passing through North Jerusalem, and especially the Bar-Ilan Road. The haredim claim that closing such streets is a matter of civility and respect for their religion. Some secular groups believe that this is the beginning of a systematic
attempt to limit the freedom of non-observant individuals to maintain their secular lifestyle. Both sides sought to influence the municipal authorities in Jerusalem to grant their wishes. The Mayor, captive to the haredim in his council, referred the issue to the national ministry of transportation, where the officer in charge of these issues maintained that Bar-Ilan was a main artery that could not be closed on Sabbath. The secular gain was short-lived, however. When the NRP got the ministry of transportation in 1996, the new minister arrogated to himself then powers of his officer, and decided that, in view of the public unrest created in the region, closing the street for the hours of prayers during the Sabbath was the right decision. Both parties challenged that decision before the HCJ. The secular group wanted to overrule the decision of the Minister of Transportation. The haredim wanted to extend the closure to the whole of the Sabbath.

The Court realized the issue was charged, and asked that the matter be resolved by a committee, comprising representatives of all parties, which will also consider the general question of criteria to close roads on the Sabbath. The committee reached a compromise, under which Bar-Ilan will indeed be closed during prayer time on the Sabbath, but public transportation in Jerusalem would be introduced in limited forms. At the last moment, the representatives of the haredim refused to sign the recommendations. In the court, the minister of transportation argued that his order was indeed in keeping with the recommendations. The court decided in a 5 to 4 decision to uphold that decision subject to some minor modifications (having to do with the rights of free movement of non-observant residents of the neighborhoods near Bar-Ilan.
It is not easy to assess this development at this point. The road is now closed for large parts of the Sabbath, which may seem a victory to the haredim. They even managed not to agree to public transportation on the Sabbath, so it is not that the ‘package deal’ approach worked here, with each side gaining some and conceding some. But one may say that the principle of judicial review is now securely in place, and the balancing, ultimately, will be in its hands. Others argue that it would have been better had the court let the matter be decided by the political system, which had its way anyway, without incurring criticism from all parties.

Another Sabbath front involving both the political system and the courts is that of commerce on Sabbath. Economic and liberal interests combined to create a situation under which many shopping malls and kibbutz stores are open on the Sabbath. On the other hand, large concentrations of secular population generated more and more demand for Sabbath entertainment and shopping. It turned out that Israelis liked shopping on the Sabbath, thus creating incentives for more shops and businesses to open up. The religious claim that Israel has joined those consumerized countries, doing commercial business without interruption seven days a week. Religious politicians sought to strengthen enforcement against these violation of the laws, but the enforcement efforts have often failed. At times, the failure comes from ineffective supervision, and at times – from judicial interpretations that undermine the illegality of such commercial activity on the Sabbath. Attempts to re-establish some status quo usually fail, since the secular forces mask their economic forces with high mobilization in terms of freedom from religion and freedom of occupation. These failures create frustration and despair among those who seek to struggle against the new tendencies.
An additional focus of debate is that of the structure of the religious councils in Israel. Israel does not have separation between state and religion. To the contrary, religious services are provided by the state, and even subsidized by it. The provision of religious services is done through religious councils. This arrangement applies to all major religions in Israel, but I’ll discuss only the Jewish ones. Religious councils have always been controversial, and there have always been problems with electing their members and ensuring their proper and transparent functioning. In the last two decades, however, these bodies have become the center of many public and legal discussions. The structure of religious councils was determined when the two contending powers were Mapai and the NRP. The law specifies that …..

For years, the individuals elected were orthodox people connected with the ruling parties. The first challenge came from an orthodox woman, who was elected a representative by her party in the local authority. The religious establishment opposed the appointment of women to the council, despite the fact that this was a state body, and not a halakhic one. The high court, in an opinion given by the religious Judge M. Elon, ruled that women could not be excluded. After much public debate, the religious establishment accepted the principle, but continued to try and block the appointment of women. Membership of women in these councils is still very low. The frontier of the battle has moved, however, to representatives of non-orthodox movement. In a few places, like Jerusalem, Beer Sheba, Netanya and Tivon, strong liberal and secular forces elected as their representatives to the religious councils members of non-orthodox movements. The religious establishment found this impossible to accept, and for two decades now the issue has been taking the time and attention of the courts, various local authorities, a public committee devoted to the subject, and the
Knesset. To date, despite clear HCJ decisions declaring that candidates cannot be excluded on the basis of their membership in non-orthodox movements, no such member has been working within a religious council.

Again, it is hard to assess the significance of this struggle. It may be too early to do so. This is one area in which the court has taken a very active role. In one way, this is quite justified: the matter here does not involve the values of freedom of religion. Religious councils are state bodies, and there is no good reason why it will exclude candidates on the basis of their religious affiliation. In fact, proper principles of representation support, on the merit, the involvement of non-orthodox participants in the work of the councils, which are responsible for the provision of religious services to all Jews interested in them (or coerced to use them). On the other hand, the matter is clearly, at heart, political. The attempt of the court to impose principles of neutrality has encountered fierce opposition. Skilled use of political power has meant that to this day the court has not been successful in changing the political situation on the ground. In hindsight, a decision by the court to stay out of this controversy, and let the non-orthodox fight the matter within the political system itself might have been wiser.

Be this as it may, it should not be surprising that against this background of recurrent debates, some groups of both religious and secular citizens seek to establish a new ‘social covenant’ between the Jewish groups in Israel. Some of these initiatives come from the political system itself. They have generated the Beilin-Lobotzky document, and the proposal by MP Langental. There are also a large number of groups seeking to form dialogues between Jewish groups. In May 2000,
the government established a council dedicated to this purpose, comprising representatives of the various groups. A comprehensive document dealing with these issues was written as a result of a dialogue between Ruth Gavison and R. Yaakov Medan of Elon-Shvut. At the same time, the legislative initiatives, seeking to use majority power to resolve some of these issues, continue. A comprehensive basic Law: Freedom of Religion was discussed in the Knesset. And PM Ehud Barak tried to save his government by initiating a ‘civil revolution’ hoping to create a majority around the platform of some separation between state and religion in Israel.

Yes it seems clearer now, that a majority among the Jewish population now sees weakening the “Jewish” elements of the state not just as an attempt to privatize religion. The internal Jewish divide and the Jewish-Arab divide are now closely linked in public awareness. The solutions offered are affected by the fact that while there may be a majority among Jews for privatizing religion, there is a large majority among Jews who resist the privatization of national-ethnic affiliations. The picture gets even more complicated when we recall that among non-Jews, positions on these issues are far from being simple or unified. Most Arabs, for example, resist the privatization of national-ethnic identity, although they may cooperate with Jewish who advocate this solution. And there is a growing divide among Israeli Arabs concerning the privatization of religion and the role it should be allowed to play in Israel’s public life.

4. Equality
Israel’s declared commitment to civil equality is over-determined: It is based on universal principles, on any serious conception of democracy, and on Israel’s own Declaration of Independence. It has been repeated time and again in the opinions of the High Court of Justice. A commitment to civil equality is dictated by political prudence as well. A political community will only be stable if it lets the large majority of its residents feel that they are full members within it, and that the society is dedicated to promoting their welfare. A community in which large groups feel excluded and exploited in important respects is likely to encounter protest and discontent. A free society may only hope to contain such feelings if they are harbored by relatively small and disparate groups. In Israel such feelings are pervasive, and there is convergence between the groups who feel excluded and the divides we have been discussing. In other words, some – but not all – of these tensions between groups of population are connected to the tensions between democracy and the Jewishness of the state.

Let me start with an obvious group for whom citizenship in Israel as a Jewish state poses a serious problem - The Arab citizens of Israel. Above I described the development in the recognition of political rights to Arab parties. The fact that the Arab citizens of Israel had the right to vote from the very beginning, and that this right has become more meaningful, allowing them more freedom to express their national aspirations and frustrations, is significant. It clearly forms part of the reason for the important fact that the vast majority of the Arab citizens of Israel are unwilling to consider arrangements under which the borders would be re-drawn so that they become citizens of the Palestinian state. Nonetheless, it is also important not to
forget, and not to cooperate with the tendency to belittle, the complexity of their situation politically and culturally.

First, it is misleading to look exclusively at the situation of the Arab now. We must remember that for almost 20 years after the foundation of the State, most of the Arabs were subjected to military rule, which imposed serious limitations on their freedom of movement, and consequently on their ability to find employment outside their villages. In addition, the first years of the state saw a massive transfer of titles to land from Arabs and from previous governments to the hands of the state of Israel. We should also recall that a large proportion of the Arab population of what became Israel left the country during the 1948-49 war, and that most of them were not allowed to return, and became refugees. Israel did include all its residents in its mandatory public education system, thus contributing to the reduction of Arab illiteracy. At the same time, the school systems of the Arabs in Israel had been subjected to close security and ideological supervision. The situation of Arabs in Israel now is very different, but the weight of this history is still heavy and present. In addition, even after the military rule was abolished in 1966, and despite the many advances, the equality Arabs enjoy is still legal-formal rather than full and substantive. Arabs are, as a whole much poorer that Jews. There is a great difference in the allocations they enjoy for infrastructure and education. The access of Arabs to land and water is limited. Their representation in the high echelons of the civil service is low. And on many issues, they do not have systemic input into decisions affecting their welfare and development. Arabs find it hard to rent or buy apartments in Jewish areas. And Arab and Jewish communities are highly segregated, in part because of voluntary choices of members of the two communities, and in part due to restrictive practices. We should not ignore this situation, and its ramifications for the possible tensions
between the Jewish and the democratic nature of Israel. These practices of separation and discrimination stem from complex patterns of attitudes and fears of the Jewish public. They have greatly increased at the wake of the violence that erupted in the region in October 2000, including the short spasm of Arab riots within Israel, in which 13 Arab citizens of Israel were killed by police. Persistent polls among the Jewish population testify to the fact that Jews are afraid of Arabs, and justify violation of their rights. These trends became more pronounced in the last year.

In addition to these very real aspects of segregation and discrimination, there is also the symbolic issue and that of identity. Israel is not only a state with a Jewish majority. It is a state founded in a territory in which Arabs had been the majority for generations. It is based on a Zionist ideology, which actively legitimates the use of the state mechanism to strengthen its Jewish aspects. And it has been built against persistent Arab objection, and after a painful military defeat, which destroyed a large part of the Palestinian fabric of society within Israel. Finally, in 1967 Israel captured the remainder of Palestine, and it has controlled since then all of the territory in which Palestinians had political control. Since then it has resisted the efforts to recognize the right of Palestinians to their own state on any part of Mandatory Palestine. The combination of all of these factors makes the membership of Arabs in Israeli political community especially problematic.

There are many aspects of life in Israel which serve as a constant reminder of this alienation between Israel and Arab citizens of the state. Most of Israel’s public holidays are alien to them. But some, especially the Day of Independence and Memorial Day, celebrated in Israel, are to them days of ‘the Naqba’. The Holocaust
Day, too, is a reminder of an experience which stresses their alienation from Israel’s public culture. Israel’s national anthem, Hatiqva (the hope), centers around Israel’s hope for national self-determination. Most of the talk in Israel’s public life is about the welfare of ‘am Yisrael’. This expression may be ambiguous between Jews of Israel and the Israeli nation, but the ambiguity may therefore go both ways. These feelings of anger and alienation may be strengthened by the explicit commitment of Israel to Jews all over the world, which sometimes is interpreted as giving preference to Jews who live outside the country over non-Jews who live in it for generations.

I said above that democracy, in its thin conception, does not entail either socialism or economic equality. At the same time, a stable democracy does require that all those living under it feel that they are partners in the enterprise, and that their interest and welfare count in the decision made by the community. It follows that a stable democracy cannot ‘tolerate’ a situation, which may be perceived as exploitation of some parts of the population for the welfare and benefits of others. This requirement applies within the Jewish citizens of Israel, but it applies with special force when social and economic weakness converge very strongly with ethnic and national affiliation. This is especially true when we recall the separatist tendencies of all the relevant groups, and the historical and the security background of the situation in the region.

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56 The ambiguity does work both ways. When an Arab young woman was elected as Miss Israel in 1998, she responded to questions about the relevance of her ethnic affiliation by saying she was proud to represent ‘am Yisrael’.

57 I am discussing here the implications of democracy, not those of a commitment to human rights. I want to stress, however, that certain levels of equality of treatment of various groups among the citizenry may well be required by a commitment to human rights as well. I do not need to expand here on this important subject, and about the details of such implications. In principle, the state of Israel concedes that it owes such ‘equal treatment’, whatever its details, to its Arab citizens, and that it has not fully discharged this obligation: See Israel’s statement to the Committee on CP Rights, 1998.
I cannot go here into detailed documentation of the forms and contexts of discrimination against Arabs in Israel. For my purposes here, it is important to note one fact. This discrimination is almost never based on explicit legislation. Most of it is based on low-visibility administrative arrangements, such as budgetary allocations of various government ministries, or personal decisions concerning appointments to the civil service. Patterns of ethnic-based decisions are also present in patterns of the private sector behavior, such as employment and rental arrangements by private bodies and individuals. In all such cases, the proof of discrimination is not easy. On the face of primary legislation, all laws (with the notable exception of the Law of Return) are neutral. While these facts cannot be denied, the interpretation put on them may vary. Some say that this is just a clever method to obscure the discriminatory (some say racist) policies of Israel towards its Arabs citizens. Others argue that the symbolic insistence of neutrality, and the firm and consistent official commitment to the principle of non-discrimination, are important legal and educational tools in the struggle against unjustified discrimination. In recent years, these principles and commitments have been used more effectively to promote equality and to expose deviations from it. Nonetheless, successes in this struggle, albeit important, have been limited.  

Another feature highlighting the difference between Jews and Arabs in Israel is the participation in the defence burden via participation in Israel’s armed forces. The Military Service Act 1959 imposes a duty of military service on all residents of Israel irrespective of religion or national origin. Nonetheless, from early on, Arabs got

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\[58\] For an optimistic account of the way the official commitment to equality and the rule of law may promote equality in fact see Saban (1996). The complex relationships between groups and the limited contribution of law and judicial decisions to ending discrimination are not issues unique to Israel. The record of white-black relations in the US provide a sobering reminder of the universality of these issues.
a wholesale exemption from military service, while Druze were enlisted, and Beduins were allowed to volunteer. This arrangement, when made, suited the preferences of all parties. Jews feared that Arabs would not be loyal to the state, and may co-operate with their brethren against it. The state did not feel it could require Arabs to fight against their brethren. And most Arabs did not feel like joining the armed forces of the state responsible for their ‘disaster’. At the beginning of the 21st century, there are growing voices among Druze and Beduins against serving in the IDF. On the other hand, many claim that the status of those not serving in the army should not be equal to that of those who are required to serve 2 or 3 years, and may even risk their very lives for their country. Some advocate, as a way out of this dilemma, a universal duty of ‘civic service’, some of which can be military, and which can take other forms as well. Some of the Arab leaders express objection to this notion, seeing it as a forced form of legitimating Israel and its policies. Ultimately, so long as this form of difference between Jews and Arabs in Israel persists – a major element of civic cohesion and solidarity will be absent in Israel’s public life.

This point facilitates the passage to the discussion of a second sector, which does not participate in the defence burden of Israel – the haredim (the ultra orthodox). Haredim are about 15% of the Jewish population (i.e. about 10% of the population at large). Nonetheless, their representation in the Knesset is (at 2001) almost 20%. This is due to the fact that most of the constituency of the Sepharadi Haredi party, Shas, does not share the haredi way of life. The European Haredim have a bit less than 5% in the Knesset, and this reflects their numbers. The haredim, too, feel alienated from the state and some of its symbols. They, too, are on the lowest echelons of the social-economic ladder, mainly due to very large family and low participation in the work
force. The ultra orthodox feel persecuted and hated. The Zionist elements of Jewish society do accuse them of being parasites, since they do not participate in military service or in the work force. The anger in the Zionist sectors grows as the haredim succeed in directing substantial public resources into their educational and welfare systems, despite their limited contribution to the Israeli work force and defence effort. The depth of the rift in itself may risk stable democracy. The threat is intensified by the fact that haredim live in their own communities, regard the only worthwhile activity as learning the torah, and do not raise their young to feel commitment and allegiance to the secular institutions of the state.

Again, we should note the connections between the decisions actually made, and the decision-making mechanisms used to make them. The Israeli Defence Service Act imposes a universal duty of military service on all residents of Israel. It also specifies powers to exempt individuals from such service. The non-service of the haredim has been regulated, since the foundation of the state, under this power. Ben-Gurion, the first minister of defence, respected the plea of the leaders of the haredi community that an exemption from service be granted to about 400 young men, so they could re-built and re-surrect the center of Jewish studies destroyed in Europe. Similarly, the sweeping exemption for Arabs was formulated by the government, headed by the Defence Ministry, and with no public debate or Knesset involvement. As for many other issues, the objection to the essence and to the low visibility of these arrangements concentrated on the internal Jewish dispute. Starting in the early 1970s, Jewish secular forces tried to bring about an abolition of the sweeping exemption for haredim. At the same time, the growing political power of the haredim, especially after the 1977 rise to power of a right wing-haredi government, meant that the exemption was in fact broadened and institutionalized. This process was aided by the
fact that the IDF itself was ambivalent about drafting the young haredim, and was reluctant to build the frameworks that would have been required to enable them to maintain their religious life style while serving. Attempts to get the court to get involved in this subject failed. Petitioners claimed that the exemption discriminated against those that had to serve in the army more because of the absence of the haredim. The court responded that the petitioners did not have standing, and that the issue was not justiciable.

In the 1980s, the social situation and the court’s approach both changed. The number of haredim ‘enjoying’ an exemption grew, as did the anger by those who were required to serve. The IDF started to see that the sweeping exemption created a serious threat to the motivation to serve, and supported a political solution that will put limits on the exemption. Efforts to change the arrangement through the political process failed, and in 1986 the court was again petitioned. By that time, the court has already broadened its rules concerning standing so that ‘popular’ petitions raising issues of public interest became quite frequent. The claim of standing was therefore dropped. In addition, the court started to limit the doctrine of ‘political question’, and extended its review not only to the legality of decisions but to their reasonableness as well. The court unanimously upheld the arrangement, but the judges differed. While the then President Shamgar maintained that the issue is probably within the ‘political question’ doctrine, Judge Aharon Barak held that the issue was in fact justiciable, but that the arrangement was reasonable. Not surprisingly, the issue did not leave center stage. Attempts led by the then head of the opposition Ehud Barak in 1998 to pass legislation prohibiting the exemption failed, when members of the

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59See the account of these developments in Zamir and Zysblatt (eds.) Public Law in Israel, OUP 1986.
coalition and the Arab MKs joined forces to defeat the initiative. In the meantime, the Supreme court crossed the threshold and pronounced the arrangement illegal, since it is a primary arrangement which should not be based on something as low-visibility as the discretion of the Minister of Defence. The court allowed the political system a year to legislate an adequate arrangement. Some of the Judges hinted that any arrangements that will not draft the bulk of Haredim will be declared unconstitutional. The one year has been extended time and time again, because the political system cannot resolve the issue. A public committee chaired by orthodox ex-supreme court judge Zvi Tal recommended a transitory arrangement under which the exemption will hold, and will depend on the youngster’s choice, but that a person choosing not to enlist would have to be responsible for his own income. (At present, those who do not serve need to remain as full time students in the yeshivot, and they do not join the work force. This compromise was greeted by great criticism from both Haredi circles and Zionist ones. To date, three years after that important decision, the political reality has not yet changed, despite the fact that now it is declared to be illegal…The case provides yet another powerful illustration of the complex relationships between institutions and decision-making mechanisms concerning Israel’s most basic rifts.

Equality issues in Israel are not exhausted, of course, by treatment of Arabs or of the Haredim. In fact, some argue that the Haredim are treated better by the system than other sectors. Even if we concentrate on issues related to the Jewish character of the state, we should mention the issue of the status of women. While women suffer from discrimination in all modern societies, including the ones most democratic,

60 Allocation per student in schools is highest in the Haredi sector, lowest in the Arab. The Haredi and the public-religious streams get higher allocations than most Jewish public schools.
 liberal and Western, the situation in Israel is affected by the religious and traditional attitudes of most of its population. It is also affected by the persistence of military conflict, and by the resulting power and prestige of old-boys networks. The picture of women’s rights in Israel is quite mixed. At some level, the commitment to equality of women is strong and clear. Israel does have a history of women participating in public life. And it has a strong record of legislation in favor of women’s rights, and of judicial enforcement of such legislation. Nonetheless, Israel has all the persistent signs of discrimination we find in Western societies: low representation in high echelons of power, unequal pay for equal work, discrimination in employment and an extra burden on women in responsibilities for home-making and the care of children.

A source of problem unique to women in Israel is the religious monopoly over matters of marriage and divorce, inherited from the British Mandate. Israel’s legal system thus perpetuates those problems of women status that are generated by religion, especially Judaism and Islam. Another source is the prevalence of orthodox people, and of representatives of orthodox establishments, in the state apparatus. While the objection of these to the promotion of women is not often based on religious laws, the deeply traditional attitude of these establishments to the participation of women in public life is creating difficulties.

In May 2000, a law was passed that declares that all occupations in the IDF should be equally open to women and men, so long as the woman agree to the conditions of service required from men for these occupations. In addition, there has been a growing policy in the army to integrate women into combat duty. This is creating some difficulty for those orthodox people whose religion prohibits some types of contact between men and women who are not married.
It is interesting to note that all women’s groups rejected initiatives to enact a Bill of Rights that will include retention of the religious monopoly over matters of personal status. They were quite willing to give up possible benefits of constitutionalizing equality and other liberal values, because they felt these gains were ‘purchased’ by legitimating the status quo on matters of personal status, which they found unacceptable.

Finally, recent work has sought to study the relationships between democracy, stability and some sense of social justice or solidarity among citizens. These issues were highlighted by the effects of globalization, and by the growing gaps between the developed world and many parts of the Third world. The problems exist inside states as well. In many Western countries, there is a re-assessment and restructuring of the welfare state. In all developed countries, issues of immigrants and foreign workers loom large on their agendas. In Israel, these problems are more difficult, because of the combination of the economic gaps between Israel and the rest of the region and the conflict situation between Israel and its neighbors.

In Israel, there is a worrisome convergence between lower social-economic status (and low educational levels) between ethnic and cultural groups. Arabs and Jews who came from Moslem countries tend to cluster more on the lower parts of the social and economic ladder. The same is true for haredim, but they are among the highest in educational levels (if one includes learning in yeshivah in higher education). Their problem is the combination of extremely large families, and a tendency by the male heads of the family to spend all or most of their time studying.
The annual report on poverty published in December 2001 indicates that about a fifth of the population lives under the line of poverty. Another datum, which may be even more disturbing, is the size of the gaps in Israeli society. When one compares gross income, Israel is first or second in gaps in the developed world. Welfare payments mitigate the gaps to an acceptable level. However, the size of the GNP required to keep the net gaps under control is growing steadily and fast. It is quite clear that Israel needs to take care both of the severity of the gaps and of their unequal distribution among groups in Israeli society.

5. Education

I will end with some short words, much too short, about education. Every democracy must strengthen the civic affiliation of all its citizens with it. This is one of the most central elements of civic democratic education. This is the sense in which every state, by definition, must invest in ‘nation-building’, where the nation is equal to the body of citizens, irrespective of ethnic or religious affiliation. The most obvious and systematic way of doing so is within the system of public, mandatory education, especially in its early sages. States have obligations to provide public education to all, and the population has a right to such education. It is quite natural, therefore, that public education will be the primary tool of initiating students into their civic obligations. Indeed, this function is served effectively by the system of public education in many countries. A notable example is France, a paradigm of a ‘state of all its citizens’, in which the public school system has been used (together with the
army) as a major socializing agent, and as a great tool of assimilation into French culture. In the US, too, public education includes education to civic commitment, allegiance to the state and to its constitution and major institutions.

The educational system in Israel, like the political system, is based on mandatory and pre-mandatory arrangements combined with changes introduced after the foundation of the state. In the mandatory period, both communities sought and received autonomy in their school systems. The Jewish school system was a central vehicle in reviving the Hebrew language and in strengthening the Zionist ethos. Within the Jewish school systems, there has always been separation between a few ‘streams’ of education, more or less corresponding to political and social groupings within the yishuv.

One of the first laws Israel enacted dealt with mandatory general education (Mandatory Education Act 1949). It took 4 more years for the structure of the school system in Israel to settle, and it is reflected in the Public Education Law of 1953. Basically, this structure is a continuation of the pre-state period. The law recognizes three types of schools: official, those who are a part of the public school system and financed by the state; recognized, i.e. schools in which one may discharge their duty to register in a school, but which are neither fully accountable to the ministry nor fully financed by the state; and ‘exempted’ institutions, mostly those run by various haredi groups, which are neither accountable nor entitled to public funding. Within the public sector of the education system, there are three main groups. These are the general schools, comprising the old labor and the liberal streams; the public religious
schools, who have their own council and programming; and the Arab schools, in which the teaching language is Arabic, and which have their own program.

In principle, and according to the law, Israelis can choose freely which of the public schools they would join. However, since most neighborhoods are segregated on the basis of ethnic origin, and because of a serious language barrier, it is very rare for Arabs to choose to go to Jewish elementary schools (or vice versa). In recent years, it is also rare for religious youngsters to choose to go to ‘general’ public schools. Secular or traditional students choosing to attend the religious public schools undertake to follow the religious requirements while in the school. Teachers are also expected to serve role models and not be seen as non-observant outside the school as well.

The general trends in Israel are tellingly reflected in its educational system. In the first years of the state, the exempted institutions were small and marginalized and mostly unfunded by the state. The Arab school system was under heavy security supervision. Its curriculum avoided all political matters, and included mandatory Hebrew and chapters of Jewish history. While there was recognition of the distinct Arabic, Moslem and Christian nature of the community, there was ambiguity concerning the political implications of this distinctness. On the one hand, there was the fear that the Arabs were a part of a fifth column seeking to act against the emerging state. On the other, there was the hope that they will accept their place as

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61 For rare exceptions and their analysis see my “Can Separate be Equal? The Case of the Jaffa School System” (2000) 3 Democratic Culture.
62 There are in Israel a small number of schools seeking to integrate among these groups. In Neve Shalom there is a ni-national elementary school. In Jerusalem and Misgav there is a bi-lingual school. In Jerusalem there are also two schools seeking to integrate religious and secular Jews. All of these schools are voluntary, and require a heavy special investment. They cannot serve as a basis for the educational system as a whole.
faithful citizens of the Jewish state. Consequently, there was close security supervision of schools and teachers, but at the same time it was expected that Arab school will celebrate Israel’s day of Independence. The 1953 Public Education Law explicitly stated that the goals of public education were to raise youngsters to the values of Zionism and Love of one’s People and Homeland. While a special section in the law spoke about adaptations of curricula to non-Jewish schools, nothing much was done to translate this into an educational program adapted to the needs and narratives of Israeli Arabs. In the early fifties and sixties, Zionism was the clear norm in all the Public school system. Arabs at that stage were too weak and insecure to challenge this fact.

Starting at 1967, and more so since the 1980s, changes became clear among both Jews and Arabs. As Arabs grew in numbers and vocality, and as their challenge of the Jewish nature of the state became deeper and stronger, demands grew for Arab control over the curriculum in Arab schools. While this demand has not been met, there is now recognition that the tension between the Jewish and the Arab narratives about the history of the state and the conflict need to be faced. One indication of this awareness is the amendment of the 1953 description of the goals of public education, that omits the reference to love of the Jewish people, and talks instead of love of one’s people.

From the other side, people are complaining of a serious weakening of ‘patriotic’ education among Jews. Secular Jews, unlike the founding Fathers, are not the first generation who rebelled against religious Judaism but knew it well. They are often described as ‘Hebrew speaking Gentiles’. In addition to their alienation

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63See, notably, Yoram Hazony, The Jewish State, and....
from Jewish religion, some of them have become extremely critical of Zionism and its implications to the self-determination of Arabs in Palestine.

All this creates a delicate situation for civic and democratic education in Israel. About 27% of first grade students in Israel are Arab. Naturally, they get a strong education to democracy, since they see democracy as their main support against the Jewish nature of Israel; but their allegiance to the state is not too strong. Another 15% go to haredi schools, in which state institutions are regularly de-legitimated. Even in the public religious system there are serious tensions between the laws of the state and the superiority of God’s commands. These tensions are immanent in any serious conception of religious education, in which religious law must be seen as superior. However, in the past religious leaders of the national-religious camp knew how to give the political system the discretion it needed, by interpreting most of the political questions as outside the realm dictated by religious law. This is no longer the case now, when a growing number of religious leaders insist that the paramount political questions of the day, including whether or not Israel may or should compromise and agree to Arab sovereignty over parts of ‘eretz yisrael’, are conclusively decided by religious law. Under these circumstances, students in the public religious schools may well find themselves torn between their duty to obey religious law as interpreted by their leaders and their duties to obey the laws and the decisions of their duly elected government.

When such a large and divergent part of Israeli youngsters do not get a simple and clear message concerning the legitimacy of their major institutions – the prospects of a stable democracy do not seem too strong. The picture gets even more troubling
when we add into it serious differences in public allocation for education in various sectors.\textsuperscript{64}

6. The Institutional perspective

In this section I want to emphasize again that many of the developments and arrangements I have described have a significant institutional aspect: we need to attend not only to what the situation is, but also to who has the power of decision-making, and what kind of use is being made of such powers.

In most of the areas I have described, decisions are made by political actors, usually in low-visibility processes which are deliberate and intentional. The low visibility is motivated by a wish to avoid the accountability that comes with transparency, but also due to the awareness that the issues are very charged, and cannot easily be resolved at the level of principle. In such contexts, the differences between the Jewish-Arab divide and the internal Jewish divide are very clear. Despite their number, Arabs are much weaker politically than religious Jews, and their political achievements reflect this fact. In addition, their political legitimacy is much weaker than that of religious Jews.

\textsuperscript{64}A report by Human Rights Watch from December 2001 discloses great discrepancies between public allocations to Jewish and Arab schools. The picture is indeed serious, as Israel itself concedes (Israel report to the HRC, 1998). However, the HRW report calls on international bodies to use sanctions against Israel. Against this background, we should be reminded that the picture of public allocations to white and black schools in the US is much bleaker.
Two related changes are taking place: one is an increase in public debate over these issues, a reluctance to accept the implications of low visibility, and a consequent increase in the visibility of all political arrangements. The other is the greater participation of the Courts, and especially the Supreme Court as High Court of Justice (bagatz), in these matters. The independence and the connection between the two trends can be illustrated through the case of the haredi draft case. The plea for an egalitarian draft policy, which will include haredim (and possibly Arabs) has strong political support, and has generated demonstrations and legislative initiatives. On the other hand, the effective changes in this field were introduced by decisions of the Supreme Court, which has set aside standard defense mechanisms such as standing and justiciability, and has ruled the exemption policy unconstitutional. This fact requires that we recall the differences between institutional competence and the decision-making procedures by the political system and the courts. Political pressures and legislative Bills are all known parts of the political process itself: they generate the kind of responses that seek a political resolution, reflecting the balance between power and values which the system can support. Basically, it is understood and accepted that legislation and administrative policies may be, possibly even should be, the outcome of political compromises between parties and interest-groups, within the framework created by laws and the constitution. Courts, on the other hand, are there to enforce and empower the values already enshrined in the laws and the constitution. Their strength is on the level of declarations of principles, and they are the defenders of the Rule of Law, where the Law is the product of the political

65 In December 1998, the court did not overrule the policy because of its content, but because of its being decided by the defense minister, as a part of his general discretion. The court held that a decision of this sort must be legislated by the Knesset. It gave the Knesset a year to pass that legislation, but to date (December 2001) this has not been done.
processes described earlier. This is why judges are not directly accountable to the electorate, like politicians. They are not supposed to reflect the immediate interests and preferences of the population. Instead, they are supposed to defend the values and principles, which the population had accepted even against their representatives themselves. Consequently, courts cannot generate compromises and give them the sanction of law. What they can do is declare what the law is, invoking the law and the norms of public reason and justification. It follows that the choice of the forum where such decisions should be made is of critical importance.

Israel has seen a trend, familiar in other countries as well, of distrust of politicians and a resulting transfer of review and decision power to the courts. This trend of passing important public issues to a resolution by the court may be accelerated if the Supreme Court succeeds in generalizing and institutionalizing its power of judicial review over Knesset legislation as well as the power of review it enjoys over all administrative decision-making. This extension of judicial powers started with the enactment in 1992 of two ‘basic laws’ dealing with Human Rights: Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Freedom. Until these laws, the court did not have the power to review and overrule Knesset laws as inconsistent with ‘higher norms’ of any sort. The 1992 laws did not mention judicial review, but they did specify that there will be limitations on the power to violate them. The ‘limitation clause’

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66 For a description of this process see Zamir and Zysblatt, Israel’s Public Law, OUP 1998. See also Gavison, Krementz and Dotan, Judicial Activism: For and Against, Magnes 2000 (Hebrew)
67 For accounts of the history of this process see A. Barak, The Role of the Supreme Court in Democracy, Israel Studies 3; R. Gavison, Israel’s Constitutional Revolution: A Reality of a self-Fulfilling Prophecy (forthcoming, 2001); and Gavison, Azure 2001
68 For an important exception to this principle see C. Klein, A New Era in Israel Constitutional Law.
states that the rights enumerated in the law can only be infringed under law, for a legitimate purpose, and proportionately. In 1995, a panel of 9 judges of the court declared unanimously that under these laws the court has the power to review legislation, and possibly overrule it as inconsistent with the ‘limitation clauses’ of these laws.69

I cannot go into this complex subject in detail. I do want to emphasize the significance of this development to the institutional dimensions of the issues discussed in this book. Until 1992, the court clearly accepted that it was bound by clear legislative arrangement, even in cases where these arrangements possibly violated acknowledged basic rights. The court thus had no difficulty in dismissing a challenge of the religious monopoly over matters of personal status because it was inconsistent with freedom from religion and freedom of conscience. The court openly conceded that the claims were serious and probably even correct, but stated that it had no power to review a clear law. Similarly, we saw that the court struggled with the initial petition by Shalit, due to the vagueness of the definition of ‘a Jew’. It did not have any difficulty in rejecting Shalit’s further petition that his youngest son, born after the change of the law, be registered like his older siblings.

All of this will not be possible if there is judicial review of Knesset legislation. The court will not be able to avoid, in the future, discussion of Knesset laws on their substantive merits. The Knesset, in turn, will need a special majority in

69 Bank Hamizrahi. For an English version of Barak’s decision, and a summary of the other opinions see Rabello, …… The Israeli Supreme Court is the top of the Israeli civil courts system. It serves as a court of appeal on judgements given by the district courts, and as a high court of justice of the first and last instance. The Court has 14 members, whom serve till age 70, and usually sits in panels of 3.
order to legislate arrangements, which the court will declare unconstitutional. It may be very hard to muster that majority once the court labels the proposed arrangements inconsistent with human rights... These considerations should be born in mind when Israel seeks to stabilize and clarify its constitutional arrangements.

The potential, as well as the limitations, of the new laws, were both exemplified quite dramatically in attempts to regulate the import of meat into Israel. For many years, there was a religious monopoly over the importation of meat into Israel, because such import was in the hands of the government. The importation of non-Kosher meat into Israel was very restricted, and most of the meat imported was Kosher. Attempts to de-regulate the import of meat failed due to religious opposition. A person sought a license to import non-Kosher meat and his application was denied. He petitioned the court, claiming that the decision was motivated by illegal religious reasons, and that it infringed on his right to freedom of occupation. The court accepted the petition, adding that if the government sought to remedy the situation by legislation, it will now have to meet the requirements of Basic Law: Freedom of Occupation. The court’s decision created a mini crisis in Rabin’s coalition, which at that time included the haredi party shas. It also triggered the backlash against the continuation of Basic Laws, because the religious parties agreed to the 1992 laws based on an understanding that they will not affect the status quo on religious matters. The governmental crisis was resolved by an amendment to the basic Law. An override clause was added to it, under which overriding legislation could be enacted with a special

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70 In addition to a limitation clause like the one in Basic Law: Human Dignity and Freedom, the Basic Law: Freedom of Occupation has further entrenchment. In principle, it can apply to present legislation as well as to new one. And its change requires a special majority of 61 members of the Knesset.
majority of 61, for a limited period. The law prohibiting the importation of non-Kosher meat was duly passed. Naturally, the new law was challenged under both basic laws. The court found no difficulty in conceding that the override clause was valid and that its conditions were met. It had a harder time with the claim that the law was inconsistent also with the Basic Law: Human Dignity and Freedom. Clearly, an expansive interpretation of human dignity and freedom may well cover all the basic freedoms, and President of the court Aharon Barak explicitly supported such a broad reading of the law. Nonetheless, the court unanimously held that the infringement of liberty and dignity in this matter were minimal, and that the court would therefore defer to the clear preference of the legislature. Naturally, the decisions won harsh criticism from traditional supporters of judicial activism.

A participation of the court in the public dialogue over human rights and basic values is no doubt a positive development. The court is persistently a more consistent and vocal defender of equality and justice than are the political branches with their constraints. However, the involvement of the judiciary in these matters is not cost free. These costs should also be born in mind when Israel designs its constitutional arrangements.

Another important trend should be noticed. For many years, the asymmetry between the divides was very obvious in the attitudes of the court as well. The court had been much more visible and forthcoming in matters of state and religion, then it was on issues relating to the status of Arabs. It seemed as if the court, exclusively Jewish and committed to the Zionist ethos of the state, felt
more secure defending secular and liberal conceptions of the Jewishness of the state, then when it was asked to defend the equal rights of Arab citizens in Israel. For many years, the Supreme Court could be seen as the enlightened long arm of the Zionist-liberal-secular-Western conception of the Jewish state. This conception definitely included protection of due process rights for Arabs. But the court was reluctant to question limitations of rights, which seemed connected to matters such as security or settlement policy of the young state. On the whole, the Court legitimated the decisions and actions of the Zionist political branches. This trend became even more apparent after 1967, when the court, with notable rare exceptions, upheld the policies of Israel’s authorities in the occupied territories.

There is an interesting change in this trend in the late 1990s, however. The Supreme Court has become more willing to question government policy on matters relating to Israeli Arabs, and to matters relating to the way Israel conducts its political and military operations. It is too early to know at this stage how the eruption of violence in the region in October 2000 may affect the attitudes of the court.

The court has become much more receptive to petitions concerning equal allocations and adequate representation of Arabs in various fora and institutions. It has declared that allocations of land by the state or on its behalf cannot discriminate against Arabs. It suggested that a Jewish community settlement could exclude Arab applicants just because of their ethnic origin.\(^71\) It has declared illegal a set of practices used by the General Security Service (GSS) in interrogating

\(^71\) Qaadan vs. Minhal Mekarkei Yisrael (Israel’s Lands Authority), PD 54(1) 258. Opinions,
suspects. And it has decided that one could not detain Lebanese prisoners just in
order to facilitate negotiations for returning Israeli POWs or information about
their fate. While many Arab leaders still complain that the court does not do
enough, some Jewish circles are now accusing the court of joining the post-Zionist
trends and working towards weakening the viability and the legitimacy of the
Jewish state. These decisions thus strengthen the controversy around the court
within Jewish society. I will return to some of these issues below.

In addition to specific decisions rendered by the court, it is important to see its
contribution to the public debate over the tensions between Jewishness and
democracy. We saw that the 1992 basic laws introduced this description of Israel
into the authoritative legal corpus of Israel. Consequently, discussions of the
relations between Jewishness and democracy can no longer be monopolized by
political philosophers or by historians. The matter may become one of legal and
judicial interpretation as well. Indeed, judges addressed this description of the
state in both specific decisions and in their extra-judicial writings. The
comparison between these types of text is illuminating, because it permits us to
look at both the use made of the expression in decisions and at attempts to locate
such decisions within their broader context. It enables us to gain insight both into
the duality between Jewishness and democracy, and into the issue of the proper
role of the law and the courts in such discussions.

We saw that some of the decision discussed above – like those about
the rights of Arabs to vote and to be elected – involved direct discussions of the
relationship between the Jewishness of Israel and its democracy. In many
decisions rendered after the 1992 laws, the court takes special care to notice, summarily, that the arrangements they are discussing fit Israel’s values as a Jewish and democratic state, but in many of them there is no substantive discussion of these elements and what may follow from them. Qaadan is an exception. In that opinion, Barak needs to address his own previous statement, in a book, that the Jewishness of Israel means, among other things, a priority to Jewish settlement in all parts of Israel. He therefore says that the Jewishness of Israel is exemplified in the Law of Return, and in the fact that its language and holidays are Hebrew and Jewish. He then adds that the commitment to equality, itself, is a Jewish value. The Court’s decision that Israel cannot discriminate between Jews and non-Jews is consequently an implication of the Jewish nature of Israel no less than it follows from its commitment to democracy.

This important decision thus brings into judicial opinions themselves the debate that until now raged only in extra-judicial writings. Among judges, this debate centered on the proper judicial interpretation of Israel as ‘Jewish and democratic’. Until Qaadan, this debate reflected in full the asymmetry between the divides, and dealt exclusively with the internal Jewish controversy. The main proponents of the debate were President of the Court Aharon Barak and the ex-deputy President, the orthodox Judge Menahem Elon.

The low visibility of the Jewish-Arab divide in the thinking of the judges is reflected most clearly in the writings of Judge Elon, who is one of the only judges who did address the Arab-Jewish divide in an important judicial opinion. Judge Elon was one of the dissenting judges in Ben Shalom. There he ruled that the
Jewish-Arab PLP should be banned due to the inconsistency of its platform with the law’s requirement that parties do not deny that Israel is the state of the Jewish people. Elon argued that a party who seeks full equality for Arabs in all relevant ways, including the affiliation of Israeli Palestinians with the Palestinian diaspora denies the legitimacy of the Law of Return, and thus denies that Israel is the state of the Jewish people. Surprisingly enough, this reasoned position is not even mentioned in the many publications in which Elon addresses the proper interpretation of Israel as a Jewish and democratic state! Elon’s exclusive focus is the polemic with Aharon Barak’s interpretation of this combination. The latter reasons that ‘Jewish’ in this expression should be interpreted at the highest level of abstraction, so that it becomes co-extensive with the Jewish values that have become universal, like the Rule of Law, social justice etc. In this way Barak succeeds in minimizing the potential for a conflict between what follows from the democratic nature of Israel and what follows from its Jewish character. We saw that he invokes the same technique in Qaadan. Elon responds that Barak’s interpretation deprives the Jewishness of Israel of all meaning and significance. The Jewishness of Israel is not an indication of the sense it which it is uniquely and particularly Jewish. Instead, it is made to be totally subservient to the universal, democratic nature of the state. Elon suggests that Jewishness should be allowed to have a particularistic meaning, and that the precise meaning should be extracted from the unique Jewish sources. While Elon does not claim that these are exhausted by the sources of Jewish law, he definitely argues that these sources should be included in seeking to identify the distinctive meaning of Jewishness in the context of the basic laws. It seems that the fact that Elon does not even mention the issue of the status of the Arabs in Israel in this context suggests that,
to him, the primary tension between Jewishness and democracy is the one reflected in the internal Jewish divide.

In fairness it must be said that Barak’s initial formulations of his interpretation to the expression ‘Jewish and democratic’ in the basic laws did not indicate an awareness to the Jewish-Arab divide as well. His analysis was based on a generalized reading of the fact that there was a potential conflict between the two parts of the expression. He claims that, in general, there is no tension between Jewish and democratic values of Israel. As unproblematic illustrations of this duality he mentions some of Israel’s arrangements, including the Law of return, the religious monopoly over personal status matters, the special status of the Jewish national institutions like the Jewish agency within the state of Israel, and the principle of Jewish settlement in all parts of Israel. The list comprises, more or less, the main grievances of Arabs in Israel against the Jewish state. They are only unproblematic to Jews, who feel that the tension between Jewishness and democracy comes from seeing Jewishness as theocracy. Indeed Barak continues to argue that Jewishness should be read as comprising two sets of values: national-secular-Zionist ones, and religious ones. Barak says that the democratic nature of Israel is not affected by accepting Jewish elements of the first type, but it is inconsistent with a sweeping endorsement of the Jewish-religious themes. In this he seems to rush into a widely open door, at least as far as Elon is concerned: The national religious leaders never wanted Israel to be a theocracy.

It seems that neither judge Elon nor president of the court Barak make it a part of their debate to raise and address the difficulty of squaring the particular nature of
Israel as a Jewish nation-state with the status of its non-Jewish citizens. Naturally, they do not seem to worry about the question whether a Jewish nation-state can ever be a democracy.

Within the internal Jewish debate, it seems Elon is right that Barak in fact dilutes the Jewish element in the combined expression ‘Jewish and democratic’ to the point of disappearance. In fact, some critics applaud his approach precisely for this reason. Barak recommends that we take into account these Jewish values that have been incorporated into Western or universal thought. At the same time, he accepts that in some matters, Jewish law should apply (he defends, among other things, the religious monopoly over matters of marriage and divorce). He does not seem to put any weight whatsoever on the unique linguistic and cultural Jewish tradition, and on the indirect ways in which it may affect judicial decisions. At the same time, he does not object to this possible interpretation of “Jewish”, he occasionally invokes a Jewish source or maxim, and he explicitly supports analyses of Jewish sources as sources of inspiration for judicial decisions. In other words, Barak’s position does not give any systemic or structured sense to the Jewishness of Israeli legal tradition. In this sense, his position helps in positioning the court and the legal tradition in Israel on the side of the liberal-Western-secular-neutral pole of Israeli politics. On the other hand, Elon himself does not provide us with a sense of “Jewishness’ that is distinct from seeing Jewish religious law as binding, or at least is a source of inspiration, in some cases. Consequently, he makes his position vulnerable to Barak’s argument that this is a case of a conflict between enlightened secular democracy, protecting freedom of religion, and religious conceptions of the state.

72See Joseph Raz, in Walzer, Jewish Political Thought, vol. 1
It is illuminating to look at one case, written by Elon, which Barak is happy to cite as a strong illustration of a legitimate use of the Jewishness of the state in adjudication. Israeli law is silent on the subject of euthanasia. Consequently, any intentional action or omission seeking to end the life of another person may be subject to criminal liability. A mother of a terminally ill girl petitioned not to prolong the life of her daughter. The Supreme Court rejected the plea. In a long decision, published after the girl had already died, Judge Elon invokes the new 1992 laws to illustrate the way he thought the ‘Jewish and democratic’ expression should be interpreted. He looked at the laws of many democratic countries, and saw that they varied in their approach to euthanasia, either active or passive. He concluded that democracy, in itself, does not dictate one answer to the question. He reasoned that therefore the solution should be found in Jewish law, and he uses it to draw a distinction between active and passive euthanasia. Barak himself cites this opinion as an illustration of possible ways of making adjudication in Israel ‘Jewish’ in a legitimate way.

At the time of the initial debate, it seemed that both of them were willing to accept, rather uncritically, the major arrangements in Israel affected by these tensions, such as return, matters of personal status, and Jewish settlement. At the time it seemed that these reflected, according to them, acceptable balances between the democratic and the Jewish character of the state. Barak’s critics are worried by the fact that when specific issues do come up for his decision, as in Qaadan or in Bavli, he looks at these arrangements from a universalistic perspective, and does not base his

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73 CA 506/88, Sheffer. Elon’s opinion is criticized for the fact that the reasons were published a long time after the decision was made, and invoked the 1992 laws that were not yet on the books when the case was argued. David Heyd argued persuasively that this was, in a way, a serious deviation from the ethics of adjudication.

74 Cite (book)
decision on the need to give the Jewish distinctness of the state any effect on the results of the adjudication.

This raises an additional issue about the Barak-Elon debate. While this is a debate between two judges, it seems to be a general and abstract debate, completely unrelated to specific arrangements or decisions.\textsuperscript{75} In fact, the debate between them that was triggered by the 1992 seems to be a new round in an older debate between them that started after the enactment in Israel of the Foundations of Law Act in 1980. That law had severed the link that mandatory law established between Israeli law and English law, when it required that when Israeli law was silent – the matter should be resolved by the principles of the common law and equity. Instead, the 1980 law determined that courts in Israel should follow, in this order, laws, precedents and analogy, and if all these failed – they should decide the case by ‘the principles of law, peace and justice of the heritage of Israel’. Barak, who participated as attorney general in the drafting of the law, argued that there would never be a need to invoke the heritage of Israel, since there is no case that cannot be decided by law, precedent or analogy.\textsuperscript{76} Elon, on the other hand, drew a distinction between ambiguous legal arrangements calling for interpretation, for which Jewish law could be a source of inspiration, and cases of real ‘gaps’ in the law, in which the command of the law to invoke this heritage became mandatory. Sheffer, by him, was a case of such a ‘gap’ in the law.

\footnotesize{\textsuperscript{75}The very fact that two senior judges conduct such a debate while in office is controversial. In many parts of the Western world, this would be considered unacceptable. Such judicial pronouncements tend to obscure the distinction between adjudication and legislation, and may make litigants feel that the judges are really already either for or against them, based on their expressed opinions on these subjects. \textsuperscript{76}Barak may not be fully consistent here in his jurisprudence, since he does acknowledge that there are cases in which judges can and should ‘develop’ the law. Presumably, these are cases where the law is silent, and the duty to invoke the ‘heritage of Israel’ under the 1980 law may arise.}
Elon clearly lost the battle against Barak on seeing sources of Jewish law as *binding* on Israeli courts. An opportunity was lost to make the 1980 law a basis for an internal Jewish discussion of the relationship between halachic and non-halachic sources in ‘the heritage of Israel’, which is deliberately ambiguous. While no one would object to using Jewish sources of all sorts as sources of inspiration, only religious judges with an agenda, like Elon, and a very small number of non-orthodox judges, actually give this aspect a presence in their decisions.77

This fact is more than an anecdote. It signifies a troubling aspect of the need to give an acceptable sense to the combination of democracy and Jewishness in Israel’s identity and in its basic laws. While taking Jewish law as binding in Israel’s legal system is troubling, the cultural interpretation of Jewishness, as well as a cultural, non-religious interpretation of the heritage of Israel, are legitimate elements of the Israeli legal culture. Moreover, these elements are indeed important if Israel is to maintain some cultural distinctiveness, some connection between the state and the history of the nation whose homeland it is. While such elements may be alienating to non-Jews, their inclusion in Israel’s legal culture is not more alienating than the fact that Hebrew is Israel’s main language. However, the feat requires the kind of education and background that most judges do not have. This combination can be done best by individuals, whose culture is deeply Hebraic and Jewish, but who do not feel that Jewish law is binding on them. Unfortunately, the Israeli school system has

77Among them we can find Haim H. Cohn, who used to be orthodox, and the Cheshins, who systematically invoke Jewish sources and expression, of various layers, in their opinions. M. Cheshin addressed the issue in an article on the 1980 law, where he forcefully argued against seeing religious law as binding, but for a structured recognition of the deep Hebrew and Jewish sources of our legal tradition: Essays in Honor of Haim Cohn (Gavison ed.) 1982
not been producing such people. Judge Mishael Cheshin of the Supreme Court stands out as the only secular judge, who takes an principled position against the binding force of Jewish law in our legal system, but insists on giving his opinions a distinctively Jewish character.

Moreover, judge Cheshin does not balance the elements of democracy and Jewishness, as Barak does (at least on the level of rhetoric). For him, it is not the case that Jewishness may limit the scope of democracy. Rather, Judaism is for him the deep fountain from which all his linguistic intuitions and his ‘deep sources’ emanate. It colors the way he presents issues and the way he decides them. It does not dictate his results. Similarly, the landmark cases of Kahane (Neimann 2) and the PLP (Ben-Shalom) do not balance between Jewishness and democracy. They are based on interpretations of either the requirements of democracy or of the meaning of denial of Israel as the home of the Jewish people. This is as it should be. Specific decisions are never dictated by general first premises. Similarly, they cannot be dictated by a balancing between Jewishness and democracy. It is therefore misleading for Barak and Elon to present their differences as if they relate to possible differences in specific results. And it is not very surprising that in most of the relevant cases in which the

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78 In the past, there have been judges who were themselves non-observant, but grew up religious or actively Zionist. Mostly, they were people who had acquired their education abroad. In Israel, the public school system takes Jewishness and Hebrew for granted, and even Zionism is seen as a goal attained, which requires no special learning or effort.

79 It is true that the law in Sheffer did not provide a simple answer to the question. However, there is no reason to expect that ‘democracy’ in itself will indicate a solution; and it is NOT the case that it is the silence of democracy that led to the ‘victory’ of Jewish law. Elon could be inspired by Jewish law (which is very similar to other legal system in this regard) without this showing that this solution was dictated by the law in the case.
courts had to address these issues, they do not choose to do so by an explicit balance between the requirements of Jewishness and those of democracy.\footnote{I discussed Qaadan above. The most obvious example is that of bar-Ilan street, mentioned above. Barak does not balance between Jewishness (which allegedly requires closing the street on Shabbat) and democracy (which allegedly does not). He states summarily that closing the street is consistent with the values of Israel as a Jewish state, but this is besides the point. He never says (justly I think) that the Jewishness of Israel requires the closure of the street (If it had, what about all other streets?). Most of his judgment is a detailed balancing of different rights and interests within the liberal model. His conclusion is that the balance between religious sensibilities and freedom of movement and freedom from religion tends towards closing the street during prayer time. This is indeed a possible balancing, but the balancing of the 4 dissenting judges, that the balance is unreasonable and violates rights to freedom from religion, is just as plausible. The bottom line is that the court legitimated a controversial decision by the government, instead of just deferring to the political authority. The matter would have been different had the issue of human rights been very central to the case. As I have argued above, this was not the case in this matter.}

It follows that judicial decisions are unlikely to guide us in matters of the proper way to deal with the tensions between the Jewish nature of Israel and its commitment to democracy. I will argue below that this is as it should be. These are the most central questions of Israel’s public life. Mainly, they should be discussed, and decided, in fora different than the courts, and in discourses very different from judicial rhetoric. Courts and judges should be partners in these debates when cases coming before them require such discussion, but they should not be either the leaders or even the main articulators of the ways in which Israeli society deals with these crucial issues.

Chapter III: Challenges and Directions

In this Chapter I discuss the most difficult question: Has Israel succeeded in striking a good balance between its democratic nature and Jewish distinctness? Under its present constraints, can it be expected to do so? I shall start with a description of
some threats hidden within each of the components of Israel as a Jewish and
democratic state. While discussing threats to democracy, I will naturally stress more
those related to Israel’s Jewish nature. I will then move to a more detailed discussion
of some of the main issues concerning the tensions between Jewishness and
democracy in Israel.

1. Background conditions for Democracy and Jewishness

We should recall here that the Jewish nature of the state is not only an element
threatening its democracy or making it impossible. The Jewish distinctness of Israel
stems from the fact that it has a large Jewish majority, and that it was created in order
to permit this majority to exercise its right to self-determination. Diluting the Jewish
nature of the state against the wishes of its Jewish majority will not only enhance the
democratic nature of Israel by increasing the sense of belonging of its non-Jewish
citizens. It may also decrease it, by frustrating an important preference of its majority.
Invoking ‘democracy’ itself cannot do the work here. We need to look at the
preferences and the aspirations, and to evaluate their legitimacy, their intensity and
their relative weight. We should also see whether fulfilling these aspirations merely
harms minorities, or whether it infringes their rights in unjustified ways.

One of the sources of the natural strength of European nation-states was the
fact that these states were built around a hard core of members of the same national or
ethnic group, who were the critical mass of the population in a given territory. In
many cases, movements for unification of small states invoked a sense of ethnic identity (as in the cases of Germany and Italy). In other cases, claims for national self determination and statehood were based on the wish to give an ethnic group its own state (see the voluntary disintegration of Checkoslovakia, or the developments of the last decade of the 20th century in Yugoslavia). The initial strong identification between citizens of a given state and members of a single national or ethnic group generated processes that helped maintain the nation-state: members of minority groups either assimilated, or accepted that they were minority groups in a nation state of another people. When the minority group was large and concentrated in some territory, claims of secession often followed. This was especially true if the minority group was situated next to the nation state of its own people (see the German minority in the Suddettes). When the minority group was created by recent immigration – especially across a river or even a sea – the plausible option was assimilation, or a privatized voluntary ethnic association. Nation states are under new challenges everywhere, due to globalization and immigration. The labor market has become extremely mobile. And the gaps in wealth between first and third world countries, as well as the need of first world countries in cheap, young foreign labor, meant that old homogenous nation-states have become multicultural entities. Furthermore, many of the immigrants are unable or unwilling to assimilate, and the host societies are reluctant to let them integrate fully. The result is that demands for equal citizenship, irrespective of origin, religion, language or ethnic identity have become the norms. The aspiration of host countries to assimilate immigration waves is now seen as illegitimate. And some explicitly claim that the host countries should give up their distinct national identity and accept the fact that they are now
multicultural states. It is interesting to note that in these countries, the tension is not usually described as one between the distinct culture of the host country and ‘democracy’. Nonetheless, we can easily see how these claims may be presented as based on the implications of democracy to equal citizenship.

In Israel, threats to democracy are not only derived from the presence within it of a large indigenous minority, which sees Israel as a colonialist country built on the demise of its people and as dispossessing them of their land and homeland. Naturally, members of this group do not feel voluntary citizens in Israel, and they do not feel they can be equal citizens in the Jewish state under these circumstances. Democracy is also threatened by anti-democratic tendencies among Jewish groups, mainly religious ones. The ties between Jewish religion and anti-democratic forces stem from two main sources. One is the immanent fact that religion, any religion, claims ultimate validity and supreme authority. The second is the fact that Judaism, like many religions, has an interpretation that is sectarian and separatist in the extreme. This kind of an interpretation lends itself to negation of the claims of equal citizenship to all, which are central to democracy. The first problem, although it is in theory insurmountable, is in fact less important. Religions in the whole world have learned to live with secular political powers and with democracy, and have incorporated into the religious doctrine elements, which permit obedience to the laws of the land. In contemporary Judaism, unfortunately, the sectarian and separatists interpretations find support in the feeling that many have that the world out there is hostile to Judaism and to Jews, so that sectarianism is essential for Jewish survival. The destruction of European Jewry, and the anti-semitic rhetoric often heard from various quarters seems

82 See Biku Parekh for England.
to give further support to this reading of history. This kind of reading of Jewish history and religion make it very difficult to build in Israel a political framework based on partnership and equality with non-Jews, especially Arabs. It also makes it hard for Jews to feel free to integrate fully into Western civilization and its culture, based as these are on Christian sources.  

It is therefore not really surprising that the Jewish State needs to attend to prejudice and tendencies to fear and to discriminate against Arabs. Or that Israel is a divided society, where groups of citizens do not feel full members of its polity. Yet it should be acknowledged that this weakness of civic cohesiveness, despite its being easy to understand, does create an ‘overburden’ on the stability of Israeli democracy.

In part, the threats to democracy come from the wish to strengthen and emphasize the Jewish distinctness of Israel. We should now look more attentively at the obstacles standing in the way of implementing this preference. We mentioned a basic one – the preferences, the claims, the interests and the rights of the Arabs within Israel and around it. But the wish to maintain here a state which will continue to be the place where the Jewish people exercises its right to self determination is also affected by many other factors. I will concentrate here on four of them. First is the internal Jewish debate about the nature of Jewishness in general, and the implications of Jewishness to the life and structure of the state. The second is the internal Jewish debate on the justification for maintaining a state with distinctive Jewish affiliations.

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83It is important to notice that these interpretations do not derive from religion only, and that religious observance does not dictate them. Furthermore, a person may hold the belief that the Arabs are a potential and actual enemy of the Zionist cause, and at the same time be committed to full equality towards them. Illustrations are a good tool to make these points. Zabotinsky is a notable example of a secular Zionist, who warned against the illusion that Arabs may agree to Zionism, but advocated consistently that the Jewish state should be democratic and grant full and equal rights to all its citizens, including inviting them to share power in all political positions. Leibovitch is an example of an orthodox person, whose political morality was that of full dignity and equality to non-Jews.
and Jewish substance. The third is a weakness in developing and imparting Jewish cultural substance, which is not easily reducible to religious observation or nationalistic aspirations. And the fourth is tensions between the legitimacy of self-determination and universalist inclinations among some of Israel’s elites. These differences may be summed up in saying that there is an internal debate among Jews about what is the Jewish state, and what measures and policies its maintenance may justify.

It follows, I believe, that the factors threatening democracy in Israel, and the factors shedding doubts on its viability and justification as a Jewish state are both connected to the two main rifts discussed in this book. It is not the case that the Jewish-Arab rift is about the extent to which Israel can be democratic, while the internal Jewish debate is about its being Jewish. Both rifts influence and affect the question of the stability of each of these elements, and the possibility of their effective combination.

A. Background conditions of Democracy

Studies about conditions conducive to democracy indicate a strong positive relation between it and the level of education and economic growth of societies. An additional feature is the extent to which the country’s elites support democracy and are interested in its success. From the analysis of democracy itself, even if we take the thin conception of democracy (whose adoption I have advocated), the most important implication is the centrality of equal civic affiliation. The demos, the group
legitimating the regime, is the state’s citizens. And their affiliation must be equal, irrespective of all religious, national or ethnic differences. The basic democratic principle of the consent of the ruled thus generates both a justification of the regime and a hope for its stability. A minimal equal civic affiliation is a part of the very definition of democracy. The justness and stability of the regime depend also on the enrichment and the thickening of this equal civic affiliation. People living in the same state, ruled by the same government, should in principle feel partnership in the political enterprise. They should feel that their welfare is at the center of the function of the political elites. And that there are important ways in which all groups are a part of that political enterprise. Of course, all societies have difference of opinions, and conflicts of interests abound. These differences are legitimate and important and should not be underscored. At the same time, the legitimacy of the political regime requires that the political framework is shared and accepted by all. It is this general consent that provides the cohesiveness and partnership which may make the laws of the land justifiable to the population as a whole. Democracy will be strong and stable if it gives all those subject to its rule a significant sense of citizenship and membership, and if the citizens’ body, as a whole, undertakes the rules of the game required for its persistence.

His equal civic affiliation must include the political rights to vote and to run for elected office; the right to carry the state’s passport; the right to leave the country and return to it; and the right to stay in it and work within it. The sense of civic affiliation will be stronger if it also includes a sense of equal opportunity and a sense of belonging to the society in question. Equal civic affiliation is not exhausted, however, by equal rights against the state. A stable
civic affiliation will only be stable if there is also a sense of equal participation of the various groups in the contribution to society, its development and growth; and in the sharing of the fruits of the shared enterprise. Democracy will be stable if there is a good relationship between the extent to which the political rights are exercised and used, and between the contribution of a group to the main tasks of the society in question. Finally, it is required that all citizens and all group accept the democratic rules-of-the-game, and commit themselves to acting within them, rather than using force or illegal means to undermine and terminate them.

We saw that neither of these requirements is simple in the Israeli context. All Israeli citizens do have political and civil rights irrespective of national or religious origin. The law does not deny or limit the political rights of individuals or groups. Many commentators tend to underestimate the importance of this fact. At the same time, it must be stressed that the civic affiliations of Jews and Arabs are very different, on a number of levels.

The Arabs are an un-assimilating minority living in a state which is defined as Jewish, and thus are less than full members, under all possible descriptions of this Jewishness. This in itself would make their situation different than that of Jewish citizens of Israel. The continuing conflict and its history make the status of Arabs in Israel extremely conflicted and complex. Many of them are not even willing to describe it as a tension between their people and their state. They see the very description of their predicament in these terms in giving the state more legitimacy
than they are willing to grant it. They describe themselves as ‘Palestinians in Israel’ rather than as Palestinian citizens of Israel…

Among Jews, too, there is at least one group – the European haredim - large parts of which are alienated from the state and its socialization agents and processes. The Law of return creates huge difference between Jews and their family members, and between others concerning naturalization and residence in Israel. New immigrants under the Law of Return acquire citizenship immediately and automatically, without the need to demonstrate any bond to the state of Israel or its raison d’etre, or any familiarity with Israeli society, its culture and problems. This fact created a serious gap, at least in the initial stages after immigration, between the involvement and the commitment of new immigrants and those of ‘natives’ of all sorts. In periods of large immigration, as Israel had throughout the 1990’s, this situation may create serious tensions.

Participation in the country’s burdens, in Israel, takes three main forms. First is the mandatory general military service, imposed by law on all residents. Second is a relatively heavy taxation. Third, which has become more pronounced after the breakout of the second uprising, is a permanent threat to one’s personal safety. I have already mentioned that the Arab citizens of Israel do not ordinarily serve in the military. They have also not been offered a substitute ‘civic’ or ‘national’ service of any sort. Their leadership opposes any such arrangement, even if the alternative service allows them to work within their own communities. Most of the haredim in Israel do not join the army as a part of a special arrangement designed to allow them not to disturb their studies of torah. Some of them do serve, usually a shortened
service in units connected with religious services and with no connection to combat
service of any sort. The participation of the Arab sector in the labor market is
significantly lower than this of the non-haredic Jewish sector, mainly due to very low
participation rates for women. Furthermore, employment and income opportunities
are usually lower in the Arab sector because of lower educational achievements, and
due to significant differences in the development of industrial and technological
infrastructure in that sector. The haredi Jewish sector is the poorest in Israel’s
economy, mainly due to the voluntary decision of most men to prefer torah studies to
a serious participation in the labor market. In both the haredi and the Arab sectors,
families are much larger than the average in Israel.84

We also saw that in Israel, the educational system in fact reflects and even
strengthens the rifts and the divisions rather then explicitly seek to diminish them.
Most of the Israeli Arabs study, in Arabic, within the Arab sector of the public school
system. Arab schools give their students civic education, and seek to prepare them to
participation in the labor market. Most of the haredi children live in ‘private’ schools,
often financed quite generously by the state. In these schools there is no civic
education, and work skills are taught very little, if at all. The Jewish public education
system distinguishes between a ‘general’ and a ‘religious’ section. Both of these
sections are Zionist, but the separation of the schools creates de-facto segregation
between orthodox and non-orthodox Jews in Israel. Many studies suggest that the two
sections differ significantly in the way they teach a commitment to democracy and to
civic equality. The religious public school section is governed by an autonomous

84There is an important difference here between Haredim and the Arabs. Among Arab families, we
can see the usual effects of modernization and secularization: these often lead to the reduction of the
size of families. Haredi families, on the other hand, are all large as a matter of deep religious duty and
value preferences.
council, and it demands that all teachers and employees in it are in fact orthodox. Orthodox teachers are of course free to teach in the general public schools. In all Jewish schools there is no systematic teaching of Arab culture, other religions, or then history of the conflict. Often, Jewish students do not learn about the developments in the status of Arab citizens within Israel.

The feeling of semi voluntary distance and alienation from the Jewish state and its mainstream institutions is an element shared, for very different reasons, by some Arabs and Haredim. Nonetheless, the differences between these groups may be greater than the similarities between them. The Arab citizens of Israel combine national and religious talk with invocations of democracy and human rights, and express acceptance of the rule of law and Israel’s institutions. The ultra-religious parties do not a similar commitment, not even on the level of lip-service. Their attitude to democracy and the state’s institutions is at most instrumental, both in their discourse and in their political practices. Both groups claim that the authorities do not grant them the full equality to which they are entitled. On the ground, however, the lot of the ultra orthodox seems much better than that of the Arabs. Arab parties never participated in Israel’s governments, while the hareidim are responsible for many important and influential ministries. In addition, there have been persistent calls that the Arab vote should not be allowed to decide issues such as the referendum of Israel’s borders. While the haredim are intensely disliked by some sectors of Jewish Israeli society, no one ever Raised the possibility of denying their political rights. There is also a major difference in the power of Haredim and Arabs to compete for

85Sharon promised to appoint the first Arab minister. The Druze Salekh Tariff from labor was indeed appointed Minister for Arab Affairs, but had to resign after a few months due to a criminal proceeding against him.
financial allocations of public money. In fact, in some cases the Arabs benefit from the fact that the haredim manage to pass legislation that benefits them as well as the Arabs. ⁸⁶

These phenomena reflect very well the complexities of Israeli life, and the tensions between Jewishness and democracy. It may well be that the challenge of the hareidim to Israeli democracy is stronger and deeper than that of the educated, secularized Arabs. ⁸⁷ Yet in many ways, the Arabs are seen by many Israelis as a homogenous group, identified by its persistent conflict with Israel. The Hareidim, on the other hand, are clearly a part of the Jewish nation, whose revival is one of the goals and purposes of Israel as a Jewish State. At least so long as there is no stable resolution of the Israeli-Palestinian conflict, this preference for the Jewish hareidim over Israeli Arabs will probably persist.

Israel has not seriously started to cope with the issue of its attitude to various groups within it. Until very recently, the goals of its public education included values such as history and heritage of the Jewish people. Israel is an ideological state, and it trumpets and celebrates its uniqueness as a Jewish state. We saw that the flag, the hymn, the state’s name and symbol all reflect this nature. It celebrates, in addition to religious high-holidays, its Day of Independence, preceded by Memorial day, and Holocaust Day. All of these are anathema to both Arabs and the hareidim. A State where a quarter of the population (and the parts growing most quickly) feel alienated

⁸⁶ A notable example is the controversial law increasing child support for families with more than 5 children. 90% of these families are either hareidi or Arab. The Hareidi parties insisted that the law be retained despite claims that it created a disincentive for work and education.

⁸⁷ The radical Islamist elements among the Arab population are an exact counterpart of the Jewish ultra orthodox. Some of them ignore the political system and do not participate in the elections. Others form their own parties.
from its flag and hymn must think creatively of ways to enrich and strengthen the civic affiliation shared by all its citizens.\textsuperscript{88} Be this as it may, it seems clear that Israel at present lacks the degree of natural and immediate cohesiveness, which permits a stable existence of a shared democracy.

Israel also suffers from a weakness in the commitment of major groups to democracy and to the shared political framework. More important, there is a convergence between such attitudes and ethnic and religious commitments. All democracies, even the ‘thin’ ones I wish to include in the definition, have a built-in tension between their emphasis on the centrality of individual autonomy and consent and the necessity to defend the shared democratic framework. The values of democracy are, in a way, the normative framework which permits and facilitates the variety of broad freedoms that democracy protects. The democratic framework itself is not supposed to be constantly open to the same challenges, protest, dispute and critique, which are permitted within it. Democracy, especially in a rifted society, cannot be stable if obedience to the decisions of its legal officials is always subject to the compatibility of these decisions with the preferences of all members and groups in society. Participation in the democratic ‘game’ presupposes some acceptance of the rules-of-the-game, including the one imposing a general duty to obey, in principle, the decisions made by its authoritative officials. Expressions against the legitimacy of these decision-making processes (as distinct from criticism of the substance of their decisions), and systematic calls to disobey laws and decisions made through them, thus impose serious threats to the robustness and stability of democracy. Persistent reality of this sort may well lead to the collapse of democracy, and with it to the

\textsuperscript{88} Allegedly, this was the purpose of the Flag Act of 1996. Against the background of social and political reality, it may achieve the exact opposite. It will not be seen as a law designed to exhibit shared allegiance to the state, but an attempt on the part of the government to coerce various groups into a feeling of allegiance and belonging that they do not in fact feel, and do not think they should feel.
collapse of the basic understandings underlying the foundation of the state. A democracy with a healthy wish to survive may, and at times must, take steps to defend the democratic framework itself from its enemies. On the other hand, the wish to defend democracy may then generate steps which themselves threaten the stability of democracy, if they involve serious curtailment of the freedom to express opinions, and form associations, to protest a controversial policy. These are persistent questions faced by many democracies. The ways various democratic regime handle these threats is as much a matter of their history as it is a matter of analysis of arguments of political philosophy. Thus measures to protect democracy against challengers are much stronger in Germany after Weimar than they are in the US. And the US after September 11 2001 is very different from all other Western democracies in its willingness to silence opposition and critique.

Freedom of speech:

Israel faces these issues persistently. It had a special opportunity to deal with them when Kahane’s party appeared on the scene, with its message of ‘transfer’ of non-Jews; and again when Prime Minister Yitzhak Rabin was assassinated by a young Jewish man invoking religious law. The issue is re-emerging now in a variety of contexts. Some people on the Left refuse to serve in the occupied territories; and some of the leaders of the Arab community have been making statements interpreted by some as support and encouragement to the enemies of the state.89 At the same time, some ultra-religious groups and leaders make delegitimizing statements concerning Parliament and especially Israel’s supreme court.

89In February 2002, the trial of MK Azmi Bshara for such statements was opened in Nazareth.
Kahane’s program and Rabin’s murder share a unique feature that is highly relevant to our concerns here: the challenge to the legitimacy of the decision-making processes of democracy itself was not based on a competing, anti-democratic political vision, but on Jewish religion. The implication was that anyone who was truly Jewish had to accept the validity of the grounds of the challenge. Israel responded to Kahane’s challenge by passing a law banning anti-democratic parties, which was then applied to ban his Kach party. Rabin’s murder has generated a more mixed response. The murderer himself was convicted and sentenced to life imprisonment. In an unprecedented and controversial step, a law was passed that limited the power of the President to commute or pardon a person convicted of the murder of a Prime minister.\textsuperscript{90} Initially, at the first period after the murder, the Attorney general stepped up prosecution against inciting statements. The feeling was that the inflammatory tones of the political debate before the assassination contributed to its taking place. This policy was controversial from the very beginning, and was undermined by limiting interpretations of incitement laws. The government’s efforts to introduce legislation that might make it easier to prosecute for incitement have been defeated by an interesting coalition of liberal Jews, Arabs and the ultra-religious…

I cannot go into the complex and fascinating debate concerning the proper attitude of the law to incitement.\textsuperscript{91} For my purposes here, let me make a few observations. We should realize that this is a question on which people with deep commitment to democracy and freedom of expression differ. I do not believe any of these positions can be dismissed as inconsistent with such commitments. While I

\textsuperscript{90}For an analysis of the trial see Bilsky; Kamir.
\textsuperscript{91}For discussions in the Israeli context see Gavison, (post ed), Benvenisti, Gur-Arye.
understand the position of those who advocate legal action against inciters, and accept it as legitimate, I think it is in most cases misguided. It is quite understandable that the legal system reacted to Rabin’s assassination as it did. Once the event happened, it was very easy to see the writing on the wall. The wish not to cooperate in creating an atmosphere in which such a murder could recur was clear. Nonetheless, developments since then reinforce what had been said by many at the time. The legal system is not a very effective tool for dealing with political expression, even when it is inflammatory, pernicious, infuriating or inciting. This is especially true when these statements are made against the background of a major political controversy, where both sides feel the stakes are extremely high. The limits of public debate in such cases are very important, but they are best enforced by informal means stopping short of criminal prosecutions. There are many arguments for this position, all rehearsed at great length in the literature. I want to stress two points.

First, the use of criminal prosecutions to combat inciting political speech is often ineffective and even counter-productive because of the institutional features of law. Law is part of the shared framework of states, especially in democracies. It reflects the decisions made by authoritative officials within their powers. As such, legal institutions, and especially the courts, are supposed to be a part of the shared political framework. All individuals and groups within the state should feel obligated by the ideal of the Rule of Law and protected by the legal and judicial systems. Criminal prosecution against political statements within the context of an intense public debate will usually seem to supporters of the views expressed as persecution for political reasons and an attempted silencing. The trial is very likely to increase the rifts and the alienation felt by some, instead of giving all the feeling that justice was
done in the name of democracy. Such processes may therefore weaken the perception of lawyers in the civil service and of the courts as neutral arbiters of shared values. If the speaker is convicted, he is likely to be seen as a martyr by his supporters. If he is acquitted, on the other hand, the verdict is likely to be seen as legitimating the speech rather than simply saying that it was not beyond the pale of legality, when this pale is broadly defined to allow for maximum freedom of speech. Since the verdict is unlikely to end the debate or even modify it significantly, it may be better to try other avenues of regulation and control.

Secondly, and related, criminal prosecution is likely to generate a serious charge of double standards and of singling out. When such expressions are rare – we do not need to use the law to deal with them. When they are prevalent, it is difficult to justify picking up one rather than many others. And no one wants to fill their prisons with those whose only crime is the expression of statements that may seem to some incitement.

However, this is NOT an argument against all laws prohibiting incitement, or even for a general decision not to invoke them. There are times in which unhindered public expression is an important part of an atmosphere that may indeed lead to the dangerous weakening of democratic constraints. If non-legal means fail to achieve proper regulation, legal prosecutions should not be counted out. Nonetheless, it must also be pointed out that in such circumstances criminal prosecutions may not be able to stop the tide. One may use the law, but one should not hope that the law, alone, could deal with the undercurrents that feed the social and political processes under consideration.
Looking at Israel’s record in this respect, the picture seems mixed and interesting. Israel has been struggling with these issues for a long time, and the challenges have been coming from many quarters. On the whole, the level of freedom of expression of dissenting views in Israel is very high. It is always possible to fault specific decisions of the Attorney-General, for both over-prosecution and under-prosecution. Similarly, one may criticize the details and the argumentation in the major decisions made by the courts in this area. I do not believe that massive changes in the policy of prosecution, or in judicial decisions, is what will promote the strength and stability of Israeli democracy.

Banning of Parties

A more interesting measure justified by some to protect democracy from its enemies is that of banning anti-democratic parties. I described the situation in Israel in this respect in Chapter II. This legal and political situation raises two questions concerning tensions between Jewishness and democracy, one relating to the external challenge of the legitimacy of the Jewishness of the state, the other to the internal Jewish debate concerning the legitimacy of a Jewish theocracy.

We saw that Israeli law bans both anti-democratic parties and those parties, which deny ‘Israel as the home of the Jewish people’. The judicial opinions are ambiguous. On the one hand, it seems that a party, which will explicitly declare that it seeks to change Israel, even if this is done in peaceful ways, so that it ceases to be a
Jewish state in any way, will have to be banned. On the other hand, the court has affirmed that advocating Israel as a ‘state of all its citizens’ does not, in itself, meet that test, since all democracies are ‘of all their citizens’. Leaving aside for a moment the interpretation of the law and the position of the court, is the latter ground of exclusion consistent with democracy? A related though distinct question is that of the legitimacy of requiring that certain political decisions within Israel be made by ‘a Jewish majority’. When we had direct elections of the Prime minister, it was very important for Labor candidates to be able to claim such a majority for their negotiations on Israel’s borders and agreements with her neighbors.

I remind the reader that I approach the question of the democratic legitimacy of banning a party whose platform includes the denial of Israel as a Jewish state from the conclusion that a Jewish state in Israel is consistent with democracy and justifiable. Nonetheless I draw a distinction between an anti-democratic party and a party whose platform is the attempt to change the nature of Israel so that it ceases to function as the nation-state of the Jewish people. So long as the party seeking to implement this change is truly committed to democracy, and to giving up violent means of achieving its goals – democracy is not consistent with the denial of people’s right to re-think the self-definition of their country in terms of its affiliation with a particularistic vision of the good life. Jews may legitimately wish to live in a state in which they form a majority, and whose public culture is theirs. But this does not entail a permission to prohibit others from trying to seek to persuade their fellow-citizens that this goal should be replaced by a neutral, liberal state. As long as the majority wants Israel to be a Jewish state, it is legitimate for the state to maintain this public character (to the extent that the rights of others are not violated). Since Israel is
the only place in the world in which Jews enjoy self-determination, it is even legitimate for Jews in Israel to take steps to make such a change harder than a ‘regular’ decision concerning a policy. Nonetheless, if Jews lose their majority, or if some groups of Jews join the non-Jews in seeking to abolish the Jewishness of the state – Israel will indeed have to make a choice between its Jewish nature and its democratic regime.

Usually, the conflicts between Jewishness and democracy in Israel in terms of the eligibility of parties to participate in elections are seen as related to the rights of non-Jews, mainly the political rights of Arabs. We should see that a related tension exists within the internal Jewish rift. We saw in Chapter I that, theocracy and democracy are inconsistent. How should a democracy treat parties who explicitly seek to create a theocracy in Israel? The question becomes even more complicated when the same parties are not democratic in their structure, and when their adherents follow almost blindly the decisions and calls of their religious leaders. In at least some cases, these parties also conduct systematic de-legitimation campaigns against the central organs of the state, especially the Supreme Court, which are faulted precisely because they do not follow the dictates of Jewish law. Israel’s Parties Act of 1992 did not require parties to be democratic. This controversial decision was made in order not to exclude religious parties, who determine their political positions on the basis of religious verdicts by the sages. Some argue that this decision does not grant Israeli democracy the protection it needs against theocratic tendencies. Others claim, on the other hand, that any other decision would have undermined Israeli democracy in serious ways, since it would not have allowed large numbers of citizens vote for those
who they feel represent them best. I believe the balance struck by Israel’s legislature is both democratic and wise. The ultra religious parties in Israel follow the democratic rules of the game, and it is much better to contain the large religious constituency within democracy than to outlaw it. It is notable that there is also a Moslem fundamentalist group in Israel. The more extreme part of this movement does not participate in Israel’s elections, but another part does.

The issue of the ultimate source of authority accepted by religious people and parties is more troubling and basic. In one sense, the conflict here is immanent and necessary: any serious religious person will give his religious norms a higher place than any norm established by human political authority. However, different religions (and different streams within religions) find ways of accommodating these tensions so as to permit believers to be both members of their religious communities and citizens of their states. States, too, find ways of permitting their citizens to be religious by respecting the rights to both freedom of and freedom from religion. Many European countries have ‘religious’ parties, which have functioned long and well within democracy. So despite appearances, the question is not one of principle, but one of political realities.

In fact, the platforms of the religious or the ultra religious parties do not specify what they mean by ‘a halakhic state’. Neither of these parties ever suggested that laws in Israel should be enacted in any other way but by Knesset legislation. Kach did propose denying non-Jews their political rights, and was banned for that.

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92 These tensions between democracy as reflecting people’s wishes and democracy as anti-theocracy are not unique to Israel. See, for example, the recent decision of the European court re the eligibility of a Muslim party to participate in the Turkish elections. Nonetheless, despite recurring bans of Islamic parties, new such parties are formed.
reason. Kahane also declared that the Torah was superior to these acts, and expressed a willingness and an intention to dismantle democratic structures if he came to a position of influence. Other religious parties do not say such blatant things, but it is not at all clear what they would do if they ever came to power in Israel. It seems highly unlikely that they will abolish democratic elections, or that they will be able to restructure the organs of government.

The de-legitimation of government by some religious parties and spokespersons when the decisions of the government or the courts are perceived as inconsistent with religious law is indeed problematic. We should recall that many of the moves against Rabin’s government and the Oslo process were based on certain interpretations of Jewish religious law, which in fact claimed that no Israeli government had the permission to give parts of Eretz Yisrael to non-Jews. In addition, Rabin’s murderer explicitly invoked Jewish religious law as permitting, even demanding, the assassination. The potential for anti-democratic sentiments based on radical Jewish fundamentalism was therefore materialized in this particular and dramatic case.

Nonetheless, the picture is complex. From within the Jewish orthodox community there were many voices, who deny these interpretations of Jewish law, and in particular the permission to assassinate Rabin. Some leaders of the religious Zionist camp even called for an internal reprimand of religious leaders who were not careful enough to clarify that the assassination was against Jewish law. This fact illustrates that while a religious person is committed, by definition, to the superiority of religious law, religious leaders may find creative ways in which to mitigate the
tensions. All of these ways must be based on religious law itself, but there have been religious leaders in modern Israel who have explicitly ‘ruled’ that religious law does not aspire to decide questions of detailed policy, and that these should be made by the people’s lay leaders. Many have pointed out the analogy between these different interpretations of Jewish law and its scope on the one hand, and the different interpretations of the limits of law given in state jurisprudence. In both legal traditions there are those who argue that the law covers the whole realm of human affairs, whereas others declare that the role of the law as such may be limited, with some powers and responsibilities granted to the jurisdiction of other decision-makers. In political terms, those who advocate the narrower conception of Jewish law argue that Jewish law itself requires the legitimation of the people’s elected organs.

This complexity suggests that the law requiring the ban of anti-democratic parties should not necessarily exclude all religious parties. It is not sufficient to say that religious parties must, by definition, oppose the legitimacy of the elected representative state organs. The threat of inconsistency is indeed immanent, but it is not inevitable. At the same time, we should acknowledge that there may be a situation in which a religious person may be called upon, by his religious convictions, to resist the laws and the commands of his legitimate political leaders. More important, this requirement to disobey may be based not only on religious principles reflecting universal humanistic values. It may also be based on particular interpretations of the alleged implications of Jewish law, such as the prohibition to give away parts of eretz Yisrael to aliens.93

93 Not surprisingly, opinions on this prohibition differ among religious leaders. Ovadia Joseph, the leader of the influential Shas party, opined that no such sweeping obligation exists, and that if the survival of the people requires giving up parts of the country – this is legitimate.
Against this background it is important to recall that the only party banned to-date for inconsistency with democracy was Kahane’s Kack party, which recommended that the political rights of non-Jews in Israel should be curtailed. Both the political and the legal system agree that democracy should seek to be very tolerant towards political associations, including those committed to Jewish law. It must be stressed that this tolerance is the consequence of the democratic nature of Israel and not of its Jewishness. Until now, toleration was shown both towards Arab parties with national aspirations and towards Jewish religious parties with religious programs. However, an important difference may be emerging, at least on the level of freedom of expression. While there was a lot of criticism against radical expressions of ultra orthodox leaders against state authorities, especially the Supreme Court, and secular politicians – no legal action had been taken. Radical expressions made by Arab leaders, interpreted by some as identification with Israel’s enemies, have led to the prosecution of MP Azmi Bshara, and may lead to renewed attempts to ban Arab parties whose platforms may credibly be interpreted in the same way.

I believe this state of affairs is justified. Kahane’s party did stand out in ways that justified, at the time, its special treatment. His political messages were not only extreme and blatant. He also took the position that violence against what he considered enemies of Jews was justified. He systematically sent his followers to interrupt political meetings of his opponents, and encouraged and publicly congratulated those who committed terrorist activities against Arabs. All other parties in Israel, including all the Jewish religious parties, explicitly and regularly commit themselves to abstain from using force, especially threats to life, as tools in the political struggle. The asymmetry between Jewish and Arab political leaders exists...
here as well. Leaders of both types of parties may at times refrain from condemning the use of violence. At times they even express some sympathy and support with those using force in promoting their political goals. While there was criticism against right-wing political leaders who supported the members of the ‘Jewish underground’, no one considered prosecuting them or banning their parties. This is because the Jewish underground did not pose a threat to the security of the state. It challenged its monopoly over force and its ideal of legality. Arab leaders supporting Hizbollah, on the other hand, and expressing joy at its victory over Israel, are seen as threatening the state itself.

I still believe that the danger to democracy posed by the banning of political parties is very great. It requires that we should not usually take this radical step based solely on the inconsistency, in principle, between democracy and the party’s platform. To ban a party we need a ‘something extra’, such as the use of force or at least the legitimation of such use. In the circumstances of Israel, it is right to allow religious parties to participate in the political process. First, their platforms are ambiguous enough to allow consistency with democracy. Secondly, their participation in the political game has been well within the rules of the game. Most importantly, any other decision would go far beyond the desirable effect of excluding a marginal, violent element from the legitimacy of the political process. In contemporary Israel, an exclusion of religious parties will create a feeling of alienation and distance among a very large population, which is fully committed to life in the country and to work promoting its welfare. This very result may have a distinctly anti-democratic effect on Israel’s political life.
This conclusion is an implication of Israel’s commitment to democracy, and not to the Jewishness of the state. It applies with equal force to the Islamic party, which is now the largest Arab party in Parliament. This fact becomes clearer when we recall that threats to democracy are not posed by religious parties or establishments alone. Israel has radical secular parties which advocate the use of force to achieve political goals. In the 20th century, the greatest threats to democracy came from non-religious or anti-religious movements, such as fascism, nazism and communism. In other words, I believe the result we have reached – that both religious parties and Arab national parties participate in the political game – is the correct one for Israel. I hope we can keep it this way. This requires the continuation of toleration on the part of the political and legal systems, as well as respecting the balances struck in the past between citizenship and ideology. The Arab parties need to maintain the delicate balance citizenship and expression of their civic and national grievances and aspirations. The religious parties need to find ways to accommodate freedom of religion with the duties of citizenship in a country, which is not a theocracy. If Israel starts dealing with possible tensions between the platforms of parties and its commitment to democracy and Jewish self-determination by banning parties this will be another indication that its crisis has become deeper and more threatening to its stability.

The internal organization of some parties, especially religious ones, may pose an additional threat to democracy through challenging its presuppositions. The justification of democracy is built on seeing individuals as autonomous, entitled to the freedom and dignity of making their own decisions concerning their lives within the law, and of participating in the decisions made by their society. Many religious
communities, including many Jewish religious communities, share in this vision of Man and democracy. Yet some parties and regimes are built on the blind following of one’s leaders, be they religious or political leaders. Often, such parties may attract their voters by promises of heavenly reward. These parties and regime are not based on public reason and the possibility to persuade the public of its best interest. Rather, they are often based on fear and prejudice. As a result, the leaders of such parties can ‘control’ the votes of their followers, and the principle of ‘one man – one vote’ does not obtain.

Some wish to argue that this state of affairs, in and of itself, is a good reason for banning a party. Or, better, that it should be a condition of registering a party that its internal structure is itself democratic. The latter idea was raised when Israel enacted its 1992 Parties Law, but it was rejected. In part, there was fear that the relevant parties may prevent the passage of the law. But there was also an argument of principle against such requirement. While this situation is clearly quite problematic, it is not completely clear that it is legitimate to require that political parties have a democratic structure. We do not look into the reasons and motives that make people vote as they do. While we hope that all citizens try to form an educated opinion on the basis of facts and values, and after an exposure to robust public debate – it is quite possible that many vote as they do for other reasons. They want to please someone, or they follow the judgement and advice of someone they trust and respect. In fact, in our modern complex societies it is impossible to make one’s own judgement about most issues on the public agenda. In most of them, voting is an act of faith in professionals or political leaders. The line between legitimate reliance, consistent with full autonomy, and between the thoughtless following of the recommendations of
a spiritual leader, relatives, or other relevant others, is far from clear. A prohibition of such parties may seem like patronizing and an expression of superiority and dismissal towards structures of authority, which are deep and profound. It is quite possible that traditional and religious societies may enact democracy in ways very different from those, which are familiar to us from Western democracies, where the individual is central. These differences may not mean that only individualistic societies can have democracy. A society in which the struggle about the centrality of religious communities is an important part of the debate over the public good - should not exclude the traditional and religious groups from the political game. Traditional structures of authority do not dictate the votes of members of these groups. It may be impossible to change the patterns of voting in traditional societies so that individual autonomy is increased. But democratic rules of the game permit gradual and slow changes, while the exclusion of whole groups from the political sphere is a sure recipe for unrest and silencing. On the whole, democracy will be stronger if it takes an inclusive attitude towards such groups, while maintaining clear rules to minimize the threats to democracy itself.

This recommendation is not cost-less. An attempt to establish a stable democracy in a society with very different levels of modernization, and with very different presuppositions and ideals about individuals and their relations to the civic nation and its ethnic and religious groups may indeed not be easy. Granting the religious groups the right to maintain their hierarchical structures, and participate in the political game may make such parties important coalition partners. The attempt to court these parties into a coalition may require compromises on the very democratic rules of the game, or at least a show of tolerance towards the instrumental attitude of
religious establishments towards the shared political institutions of society and to democratic principles.

A more direct and explicit challenge to the integrity of democracy and the legitimacy of its institutions is the call to resist and disobey the laws and the decisions of authorized governments and institutions. Israel faced this challenge a number of times in the last decade, with such calls coming from all sides of the political spectrum. As this book is being written, the spring of 2002, the call was made by a group of reserve soldiers refusing to serve beyond the green line, arguing that the military activity undertaken by Israel is immoral and designed to maintain control over the territories occupied in 1967. When Rabin was negotiating over the same territories in 1994-95, various right wing leaders, mainly religious, called to refuse any order to evacuate settlements of even military bases from the area.

This type of challenge is complex, because many justify the call to refuse and to disobey in terms of democracy. Democracy serves here as the basis of both claims supporting and rejecting civil disobedience. Often, calls for civil disobedience and refusal to obey the laws come from groups who are alienated from society. But it is also quite often the case that this form of political action is taken by central sectors in society, who use it to make a point despite the fact that they have failed to persuade the political authorities to adopt their preferences. Israel has witnessed all of these types.

The Arab sector, whose allegiance to the state is very fragile, has not usually claimed a right of civil disobedience. Its leaders were very careful to stage all protest
within legal frameworks, utilizing tools such as strikes and demonstrations. In fact, the willingness to obey the laws (even if they seek to change them) has been their answer to frequent challenges that they were not really loyal to the state. It is a sign of either the growing Israeliness of the Arabs, or of their growing willingness to test the limits, that this is no longer the case. Most Israeli Arabs, but not all of them, condemn the murder of civilians by the use of suicide bombers. Azmi Bshara is now standing trial for allegedly encouraging Israeli Arabs and others to use force against Israel to attain their legitimate goals. And other political leaders threaten to object by force and resist policemen and workers if they come to pull down buildings built without proper permits. Israeli Arabs have acquired great skills in using Israeli institutions such as the court to promote their claims for civic equality, and they have had some significant gains. However, at the same time, they have started turning to international commissions calling for international intervention against Israel’s policies of ‘apartheid’ and ‘racism’. Since most Arabs are exempted from military or national service, we can only speculate how the Arabs would have responded to an attempt to apply to them the mandatory service rules of Israeli law.

For this reason, discussions of the limits of the obligation to obey the law and of civil disobedience were conducted mainly within the Jewish population. Israel has not yet seen political drives taking the form of refusal to pay taxes. While the challenge of disobedience came from both sides of the political spectrum, the individuals who actually refused, and movements devoted to refusal, come from the left, and are concerned mainly with the controversy over Israel’s control over land beyond its 4 June borders. Until Israel’s unilateral withdrawal from Lebanon in 2000, the refusal movement concerned both Lebanon and the West Bank and Gaza. The
success of both the protesters and the Hizbollah in Lebanon increased the willingness, on both sides, to hope to get the same result in the West Bank and Gaza. Right wing protest took different forms: initially it took the form of illegal settlements, against the decisions of the then serving governments. It then involved resistance to the evacuation of Yamit as a part of the peace agreement with Egypt; illegal demonstrations against the Oslo Process, inciting calls against the Rabin’s government, statements that no Israeli government had the mandate to return parts of Eretz Yisrael to gentiles, and the implicit support some gave to the interpretation of Jewish law which permitted, even required, the murder of those responsible for the Oslo process.

Many people who advocate a negotiated agreement of returning more or less to the 1967 lines (the Clinton proposal, and the Israeli interpretation of UN decision 242) nonetheless object to calls of refusal, or to calls and demonstrations calling for the unilateral withdrawal from Lebanon. The refusniks, on the other hand, claim that stopping short of refusal means that they are cooperating with policies that they deem dangerous and immoral.

The debate around these issues has heated up during the violence cycle that started after the collapse of the Camp David talks in October 2000. Those objecting to calls to refuse argue that it undermines both Israeli democracy and its ability to stand pressures at this sensitive juncture. The refusniks, on the other hand, argue that staying in the territories beyond the 1967 lines is itself anti-democratic, so that democracy requires that Israel controls only the area settled by its citizens. They further claim that it is holding to the territories itself that makes Israel so vulnerable,
and that its holding on to the territories heavily populated by Palestinians is what weakens Israel’s ability to defend itself.

I of course do not intend to settle the political debate in this essay. It is important to note, however, that both sides have been using very misleading rhetoric to support their claims. It is important, therefore, to sort out the claims and the arguments made in this context.

The issue of refusal to serve and that of freedom of speech are intertwined, but should be kept distinct. Refusal to serve is an act, which may be encouraged by speech. Similarly, ‘incitement’ to use force for political gains is very different from actually using force to achieve such gains. Legitimating a political assassination, serious as it is, is nonetheless different from assassination. True, when there is a spreading phenomenon of refusal to serve, one may be tempted to take action also against those legitimating it (assuming both the refusal and the encouragement are illegal). After a traumatic assassination, it is natural to be more stringent about calls legitimating such actions. But the two are nonetheless different. At this stage, let me concentrate on the legality and morality of refusal to serve.

Before I do that, I should note another type of speech which is a serious threat to democracy – the delegitimation of the authority of elected democratic powers. In part, such de-legitimation comes from religious parties, invoking the superior authority of God and His laws. But it also comes from secular circles, in a variety of contexts. In Israel, a main victim of such de-legitimating rhetoric has been the legal establishment, especially the Supreme Court. It started with religious critiques, and
soon broadened to claims that the courts are detached, removed and not responsive to the main political problems of Israel. I shall return to this issue below.

The question of the scope of the obligation to obey the law is one debated heatedly within jurisprudence and political philosophy. Most scholars argue that citizens in democracies have a presumptive obligation to obey the laws and the authorized decisions of officials. Only anarchists deny even this presumptive duty. This formulation of the question presupposes a ‘positivistic’ definition of the laws and the authorized decisions, so that their moral justification is not a part of their definition as ‘laws’. But those committed to both democracy and morality may debate the strength and scope of this duty to obey.

This debate should be distinguished from the principle, which should be accepted by all, that individuals have a duty (as distinguished from having the mere liberty) to resist and disobey blatantly immoral orders or laws. We hope and expect that it will be hard, under most circumstances, to pass blatantly immoral laws. But blatantly immoral commands have been known in many contexts and in the histories of most nations. The legacy of the Nuremberg trials has been that a person cannot be excused from responsibility to moral atrocities by invoking laws or orders that permitted or required them. This is also the rationale of the Rome Convention establishing the International Criminal Court (ICC).

In Israel, the principle is a part of both the criminal law and the law governing military actions. The ‘blatantly immoral act’ was described by an Israeli court as an

94 A non-positivistic definition of law will make the question almost redundant, since immoral laws and commands would not count as ‘laws’ and ‘commands’ under these characteristics.
act which any reasonable person can see is prohibited by a ‘black flag’ flying over it.\textsuperscript{95} A paradigmatic ‘black flag’ order is the intentional killing of civilians, or of a person who poses no immediate threat (such as a prisoner of war, or someone who raised a white flag). Similarly, humiliation, rape or robbery, are all ‘black flag’ orders.

The power of this moral principle is so strong, that many seek to enlist it in support of their own political persuasions. We thus see a tendency to conflate all immoral or illegal acts with those that have a ‘black flag’ flying over them. This may undermine all structures of military effectiveness, is unfair to soldiers and misleading. The same tendency is apparent in the ICC documents, in which all offences against the Geneva Convention are described as the types of crimes creating ICC jurisdiction. In this way, offences against international conventions that are not blatantly immoral are included in the jurisdiction of the ICC.\textsuperscript{96}

After the collapse of the Camp David talks between Ehud Barak and Yassir Arafat, the radical peace camp in Israel, as well as the refusniks, at times claim that the mere continuation of the occupation is not only illegal, but blatantly immoral. They thus subsume their opposition to serving beyond the 1967 lines under the principle of the duty to resist blatantly immoral commands. Presumably, every Israeli soldier protecting Israeli civilians driving in West Bank roads, or manning a road block, is

\textsuperscript{95}The expression was coined by Judge Benjamin Halevi, who convicted Israeli soldiers, who shot and killed Arab civilians in Kfar Kassem during the 1956 Sinai campaign. The Arabs were breaking a curfew they did not know about, and were returning from the fields. The soldiers were ordered to enforce the orders. When some asked what would happen to the civilians who did not hear about the order, the commander reportedly answered: God will help them.

\textsuperscript{96}This point is of special relevance to Israel, since the broad definition of offences against the laws of war was explicitly designed to bring settlements of Israelis beyond the 1967 lines under the jurisdiction of the ICC.
described as a person not seeing the blatant immorality of his deeds, and maybe indicted before an international court!

Of course, even if such acts are not tainted by a black flag, the issue of the moral justification for the refusal does not end. But it must be clear that this is a different type of moral claim and argument. This argument rests not on the universally held and blatant immorality of the deed, but on the judgment that, on the whole, the policy or command are so immoral as to justify resistance even to lawfully made commands. Some scholars claim that in a democracy, obedience to the laws must be absolute, and that objection to laws or policies must take the form of political action against them. Their argument is that anything but this position will undermine the moral duty to obey the rules of the game of democracy. But others claim that democracy, while important, is not the ultimate value. At times, they claim, one has the liberty, even the duty, to resist immoral laws and policies even when they are not so clearly and blatantly immoral as the intentional killing of civilians.

I tend to accept this position, but I cannot go into its details here, and it is not necessary for my purposes. Even those who accept a moral liberty (or even a duty) to disobey immoral commands concede that, in a democracy, the moral weight of these reasons must be very great to justify the refusal to obey the products of democratic rules of the game. After all, democracy is primarily about accepting that the opinions of others count as much as my own. It cannot be that the only obligation it imposes on one is to obey only those decisions and policies one would have voted for.

Some scholars hold this position as a general matter of political morality. In Israel, some hold this moral positions, but others who claim the obligation to obey is absolute seek to prevent the situation, quite common, in which people support disobedience when their morals are invoked, and object to it and condemn it when it invokes a different set of moral standards.
Human history teaches that claims of a right to disobey the laws of a democracy are not necessarily based on religion, and that they do not always come from either Left or Right. This is a general problem of the relationship between the values of individuals or groups and the laws of the land in which they live. But in some circumstances, like the one obtaining in Israel, a religious source of claims of disobedience enhances the threats to democracy involved in them. This is not just a ‘local’ conflict between law and conscience, but a possible conflict between structures of authority and institutionalized establishments. No one claims that ‘conscience’ or morality can and should run states. Many religious people think that the states, in which they reside should be governed by religious laws.

A conflict between religion and state law may take two main forms: the law may demand that a person should act in a way prohibited by his religion; or it may prohibit conduct that religion demands. But the success of such moves depends on many factors, including the values of society and the content of religious commands. Potentially, the conflict may be immanent and unbridgeable. In principle, whenever the state seeks to limit the freedom of a religious believer to follow the commands of his religion – the conflict is direct, and the believer must prefer his religion. However, both states and religions have made serious and far-reaching efforts to accommodate the conflicts and mitigate them. The State usually seeks to make its contribution to this mitigation through its commitment to freedom of religion. Religions, from their side, often indicate that some types of questions should be relegated to the decision of human legislatures. Often, the presence of many religious people in a community guarantee that the laws will not include commands which are incompatible with the
demands of religion. But these mechanisms may fail when a society is not homogenous. Tensions between religious communities with different demands, or between religious and secularized communities, may generate situations of conflicts between the laws of the state and some religious demands. Such tensions may also generate institutional issues, when legislatures, governments and courts reflect different bases of legitimacy.

In Israel, state authorities try to reduce as much as possible potential direct conflicts between laws and religious commands. The reason is a combination of respect for religion and the wish to avoid coalition tensions. All Israeli governments include the maintenance of the religious status quo in their agreements. One such example is the dietary arrangements in public kitchens, which seek to make them open to all. Since no one is under a religious obligation to eat non-Kosher food, public kitchens in Israel are all Kosher. A more controversial arrangement is the one granting virtually all haredi youngsters an exemption from military service. A recent study reveals that 80% of the Jewish population in Israel objects to this arrangement. This arrangement was defended by most governments in order to avoid a confrontation with their haredi government partners. However, it is questionable whether this is truly a case of a conflict between law and religion, since most interpretations of Jewish religions do not see it as preventing military service. It is natural that haredim will seek arrangements, which may permit them to maintain their religious life styles, but there is no indication that once this is done, there is a religious prohibition to serve.

Different religions, and even the same religion at different times, or various streams within the same religion, may have different attitudes towards the state-religion
relationship. Judaism and Islam are different from Protestant Christianity in that they require, in principle, and under some interpretations, that religion will regulate all aspects of a person’s life. But both religions had to accommodate different situations, so that they have within them the resources, which may permit flexibility. In Judaism (as in Islam) there are those who hold that all matters of state should be governed by religious laws, as interpreted by their authorized officials. Other religious leaders believe that religion itself relegates these matters to the ‘temporal’ authorities of the people and the state. This is the background to some of the intense debates, which arose in recent times. Senior rabbis have held that Jewish law prohibits giving away parts of eretz yisrael to non-Jews, and have concluded that Israel’s government therefore cannot enter an agreement that stipulates that Israel will do so. They have further argued that soldiers should not obey orders to evacuate settlements or army installations. Other rabbis question their authority to make any halachic rulings, or in particular rulings on such matters. Some further argue that Jewish law in fact does not contain specific answers to such questions, and that Jewish law permits the rulers to make agreements which may be beneficial for the people. In addition to this internal debate about the interpretation and scope of Jewish law, some argue that calling on soldiers to disobey on the basis of such interpretations is incitement, which should be investigated and prosecuted. Others claim that such interrogations and prosecutions should be avoided, since they violate the right of religious sages to teach and interpret their own religious texts.

We can see that the conflicts between law and religion may move between freedom of action and freedom of speech. It is sometimes argued that allegedly illegal speech, constituting incitement to violence or to racism, is in fact only sacred texts or their
exposition. In such cases, the debate about the limits of free speech becomes the first step in a deeper and more complex debate about the superiority of the religious normative system and the meaning of freedom of religion. A dramatic case of this sort reached the courts: Iddo Elba, a young rabbi, was accused of incitement to racism, based on a text analyzing the Jewish law on the killing of a non-Jew. Elba’s analysis included the conclusion that in a situation of a mandatory war, individuals have both the liberty and the duty to kill any person belonging to the nation with which Jews have such a war. Elba stressed that his analysis was only for learning and not a recommendation for action. However, he also declared that it was endorsed by religious authority, and the text is full of expressions suggesting a ruling rather then a debate or an exercise in learning or exposition. In court Elba argued that his expression should be protected by the guarantees of freedom of speech and freedom of religious teaching. He was convicted in the district court, and his conviction was affirmed by a 5 to 2 vote.98

The potential conflict between the law prohibiting incitement and religious texts is reflected in the fact that the Israeli law against incitement to racism includes a specific defense for speech, which is merely citation of religious sources. The law is neutral and does not specify the religion in question. However, the law was introduced to combat the anti-Arab speech of Meir Kahane, who was then an MP. It is ironic that Kahane was successful in adding the defence, and as a result he himself voted for the law… Elba and Rabin’s assassinator both claim that if the law of the

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98 The decision generated a lot of academic writing, since the opinions are unclear, and deviate from the standard position of the Israeli Supreme Court on freedom of speech. The appeal was scheduled to be heard by the court the day after the assassination of Yitzhak Rabin, in a regular panel of 3. The panel was then extended to 7.
state conflicts with Jewish law, they are bound by the latter only, and that this obtains even if the relevant state law is the one against murder.

A situation where such claims are being made and supported by a group in the population is of course extremely threatening to any regime which does not regard itself as accountable to Jewish law. I want to repeat that, in principle, believers will hold this position everywhere. Nonetheless, it is not surprising that Jews make these claims, and act on them, in the Jewish State. These Jews expect that crimes committed in the name of Jewish law will be condoned and even endorsed, or treated very leniently. Unfortunately, this expectation turned out not to be completely unfounded. It follows that while this type of challenge to democracy may exist everywhere, the special circumstances in Israel mean that this challenge by fundamentalist Jews may pose a significant threat to Israeli democracy.

I am not competent to join the internal halachic debate about the scope of Jewish law. For my purposes, suffice it that the internal debate exists and is heated and serious. The existence of this debate is critical to my claim that there is no necessary and immanent contradiction between seeing Israel as a Jewish state in the religious sense and its being a democracy. However, it seems that those who hold the narrow position on the scope of Jewish law are a minority. This fact suggests that some parts of the religious community in Israel, and parts of the religious establishment in Israel, may indeed pose a threat to the democratic nature of the state. As far as the state is concerned, the mere fact that some religious authorities grant full legitimacy to democratic institutions is a relief, but cannot settle the matter. The state must clarify

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99 It should be noted that this problem exists not only for Judaism. Some Israeli Moslem leaders explicitly declare the superiority of Islamic law over the laws of the land, at least in matters of personal status.
its position vis-a-vis statements by religious leaders who declare that some decisions of the elected government contradict Jewish law and should therefore be disobeyed by citizens and soldiers. Does it see such expressions as covered by freedom of expression and religion, or are they illegal? Even if we reach the second answer, it does not follow that the state must always prosecute such speakers. Criminal prosecutions have serious costs of their own, and it is often unwise to use legal tools in such contexts. But the state can have ways other than criminal prosecution to express its evaluation of such expression, and the need to take a stand should not be avoided.¹⁰⁰

The tendency to avoid the issue is quite understandable in a country, which seeks to avoid direct confrontation between state and religion. But the duty to mitigate these tensions is not the responsibility of one side only. If only the state tried to avoid these conflicts, the religious community has a practical veto power over legislation and political decisions. It also means that the religious communities are not required to exhibit a commitment to democracy and the complexity of living within it. The state must be very careful not to communicate to religious individuals and groups that their religion exempts them from the duties of citizenship. It must draw the lines clearly, and insist that state law is superior when this is called for.

A call to disobey a serious political decision reached by the elected government after long deliberations and soul-searching debates, including the orderly consideration of opponents, is a very serious challenge to democracy. It is misleading to see this problem as one of state-religion tension. Such challenges may come, and

¹⁰⁰Many of the rabbis who signed the petition claiming that Jewish Law prohibits transferring parts of Eretz Yisrael to non-Jews are employed by the state. The state may well curtail the freedom of speech of its own employees in ways not applicable to citizens who are not so employed.
have come, from non-religious sources as well. It is a general tension between the
decisions made by democratically elected bodies and normative systems, which are
seen as superior by their adherents. A democracy cannot remain neutral when those
who fail to persuade their fellowmen in the public sphere claim the right to undermine
the decisions by sustained and organized disobedience, or by the assassination of the
leader who is pushing a program which the murderer thinks is misguided and
dangerous. A life-wishing democracy must see such conduct as a serious threat to its
integrity and stability, and to deny the legitimacy of institutionalized calls for their
performance.

The issue is one of substantive political morality. Let me recall some of the
basic distinctions I have drawn above. All the types of laws and commands that have
been declared contrary to Jewish law are not the kind of conduct which has a ‘black
flag’ flying over it. The category of blatant immorality is supposed to be universal,
not one dictated by Jewish law. Evacuation of a military camp or a civilian
population as a part of a political agreement is not blatantly immoral. 101 We need
also to distinguish between conscientious objection, civil disobedience and rebellion
on the one hand, and between calls to perform such acts on the other. Conscientious
objection is the refusal by an individual to do something, which is deeply inconsistent
with their morality. The objection is not motivated by an attempt to change the
decision or the law, which the objector refuses to obey. The objector’s decision seeks
to maintain the moral integrity of the individual himself. The paradigmatic example

101 In fact, some political philosophers argue that the continuation of the occupation, and thus the
existence of military bases and Jewish settlements in the OT, are themselves blatantly immoral. I
believe that even those who share this political analysis should be careful not to attach to the situation
the ‘black flag’ label. It is interesting to mention that some right-wing religious settlers see it as a
religious duty to evacuate settlers, even against their active opposition, if the place is going to be given
away to the Palestinians, for fear for their lives.
of CO is the pacifist. Often, laws permitting abortions specify that a doctor who objects to them may be excused from performing them. Civil disobedience is different. This is an illegal activity whose purpose is to challenge or to protest a law or a policy, with the hope of bringing about their change. Rebellion is an attempt to use force in order to change the government or the regime in ways unauthorized by law. Some Vietnam objectors undertook civil disobedience, hoping to create pressure on the government to change its policy. Others decided to make a personal point, and just refuse to register or serve.

In general, we should be more careful about prohibiting public calls and encouragement for illegal action than about the actions themselves. This is because of two reasons. First, such calls are an important part of public debate. If we silence such calls, we cannot have the opportunity to address the arguments for and against such calls, and we cannot evaluate the justice of the challenged policies. Secondly, between the call and acting on it there is always the judgement, discretion and responsibility of the hearer who acts on the speech. The speaker may assume that this is a serious constraint on people’s actions. However, this is not always the case. There are situations in which the inciting potential of the speech is so great, that we should not give it immunity. Mark Anthony’s speech in Caesar’s funeral comes to mind as an example. Had Brutus been smart, he would not have allowed him to speak. At least, he would have stayed there to check the situation. In addition, we should distinguish between calls to undertake CO, CD or rebellion. The latter may be dangerous to the extent that it may be justified to prohibit and check not only the action but the calls and the encouragement as well. CO, and especially CD, may be
very effective tools for changing policies, but they are omissions rather than acts. The principle that speech should be dealt with by more speech seems applicable.

It is usually futile to force persons to act against their deepest moral judgement. The real question is whether to declare such actions illegal, and decide how to handle them as they occur, or whether to grant them a general exemption in certain circumstances. Most legal systems grant exemption from military service to pacifists, but define other forms of CO (other than the refusal to obey blatantly immoral orders) as illegal disobedience. They then use discretion when the question of enforcement arises. This is as it should be. In Israel, most cases of CO are solved informally, using low visibility mechanisms. It is rare that people invoking such reasons are prosecuted or punished.

Yet effective communications often means that what may seem as a case of CO quickly becomes a part of a CD drive. This is clearly the case with the refusniks in Israel 2002. While some of the reasons they give for their refusal are moral – what they are trying to do is create a movement that will put pressure on the government to change its policy vis-a-vis the OT. Unlike CO, CD should be evaluated for its impact on effective government and stable democracy as well as for its moral merits. The justification for using illegal ways of action decreases with the power that the protester has to influence his government and society in legal ways. The stronger the democracy – the weaker the justification for civil disobedience within it.

Israel has not witnessed clear calls for rebellion, so these issues were not discussed in this

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102 The 2002 refusniks in Israel make a strong argument that in the Israeli situation, the continued occupation by Israel of the densely populated West Bank and Gaza is itself anti democratic, since all this population does not have the right to affect their own fate. They argue, therefore, that the refusal is required by the ideal of democracy, because its goal is to strengthen democracy itself. This argument is based on the idea that in many important senses, the land between the sea and the river should be seen as one political unit, which is not a democracy. However, the refusniks are using this measure to persuade the Israeli government to return to the 1967 borders. In other words, they also claim that the relevant political unit is Israel proper...
context. But the considerations against these kinds of activity are of course stronger than the ones against CD.

True, calls for CO, CD or rebellion are not made exclusively on the basis of religion. In fact, in recent Israeli history they were more often made from the other side of the political spectrum. When this is the case, the case for disobedience is clearly made on its moral merits. Individuals and groups may make their own judgement about the morals of the situation and what is called for in it. When religion is invoked to justify a call for disobedience, the conflict created has an additional, institutional, element. This is not only a conflict between law and morality. It is a conflict between law and religion itself. Religious communities are organized and have structure. Not following an interpretation of one’s religion may involve one not only in moral debate with one’s friends and colleagues. It may affect his or her membership in their most important community.

Again, there is no need to sharpen the potential conflict between laws or commands and religious beliefs. If soldiers believe that a certain command or political decision contradicts their religious commands, they should be relieved from enforcing them if this is at all possible. There is no need to force them to do what they deem to be against their religion. But this policy, which is wise and generous, is very different from legitimating organized calls for disobedience coming from within the political and the religious national centers.

It is very important to reach an agreement among all political forces in Israel that calls for organized rebellion, or even organized civil disobedience, are not
legitimate in a democracy. It is important to distinguish between CD and protest, which is legal in democracy. Demonstrations, strikes, marches and calls for boycotts etc. are legitimate means of trying to influence decisions in a democracy. It is the very fact that these means of protest exist, that make calls for civil disobedience problematic. Some define CD as non-violent illegal action (such as sit-ins where one is not supposed to be etc.). Others do not make non-violence a part of the definition of CD. Be this as it may, it is clear that violence, and calls for violence, need special justification.

I do not think legal prosecutions are the way to handle these phenomena. However, the state should use other means to secure the borderlines of legitimate public debate. People who advocate using force against the legal government and its decisions (when these are not moral atrocities) should not be allowed to serve in a public office or be on the government’s payroll. They should not be part of the state’s educational system. These people should not be put in prison – but they should also not be around the table of the government or the Knesset, or in schoolrooms.

This is so because democracy must respect itself and demand from those working within it that they should not cooperate with efforts to undermine its principles. Religious leaders around the world, including Jewish (and Moslem) religious leaders in all parts of the world have accepted this condition of their action in all free democracies. Where these undertakings are not enforced, they should be enforced fully. After September 11, 2001, this seems to be a statement enjoying general agreement. There is absolutely no reason for not demanding a similar undertaking in Israel. If we interpret the Jewish nature of the state as permitting religious leaders to follow their interpretation of religion without any attention to the
laws of the states – we adopt that sense of Jewishness that is indeed incompatible with democracy.

I should address here an argument often made by religious circles. Ironically, this argument invokes the rhetoric often used by Israel’s supreme court to justify its judicial review over decisions by the government. This argument claims that democracy is indeed an important political tool, the type of regime that guarantees liberty and dignity and stability. However, democracy derives its justification from basic moral values. It follows that the products of democracy – laws and decisions of democratically elected authorities - should be judges according to these basic values. This is why the Supreme Court claims that it has the immanent power to review government decisions and even Knesset laws by their correspondence to these basic values. For a religious person, the argument goes, the basic values are religious laws. Therefore, all adherents to this argument for judicial review should accept the religious person’s freedom to test laws and commands by their correspondence to their own ‘basic values’.

I concede that a law of the Knesset or a decision by a large majority of the population are not enough, on their own, to legitimate the content of these measures. They may enjoy popular support and be immoral. I grant the challengers that democracy is not an ultimate value but the best political regime I know, and the best way to make political decisions in complex societies. I also concede that the structure of the religious challenge made here is indeed similar to an argument often made to support judicial review. However, I reject the idea that the all democratic products should therefore be tested against moral values, and be invalidated if they do not pass
the tests. Democracy does require that the validity of decisions made within it will be determined, in most cases, by their pedigree, that is, by the fact that they were duly adopted by the rules specified for their adoption. In most cases, in the regular realm of affairs of state, democratic rules of the game replace the independent moral evaluation on the merits of particular decisions. Only in rare and exceptional situations we should resort to the ultimate justification of democracy, to the ‘basic values’ informing it. This is the function of the ‘black flag’ I mentioned above. In some legal systems, human rights or natural law get the same function. But in order to keep the regime democratic, the use of these should be careful and residuary. Too many moral atrocities were committed in the name of the law for us to accept that the legality of actions should always serve as a moral defense. At the same time, we cannot let notions like ‘basic values’ or ‘religious law’ to dictate the details of our legal system and still see it as a product of democracy. If we do, we replace the voice of the people with the positions and preferences of the authoritative interpreters of the ‘basic values’ or of ‘religious law’. Neither is compatible with democracy.\textsuperscript{103}

At this point, the comparison between the ‘basic values’ of the court and the religious argument indicates an important asymmetry. Democratic decision-making rules should be restrained by general values, which leave quite a lot of room for society’s deliberations and decisions of the arrangement suited to it within the general constraints. This function can be played by ‘basic values’ or ‘human rights’ (or even by ‘Jewish principles’, if a state so chooses), but they cannot be played by the details of religious law. Further, ‘basic laws’ and ‘human rights’ as well as ‘black flags’ are all standards claiming universal validity. Jewish principles, even when they are broad

\textsuperscript{103}Some claim that Plato’s rule of the sages or the philosopher-king was indeed a better form of government than democracy. I disagree. But those who think so should not hide behind the veil of democracy. Plato may have been enlightened, but he was an enemy of the open society.
and general, do not apply to non-Jews. But once we understand the rationale of constraining democratic decision-making procedures by a set of values, of whatever source, we also see that these values only very rarely dictate the invalidation of a democratically made law or decision. The political decision to give up Israeli control over lands occupied in the 1967 war is clearly not the type of decision which should be invalidated by them (nor is that decision required by them).  

In this chapter I concentrated on those background conditions of democracy which belong to the tension between it and particularistic nation-states or religions. It is important to remember that threats to democracy exist in countries where there is no such tension. Dictatorships and totalitarian regimes exist in many countries where the population is more or less homogenous in terms of religion or ethnic origin. In some of them, the threat to democracy does stem from theocratic tendencies. Today, this is the case mainly in Moslem countries. Two other main vulnerabilities of democracy should be pointed out. First, a stable democracy requires a reasonable level of economic welfare and education, and an acceptable feeling of solidarity, so that the country is not divided into oppressors and oppressed, or exploiters and exploited. Secondly, there must be some correspondence between the effectiveness of democratic decision-making and the existential problems the society is struggling with. The traumatic experience of the collapse of the Weimar republic illustrates the power of these two factors, when they combine with racist and sectarian sentiments. A serious economic crisis, combined with a feeling of national humiliation may well feed the yearning for a strong, charismatic leader, who will solve the difficulties and

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104 I agree with those who point to the inconsistency in the position of those who object to religious-based objection to laws and support expansive judicial review in terms of secular-liberal values. I therefore join those in the legal community who advocate restraint in invoking 'basic values' to justify judicial activism.
remove the humiliation. The danger that such a scenario may materialize increases as the effectiveness of democratic government, and its ability to cope with the challenges it faces, decreases.

Economic factors are very relevant to the strength of Israeli democracy. This is especially true in the era of globalization. The gaps between groups in Israeli society are large and growing. The situation becomes even more serious when we recall that the economic gaps converge with the rifts connected with the tensions between Jewishness and democracy. The poorest groups in Israel are the Arabs and the ultra orthodox. When we look at levels of inequality before transfers, Israel is second only to the US. An extensive welfare system puts Israel somewhere in the middle of developed countries in the level of inequality after such payments. No analysis of Israeli society and its democracy can be complete without a detailed study of this aspect. Nonetheless, for obvious reasons, I shall not deal with it in this essay.

B. Background Conditions for the Jewish State

There are two external threats to the Jewish State. The first is a military danger to the very existence of Israel as a distinct and independent state. The second is a demographic threat, based on the possibility that Israel may lose its Jewish majority. If this threat materializes, Israel will not be able to maintain its Jewish distinctness in a democratic way, and may have to take unacceptable measures to maintain it. In addition, there are internal factors, which are necessary for Israel to prosper as a Jewish state. The Jewish people, in Israel and abroad, must show the ability, the will
and the interest in maintaining and strengthening the Jewish people and its
civilization, and in securing its right to political self-determination. Among other
things, this survival requires Jewish creativity in all its forms, and an elaboration of
different senses of Jewish identity that can be maintained over time in a modern
secular world. The demographic threat is related to the internal factors. The fact that
Jews leave Israel, and that many Jews living abroad do not come to live in it, shows
that for many Jews living in the only state in the world where Jews have self-
determination and where the public culture is Hebrew and Jewish is not a major
consideration. Both are related to the question of Jewish identities, their nature and
their strength over time.

The first and essential condition for a Jewish state is the existence in it of a
substantial and stable **Jewish majority**. All societies, especially democracies, reflect
the life style and the preferences of their members. When societies are homogenous,
public culture is determined by the cultural norms of the population. Zionism was a
movement that was based among other things on the plight of Jews who were
minorities wherever they resided. The public culture was never theirs. At best, they
lived in their own Jewish communities, and enjoyed some measure of autonomy.
Zionism wanted to create a place where Jews could live in their own public culture.
This required the establishment of a Jewish majority. In the state of Israel, this
majority needs to be maintained in order to justify the cost to the members of the
other local culture – the Arabs – of the country having a hegemony of the Jewish-
Hebrew culture.
Historically, Israel used its monopoly over state power to enhance the Jewish majority. The Jewish state under the UN partition plan was supposed to have a large Arab minority (about 40 to 45%). The idea was that the state will then encourage Jewish immigration, which will make the Jewish majority more substantial and stable. In fact, the 1947-1949 war meant that the number of Arabs left within the cease-fire lines was much smaller, since a majority of the Arab population left through a combination of voluntary departure, flight or deportation by the IDF. Israel agreed to accept some Arabs into its 1949 borders in the cease fire agreements, but its immigration policy was clear and one sided: Active encouragement of Jewish immigration, and a very restrictive attitude to the wishes of Arabs who had resided in the country to return to it. The Law of return grants every Jew who wants to immigrate to Israel automatic and immediate citizenship. In the 50 years of Israel’s existence, Arabs and Jews increased their numbers in roughly the same rate. The ‘small’ difference is that for Arabs this was mainly the result of high birth rates, while for the Jews most of the rise is the result of large waves of immigration.

I have discussed the details of the Law of Return in Chapter II above. Here I want to look at its justification. Every state claims the right to control immigration to it and naturalization in it. This is one of the major signs of sovereignty. In this sense, Israel is no exception. Furthermore, every state designs an immigration policy that suits its own interests. Many states seek to limit the entrance of people who may burden its welfare system, and require that immigrants have certain qualifications. There are even states, which give preference in immigration to people who are members of the nation or ethnic group whose nation-state the state is. International law prohibits

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105 Germany is a notable example, but such preferences may be found in the constitutions of many European countries.
racial discrimination in immigration, but such preferences seem to be compatible with its requirements. The Israeli Law of return has two main problems. First, it is the only immigration law, which identifies one’s ethnic or national identity through a religious rule of membership. International law recognizes the right of **peoples** to self-determination, not the right of religions to a state. Secondly, and maybe more important, Israel is the only nation-state in the world in which a very large part of the population belonging to the majority group have immigrated to the country within the previous generation or two. A majority of the Jewish population of Israel came to live in the state after it was established. In the last decade, close to a million people immigrated to Israel from the FSU and Ethiopia. We saw that the combination of these two facts is used to challenge the right of the Jews to political self-determination in Israel (Chapter I). Yet, once you concede the right, some control over immigration that is sensitive to demographic issues may be not only justified but virtually necessary.\(^{106}\)

The justification may take the form of a claim of affirmative action, as argued by Kasher (1985). It may also be seen as an aspect of the right of a person to live in a country where his culture is the dominant one, as argued by Gans (1995). Whatever the justification of the principle of Jewish Return (and the objection to Arab return), it is important to realize the fact that this principle constitutes a serious injury to non-Jews, and that the country must seek ways to minimize this injury. Changes in Israeli immigration policy are not required by democracy in the narrow sense I advocate, or

\(^{106}\)I therefore reject the claims often made by Arabs that Israel’s immigration policy must be neutral, and that no one should discuss demographic issues because this is an indication of racism. The structure of the population in all countries is a legitimate concern of the authorities, and it may be necessary if the state is asked to provide the different communities with their respective needs. Besides, in many countries issues of stability and power-sharing are strongly affected by demographic considerations. Ignoring them does not seem to be justified.
by human rights. Nonetheless, a situation under which the majority group uses immigration law to perpetuate the marginality of the minority within it is bound to raise resentment among that minority. The sensitivity is especially great when preference is given to Jews who have not lived here for hundreds of years, while Arabs who left here during the war in 1948, and whose families have lived here for generations, are not allowed to return. The Law of Return is therefore a paradigmatic symbol of the alienation of Israeli Arabs from their state. They feel the state is monopolized by Jews to serve the interests of Jews in Israel and abroad, rather than to take care of the interests of all the state’s citizens.

The justification for this state-of-affairs is not the fact that Israel is defined as a Jewish state. This is a problematic state of affairs, and a definition of a state should not stand in the way of amending it. The justification is the reason why the Jewish claim for self-determination was justified to begin with: If the Jewish people is denied Israel as the place in which it has self-determination, it will have no other place to exercise this right. Its need to safeguard this right justifies some, but not all, hardships imposed on non-Jews in Israel and in the region. Israel can justify differential policies preferring Jews and their families in admission and naturalization. It cannot justify discrimination between citizens. And this principle of non-discrimination does apply to some aspects of immigration policy, such as the power of Israeli citizens gain admission for, or to naturalize, a partner or other family members who are not Jewish.

It is important to see that the issue of Return will remain even if the religious debate over ‘Who is a Jew’ is settled in a way less responsive to the orthodox

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107 Some Palestinians argue that the Right of Return, in the sense of a right to choose repatriation within Israel, is recognized by human rights law. I cannot enter here into the details of this crucial subject, but I think this claim is wrong. This is a prime example of a context in which rights discourse may confuse.
establishment. In other words, even if all concede that eligibility for return is a national and ethnic, not a religious matter, the problem of preferring Jews will remain. In addition, we will still have to find a solution to the definition of those who are eligible for return. Despite deep controversies over ‘Who is a Jew’, there is a broad consensus among Jews of all persuasions that the principle of return should be kept. Yet we need to face two major issues, which are becoming more serious with time. First is the fact that under the present arrangement, Jews do not only have a preference in immigration. Their naturalization process is different than that of others, and their ability to confer citizenship and residence on others is greater. Secondly, it is not at all clear that present immigration is in fact connected to the ideal of a Jewish state as a home for Jews who seek Jewish life. It seems that large parts of recent immigration waves consist of people who are not Jewish and do not want to live as Jews, and that many Jewish immigrants are not at all interested in living as Jews in a Jewish state.

The two problems are related. Originally, the principle of Return was based on the belief that the situation of Jews in the world is fragile and vulnerable, since they are a chronic minority wherever they live. As a result, they could be victimized by those among whom they lived. It was crucial to establish a place in which Jews could live in safety and independence. It was the Arab’s bad luck that Jews had historical and religious ties to Israel, and that they did not have the independence that would have allowed them to prevent their return. This justification for the Jewish state grew in weight after the scope and the details of the holocaust became known. Even if many Jews chose not to come to Israel, the argument that a state where Jews could live independently and safely was a powerful one. It is not clear that the present
immigration policy is still justified by the same rationale. It is said that in the last waves of immigration, about half of the immigrants are not themselves Jewish in any way. Many of them, Jews and non-Jews alike, come to Israel because of its social and economic advantages, and have no interest in living in the only place in the world having a Hebrew-Jewish public culture. They may increase the non-Arab majority in the state, but they do not have a right to come here, nor does their immigration strengthen the Jewish state.

For these reasons, it is crucial to re-think the naturalization mechanisms under Israeli law. Despite broad consensus that the present legal situation is far from optimal, the sensitivity of this law is so great that it may be impossible examine it critically and amend it. Furthermore, there is a broad consensus that some principle of Jewish return should be maintained. For these reasons, we will not be able to avoid, in the foreseeable future, the need to provide a clear, operational, definition of ‘a Jew’ (or a person eligible) under the Law of Return. We shall thus not be able to leave this aspect of Jewish identity to historical, social, cultural and political processes. It also follows that some determination of eligibility for return will have to be decided by the courts, since it is inevitable that people will seek Israeli citizenship, and they may challenge a decision under which they are not eligible. One way to deal with the problem is to reduce the accompanying privileges of eligibility for return. Acquisition of citizenship by right is important enough. Israel does not have to make it even more attractive – and discriminatory – but making it immediate, automatic, and coupled with a generous absorption aid. If these additional features are taken away, immigration to Israel may be less attractive, so that intention to immigrate may attest to some real affiliation with the unique features of the state.
This may mitigate the practical problems connected with Return, although it will leave the principled intractability unchanged.

Another way to reduce the institutional and cultural costs of the present situation is for the political system to adopt a clear definition for ‘Jewish’ under the relevant legislation. It will be best if this definition is clearly adapted to the functions of the legislation, and leaves out, as much as possible, religious and ideological controversies. If this is done, the court may well serve as an effective dispute resolution organ, without becoming vulnerable to the charge that it seeks to impose its own views in controversial issues.\textsuperscript{108} I will return to this important issue below.

The same Law of Return is this a key element of the tensions between Jewishness and democracy in both of the two main relevant rifts within Israel: that Jewish-Arab one and the internal Jewish debate about the meaning of the Jewishness of Israel. It can therefore permit a smooth passage to the second element of a strong Jewish state: A strong Jewish identity among a large part of its population, and a wish to see the life in a Jewish atmosphere and public culture as a central element of individuals’ welfare. Among Jews it is usually accepted that a principle of Jewish return and gathering of exiles is legitimate and central. The controversy is over the identity of those who should be eligible to preferred immigration benefits under the law. As in many of the other controversies we examine here, the range of the debate is broad.

\textsuperscript{108}It is uncertain if the political system wants to undertake this responsibility, or if it can do so. During the Shalit case, the Knesset refused to make the case mute by simply deleting the item ‘nationality’ from the records. Once the court decided 5:4 in favor of the plaintiff, his then children were indeed registered as Jewish by nationality, but the law was changed and provided a relatively clear definition, one that clearly excluded Shalit’s children from being seen as Jews. However, as we saw, the new law left ambiguous what is to count as conversion for purposes of the law. In 2002 the court finally decided that people who undertook non-orthodox conversions in Israel should be registered as Jews under both nationality AND religion. Now the political system quickly decided to abolish nationality from one’s identity card (but not from the records). This, however, will solve neither the problem of the religious orthodox establishment nor that of the court.
and multi-dimensional. In part, the debate is ideological: Is Judaism a religion or a historical-cultural ethnic identity? In part, the questions are practical: Who will be eligible for the easy’ automatic and immediate naturalization process under the Law of Return, and who will have to become Israeli via the long and hard process, depending on the discretion of the state, under the Citizenship Act? In part, the debate is about power and income: who will control the lucrative process of conversion to Judaism? It may also be theological and political: Who will have the power to determine the life style of those who convert? Can they be required to keep some orthodox requirements, or will they be free to be reform or conservative or even with no regular religious affiliation at all?

The orthodox attitude is that full membership in the Jewish collective is primarily a matter of observing religious law. The adherents of this view argue that the only way the Jewish people managed the unprecedented feat of surviving thousands of years without sharing a land or a language has been through observing a shared religious law. One implication of this view is that admission into Judaism should be done only through the orthodox religious route. People holding this attitude may have various attitudes to the question of the role and the centrality of the State of Israel in modern Jewish life. These may range from the NRP, which sees the state as having religious meaning, to the ‘Guards of the City” who reject all affiliation with the State, and see it as anti-Jewish. Others may wish to maintain the centrality (and maybe the exclusivity) of religion to Judaism – but to soften the characterization of Jewish religious life. These are the non-orthodox streams, which form a majority of Jews in the Western world, but only a minority among Israeli Jews. Under these streams, both Jewish life and worship and ways of joining Judaism are very different from
those advocated by the orthodox. Non-orthodox religious streams, too, may have varying positions vis-a-vis the role of Israel in modern Jewish life.\textsuperscript{109} Both these attitudes share the idea that joining the Jewish collective must be done via the religious process of conversion. The difference concern the nature of the converting courts and the requirements, in terms of study and life styles, made of those who seek to convert.

Historically, Zionism was a movement developed and implemented by forces, which rejected these perceptions of Judaism. Zionists ideologists all agreed that religious way of life was the factor, which maintained Jewish communities throughout the long years of exile. They believed, however, that this characterization of Judaism did not suit modern realities. The long process of secularization, combined with the rise of national and ethnic identities, meant that groups that had been identified by their religion now were identified in part by an ethnic-national identity not exhausted by religious affiliation. Moreover, some states recognized the distinction between membership in them (citizenship), and membership in religious communities by separating the two, and privatizing religion. In addition, international law and political movements acknowledged the differences between states and ethnic affiliations by introducing ideas such as self-determination of ‘peoples’ and regimes protecting minority rights. While there are some people who are characterized by an exclusive religion or religious tradition, many peoples include members of different religions (the Arabs are a good case in point).

\textsuperscript{109}We should recall that the reform movement was initially anti-Zionist, feeling that Zionism endangered the chances of Jews to accept the full citizenship offered to them by their host countries in Western Europe. That citizenship was based on the idea that Jews could and should be German or French in their nationality, and Jews in their religion (which would be privatized, along with all other religions, in the liberal state). The affirmation by Zionism of a Jewish \textbf{national} identity thus seemed a serious threat. Even now, when all major religious streams are Zionists, there are important differences in their attitude to the role of Israel in modern Jewish life.
Zionist thinkers shared a diagnosis of a problem, and a proposed remedy for that problem. The problem was that of Jews or of Judaism itself. The remedy was a national revival, leading to a territorial base where Jews could lead Jewish public life. The political Zionism of Herzl concentrated on the solution of the problem of the Jews, mainly though founding a state where they will be a majority, and could thus guarantee that Jews there will not be persecuted and humiliated for being Jewish. Herzl believed anti-semitism was predicated on the presence of large number of Jews among the Western European nations. Concentrating most of the Jews in their own state will thus cure the problem of those few Jews who might choose to stay. Today we know that Herzl did not take into account the possibility that founding a Jewish State may raise intense resentment and opposition among the people whose land will be taken for this purpose. Thus the Jews concentrated in the Jewish state may be free of the fear of persecution and pogroms as Jews, but they may be the center of a different physical and existential threat to them.\(^{110}\)

For the spiritual Zionism advocated by Ahad-Ha-am (in today’s parlance, it would be called ‘cultural Zionism’), a Jewish state was not as crucial as it was to Herzl’s vision. He was concerned more with the robustness and prospects of Jewish identity and Jewish communities in a world where Jews, like other religious groups, underwent major changes in their life styles. The problem as he saw it was a problem of Judaism, or of the continued survival of Jewish civilization, rather than that of the Jews as individuals or groups. Herzl reached the solution of the Jewish state after he realized that Jews were not allowed to integrate even into the liberal emancipated

\(^{110}\)In his novel Altneuland, Herzl indicates that he knew that there were Arabs in Israel, and expected some opposition. He also described some radical Jewish sectarianism among the population. In his vision, however, most of the Arabs feel grateful for the benefits the Jewish state created for them, and are happy to live as equal and free citizens in it. Similarly, the Jewish exclusivist loses the election, and the state is led by liberal and egalitarian progressives.
European countries. Ahad-Ha-am wanted to discourage that preference to begin with. Ahad-Ha-am wanted a strong Jewish cultural life, which would permit a lively and full Jewish life, in all parts of the world, even for those who leave the old ways of full observance, and enjoy the ‘forbidden’ fruits of the enlightenment. Ahad-Ha-am did support the Zionism movement and the Jewish settlements in Palestine. But he saw that settlement as providing the function of a spiritual and cultural Jewish center, which may inspire Jews wherever they choose to live.

Zionism, in both its forms, may thus provide a new attitude to membership in the ‘new’ Jewish collective. For this membership, being a Jew under religious law is neither sufficient nor necessary. The critical feature is the wish and the determination of individuals and groups to join in this new effort of re-definition of Judaism. The effort must combine willingness to look critically at the religious tradition, and seek to adapt it to modern perception; or a decision to give up religion altogether. And it must reflect an awareness of, and a willingness to make a contribution to, the dynamic nature of Jewish identities. One obvious way of making this commitment is by fighting for the Jewish state. Another is by making a contribution to the cultural creation of modern Judaism, free of the full acceptance of the sacredness and exclusive force of Jewish religious law, as it was transmitted to us by generations.

Adherents of this ‘modern’ perception of Judaism and of Jewish civilization also differed in their attitudes to Israel. Some did argue that only a life in Israel, the only place in the world where there is a Jewish-Hebrew public culture, may constitute the full way of being Jewish. According to this view, a Jew who chooses to live
elsewhere, is, in important senses, less of a member of the new Jewish people than those who live in Israel. The less Israel-centered views are pleased to see Jewish communities all over the world thrive and develop, and see their growth as an important part of the commitment to maintain and strengthen Jewish modern life. The secular Israeli versions of Zionism give a special emphasis to what was central to all forms of Zionism: the revival of Hebrew and of creation of all sorts and level in this language.\footnote{It is interesting to note that this was a point on which Herzl was not the great optimistic visionary he was on other aspects. He expected people would continue to use ‘their’ languages… It is hard to see how the Israeli project could have succeeded without a shared national language. The revival of Hebrew and making it the shared language of Israel must be seen as one of the greatest achievements of Zionism.}

It is important to point out that even the ‘thin’ political Zionism, which had no explicit cultural or religious premises, required some ability to identify who belonged to the Jewish nation. The state of the Jews was designed to solve the problem of Jews, not that of non-Jews. But the characterization of Jewishness under this conception of Zionism may be, indeed must be, very open. It can be simply subjective (a Jews is anyone who sees himself as Jewish), or be based on real or perceived persecution as a Jew, or it may demand more ‘objective’ criteria.

These different attitudes and conceptions generate different senses of Jewish identities, which in turn identify in different ways those who may join the Jewish state, as well as some characteristics of that state. We can distinguish two main ways of coping with the immanent difficulty of squaring a Jewish state with moral requirements. First is the conception some ascribe to Herzl, under which the Jewish state, once founded and once a Jewish majority was established, should operate according to universalistic and liberal European principles. Another is the more
radical approach which concedes that there is a moral problem with the attempt to create a Jewish state in a territory populated by another people, but that this fact requires a willingness to share and co-exist, not a willingness to give up altogether the Jewish right to self-determination in their ancient homeland. In a way, the necessity of a Jewish state was dictated by the intensity of the Arab resistance to grant Jews any living space in the territory. Whatever the style of the attempt to defend the Jewish state, it should be clear that the mere fact that a Jewish majority was established in Israel does not in itself solve the tricky issues related to joining the Jewish people, joining its state, and regulating public culture in it. The opposite may be the case. There are deep controversies among Jews on these matters. Many groups seek to use their political power to impose their views on other groups and enlist the power of the state for that purpose. These facts create a significant threat on the strength and endurance of Israel as a state with some Jewish distinctness.

As Israel grows less and less orthodox, and the distance between its public life and a Jewish theocracy increases, large parts of the orthodox public feel more alienated from it. We notice some tendency among the orthodox to become more observant, and grow less tolerant of the implications of living in a democracy, which is controlled by non-religious forces. On the other hand, the growing pressure of the religious bloc increases the resentment and the alienation of non-orthodox Jews. As a result, their Jewish identity grows weaker, and is replaced by an Israeli identity. While Israelis feel most at home in Israel, their willingness to accept its strictures and its

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112 This was the position held by Martin Buber, who insisted that Arab consent was crucial for the Jewish community. However, once the state was founded without such consent, Buber accepted it as justified.

113 The problem is of course harder when we look at the whole unit between the sea and the river. In that area, Jewish control is applied to a large number of Palestinians not enjoying citizenship and civil and political rights, who do not have a state where they have any political self-determination.
laws enforcing Hebrew-Jewish public culture decreases. An identity problem is found also in Jews who hold humanistic commitment such as human rights for all, which is often hard to square with the differential treatment of Jews and non-Jews in Israel and its vicinity. These doubts are strengthened for those who realize that Israel will have to live on its sword for a long time. Those who doubt that this situation is either inevitable or justified have additional difficulties to identify with Israel and to tie their fate with it. These issues come to the fore much more clearly when the level of violence in the region is high, as it has been since the collapse of the camp David talks in the summer of 2000. When we add the anger at the haredim, who are seen by many as a group benefiting from the government and making it more right-wing, while not participating in the economic and military burdens of life in Israel, the potential for withdrawal from social solidarity is substantial. Some of the people who feel this way simply leave. Others do see Israel as their home, and they fight politically to reduce both the theocratic elements in Israel’s life and its Jewish distinctness.

There has always been in Israel a small Jewish group that feels that the particularistic Jewish element is insignificant both existentially and normatively. Some of these seek a connection to the land and its history, in a sort of Cnaanite cultural approach. Others see the fact they live in Israel as irrelevant, fighting to make it a neutral state governed by universal liberal principles. But most Jews in Israel live in Israel because they feel more at home in it than any other place. They feel that way

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114 This trend increases slowly over the years. A second study of the patterns of Jewish behavior of Jews in Israel reveals an increase in those who want to have civil marriage and businesses open on Sabbath. At the same time, only half of those who want these changes say they themselves would use civil marriage or shop on Sabbath. And a large majority of Jews want Israel to maintain its Jewish distinctness. Elihu Katz et al., Profile of Jews in Israel, 2002, Guttman Social Research Institute, IDI and Avihai.
because (for some) they have been born in it. But an additional factor is that this is the only place in the world where Jewish-Hebrew culture is the hegemonic public culture. Religious Jews are very aware of this, and for them living in Israel is a religious commandment. But the same is true for many non religious Jews, and even for anti-religious ones.\textsuperscript{115}

The central question then is whether Israel can maintain some meaningful Jewish distinctness and keep up its commitment to basic civic equality. In a nutshell, it seems that the state should find ways of staying away from divisive religious and ideological matters concerning identity. It should facilitate the maintenance and development of Jewish identities without endorsing officially any single interpretation of such identity. The maintenance of a Jewish cultural distinctness will be promoted if we resist the misleading tendency to present the debate between universalism and particularism, or between Jewish religious and national identities, as one between Jewishness and democracy. Non-Jews in Israel do not want a neutral, universalist state. They want a place in the public forum for their national self-determination and culture. Similarly, some secular Jews are more interested in a Jewish state than some of the ultra orthodox! Many of those who want a Jewish state, both secular and religious, also want it to be democratic. On the other hand, anti-democratic forces in Israel come from the right and the left, from Jewish and non-Jewish communities, and among both religious people and secular ones.

An additional important element is the strengthening of agreement between Jews in Israel and in the diaspora about the contribution of Israel to modern Jewish life.\textsuperscript{115}In fact, the combination of anti-religiosity and right wing politics has been quite powerful in Israel’s parliament.
This agreement must be careful not to alienate any Jewish creed that enjoys broad support among Jews, and to facilitate the development and growth of many forms of Jewish life styles and identities. Such an agreement is crucial to the long-term existence of Israel as a state with a Jewish distinctness, serving as a spiritual and cultural center for Jewish communities in the world, and benefiting from their support.

Let me now turn to a sketchy discussion of some central issues.

2. Some Central Issues

A. Equality and Integration

I mentioned above that the civic equality of non-Jews and of non-Zionist ultra-orthodox Jews is far from being full and easy. When we extend our view to check further than the formal features of democracy, and look at civil society in Israel, it becomes clear that feelings of civic solidarity and cohesiveness among segments of society are quite fragile. This has become more apparent after October 2000, when the rift between Jews and Palestinians in Israel deepened with the growing violence of the conflict between Israel and its neighbors. These feelings of hostility and distrust are not a very good background for a stable plural democracy.
There may be a debate about the duty of the state to act actively to reduce inequality between segments of the population. But there can be no argument that the state and all public bodies must be committed to the principle of non-discrimination between citizens of the state. Discrimination is not always easy to prove, but the general facts of the matter at times speak for themselves. There are very large discrepancies in the level of public funds allocations to different groups.\textsuperscript{116} It is one sign of progress that in recent years, NGOs and state authorities analyze these differences in public allocations. They are addressed by the state controller, and brought to the attention and the decision of the HCJ. A major element in this process is the growth of civil society and litigation bodies specializing in some of the weaker segments, notably Israeli Arabs. These processes of scrutiny reveal the complexity of the situation. Often, the picture after more detailed analysis of the data is more nuanced than the one presented by protagonists.\textsuperscript{117} Even when the data does suggest systemic discrimination, the way to move forward is not always clear. In some cases, the documentation is sufficient to create change. But in most other cases, the state seeks to justify, or at least explain in ways avoiding its responsibility, the large gaps. In addition, these matters often require budgetary allocations and decisions about social and economic priorities over time. These are not usually matters that courts or bodies invoking principles are authorized to make.

\textsuperscript{116} Such differences re conceded as a problem in Israel’s first report to the committee dealing with social, economic and cultural rights. In January 2002, Human Rights Watch published a very critical report about differential treatment in education. While some of the differences documented there may be explained by different levels of parents’ investment, the gaps are too wide to be ignored. 

\textsuperscript{117} An important case in point are claims about limited access of Arabs to land in Israel. It is often said that the Arabs are about 20% of the population, and they have in their ownership only 3.5% of the land. This is a very misleading datum. Only 7% of lands in Israel are owned privately. 50% of this privately-owned land belong to Arabs. Use of land, including use for residential apartments, is based on long terms leases. When the areas of settlements are examined, Arabs control and use more than 20% of the developed land in Israel. This in itself does not say there is no real problem. There is. But to analyze the situation properly, the facts need to be sorted out first.
Most relevant to our subject is the fact that in some of these cases, the differential allocations are explicitly justified by invoking the need to strengthen Jewish aspects of the state, or security needs stemming from this nature of the state. In other cases, the charge of discrimination is handled by the claim that the resources used for the activity are not state resources, but funds collected by Jewish organizations and earmarked for Jewish purposes. 118

The factual situation should indeed be examined carefully and objectively. It is crucial to establish, as a basis of public discussion, a body of information documenting the present realities and processes over time. The state and its institutions should be dedicated to the welfare of all citizens and residents. Differences of religion or national origin and affiliation, as well as political opinions and affiliations, should not be relevant reasons to justify different treatment by state organs. Moreover, the state has an active interest in reducing feelings of discrimination or alienation among major groups in society. Some facts stand out so clearly and blatantly, that they require an explanation and action even before these studies are completed. One instance is the fact that in over 50 years of Israel’s existence, hundreds of Jewish new settlements of various sorts were founded, and the only Arab settlements built were Bedouin towns, designed to enable regulation of land titles and living arrangements in the Negev and Galilee. The rate of growth of the

118 This claim is closely related to the history of Israel: before the state was founded, all Zionist activities were conducted and financed by voluntarist Jewish institutions, dedicated to the cause of the Yishuv. Once the state was founded, it accepted obligations to all citizens irrespective of national or religious origin. At the same time, however, the state was defined as a Jewish state, and Jewish organizations like the Jewish agency and the ZWO received special legal status under the law. They continue to raise money, conduct various educational activities, and promote Jewish solidarity among Jews. Arabs indeed cite the fact of the semi-official status of Jewish organizations in Israel as one of the major signs of their exclusion and the ‘racist’ nature of the state. Indeed, it seems that it is better to draw a distinction between governmental activities, which should all be subject to a strict non-discrimination principle, and between Jewish civil society activities, which may legitimately be directed at Jews only.
Arab population is quite large. It grew from 150,000 in 1948 to almost a million in 2002. The absence of orderly development meant that quite a lot of Arab building for residential purposes is illegal, and that Arab villages and towns do not enjoy the infrastructure and the support in industry and employment that a more well-planned development would have secured. This is an issue calling for an urgent re-thinking and long-term planning. It is crucial that Arabs themselves participate in the stages of planning and construction. Lower allocations for education and other services were systematically documented. A petition concerning a great discrepancy in allocations for graveyards among the different religious communities resulted in a rare decision by the HCJ to demand a revision of the budget, combined with a general criticism of the lack of transparency in budget structure, which makes tracing allocations extremely hard.

The representatives of the ultra-orthodox also claim that they are discriminated against in terms of allocations. However, with them many in the Jewish population feel that, first, they in fact get extra allocations by all kinds of low-visibility ways; but, secondly and more important, that they get much more than is justified by their contribution to the GNP in Israel. Many feel that people who choose of their own will to limit their involvement in the work market should not be financed so generously out of the tax money of those who do work.

Various other groups that claim they are discriminated against are Jews of oriental origin and the non-orthodox communities in Israel. The latter have started to take these grievances to the court. These petitions resulted in some strong affirmation of
the commitment to non-discrimination and religious pluralism. These, in turn, deepened the criticism of the HCJ among parts of the orthodox establishment.

I want to repeat: A systemic discrimination, or even a well-established sense that there is systemic discrimination, is dangerous to a stable and inclusive democracy. This is especially true when the groups who feel discriminated against converge with deep rifts in identity and life style. Under such situation, the sense of discrimination may well become explosive. The situation become even more dangerous when there is a convergence between social and economic weakness and lack of political power. Here, the Arabs in Israel are unique. Their level of exclusion from political power and from representation in the top echelons of the economy, civil service and academia is unique. It is not surprising that since October 2000, the most dangerous deterioration in feelings of civic solidarity has been between Jews and Arabs. Any responsible government should attend to the gaps between segments in the population and seek to reduce them. A reality and a show of non-discrimination, and in some cases even active action to mitigate gaps, may be policies required by democracy itself.

Despite the enormous importance of increasing civic solidarity and a sense of cohesion among citizens, it is too often assumed that the road to these goals is simply increasing ‘equality’ and non-discrimination. Moreover, the neutral and individualistic presuppositions of much liberal thought assume that equality also requires full integration, so that members in society cannot be excluded from places or activities on the basis of race, religion or gender. I want to devote the remainder of this section to the study of the complex relationships between non-discrimination,
equality and integration. The problem is shared by most modern societies at various levels. It is of great importance in Israel, where the differences between groups often come with very strong patterns of separation in residence and other contexts.

In the history of thinking about this issue, the common wisdom was that segregation and apartheid are merely means of perpetuating inferiority and discrimination, so that the struggle for equality must be combined with a struggle against segregation. In the now famous terms of the American Supreme Court in Brown, rejecting the previous ruling in Plessy v. Ferguson, ‘separate cannot be equal’. It followed that separate systems cannot be defended as constitutional and meeting the requirement of ‘equal protection of the law’, even if all tangible aspects of these systems are indeed equal. The forced segregation, it was claimed, in itself creates distinctions, a color of inferiority or superiority respectively. There is no way to achieve a sense of equal dignity if people are relegated into separate and distinct communities.

Integration is indeed a way of effectively strengthening social cohesion. It guarantees that class differences will not be strongly related to rifts of religion and ethnicity. Integrated communities work against the tendency to demonize others, and to treat them with ‘class-based’ emotions of suspicion, fear and hate. Further, in the history of mankind apartheid was indeed used as a technique of discouraging assimilation, and of permitting the easy identification of ‘others’ for various purposes. The sentiment against enforced separation is therefore easy to understand and to justify.
Israel has a very high level of segregation between its various communities. Jews and Arabs usually live in different settlements. In some cities, the population is mixed, but usually the neighborhoods are separate. It is extremely rare to find integrated neighborhoods or buildings.\textsuperscript{119} Haredim also tend to live in their different communities. One city in Israel has a large Haredi majority (Bnei Brak), and a few Haredi towns were built beyond the 1967 lines (Upper Beitar and Immanuel). Even Zionist orthodox Jews now tend to live in their own neighborhoods. In addition, absorption policy means that some cities and regions have a large proportion of people coming at the same immigration wave and from the same place. So we have islands, mainly in the periphery, of people from Moslem countries. And we have islands of new immigrants from Ethiopia, and of Russian-speaking immigrants.

These patterns of segregation are the result of a combination of government decisions and incentives, social pressure, the wishes of the relevant communities, and the natural results of differences in culture and life style. As in other places, the class difference is a major factor in these patterns of segregation, but these are poften not mentioned. What is mentioned is the convergence between national origin, religious life style and spatial separation.

There are no laws in Israel prohibiting people from living or working where they please on the basis of ethnic origin or religion. But there are various provisions and practices which make freedom of movement and freedom to choose where to live more limited. Thus it is to be expected that we may encounter tensions between

\textsuperscript{119}One neighborhood in Jaffa, and a few in Acre and Haifa, are the only places where Jews and Arabs actually live together. In addition there is Neve Shalom/wahat-el-salam, a small community settlement near Jerusalem, which is a settlement ideologically founded to house Jews and Arabs together on the basis of full equality.
claims of individuals (or groups) to be admitted, countered by claims that the group should have the right to determine its membership. Often, there is an internal debate between group themselves, especially minority groups. Some members wish to integrate into the majority culture. Others seek to gain equality between the groups, but to keep patterns of separation to protect the distinct identity and solidarity among group members. This is indeed the case in Israel, along many of the lines of tensions between groups. To the ethnic and religious rifts we have been discussing we need to add, in this context, claims for equality and integration of women.120

It is important to see that the complexity of these issues suggests that neither democracy nor even the ideal of equality, in themselves, dictate specific arrangements. In general, the wishes of communities and individuals should be respected. However, sometimes these wishes may conflict. Human rights, in themselves, are also ambiguous. Individuals have the right of freedom of movement, and can claim that they should not be excluded from a settlement on the basis of race or ethnic origin (or marital status or any other feature). On the other hand, groups have the right of freedom of association, including the right to determine their membership and exclude others from it. In human rights jurisprudence, we often distinguish between public and private contexts. Discrimination on the basis of ‘suspect’ characteristics is prohibited in public policy, but is not seen as

120Claims of discrimination and exclusion by women never relate to residential areas. This is a sense in which segregation and exclusion of women is always different from that of religious or ethnic minorities. Women, in fact, sometimes want to protect their privacy, as in Woolf’s essay A Room of One’s Own. In politics and the workplace, however, as well as in the military, women are often excluded. The exclusion and discrimination of women is a universal problem, and is not special to Israel or to the tension between Jewishness and democracy. Nonetheless, the issues are not totally independent of each other. At least a part of the problem of women in Israel (Jewish and non-Jewish alike) stems from the religious monopoly over matters of personal status, and the traditional nature of large parts of civil society. It should be stressed, however, that religion and feminism are not necessary enemies. Relations between the sexes in religious communities are very different, and many limitations on women exist in secular societies as well.
discrimination in many private contexts. When it was realized that a lot of actual discrimination (in the workplace and in housing) was in fact performed by private agents, the prohibition over exclusion was often extended to these agents as well. At the same time, laws hesitate to impose duties of inclusion on groups whose social identity is threatened by such inclusion. Notably is the family, but in the same category are other groupings.  

It is interesting to note that these issues have only started coming to the courts very recently. Laws in Israel have become more affirming of duties of non-discrimination and non-exclusion, and the rhetoric of the court has emphasized the importance and centrality of the principle of non-discrimination in public life. The 1992 ‘constitutional revolution’ has also made a contribution, because it encouraged a new critical appraisal of old arrangements.

In reality, the relationships between equality and separation in Israel are complex. As we saw, patterns of separation are deep and extensive, and they more or less converge with the basic rifts we have been studying. At the level of rhetoric, equality does not recognize limitations through legitimate exclusion. Equality should be, on its face, full ‘blindness’ towards differences of national origin, religion, gender or sexual orientation. Some laws, such as the law of Equality of Opportunity in the Work Market, or the Law concerning access to public utilities, explicitly impose a legal duty of non-discrimination. However, these laws are not enforced very effectively. In fact, the laws have not caused significant increase in the number of Arabs or women in high civil service positions. There is a growing tendency to allocate certain

121 In states that have laws against racial discrimination in housing or the workplace, there are usually exceptions for one’s own house or for small businesses.
residential areas to distinct groups (such as Jews, Arabs, haredim, or even smaller sub-groups). Often, settlements or neighborhoods are designated for specific private groups, who have their own rules of admission.

The gap between the legal state of affairs and the reality of Israel has been obscured for a long time by the fact that different communities often live in different places, and there is very little friction between them, and practical claims for inclusion are therefore rare. When individuals seek to break these lines and go to places from which they have been excluded, these moves often encounter opposition from both the group they want to join and the one to which they belong. A few such cases have attracted public and legal attention in recent years. The first concerned a petition by Arab children to be admitted into the Jewish public school in their neighborhood. Other Arab families felt this attitude would weaken the claim of Arabs to have their own quality education. Many Jewish families objected, expressing the fear that if one such request is granted, the school will soon have a large number of Arab students, which will change the characteristic of the school, and will prevent them from giving their children Jewish education. The court pressured the parties to agree that criteria of admission will be ‘blind’. However, the ambivalence of the parents did not end. In fact, the number of Arab students in the school did grow so that they required some recognition, within the school, of their religious and cultural needs. Jewish parents objected to making the school either neutral or bi-linguistic and bi-national. As a result, there are now two public schools in the same area, both called by the same name, one Jewish and one Arab. Hopefully, the schools will indeed be equal in facilities and achievements, and will allow each group the possibility of quality

\[122\] For a detailed account see Gavison (2000).
education, which is responsive to their religious, linguistic and cultural needs, together with a proximity, which may permit many aspects of integration.\textsuperscript{123}

A second case attracted much attention, but has not changed the situation much. An Arab family sought to be admitted into the Jewish community-settlements, controlled by an admission commission, of Katzir. Katzir is located in an area densely populated by Arabs, and it offered standards of living higher than those available in many of the neighboring Arab towns and villages. The Arab family’s candidacy was rejected based on its being Arab. It turned to the court. For years there was an attempt to find a practical solution which might make a decision mute, but when these attempts failed, the HJC in March 2000 affirmed Israel’s commitment to equality and non-discrimination, and stated that these made the exclusion of the candidates because of their national origin illegal.\textsuperscript{124} The court, however, did not order the Katzir committee to admit the petitioners. To date, two years after that landmark decision, petitioners are still trying to materialize their wish to live in Katzir. Again, both Jewish and Arab communities in Israel were ambivalent. Many in both communities acclaimed the decision. But some Jews saw it as the end of Zionism, denying legitimacy to the idea that Jews can settle the land. Some Arabs criticized it as perpetuating the differences of levels of housing between Jews and Arabs, permitting rich Arabs to quit their own communities, and obscuring the nature of the predicament

\textsuperscript{123}There are three school in Israel in which there is an attempt to cope with integrated education for Jews and Arabs in the same school. All are experimental. The oldest is the Neve Shalom school, and there are two bi-lingual schools in Misgav and in Jerusalem. Only the former is situated within a mixed settlement, and inspired by its ideology. All three schools are based on voluntary enrolment, and are struggling with the complex issues of teaching Jews and Arab children about the history of the conflict. The task becomes especially daunting when the conflict is not only history, but a painful and troubling present.

\textsuperscript{124}Qaadan v. ILA et al.
of Arabs in Israel by undermining their claims to be recognized as a national minority.  

Problems also exist in the relations of secular and religious, mainly ultra-orthodox Jews. Secular Jews fear that ultra-orthodox Jews may move into their neighborhoods and change the nature of the local life-style, thus forcing them away. Such tensions were in fact created in some places, and there are some attempts to use legal means to fight against these dangers. On the other hand, ultra-orthodox families are offered reduced-rates housing. A secular group petitioned the court and requested that they be allowed to purchase houses in the same place under the same conditions. The court sanctioned the decision to designate a special neighborhood to ultra-orthodox families, but prohibited the continuation of selling these apartments in reduced parts. Similarly, when a Jew wanted to buy a plot in a Bedouin town, the court decided that the wish to create autonomous homogenous communities for them was legitimate and should be upheld.

Israel’s short history even includes a process of attempted integration that is now conceded to have been a mistake. Israel was founded by European Jews, who were active Zionists. Many of these Jews were rebelling against religion and the ‘old’ life style of their parents. In their zeal to build a new Judaism, they wanted to incorporate into their life style the waves of immigration that came from Moslem countries. This was the period of the ‘melting pot’, in which Israeliness meant assimilation into the

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125 A similar ambivalence was expressed by Arabs in Israel when two Arab women petitioned the court through ACRI, to be admitted into the national service programs. The state conceded the petition. Some Arabs applauded this willingness to integrate Arab women, but many saw this step as dangerous. They feared it might indicate a willingness to serve in the Jewish state. And it seemed as a way to break away from the limitations of traditional life style in Arab communities. Both fears animate the intense opposition among Haredim to national service by young women.
‘pioneering’ spirit of the Founding generation. In a way, the new immigrants tried to assimilate. They did feel the pioneers were a role model, and wanted very much to be able to emulate them. However it soon turned out that the mission was impossible, unkind and unwise. No one can shed their cultural heritage. The new immigrants were asked to assimilate into a very different culture. They were denied the dignity of their own heritage, and were not easily admitted into the European culture of the Yishuv. Many concluded that waves of immigration should be offered a more balanced and gradual possibility: a way of maintaining internal structures of family and authority, bonded by cultural heritage, and an invitation to join into the multicultural Israeli experience. This attitude suggests a more nuanced approach to the equality-cum-integration complex. The commitment to equality should be full, integration should be encouraged when it is voluntary. The maintenance of separate communities for purposes of cultural support should be facilitated, while ensuring that the various communities share a core of activities and commitments with other citizens. It seems that the absorption of the Russian immigration was indeed based on these lessons, although these immigrants too complain of various grievances. It should be noted that many of the immigrants of the 1950’s have not yet overcome the residues of resentment and feeling of discrimination that were generated in them by the patterns of absorption used when they arrived.126

Tolerating and even encouraging a certain level of separation and autonomy may indeed be called for in some contexts. But in most cases, the picture is more complex, because the wish for separation comes from a mixture of a wish by the weak group to

126Dealing with waves of immigration is not an issue unique to Israel. Most Western countries have received major waves of immigration, and in many of them the problems of assimilation and discrimination loom very large. Some of these problems ease with time, while others in fact intensify. The simple model of full assimilation into the host-country majority does not seem to be working for many groups and many countries.
maintain culture and identity, and a wish by the strong group to maintain privilege and perpetuate and legitimate discrimination. Under these circumstances, the way to promote equal dignity must respond effectively to both these aspects. Legitimating mechanisms of exclusion may in such cases be very dangerous. It will add insult to the injury of segregation. At the same time, one must not choose mindless enforced integration. This might be both counterproductive and useless. The remedy should be tailored to the details of the situation.  

Many have taken an exception to my presentation of this issue. They say that, despite my protests, I am legitimating tendencies of exclusion, segregation and apartheid, which presuppose hidden racism, and are inconsistent with democracy and with human rights. I disagree. There should be a presumption in favor of integrating members of weak groups. But the presumption can be defeated, and there are circumstances when a regime of separation may be more conducive to stability, welfare and human rights themselves than a sweeping commitment to forced integration. Many groups now insist on both equality and their right to maintain their different culture and way of life. The combination of the two may well require respect for autonomy, which may in turn justify some patterns of separation and exclusion. The burden of justifying exclusion is always on those seeking it, yet it is not always the case that it cannot be lifted. Not every group seeking to keep its own borders in some contexts is racist. Not every attempt to lead a closed community life is sectarian and undesirable. Keeping a group’s distance may have legitimate reasons, which should be respected. The human rights tradition itself does just that when it recognizes aspects of freedom of religion and freedom of association. So we need to  

127It is important to study critically the experience of the US with integration between white and black after the 1954 Brown decision. The picture seems to be mixed on many levels. See Gavison 2000, and Rosenberg, The Hollow Hope.
check each case and each type of claim of exclusion on their merit, and reach a judgment based on the situation.

It is important to insist on the right of people not to be discriminated against. But that right presupposes a picture of entitlements. People do not have the right to go anywhere or to join any group. Therefore, it is not always the case that preventing them from joining any group or club, on the basis of their national origin, religion or gender, is illegal or immoral. It is impossible to generalize the rules governing this conflict between freedom of association and the right not to be discriminated. The smaller and more intimate the group – the stronger its freedom to associate and exclude. The more central the function of the group to one’s welfare, and the more serious the implication of not being admitted to it or to similar groups – the weaker the claim to exclude. Often, the debate about the right way to go is not dictated by rights, and should be a matter of deliberation within the relevant communities themselves.

All this probably sounds very abstract. Let me return to some of the relevant issues of equality and integration within Israeli society. In will start from the very end of life, because people have to struggle with these issues not only during their lifetimes. There are those who interpret Jewish law to demand that Jews will only be buried next to Jews. For them, having Jewish cemeteries, where only Jews are buried, is a matter of freedom of religion. Furthermore, their definition of ‘Jewish’ is, as we saw, more restrictive than many. Some orthodox voices challenge this reading of Jewish law, but the strict interpretation seems to be accepted by most of the religious establishment in Israel. At the same time, most of the urban cemeteries in Israel are
religious, and controlled by religious establishments. This has always been a serious problem of principle, but in recent years it has become a serious practical problem, because of the great increase in the number of non-Jews who came to Israel and live within Jewish communities. The issue becomes dramatic when we are talking of large numbers of people involved in a sudden event, such as the suicide bomb in Tel Aviv that killed two dozens of youngsters, mostly of the FSU. In Israel, burial is a service financed and provided for by the state (through religious organs, which administer the cemeteries). There is no doubt that this service should be available to all, irrespective of religion or ethnic origin. But does it have to be provided in ‘integrated’ or ‘neutral’ cemeteries? Should the state ‘force’ the religious bodies responsible for the cemeteries to bury people against their reading of their religion?

In 1997, Israel enacted a law that authorized the creation of ‘civil’ cemeteries. However, to date, these cemeteries are few and far between. The families of non-Jewish dead, who do not belong to another community in Israel having its own cemetery, must find ‘creative’ burial solutions. These may often take time, and impose an additional emotional burden on those who have lost their dear ones. It seems, however, that the solution is not to force religious bodies to bury against their religion, but to make sure that there is no religious monopoly over burial. Non-religious cemeteries may for a long time be the exception rather then the rule in Israel, but the solution is not to force them to bury all.¹²⁸

Burial arrangements, dramatic as they may be, do not affect the life people lead. Most arrangements of separation vs. integration do affect people’s life. Take the issue

¹²⁸In many countries, burial services are privatized. That gives individuals the freedom to choose the ceremony suitable to them, and the market sees to it that all needs are effectively met. It is interesting to note that in many countries, cemeteries show a mixture of integration and separation by religious community. This is the case even in countries upholding separation of state and church.
of conversion, which I discuss further below. Should a person, who converted to Judaism by a Reform court, be considered Jewish by the orthodox community? Again, we can look at this question as one of a conflict between the right of a person to his freedom of religion, and the right of a community to define the rules of membership in it. The converted person wants to be Jewish. He has the liberty to so choose. He is then disappointed to find out that some in his chosen religion have different rules of membership. He, and the community converting him, feel their freedom to define their religion is inhibited. The orthodox community, on the other hand, feels this person, and those converting him, are distorting Judaism. Clearly, this is not a question for the state and its courts to resolve. Decision of rules of membership and how to meet them are internal community decisions. Each of the communities seeks to see itself as the authoritative interpreter of Judaism. But it seems that there is now a plurality of Jewish religious visions. Each community has the power to decide its own rules, and it cannot demand that the other groups will accept them. The situation in Israel is more complicated, as we saw, because the relevance of the determination that a person is ‘Jewish’ is not limited to internal community matters. This determination is relevant to matters such as Return, personal status, burial and registration. The orthodox establishment does not protect the borders of its own religious community. It seeks to maintain its monopoly over the definition of ‘Jewish’ for all state purposes. This is unacceptable. It follows that, under the present reality, the state needs to recognize the plurality of definitions of ‘Jewish’, and define the way this identity is relevant for all legal contexts so that all people are provided basic services consistent with their freedom of religion. At the
same time, they should allow the communities to maintain the mechanisms they need for maintaining the levels of separation required by their interpretation of religion.\footnote{It would be a serious problem if Judaism, under any of its interpretations, required an exclusion which cannot be defended by moral values. Some argue that there are such commands in Jewish law, but I think that these claims are contested, and have not arisen in Israel.}

Let us now return to the situation in Qaadan: Should the court permit a housing private association to prevent the admission of an Arab family into a ‘Jewish’ settlement? All our intuitions would say ‘no’. These exclusions seem to be both immoral and unwise. But does it follow that, under Israeli conditions, people could not choose whether to live in a small community settlement that is Jewish, Arabic or bi-national? Can it be denied that life in any of these is very different from life in another? And why shouldn’t people be allowed to choose their living environment? We also saw that some of the Arab groups resisted the integration solution, seeing it as a mechanism for separating the richer and more educated classes from the Arab group. It seems, therefore, that the non-discrimination principle could be satisfied by allowing Arabs and Jews to mix freely in larger cities, where they will probably prefer to live in their own neighborhoods. Small villages, which can only support one school and one community center, should probably be defined from the outset as either Jewish, Arab or mixed. No settlements should be totally homogenous, but the principle of a given public culture should be respected. This would require, of course, that adequate residential solutions are made available to Arabs in their own villages and towns. This may be a better focus for the struggle for equality. These principles were adequate even before the steep rise in violence between Jews and Arabs since October 2000. They seem all the more called for against the background of the present situation. Thew hope is, of course, that this situation is temporary. But the
levels of distrust and mutual fear are now so high that most people will feel comfortable among their own.

We should recall that issues of integration and separation exist along all the main divides and rifts in Israeli society. We saw the legitimacy granted to Haredi cities. The question whether secular groups may prevent Haredi families from moving in and changing the nature of the community is still undecided. There is also controversy about gender separation in various places. While the IDF started a policy of integration between men and women, some religious leaders protested recruiting women for combat service in the same units with men. There has been a haredi demand that buses serving their cities would have a separation in the buses between men and women (of the kind that laws required in Plessy v. Ferguson). There has been some public debate whether these requests or demands should be met. I repeat – it is important to analyze the different types of case on their merits, without adopting sweeping solutions and absolute principles. Equality is a complex ideal. Even non-discrimination, a simpler and stronger ideal, is not a simple one, and there may be many ways of implementing it. Often, it is not best served by ‘blindness’ to all differences, or by forcing all individuals, irrespective of religion, national origin, culture, gender or life style, into the same frameworks.

One cannot leave the discussion of equality and integration in Israel without dealing with military or national service. We saw above that this is one of the issues reflecting absence of social cohesiveness of haredim and Arabs. For the others, mandatory military service is one of the strongest assimilative mechanisms into Israeli society. It is a way of acquiring full membership, and provides the kind of
networking that may be crucial for one’s life prospects.\textsuperscript{130} The situation in which two large groups in society, each of its own reasons, do not participate in the burdens of life in that society, is a sure recipe for resentment and anger on the part of those who do serve. \textsuperscript{131}

Again, the analogy between Arabs and the ultra-orthodox is not complete. The present increase in violence highlights the difference. The emergency situation and the vulnerability of Israeli civilian population to suicide bombs is shared by all Jews (in some of the events, Arabs too were hurt). In the conflict, it is clear on what side they stand. The problem is much more complex for the Palestinians with Israeli citizenship. Israel and its army are acting against their people’s struggle against the continued occupation. It is extremely hard for Arabs to decide their identifications, and it is hard for Jews to believe that they prefer their citizenship to their national solidarity. Israeli Arabs have not often participated in the violence – but they have been reluctant to condemn even suicide bombings in bars and restaurants.

The long mandatory military service in Israel (three years for men, two for women, with an obligation to extend service for jobs requiring special training) is required by the present political reality of the region. It may not be realistic to require military service for both Haredim and Arabs. But the present situation of an exemption is not the only alternative. Israel should consider seriously the requirement of a mandatory national or civic service, with military service being a primary, but not an exclusive way of meeting this civic obligation. It seems that both Arabs and the

\textsuperscript{130}One of the reasons women are less represented in many high political and civil service positions is related to the fact that they do not serve in the kind of units in which this ‘bonding’ is created.

\textsuperscript{131}Indeed, 80\% of the Jewish population in Israel finds this situation unacceptable: Profile of Jews in Israel, 2002.
Haredim object also to a mandatory obligation of national service. In part, they do not feel a part of the ‘nation. In part, they do have the fear that such service may create very strong pressures towards assimilation into the secular Jewish-Hebrew culture. The question of granting autonomy to different communities or to force integration into national service frameworks thus arises again.

There is a way of accommodating the legitimate fears of the two communities to some extent by permitting the national service to take the form of community service within their own communities. This arrangement may be more acceptable to these communities, which is a great advantage. It does take away a large part of the feeling of inequality in sharing burdens. And it tolerates the fact that there are different levels of identification with the state. On the other hand, separateness in most relevant life frameworks may encourage the demonizing and distancing which may endanger social cohesion. We need to find a good balance between the wish of various groups to keep their autonomy and distinctness, and the need of the polity to maintain some sense of civic solidarity and affiliation.

B. Education

It is impossible to over-estimate the importance of public education as a way of imparting common values. Children’s right to free education is now universally acknowledged. Parents and states must cooperate in providing it. Schooling and education are the ways to acquire the basic skills and the capacities, which permit the integration, social and economic, into society. Equality of opportunity in education is recognized as a condition-precedent for any meaningful equality of opportunity.
Having said this – ways of providing education and meeting the obligation to respect the right to education may vary. Many of the things said above about equality and integration are true here as well. The importance of education both to strengthening one’s commitment to democracy and civic equality, and to the maintenance of a cultural identity, Jewish or otherwise, justify a special discussion of this subject.

There may be democratic system in which the state operates, and allows, only a single public education system. Naturally, this system will be general, open to all, non-religious and civic. In some systems, such as the German, all children must attend such school at least up to a certain age. Most countries, such as France and the US, permit the parents to discharge their duty to provide schooling to their children in various ways. These may include private schools, or even home schooling. Private schools may be religious, or ideological or just purely elitistic. Needless to say, all systems permit parents, after the hours of school, to add private tutoring according to their preferences, ability and interest. The idea of a strong system of public education is an important element in the attempt to inspire all future citizens with some shared values and commitments. Common schools are also the simplest way to secure equality of education. However, mandatory common schools may create a serious problem in societies where issues of the proper education of children are deeply controversial. States who enjoy a stable and broad shared civic affiliation, combined with a willingness to privatize particular cultural attachments, may be satisfied with a system of common schools complemented by private additions. Support for this kind of a system grows if individuals and groups are interested in a strong social cohesion and integration. If these preferences are weak, however, this kind of an arrangement is not likely to be acceptable and stable.
The educational system in Israel is quite complex. Within the public schools system there are three main groups: general public education, which is Jewish-secular; religious public education; and Arab public education. In addition there are ‘recognized schools’, which are semi-private, and financed at the rate of 80% of the public schools; and ‘exempted’ schools, mainly ultra religious, which are not subject to any supervision, but are nonetheless financed by the state through a variety of means. All by the exempted schools are subject to the ‘goals of education’ declared in The Public Education Act 1953. Originally, these goals included explicit reference to Jewish history and love of the Jewish people. Another section in the law provided for adaptation for non-Jewish schools, but this provision was not implemented. In 1998 this section was amended and it now does not include a specific reference to Jewish values or culture. Rather, the section talks about education to ‘love one’s people and country’. Nonetheless, the differences between the types of schools are rather big, both in terms of curricula and in terms of inculcated values.

The ultra religious ‘exempt’ schools are completely autonomous. Their students are not expected to pass national matriculation examinations. It appears that they do not spend much time on ‘general studies’. Most of time is devoted, for boys, to religious studies. The public schools are subject to both administrative and academic control by the state. The public religious system has its own academic community, and it has autonomy in its demands from teachers and staff people. While these schools do take non-religious students, if they are willing to participate in the school ceremonies and prayer, they refuse to take staff people, who do not observe. Within the religious system there is a structured tension between religion and democracy, as
well as between religion and pluralism. All the public schools systems aim at bringing their students to matriculation, but only about 45% of the students do achieve this certificate. The rates of dropping out vary greatly for different parts of the system, with Bedouin heading the list. In curricular terms, there is a great asymmetry between the Jewish and the Arabic ‘streams’. While all Arabic public school teach their students Hebrew and Hebrew literature, as well as some Jewish history, most Jewish students are not exposed to Arabic or to the history of Arab culture. In the last decade, a debate has been conducted about the way public education in Israel transmits to students the history of the conflict between Israel and the Arab world. Some argue that in the Jewish system, the teaching of history became ‘neutral’, omitting the context of the 1948 war, and stressing the problem of Palestinian refugees more than that of the Jews seeking to build and defend a homeland. In the Arab sector, on the other hand, the official history is silent. As a result, the narrative adapted in it is one of dispossession and destruction. Not a sure recipe for success in reaching a reconciliation between the two peoples claiming the same land as their homeland. The difficulties are dramatically illustrated by the experience of the few schools committed to Jewish-Arab education, such as the ones in neve Shalom and Misgav in the Galilee. These schools do a lot to counter the tendency to demonize the ‘other’, especially when the other is also seen as a threat. They have not, however, made a choice between an integrated narrative and two distinct ones. Either choice may have its costs and its advantages. But the Israeli educational system has let its segregation lead it to avoid this hard issue, thus living in the worst of all worlds.

In the religious educational systems, we see the ambivalence between democracy and religion very strongly. This comes to the surface most acutely when we get to the tension between the demand of equality and non-discrimination and the religious commandments on sectarianism and inbreeding. The situation becomes even more complicated when the religious prohibitions on inter-marriage are applied to those who see themselves as Jews, but are not recognized as such by orthodox religion. The way the religious-public schools deal with these tensions is not uniform. The picture gets to be even more complex because a large part of religious education is given outside the supervision of state authorities.

This ‘private’ religious education is financed by the state, but the state has no power to control its curriculum. This includes mostly Jewish studies, with no attention paid to skills to help the student integrate into a democratic community or its labor force. Moreover, there is a tendency among religious schools, Zionists as well as ultra-orthodox, to give growing attention to Jewish studies, and to increase the level of mandatory separation between girls and boys in the schools. At the same time, the number of religious youngsters attending elite ‘public schools’ of the general stream has decreased.

In recent years, the ministry of education has been controlled by ministers coming from very different ideological bases. During the years of the Rabin-Peres (1992 to 1996) and the Barak (1999-2000) governments, the ministry was controlled by the Meretz party. During Netanyahu’s government (1996-1999) it was headed by the mafdal (NRP), and under Sharon the ministry was given to Likkud’s Limor Livnat. These changes have meant, among other things, that there have been many changes in
rhetoric, but it is not clear that any serious changes in policy could have been implemented. In the meantime, the general level of Israeli public education has deteriorated. Two public committees have looked at the situation of public education. The Shinhar report recommended ways of strengthening Jewish education, religious and cultural, in the public schools. Some mechanism for implementation was founded, with unclear results. The twin report, named after its chair Kremnitzer, which recommended strengthening civic and democratic education in all parts of public schools in Israel, has not received the kind of long-term political or financial support its implementation would require.

I am afraid the state of the school system in Israel is a serious systemic failure. It reflects a serious and unjustified surrender of a crucial tool for strengthening the shared commitment to civic education and democratic ideals. The cleavages in Israel are deep and dangerous. Many of them get deeper and more dangerous with time, especially since the eruption of violence in October 2000. These conflicts are not going to just disappear. The wish to remain parts of the system may become weaker on the part of some of its sectors (especially the Arabs). These tendencies may be countered to some extent by an effective educational commitment to a candid assessment of the situation and working together towards a shared life, despite the complexity of the background. Unfortunately, the schools system often communicates the opposite goals. It is unlikely that we will find the willingness to make the compromises needed in order to live together in Israel among a population which grows up in its separate schools, which celebrate distinctions and differences, and legitimate deep differences in both burdens and rights.
The Jewish-Arab divide is hard and complex. I argued above that the Jewishness of Israel can be defended despite the heavy costs it extracted from Arabs in the past, and will continue to impose on them in the future. It is impossible to expect that Israeli society will have the tools to deal with these complex issues when its school system systematically avoids a critical appraisal of the topic, by either Jews or Arabs. We have in Israel generations of Jews who have not heard about the significance of the 1947-49 war to the Palestinian community. They have not heard about the fact that hundreds of Palestinian villages were destroyed, and that more than a half a million Palestinians had to leave their homes and were not allowed to return. They have not heard of the long years of military administration, and are not aware of the systemic gaps in welfare and allocations between Jews and Arabs in Israel. The Arab citizens of Israel, on the other hand, are taught in the schools neither the Naqba nor the historical background to it, including the rejection by the Arab leadership of the proposed partition plan and the establishment of two states, Jewish and Arab, between the sea and the river. Neither Jews nor Arabs are therefore prepared to consider the situation and accept political solutions, which will effectively respond to its complexity. The failure of the educational system is but a reflection of the failure of leadership of all sectors to create the background conditions that might facilitate the continued existence of a stable Jewish democracy in Israel.

It is hard to know what led, historically, to the structuring of Israel’s school system as it is structured. Maintaining the autonomy and separateness of the Arab school system seemed rational due to the differences in language and the wish of both communities not to assimilate. It also permitted, in the first years, a more effective supervision of what may be seen as subversive elements. Not enough was done to
make sure that this separateness did not generate a systemic avoidance of the crucial issue of the conflict between the groups – and their shared interests. The autonomy of the religious schools probably seemed initially a small price to pay for the willingness of the religious parties not to claim power to decide issues of foreign policy and security. And it did serve legitimate interests of the religious communities. However, the Israeli structure does not give sufficient weight to the contribution of a public education to democratic life, especially in rifted societies. The legitimation of difference is very pronounced, but the insistence on a shared core curriculum of basic skills and civic education is almost totally absent.

The structure and the content of the public education system in Israel is thus one of its greatest challenges. The direction is clear. At present, public education is segregated along many lines. It is separate, and this separateness encourages differences in both curriculum and allocations. While the structure of Israeli society does require respect for autonomy and difference, it is Israel’s prime interest to see to it that its educational system, in all its parts, stresses a strong core curriculum of general education, and a strong perception that education is a resource the state is using to strengthen civic affinities between all its citizens.

I want to clarify at the outset that I do not think Israel should adopt the American system, with its clear distinction between public and private education, under which religious education must be private. Israel is not committed to the American version of separation between religion and state, and I believe this is as it should be. This is not the only possible model of state-religion relationships, and Israel Does not have to adopt it. In fact, under the Israeli conditions, it seems that public support of forms ofm
religious education (on some equal basis) is more appropriate than total separation. Israel should celebrate its willingness to accept financial responsibility for the education of all youngsters living in it, and in this way acquire the moral and political authority to influence that education. At the same time, the solution of one system of common schools is also not suitable to the conditions of Israel. Issues of fear of assimilation, linguistic and cultural differences, and religious sensitivities, do support a more differentiated school system (even if various modes of integration should be encouraged). But public education (indeed, all education) must include some elements which are shared and which will encourage the prospects of co-existence within the same political framework. First, all schools must give youngsters basic skills that will enable them to participate and compete in the modern labor market. Secondly, all of them should get civic education, including the structure and history of their own society, and the place their group has within it. Thirdly, all youngsters should be educated to respect democracy and human rights. Groups which resist any of these elements of public education should be asked to finance their own school system. In addition, the state may require some kind of basic education along these lines for all the jobs it offers in the civil service. This is not ‘punishment’ but a way for the state to enforce the basic deal a stable democracy must strike between the state and the groups constituting civil society. A group, which is not willing to join in that kind of a basic deal, cannot expect the state to give it equal shares when it allocates social resources. Its members do not acquire the abilities which enable them to be productive members of society. They cannot ask to be financed by the efforts of those who produce the wealth of the same society.
Special attention must be paid, within the educational system, to two goals, which unfortunately may conflict with each other: the fostering of excellence in all its forms, and the provision of adequate opportunity for all. There is a clear and immediate relationship between levels of education and social and economic mobility. The prospects of successful integration within the high echelons of society grow directly with the level of one’s education and skills. Adequate opportunity is also a way to deal with another tension: the wish to work by merits, and the wish to see to it that good-faith effort will provide individuals with a decent work and income. Both are crucial for social growth and the strength of society. Again, the main task is that of striking an acceptable balance between them. This need becomes harder when social and economic gaps converge with national or religious ones.

Israel is committed to free public education for all. But there are serious gaps between different systems of schools in terms of allocation of resources. For many reasons, it is hard to get full data about these differences, since they are hard to trace. It is somewhat easier to establish differences in tangible features, such as numbers of students per class, ratio of staff to students in a school, and quality of libraries, laboratories etc. The simplest way to regulate this area is to move to a uniform system of state allocation (say, price per student enrolled in the school). Additional public allocation might come from local authorities, which will decide their own priorities. Or from schools themselves, which might organize their students and their families to promote the level of education provided.

While this system is simple, and may enable the state to ‘prove’ very quickly that it does not discriminate in allocations, the system is likely to increase gaps in the
quality of education rather than decrease them. In effect, this is similar to a vouchers system. Each student gets a voucher from the state. He or she may apply the voucher towards their education. Stronger students, coming from richer families, will spend more on education, and the advantage they gain by better education will increase. In effect, this will be cheaper for those rich people who now send their children to semi-private schools. Moreover, such trends may well mean the end of attempts at integration in Jewish public schools. Such attempts (whose success was anyway quite controversial) were designed to close the registration realms of public schools, so that students had to attend their community school irrespective of choice, origin or class.

‘Privatization’ of public education may indeed be more effective in terms of costs. But public education is not mainly about effective cost-benefit ratio. There are many ‘market failures’ here which the state seeks to reduce and counteract. Public education is about adequate opportunity for all, not just about effective allocation of resources. And it is also about a shared core of values and commitments. It is quite possible that the Israeli system has not done enough to foster excellence, and that private schools may be a way of achieving this goal. But this is very different from a general tendency to privatize the whole system of public education in Israel. Public education is indeed a public good. It is proper that the state insists on supervising the education, which is mandatory under its laws and public international commitments. It is the duty of the state to do so, as much as it is its right.

This argument does not deny the fact that adequate education is not only, or even mainly, a state interest. Parents do have the right (and the duty) to give their children the best education they can get them. And education is about transmitting values and
cultures as much as it is a tool for acquiring basic skills. In fact, elementary education is more about initiation than it is about work skills. In rifted societies, the interest of various groups in transmitting a system of values and ways of life may call for some allowances for autonomy or separateness in education. Clearly, the separateness of religious education in Israel is based, among other things, on the premise that it is impossible to educate effectively to a religious way of life where the school and its staff are not themselves totally committed to this way of life.\textsuperscript{133} Representatives of the Arab sector complain that they are not given autonomy in designing the curriculum in their schools. They feel this limits the power of these schools to give the students a secure Arab identity. There is a strong basis to this complaint. However, we run again into the immanent difficulty we have encountered before. A secure Arab (or Palestinian) identity also includes, according to many, the nourishment of the narrative of the Naqba and the need to find ways to cope with it. Unfortunately, many of the ways advocated by Palestinian leaders involve the denial of the right of Jews to their state. Naturally, the state does not want to endorse a curriculum, which promotes such feelings towards the state and its legitimacy. A balance thus needs to be made between autonomy to develop and strengthen pride in the Arab heritage, combined with a civic education, which encourages loyalty to one’s state. In any event, if the sectors remain separated (which seems both likely and justified), much more systematic thought needs to be their respective curricula. There must be a balance, in each sector, between strengthening the distinctness of the group, and encouraging students to accept and cherish the plurality of their society, to know about the other cultures and treat them with respect.

\textsuperscript{133}This wholistic approach to education is much more prevalent in Catholic and Islamic communities than it is in Protestant ones. In Judaism, attitudes towards separate schools vary.
In Jewish education, two issues need to be addressed. In the religious stream, there is no question the education is Jewish. Unfortunately, in recent years, even the public schools, as well as the elitist institutions of the new orthodox, have stressed Jewish studies and have neglected general education. This is a pity, since the loss of exposure to the achievements of Western culture may impoverish the quality of individuals and of society at large. The tradition of the best education both Jewish and general should be encouraged in religious schools. Secondly, the general public system should attend to the ways in which it seeks to transmit Jewish identity and culture. In this sense, the great achievement of Zionism and Israel – creating a place where majority public culture is Hebrew and Jewish – may create a specific problem for non-orthodox Jews. They often feel more Israeli than Jewish. Their Jewish identity is nourished by the public culture in which they live, and by the persistent conflict with Israel’s neighbors. But when left to their own devices, or when living abroad, these people often find that they do not know enough to maintain, and to transmit, their Jewish identity. Most Jews in Israel are interested in maintaining their Jewish identity. The school system should reinforce this interest, by using the school years to encourage the development of a rich and secure Jewish identity not based on observance.

This issue is acute because of the need to adapt Jewish civilization to the effects of secularization. Many of the European Zionists were secular in principle. But mostly they were people who grew up in orthodox homes, and deliberately chose the route of the enlightenment. A few came from assimilated homes, like Herzl, but even they had some sense of their tradition. For the majority, the task of creating a non-religious Jewish identity was performed from a position of deep familiarity with
orthodox Jewish life. Their Jewish identity itself was strong. Their Zionism was their way of stating that they valued it, and sought an alternative way of developing and maintaining it. This is not the case with most of the Israeli-born secular Jews. They feel at home in the Jewish state because they are Jewish, but they are not familiar with Jewish history or Jewish rituals. Many young people have never gone to a synagogue, and are totally alienated from prayers and rituals. All they can transmit to their children is Hebrew and a vague sense of the holidays. Due to anger and the orthodox establishment, many feel inclined to distance themselves from any activity remotely related to religiosity.¹³⁴

The general public schools do teach quite a lot of bible and Jewish history. They even explain and transmit information about the holidays and their significance, as well as the Jewish heritage. But these are all taught without an active connection with the experience and the affective identity of the students. All this may change with the long period of violence starting in October 2000. Questions, which were conveniently left unattended are re-emerging, requiring new answers. Another major achievement of Zionism and the Labor movement in its leadership was the idea that Israel should become a regular nation, a nation to which one feels connected simply because this is the country and language of one’s childhood and family. So for many Israeli Jews, especially secular ones, Israel did become just one’s homeland, easily taken for granted. The struggle with the Arabs seemed less pressing and more manageable. ‘Peace’ seemed within reach. So people could well enjoy being Israelis, without dealing with the immanent tensions within Israeli identity. For most secular Jews, being Israeli did include being a Jew, but it also contained the possibility of playing

¹³⁴See Katz et al (2002) for a detailed description of attitudes of Israeli Jews to Jewish tradition. The picture is very complex, and most Israeli Jews do keep some Jewish rituals. On the other hand, the depth and robustness of this Jewish identity may be questioned.
down the tribal notion of Judaism in favor of more modern and cosmopolitan ideals. Now that the Jewish element seems to gain in significance, secular Jews find that there Jewish identity is anything but secure, and that the public schools system, a major agent of initiation into one’s culture, did not meet this need.

It is impossible yet to predict the direction of these trends, but in the last two decades there is a tendency among secular Jewish elites to seek structured ways of regaining familiarity and access to Jewish culture, while rejecting the normative force of religion. These efforts take the form of stressing the continuity of Jewish existence as a civilization not exhausted by its religious forms and ways of life; of making classical Jewish texts more available to people not familiar with religious studies; of studying Jewish sources as texts and not as sacred texts; and of developing the notions of national and ethnic components of Jewish identity, and their relationships to religious ones. On the other hand, some among these secular elites go the other way: they insist that there is nothing in Jewish distinctness that is not religious, so that modernity and culture of secular people need to rely on the great achievements of Western civilization. Echoes of these two approaches can be found also within the school systems.

I think it is important to stress that strengthening one’s affiliation with Jewish culture does not require accepting the normative force of religious law. In the Jewish heritage itself, even before the enlightenment, there was much more than religious law. This is to be expected, since every major culture and civilization requires materials, which complement the laws. Laws are important in all culture, and may have been of special importance in Judaism, but they never exhaust a living culture.
Moreover, laws are interpreted, and develop, by the principles of the culture underlying them. So we have agadah and midrash and kabalalah. And we have always had levels of language, and poetry, and myths, and history, and a variety of types of stories and narratives which are all a part of Jewish culture. At the same time, strengthening one’s Jewish identity does not preclude familiarity with, and even inspiration from, other great cultures. In fact, the history of Judaism is full of such interaction with other cultures. And the greatest Jewish scholars and writers have always been those not separated from the life of larger society around them. So all these fears and arguments should not stop us from thinking clearly about the kind of cultural education we want to give in Israeli schools.

We should, first of all, accept that public schools in Israel are mostly not neutral. So it is legitimate and important within them to seek a balance between universalistic and particularistic elements. We said that a shared goal of schools should be to develop excellence and high levels of basic skills, as well as democratic values and civic education. In addition, schools should seek to initiate students into their communities – both into the larger, civic community, and into their particular religious, ethnic and cultural community. Students should be familiar with their distinct culture, be aware of its importance and validity, and accept the fact that there are alternative cultures and religious within one’s society and the larger world in which we all live.

135 There is a group of educators who is developing a ‘humanistic’ stream in education, stressing universalistic perspectives. The group seeks official recognition in the independence of these schools. Participating schools are both Jewish and Arab. The group does not define Israel as a Jewish state, but it concedes that students should be educated in their particular culture, in addition to humanistic perspectives. So even this group, seeking to counteract what it sees as particularistic biases, does not propose that schools in Israel be neutral.
As an observer of the educational system in Israel, I am not concerned with the fear that secular students are ‘coerced’ to accept religious commandments; or that they are taught to prefer Western culture to their own, Jewish, one. My real fear is that the secular schools, out of confusion, do not give their students any coherent sense of cultural membership. Moreover, the ambivalence about narratives and systems of values and meaning results in the total absence of a coherent educational message on both values and commitments. The consequence is not students who are aware of their complex identities, but youngsters who do not have a good sense of who they are and who they can and want to be. Naturally, these people cannot transmit to their own children a coherent sense of identity. Many secular students feel that their choice is between Jewish religiosity, and between a generalized universalism. Moreover, religious communities have an in-built education to social commitment. This element is not structurally available to secular educators. The consequence is that for many secular students, identity is totally privatized, in a way that makes it difficult to strike a satisfying balance between private and public elements in one’s life.

We make similar mistakes with the Arab sector. The tensions between Arab identity and Israeli civic identity are many. We seek to mitigate them, and we think this can be achieved by not conceding their depth. This would probably be a mistake even had the region reached the stage of reconciliation. Clearly, this cannot be done when the basic conflict between Jews and Arabs in Palestine has erupted again into massive violence. Our policy of avoidance made the state and the schools ignore the conflict of narratives between Jews and Palestinians in Israel. But a conflict of this magnitude cannot be ignored. We had better face it squarely. We should allow Arabs
their narrative – but we should also make them teach the Jewish narrative. The Arab narrative is not only an identity-builder. It has the clear potential of raising Arab students to feel that the only dignified way of being is to struggle, in all ways, in order to undo the disaster of 1947.

The state cannot order away the fact that its Day of Independence and celebration is also the Day of Disaster of its Arab citizens. It can be asked to accept this fact and acknowledge it. But it must clarify that acknowledgement of the Arab loss does not imply a willingness to undo the events. Arabs, on their part, must distinguish very clearly between the anguish of the history and the politics of the present. If they insist that the only way for them to be in Israel is by fighting in all means against the reality that has developed here – they cannot complain if the state uses its power to limit the threat of this attitude. The legitimacy of armed struggle against the state is not a message that any state can be expected to tolerate, especially in its public schools (or its Parliament). Arabs can demand the autonomy required to develop and maintain their distinct identities and culture. They cannot demand the freedom to legitimate violence against the state within the institutions financed and provided by it.

The task of translating these principles into curricula and structure is a daunting one. But these clarifications must be the basis for this task. Unfortunately, this has not always been the case in Israeli educational policy to date. Education can never be all about basic skills, important as they may be. It must include a robust education to values. Some values pose no difficulty, because they are (or at least should be) shared and universal. These are the basic humanistic commitments. They include the idea of the virtue of participation, and the importance to any individual of his or her
membership in human associations and communities. Shared civic education must also include education to equal dignity and to toleration of differences in beliefs and ways of life. In addition to these shared values, education should also attend to one’s distinct cultural heritage and identity.

It is nice that many Jews feel that Israel is their home merely and simply because it is the only home they have ever known; because this is the only place in the world where they feel totally at home in terms of language and public culture. But the existential situation here requires more than that. The Jewish state, as we saw, extracts a heavy price from non-Jews living here. Its existence may require actual war, and even if there is no violence – it requires a justification. It is hard to justify these costs for anyone who does not feel the deep need to belong in this way, a need that stems from a strong sense of connection to the Jewish people and its distinct heritage, as well as it wish to live in its own state. Some Jews get this affiliation from religion. But Zionism was basically a movement led by secular people. Religious Jewish identity, and membership in Jewish communities, are what maintained Jews for thousands of years. If we insist, with the orthodox, that Jewish identity must be religious and orthodox, we may well lose to the Jewish people all those who do not want to lead an orthodox life. Those interested in the survival of the Jewish people in modern times must therefore develop the perception of Judaism as a civilization, as a distinct way of coping with existential and social problems. Jewish education must therefore show how, in all civilizations including the Jewish one, people struggle with the same human and social problems. The Jewish way is not the best way. But it is the way that is ours, has been ours for generations, and is therefore a part of our identity in its deepest sense.
It is crucial to strengthen within the secular generations growing up in modern Israel the understanding that both the Zionists of the first secularized generation, as well as many of the modern orthodox, have. There is no inconsistency between leading a life in which Jewishness is central, and participating fully in modern life and its culture and achievements. There is no inherent incompatibility between Jewishness, even in its religious forms, and democracy. The choice we have is not that between Jewish religious particularism and cosmopolitan universalism. The choice is not that between fundamentalist sectarianism, primitive and segregated, and between openness and modernity. The choice is not one between sensitivity and empathy to the rights and the concerns of other groups and between am proud national existence. An enlightened and modern person may well also be proud of his or her Jewishness, and wish to strengthen, nourish and develop it. Such people may support the existence of Israel. A Jew may choose to be religious, secular, or all forms of religious affiliations between these. These forms of life all share important cultural and historical ‘family resemblance’. A Jew must, like every other person, respect the rights of others. Jewishness does not exempt us from this duty, but it does not prohibit us to perform it. To the contrary, like all other great cultures, it contains the basic principles of human dignity and freedom. Educating to Jewishness, in all its forms, will be justified if it insists also on respecting the rights of others. And it must not alienate either those who observe, or those who choose not to do so.

C. The Nature of the Public Sphere
All states and all cultures recognize a distinction between private and public. All of them seek to enforce certain rules determining the character of public spheres. Inevitably, such regulation involves some limitations of the freedom of action of those individuals or groups who would like to behave in public in way deemed inappropriate by the society or culture. Take for example the practice of breaking the workday in the middle, to allow a rest, still common in many European countries. The practice has a significant effect on the nature of the public sphere (and the lifestyle of the population). At past times it may have been enforced by conventions and by social practices. Today, it may require the enforcement of laws regulating hours of business and prohibiting the opening of types of shops in certain hours at certain places. In the absence of such laws, the willingness of a few shops to open throughout the day would create a situation under which shops that would not open would suffer a serious economic drawback. Competition would force all businesses to stay open all day, and the social practice of a rest in the middle of the day will disappear.

Using legal regulation does have its costs. In some cases, the failure of social norms may be seen as not sufficient to justify legal regulation. It may be that society is willing to tolerate changes in the nature of its public spheres without seeking to prevent them by the use of law. But this is not necessarily the case. When a society decides that a certain character of the public sphere is sufficiently important to it – it may be justified in regulating people’s conduct so as to maintain it.

An obvious example is the level of cleanliness in public places. Any tourist knows that there are major differences in the level of order and cleanliness of public places in
different countries and regions. These differences are related, among other things, to the priority given by these societies to the enforcement of norms – social and legal – that prohibit throwing garbage in public places. Levels of cleanliness are a good example because they are neutral, in the sense that insistence on their importance is a matter of culture. It does not follow from the particularistic messages of a given religion or national ethos. The justification of using then law to achieve these goals and limit the liberty of individuals and groups to disrupt the nature of the public sphere is therefore less vulnerable to claims that such regulation offends freedom from religion or has discriminatory effects. But the rationale of this type of regulation may well extend to more complex areas of life.

Take the example of huge advertisements in cities and on the highways. First, there may be a debate about the permissibility of using such advertisement at all. One of the main differences between the looks of cities and roads in the US and Europe relates to different regulation of this subject. I tend to prefer the less commercialized European scene, but it is clear that these are decisions that any society may make according to its own preferences. Freedom of expression or occupation does not demand that a society to permit such billboards. Freedom of religion or conservatism do not require, as a matter of right, that they will be forbidden.

One may take specific objection, for a variety of reasons, to certain types of billboards. Frequent candidates for regulation are those showing naked human bodies, advertisements that may be described as obscene, and material offending against religious sensitivities. Again, the debate is not pre-determined by rights-discourse. Society may decide to limit the freedom to advertise in certain ways in order to enforce certain rules of public morality and the nature of public spheres. After all, the
public sphere is where all of us are supposed to feel welcome. We may decide, together, what kinds of captive audiences we want to create.

This is the point that makes regulation of the public sphere vulnerable when the values and symbols allowed (or excluded) reflect the values of certain groups within the population, and offend the interests and sensibilities of others. In Israel, this subject is often discussed under the label of the internal Jewish debate between religious and secular. An obvious example is the way Shabbath is reflected in the public sphere. Should it be different than other days in terms of commercial and industrial activity? in terms of public transportation? Secularists argue that any such limitation is religious coercion on the secular population, inconsistent with its freedom from religion. Others argue that such regulation may be justified because the interest in some distinctness of a day of rest for all, religious and secular enough, mean that the regulation should not be described as religious coercion. Before I return to these issues it is important to point out that debates about the public sphere in Israel are not confined to the internal Jewish rift. The duty to raise Israel’s flags on schools, the celebration of days such as Independence Day and Holocaust Day, and the public performances of Israel’s hymn are all symbolic uses of the public sphere used by Jewish distinctness, religious or secular. These practices may cause alienation to both Arabs and ultra-religious. A different type of problem may arise as discussions of the nature of the Rabin Memorial Day proceed. Using the day to unite behind a shared condemnation of political assassination is one thing; using it to promote Rabin’s vision of peace and especially the Oslo process may be seen as using public force to coerce those who disagreed with him to silence their criticism. They
may feel that under this conception, the Rabin Memorial Day is used to silence them and exclude them from Israel’s public sphere.\textsuperscript{136}

The general principle here is the same as it is in other matters of political debate. A state and a society may limit the liberty of its members in the public sphere to guarantee some cohesiveness in it so long as these limitations do not violate the basic rights of individuals, or the groups to which they belong. At times, states and societies should not use the power the may use to its maximum. Politics is as much a matter of prudence and tolerance as it is a matter of rights. In societies which are very rifted, and which are also very ideological, a balance needs to be struck between the interest of the majority to determine some aspects of the public sphere, and the need not to make any important group feel alienated from it or excluded from it. Democracy itself, even in the ‘thin’ sense I advocate here, dictates some forms of inclusiveness in the public sphere. People and groups are entitled to assemble at peace and demonstrate or picket or express their opinions and their criticism of the government. Such activity may be regulated to maintain public order or to prevent incitement, but it cannot be banned based on the content of the message, or the national or religious identity of the demonstrators. The state cannot ban demonstrations or marches simply so as not to grant legitimacy and visibility to a group, which it would have preferred did not exist or organize. Some of the debates in a democracy are precisely ones about visibility and public recognition. The state (or other forces) should not monopolize the public sphere. This is true, again, for both the internal Jewish rift and the Jewish-Arab rift.

\textsuperscript{136}The nature of the day is still tentative. Naturally, there was a major difference in the way the day is remembered when the government is Right wing or led by Rabin’s own party. The frequent change in governments, and especially the political developments in the region after the collapse of the Camp David talks, may strengthen the civic interpretation of the day. On the other hand, they may increase the wish of supporters of Oslo to gain national legitimacy for this move.
Some of these issues are clear and simple. The orthodox establishment was not happy when the Supreme Court decided in 1962 that non-orthodox groups should be allowed to use public halls for their prayers and meetings. Nonetheless, it understood that it could not challenge the decision. Similarly, some Jews complain when the calls of Muslims to prayers are overheard in their homes. While it may be understandable that they would prefer their public space not to include such reminders of Moslem presence, the right of Moslems to conduct their worship in public must be respected. Claiming public visibility in the public sphere is often a step in the struggle of groups for liberation or public recognition. An obvious example is the annual Gay Pride March held in Tel-Aviv in recent years. In 2002, the newly elected chief Rabbi of Tel-Aviv announced his intention to ban the march. I expect this intention will not be realized.

Other issues are trickier. This is the case when the rights violated by regulation are not so clear - and the threats posed by allowing the public activity that is requested seem more pronounced. Often, these debates take place within the political system. When the result reached there does not please one of the contending powers – we often see petitions to the court. Often, the rhetoric under which these debates are conducted, especially in the court, is that of high principles and of rights. This rhetoric has one serious disadvantage, because it suggests that the parties cannot and should not compromise. In most of these debates, the question of the scope of rights is itself controversial, and cannot determine the practical issue involved. Using rights rhetoric may obscure this fact, and make the parties intent not only on gaining an acceptable practical arrangement, but also of declaring victory in the war on symbols.
Naturally, the other party might have agreed to an acceptable compromise, but finds a symbolic victory hard to take. Thus the symbolic language raises the stakes, and may well make constructive and creative compromises harder to reach. Similarly, these are questions that should best be decided within the political system, preferably on a local basis so that the arrangement suits its population, and not in a national, high visibility ‘forum of principle’. To avoid taking the decision to courts, the political system must itself be responsive to the real needs and concerns of the parties to the dispute. The arrangements reached in the political system must be such that a court can respect without feeling that basic rights of individuals or minority groups were violated by them.

I believe most of the arrangements on Sabbath and Kashrut belong to those that are not dictated one way or the other by rights. People who observe and respect Sabbath in Israel live well with the travel of private cars; with football on Sabbath; with restaurants and movies, and with non-Kosher shops and restaurants. The fact that others do not observe is not a violation of their freedom of religion. Secular people, on the other hand, do not have a sacred right that all kinds of food and travel will be available at all places and at all times. Moreover, they themselves prefer, in many contexts, that there will be a day of rest, and that the intensity of traffic and work will vary with the days of the week and the hours of the day. The reality in Israel in these matters is flexible enough to permit secular people to do most of what they want to do, and it is much easier for observant people to live in Israel and observe than it is in any other place in the world. The existing arrangements in Israel, even if they are not perfect, does not usually violate rights and does not offend
against people’s freedom of religion. The rhetoric on each side should reflect this reality.

On many of the practical issues concerned, there is a convergence of interests among observant and non-observant that suggests the adoption of arrangements acceptable to both groups, which should not be seen as ‘religious coercion’. One such arrangement is the rule adopted in Israel from its inception that shared public kitchens, like the ones in the IDF, or in hospitals or boarding schools, should all be kosher. This is not religious coercion. It is simply a decision designed to ensure that observant people may eat freely with their colleagues. It is true that this rule means that secular people may not eat non-Kosher food in such kitchens. But this is a limitation, which is easily justified by the wish to permit religious soldiers or patients use the same kitchens. For this reason, I find fault with the fact that at a certain time, the faculty club in Tel-Aviv University was licensed to a non-Kosher caterer. This decision means that my orthodox colleague is not at liberty to come dine with me at the faculty club.

I hope it is quite clear that my objection does NOT stem from the fact that a Jewish state should not have non-Kosher restaurants. I see no connection between the Jewishness of Israel and the non-availability, in it, of non-Kosher food. There are many restaurants in the TA campus, and I have no objection to the possibility that some of them might decide to follow students’ preference and serve non-Kosher food (if this choice is advertised clearly). But there is only one faculty club on campus. I find it objectionable that observant faculty members or their guests should feel excluded from the faculty club because of their observance.
The same is the case with the Sabbath. As a non-observant person, I am reluctant to endorse laws that will ‘force’ me to observe or to limit my freedom just because this is required by religion. However, I can freely support arrangements that will meet my needs, and the fact that they may contribute to the distinctness of the Sabbath in ways supportive of the religious character of the day is to me a clear plus. Some of these arrangements are justified by my wish to avoid hurting the sensibilities of observant people. But most of them derive from my own interests, as a secular member of a Jewish community, in a shared day of rest that will be the Sabbath.

It is a pity that many of these practical disputes are presented as total wars of a principled nature, so that any governmental body seeking to decide them one way or another is threatened with de-legitimation. In this way, these disputes threaten to undermine our faith in the shared institutions that are supposed to help us decide precisely the kinds of disputes, which our principles make us hard to compromise on. We are in a vicious circle. Our mechanisms for compromise and mediation have weakened. As a result, disputes quickly become violent. Both sides feel threatened, and fear that any compromise will be the starting point of further concessions. Consequently, decisions in such disputes are not accepted, but struggled against, leading to further weakening of the ability of these institutions to resolve disputes.

The incident around the closure of Bar-Ilan road in Jerusalem on Sabbath may serve as a good illustration of this process. The road is a main artery, connecting parts of Jerusalem. But it passes through ultra orthodox communities, whose members feel that traffic on the road offends their ability to enjoy the Sabbath. Drivers may take
alternative roads, which prolong driving time by a few minutes. Democracy, as well as civilized co-existence, require that we respect the life-styles of minorities, and refrain from disturbing them. At the same time, people have a right to freedom from religion and freedom of movement, and they legitimately wish to be able to reach their destination safely and quickly. In a democracy, the power to balance these interests and make the relevant decisions is placed in the hands of officers, and the public is required to accept the binding power of these decisions (if they meet the criteria of legality and validity imposed by the system). Individuals and groups may of course disagree with these authorized decisions, and seek to change them in legal ways. But at a certain point decisions become final. When they are, expression of displeasure may not legitimately include violent attempts to undermine the decision, and incitement against the Supreme Court and its president.137

The fact that certain arrangements are not determined by human rights discourse does not mean that the adopted arrangements are always optimal. Political power often dictates arrangements that are not optimal. But sub-optimal decisions that do not violate rights are a price that we are willing to pay for the stability of a decision-making system that is on the whole legitimate, and better than all the known alternatives. It is better to accept that sometimes arrangements will not be optimal, so long as they do not violate basic human rights, and not present as matters of right the

137The case illustrates the controversy around the legal and prudential limits of judicial decisions in such matters. I argued above that the decision in the Bar-Ilan case was dictated neither by the Jewishness of the state or the rights of the ultra religious residents, nor by the right of secular people to freedom from religion and freedom of movement. Under this analysis, the controversy is a ‘simple’ political debate about the desirable characteristics of public spheres in certain neighborhoods. Some therefore argue that the decision is placed in the hands of the political actors: first the officer responsible for transportation matters, then the minister of transportation, who arrogated the power to himself. Under this analysis, the court should have seen the decision as non-justiciable, despite the fact that it was clearly ideological. Secular people reject this argument, feeling that it gives too much political power to the religious establishment. In any event, those who demonstrated against the court and incited against its judges did not care about the scope of ‘the political question’ doctrine. Rather, they found the substance of the decision unacceptable.
solutions that any one party sees as desirable. If we take the latter course, we will soon find that all decision-making responsibilities are moved from the political branches into the courts.

So we do need to identify those matters that truly violate rights, and seek to remedy them, while leaving the rest of the disputes to be decided by the political branches. There is at least one such matter in the Israeli arrangement of Sabbath: the total absence of public transportation in most of Israel’s cities. The consequence of this arrangement is that people can only travel on Sabbath by either private cars or by taxi. People who do not own cars, or those who cannot afford taxis, are thus confined to their homes. I find this limitation of freedom to be much more serious than the fact that drivers may have to add a minute or two to their drive so as to avoid areas heavily populated by the ultra orthodox. It is a telling fact about the nature of the disputes that the issue does not come up as a part of the public debate of the question of Sabbath. It is sad that the observant members of public committees appointed to think about these issues could not concede that this is a need that must be met.\(^{138}\) It may well be that the absence of this issue from public discussions stems from the status of those fighting against religious coercion. They seem to be more preoccupied with the principle than they are with the predicament of youth or of poor people who have no access to private cars.

It is important to remember that many of the disputes about regulation of public places may be resolved in ways that are sensitive to the differences between

\(^{138}\)Indeed, in the Gavison-Medan Covenant between Secular and religious Jews, Rabbi Medan has conceded the need, and agreed that there will be limited public transportation on Sabbath. Not surprisingly, he was attacked for his ‘surrender’ by some of his orthodox colleagues. See e.g. Rosen, Zohar, The Decade Issue, pp.
communities and neighborhoods. The regulation of traffic on Sabbath should be different in the midst of ultra-orthodox communities and in non-residential areas, or in areas in which a majority of the population is non-observant. This fact may add flexibility into the arrangements adopted in certain places, so that they will be less offensive to a majority of the population. This point suggests that such arrangements be designed on a local level, and not be pronounced in general terms, applicable to all places at all times. An arrangement prohibiting the sale of pork in a town with a large Russian population used to eat that meat is unacceptable. Limiting such sales so they are conducted away from areas in which there is a large observant population is better than allowing such sales in all parts of the town. Similarly, imposing a total closure on all restaurants and movies Friday night in communities, which are not all observant is unacceptable. Limiting such businesses in mostly religious communities is preferable to allowing them unlimited freedom to open at all times and places.

One should also stress that duties of respecting the feelings of others do not apply only to secular people vis-a-vis religious ones. Secular people should be advised, out of courtesy, to avoid driving through religious communities on Sabbath. For similar reasons, ultra orthodox people or Arabs, who happen to be within a Jewish space while the Holocaust Day siren is heard, should respect the feelings of the public and stand still. They should do so despite the fact that they themselves do not mark the day, or do not mark it in this way. If they choose to ridicule or insult those who express their grief by standing while the siren sounds – they cannot complain if they lose the good will of those, whose feelings they abuse. If one group demands empathy, understanding and consideration from another group, but shows no attempt or willingness to reciprocate – it should take into account the possibility that its next
plea for consideration will be met with suspicion, anger and hostility. This is the case, unfortunately, in the relationships among many groups in Israel.

The public sphere is a crucial element in the cohesiveness of any society. A society with a shared public culture will be much more cohesive than a society in which groups claims public recognition for their separate rituals and ceremonies. A shared language is important. A shared history, reflected in shared memorial days, is a great help. When the public square is naked, or privatized, it may be hard for societies to cohere. This is why many countries used to insist on assimilating newcomers into them. This is why multi-culturalism is a problem in rifted societies. Israel is a society, which clearly lacks such shared elements of a public culture. Jewish public culture is shared by a majority within Israel, but there is a bitter debate about the meaning of that Jewishness. Israeli Arabs feel alienated by this culture. It seems that the only ‘civil religion’ possible within Israel is agreement on democratic rules-of-the-game, and a shared commitment to a society with equal dignity. Democracy itself may be reflected in the public sphere in many ways. But on the whole, public culture tends to be particularistic. Rifted societies should therefore devote great attention to the way public spheres are constructed and enforced.

A democratic (or a constitutional) civil religion is crucial, but it may be too thin to support a living society. Furthermore, it may require neutrality in public culture, which may undermine the feeling-at-home of all communities. On the other hand, giving any one group a fuller feeling of ‘being at home’ may alienate members of other groups. This is a serious issue, which should be resolved according to two principles: rights of individuals and groups should not be violated; and regulation
should be done with sensitivity to the needs and interests of all groups, especially minorities groups.

The legitimacy of a Jewish-Hebrew public culture is, in my mind, one of the main practical implications of the Jewishness of Israel. As we saw, one of the two main justifications of the Jewish State is its ability to provide Jews with a place in which they control their public culture and defense. Living where one’s culture is the public culture is a basic ingredient of self-determination. It permits people not to maintain a permanent distinction between components of their civic and cultural identities. Indeed, Israel does have a Jewish-Hebrew public culture. Hebrew is the language of the country, its symbols – flag, anthem and emblem – are all Jewish in nature. Its day of rest, memorial days and holidays are all Jewish-Hebrew. It is quite natural that these aspects of Israel’s public culture offend non-Jews, especially the Arabs, and the non-Zionist ultra orthodox. However, there is a deep asymmetry between them. Arabs feel that the establishment of the state of Israel is a constant reminder of the defeat and destruction of their society. The ultra orthodox may dislike the idea of dealing with Jewish statehood, but the state is in many ways theirs. They are an integral part of the people, whose self-determination is celebrated in the state.

It is important to concede that even if all discrimination against Arabs in Israel ceases, the Jewish-Hebrew public culture of Israel will continue to offend and burden them. Symbols of Jewish statehood may indeed offend also anti-Zionist elements among Jews. Nonetheless, so long as care is taken to defend the linguistic and cultural rights of these groups, and to ensure that the Jewish-Hebrew culture is enforced with sensitivity, these burdens are justified. They are justified simply because giving this
public culture up will take away one of the main benefits of the Jewish State for Jews. Naturally, there should be here a minimum of legal regulation and criminal enforcement. On the other hand, the position should be clear and unapologetic. Arabs have a right that their language and culture are maintained, and that they can protect themselves against assimilation. They cannot demand that Israel becomes a state of two equal-status languages and cultures. This, again, would be to dismantle the Jewish State, and create in its stead a neutral democracy. This is a possible choice for the Israeli population to make, but it is not one that the Arabs are entitled to demand as a matter of right. Furthermore, as a Jew, I will argue against adopting this as a policy. We should remember that Israel is the only state in the world in which Hebrew-Jewish culture is hegemonic. If Israel loses this distinction – its Jewish population and the Jewish people will lose this unique feature of Jewish political existence. I see no reason why Jews should volunteer to make this sacrifice.

At the same time, Israel does have an interest in responding to the needs and wishes of minorities, especially the Arabs, and in this way to enhance civic cohesion, is important. Political prudence thus may suggest that Israel develops some state symbols that might be more welcome to its non-Jewish and non-Zionist citizens. It should not change its flag – but it can have an additional one. It need not change its anthem – but it can have an additional, neutral, one. Many feel that the anthem

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139I have already commented that the 1997 Act requiring that all schools in Israel fly Israel’s flag does not violate the rights of individuals or groups. Nonetheless, this is not a wise law, and it is good that it is not enforced strictly. The problem of shared civic education and commitment in Israel is real. But flying the flag will not contribute much to a sense of shared civic culture. To the contrary, it may be a blatant symbol of the immanent tensions between Jewish nationality and culture and those groups that oppose it. The enforcement of the law will not generate civic cohesion. Rather, it might be the trigger for rebellion. This is even clearer with the recent direction of the DG of the Ministry of Education that all classes in Israeli schools should have a mezuzah on them. It is not clear why Arab schools should have them at all. For Jewish schools one might argue that a mezuzah is similar to a Kosher restaurant: it is essential to make every Jew feel welcome. But this should be balanced against the likelihood that many secular schools, students and parents may feel this is an interference with their freedom.
Hatiqva anyway reflects better the stage of the Zionist movement prior to the establishment of the state. The other anthem may reflect Israel’s commitments and aspirations after it was established. Hebrew should remain the primary language in the state, but signposts in Arabic should be inserted as a matter of rule (though not of right!). The state should not change its emblem, but it could add the state’s name in it in Arabic as well. The Arab citizens of Israel cannot ask the state, or its Jewish population, to give up its Day of Independence just because it happens to be their day of Naqba. But they can demand recognition of this unfortunate fact, as a way to help the two groups accept their past and move on to a shared future.

D. State, Nation and religion

I mentioned above that the Israeli legal system contains many arrangements and institutions based on the national and the religious affiliations of its residents. All recognized religions have official religious courts and councils. Judaism also has the chief rabbinate and its ‘branches’, in the forms of local rabbis. Some, but not all, religious leaders see these as the authoritative sources of Jewish law at present. Israeli laws make people’s religious and ethnic identities relevant in a variety of ways. Registration Law requires recording one’s religion and ethnic origin. It is often said that the purpose of registration is merely statistical, so that registration should not be taken too seriously. Some judges express doubt whether this is indeed the case. Be it as it may, there are contexts in which legal determination of religion or ethnic affiliation is of substantive practical importance. A person who is a member of the Jewish people, or a family member of a Jew, may be entitled to the benefits of the
Law of return. A person’s religion determines the forum, which will decide his or her personal matters. Consequently, the decisions concerning the Jewish identity of specific individuals are legal, and they may have far-reaching effects.\(^{140}\) In addition, the Israeli government is responsible for public order in places under its jurisdiction, which include places holy to Jews as well as to Christians and Moslems. Consequently, the state has to arbitrate the disputes which have not been resolved by the parties, and which may generate disturbances in public peace. These include the debate over styles of praying near the Western Wall, access of Jews to Temple Mount, as well as the debate among Christians and Moslems about the building of a mosque near the Church of Annunciation in Nazareth. Finally, the legal regime in Israel requires it to resolve practical matters which would not have arisen in other countries: Where will a person, living among Jews, who does not belong to any religious community in Israel, be buried? How can an Israeli, who cannot marry under the laws of any religious group in the country, be allowed to exercise his right to establish a family? All of these just illustrate that Israel cannot function like a typical neutral liberal democracy, which may, possibly must, privatize and ignore all religious affiliations of its inhabitants.

It is important to note that these issues are not related only to Judaism, so they are not matters of tensions between the democratic nature of Israel and its Jewishness. These are matters concerning relations of the state and the religious and the national identities of those living in it. Recently, Israel has removed its objection to allow Druze who wanted to do son to register as Druze in their religion and Arab in their nationality. Women suffer under Islam no less, possibly more, than they do under

\(^{140}\)A person whose Jewishness is questionable will probably not be buried in an orthodox cemetery. Similarly, the Rabbinical court will not marry a person whose Jewishness is in doubt.
Jewish law. Recently, the Israeli Supreme Court decided a case resulting from the inability of Druze to resolve internally issues concerning the election of their religious councils. And the debate over the Nazareth church developed into an international issue. At the same time, the majority of cases, and the highest visibility of these issues, is reserved to those belonging to the internal Jewish debates. This is natural in view of the fact that Jews are a majority within Israel. Naturally, the tendency of non-Jews to disclose their internal differences to the Jewish authorities, and to ask them to resolve them, is very low.\footnote{The dispute in Nazareth may have signified an interesting change in the attitude of Israeli Arabs to state authorities, but the violence that erupted in October 2000 may have obscured this change somewhat.} In the remainder of this section I shall thus concentrate on the implication of this situation to the internal Jewish debate about the meaning of the Jewishness of the State, and about the proper role of the state in the enforcement and transmission of this identity. Clearly, the conception of the proper role of the state in this matter may well affect the status of non-Jews in Israel.

Membership in groups cannot always be determined very easily. The level of certainty in such determinations may change with the nature of the group under consideration. Citizenship of a state is relatively easy to determine. It is a legal category, regulated by norms, which are usually quite clear. If doubts persist, the legal system provides an authoritative mechanism whose decision on the matter is final. The same is true for religious groups, at least those with very legalistic notions and stable structures. There are rules determining membership, and when these are unclear – there are authorized bodies to decide the issue one way or another. The situation is very different when we talk about membership in ethnic or national groups. Similarly, it may be unclear how to resolve questions of membership in religious communities when they are in flux, and when there is an internal debate within them about the
limits of the collective and who should decide them. These internal debates usually revolve both around the question of the essence of the religion in question, and on the related question of who should be recognized as a member thereof. Often, the debate subsides after a time, and the rules become clear and settled again. At times, the end of the debate is achieved with the separation of the original group into two or more sub-groups. This is what happened in Christianity and Islam, and this is what happened, to some extent, within Judaism. To these complexities we must add the fact that until about 2000 years ago, it was very hard to find a person who did not identify himself as a member of a religious community. The complex processes of secularization, or at least re-definition of people’s attitude to religion and to God, mean that it is now quite common to find people who do not define themselves as members of a religious community at all. Nonetheless, the communities into which they were born often continue to see them as members (unless they converted deliberately out of the faith). And it seems that on many levels, many of these people do not see themselves as if they severed completely their relations with their religious origins.

Against this background, it is easy to see why most states never aspire to provide their own answer to the question of a person’s religious, ethnic or national identity. They leave these questions to the determination by the relevant communities themselves, if such determination is required at all. If the state is interested in data about these affiliations of its residents – it usually asks for their own self-definitions, and takes it at that. In most cases, these self-descriptions do not form the basis of any state action.\textsuperscript{142} Note that this policy does not require privatization of these affiliations

\textsuperscript{142}The USSR did register ‘nationality’ and it accepted self-description as conclusive. It may be assumed that non-Jews were not too eager to describe themselves as Jews. A notorious exception to
(although it may well be consistent with such an attitude). In many countries, religious and ethnic groups play an important role in the public life of their state. Nonetheless, the state takes these groups as given, and does not determine their nature or membership.

Israel, unfortunately, cannot be counted among these states. This fact is responsible for some of the deepest and most persistent tensions in Israel’s public life. In principle, it is impossible to resolve these disputes, since there is no shared set of assumptions and norms that permits such resolution. The Orthodox establishment believes firmly that Jews are only those who are identified as Jews by Jewish law, and that only observance will prevent assimilation. This attitude is diametrically opposed to then one seeing the Jewish people in the modern age as a national collective, whose cultural identity did indeed stem from centuries of life as a religious community, but who is now struggling to re-define itself in a world of modernity and secularization. The project of Israel as a Jewish (and democratic) state was designed to permit a joint political existence of the communities upholding these opposing views of the Jewish people. Such political co-existence requires the adoption of a shared political framework, within which it will be possible to continue, without resolution, these persistent debates and controversies. Neither of the groups should seek to ‘win’ over the other one, because their national enterprise depends on their co-existence.

It is the strength of the Israeli Zionist movement that it could provide adequate practical responses to these ideological controversies, which gave each ofn the parties some of their wishes, and met their most central needs. Secular and observant

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this principle is the Nazi regime, which determined Jewishness itself, often in ways stricter than any used by Jewish communities themselves. Further, it relied on these determination to discriminate against Jews, persecute them and even murder them systematically.
Zionists, and to some extent even the non-Zionist ultra orthodox, could unite around goals such as the settling of the land, saving Jews from their persecutors, the revival of Jewish life in Israel, making Hebrew a live language, and promoting Jewish solidarity.

I do not mean to belittle the centrality and the depth of the dispute, or deny a certain asymmetry between observant and non-observant Jews. Jewish law claims a monopoly over the right answers to many questions, especially those related to Jewish existence. Those who see the halakhah as binding on them cannot, in principle, accept any other answer. Those who do not see religion as binding do not have a similar predicament. They are committed to their own systems of values of thinking, and those may generate answers very different from those dictated by Jewish law. It is important to see that this is beside the point, however. We are not talking here about theology, but about practical politics. Our question is NOT what would have been required by a Jewish theocracy. The question is what are the proper political arrangements for a society which seeks to be the nation-state of Jews, which has a majority of Jews many of them are observant and traditional, but in which there are many non-Jews, and many Jews who do not see tradition as binding. These proper political arrangements cannot be religious, but they should permit religious Jews to feel full members of that society. After all, Jews managed to develop the doctrines that permitted them, for many years, to live in states, which were not Jewish in any way. True, a state that is in part a Jewish state, especially in Eretz Yisrael, may present more complicated problems for Jewish doctrine than a non-Jewish state. However, Jews never lacked the creativity and ingenuity to adapt their rules to the conditions of life in which they found themselves. Requiring Israel to be a Jewish
theocracy will not work, so it is counter-productive. It is better, for the religious establishment itself, to recognize its limits, and to cooperate with the state so that the internal religious questions are decided by religious authorities and not by state organs.

Let me apply these general principles to some troubling issues.

1. Financing religious services.

The right to form religious groups and conduct prayers and perform religious rituals is a central part of the right to freedom of religion and worship. The duty of the state not to prohibit these practices is a strong component of the human rights commitment. This right, however, does not determine a distinct question: Should the state aid in financing these activities? Democracy and the human rights tradition, as well as Liberalism, can live well with different answers to this question. They can all move from a strong ‘separation’ position, under which it is impermissible for the state to be involved in any financial support of religion, to a position affirming various kinds of support, on an egalitarian basis. What is excluded under all of these traditions is the discriminatory financing of one or more religions and the refusal to finance in the same way other religions.

If Israel had claimed that it was justified that it supports only Judaism, or only certain forms of Judaism, this would have raised serious problems. But, officially, this is not then position Israel takes. Israel concedes that the state is allowed to finance religious services on egalitarian bases. This attitude is not justified by the Jewishness
of the state, because it applies equally to all religions. In fact, some scholars argue that the strong separatist position (that some claim reflects the US legal position) is itself inconsistent with religious freedom. They argue that, in a world dependent on public support, not financing such services amounts to singling out religions from other artistic and cultural activities subsidized by the state.

Nonetheless, the actual reality in Israel does raise serious problems, many of which are connected to its Jewish nature and to the orthodox monopoly over many aspects of Jewish religious life. First, state participation in financing Jewish religious services is much greater than it is in the financing of religious services for other religions. Secondly, the level of financial support in orthodox services is much greater than the support of non-orthodox services. Thirdly, the way religious services are financed in certain sectors of the population poses grave risks to the civic cohesion of Israeli society. Finally, the mechanisms administering state support for religious services have been found repeatedly to be full of political biases, corruption and deception. The combination of these means that the present situation is unstable, and may easily generate a threat to the stability of democracy. The scope of state support of religious services is a substantial percentage of Israel’s GNP. This support is entrenched by political pressures which lead to a distortion of the social priorities of Israel and support practices of refusal to participate in the work force (or military burdens) in Israel.

To appreciate the complexity of the situation we need to recall that ‘religious services’ are extremely broad and vague. They include the obvious provision of prayer houses and related religious services (such as courts to deal with matters of
personal status, and cemeteries). The orthodox monopoly means that most of this support goes to orthodox establishments. A recent petition to the high court, which generated a rare order forcing the government to re-allocate, showed that non-Jewish cemeteries received about 2% of the allocation to cemeteries in Israel (with a population of 20%)! It is still very difficult for Jews who are not interested in orthodox burial to find a convenient burial arrangement in most parts of Israel. The same court decision condemned the fact that the budget book is structured in a way that makes it extremely difficult to trace the amounts going to various forms of religious services.

However, a major source of problem is the financial support of religious studies of various sorts. This support is divided between the ministries of religious affairs, education and welfare. A large number of the ultra orthodox males are given modest grants which exempt them from military service, and prohibit them from work so they can devote all their time to studies. In addition, the state finances various forms of religious studies activities. There are at least three issues here. First is the decision of principle to subsidize a way of life that explicitly keeps its beneficiaries out of involvement in Israel’s public life. The tax money of the work force in Israel is thus used to subsidize individuals and families who spend their time learning Jewish law. Second is the fact that these schools, subsidized by the state, do not give their students work skills – and educate them to distrust the democratic authorities of the state and its civic commitments. Third is the fact that there is no effective supervision on these institutions and activities. The amount of the subsidy is determined by the number of students and by the number of lessons given. Periodic tests reveal that these numbers are systematically inflated, and that there is no way to ascertain their accuracy at any
given time. All in all, this system of state support of orthodox Jewish religious activity creates clear discrimination against other sectors of Israeli society, religious and non-religious alike.

The conclusion is that the problem is not the principles endorsed by Israel, but their actual enforcement. A strong position of the court in favor of more equality has generated limited practical consequences in both the Jewish-non-Jewish divide and in the actual support given to non-orthodox activities. The connections between the status of the two ‘non-center- groups in Israel – the ultra orthodox and the Arabs – are worth a mention. For years, the ministry of education granted financial support to Zionist youth organizations. At a certain point, the ultra orthodox sought support for the activities of their own youth organizations (although many of them were already subsidized under the ‘religious activities’ rubric!). These organizations initially argued that they did meet the requirement of ‘Zionism’. This could not stand the fact that the HCJ upheld the test offered by the ministry, which specified that eligible movements must be those that educate towards both Zionism and service in the IDF. As a result of the ultra orthodox pressure, the ministry of education (Under NRP minister Itzhak Levy) dropped these requirements as conditions of support. This arrangement may survive until a petition is submitted demanding that Arab youth organizations get similar support…

143 For many years, social security child benefits were given only to families of those who served in the IDF. While the intent of the rule was to exclude both ultra religious and the Arabs, in fact the former mostly got in. The Rabin government abolished this provision in an attempt to strengthen the civic element in Israeli society. However, at the budget discussions of May 2002, when the need arose to cut 13 B NS from the annual budget, the proposal was made to link some of these benefits again to service in the IDF. It seems that proposal could not meet the requirements of the constitutional framework of Israel.
It should be noted that the dependence of ultra orthodox communities on the state’s welfare system is not unique to Israel. In the US too, many of the ultra orthodox males spend most of their time studying torah. Many of them rely, at least in part, on the state’s welfare system. There are a few importance differences between these two situations, however. First, ultra orthodox individuals and establishments in the US do not come with a special feeling of entitlement. They claim what any other resident or citizen could claim. In Israel, ultra-orthodox often say that they give the state a special benefit, and that the state should be grateful for their services. They see their subsidies as deserved payment, not as welfare benefits. Secondly, the percentage of ultra-orthodox in the general population, and their share in public allocations, are very different in the two societies. Ultra-orthodox Jews are at least 5% of the population, and their growth rate is much larger than that of Israelis who participate in the labor market. More important, there is no comparison between the political power of the two groups in their respective communities. Ultra-orthodox parties now control 22 Knesset seats, which represent about 20% of Parliament. Their political power is thus 4 times their share in the population. This is reflected both in their ability to direct public funds to their communities, and in their role in decisions concerning the priorities of Israel in both internal and foreign matters. In contemporary Israel, this creates a very strong tension between the fact that the ultra-orthodox parties belong on the right wing side of Israeli politics on issues of relations with the Arab neighbors, but their voters do not pay the price of these policies. Finally, the ultra-orthodox in the US do not have claims on the nature of public spheres in their country (although they do try to form their own municipal units, in which they control public life). They are quite satisfied to benefit from the general commitment of the liberal democracy in which they live to permit them to live their
lives. In Israel, on the other hand, they have demands concerning the nature of Shabbath and other matters (such as the orthodox monopoly over matters of personal status and conversion).

Religious Pluralism?

Part of the challenges to the status quo on religious issues stems from the growing presence in Israel of the non-orthodox streams of Judaism. They ask the state to recognize them as legitimate forms of Judaism, and to allow them to participate in bodies and decision-making mechanisms relating to religious matters (such as religious councils responsible for religious services, marriage services and conversions). These demands are based on two main arguments: the necessity to recognize religious pluralism, and the need not to alienate Jews, in Israel and mainly abroad, who are members of non-orthodox streams. In fact, this debate exemplifies the possible complexity of some of these issues. The questions involved include ones of theology, freedom of religion, historical questions, issues of human rights, and legal-political policy questions. This cluster of issues illustrates quite dramatically why the state must get itself (and its laws) out of deciding internal religious matters.

Let us start from the easy matters. No one denies the right of non-orthodox streams to freedom of religion and worship, and to state financing on an equal basis with other religious streams. The fact that this principle is not in fact enforced, and that there have been many obstacles on the way of the attempt by non-orthodox streams to gain practical recognition of these rights attests to the depth of distrust
between the establishments of the various streams. Some progress has been made, especially since the number of non-orthodox communities has grown. But in many cases, the non-orthodox streams have to go to court to enforce their rights, and even after such decisions – it is not always the case that the allocations are in fact made. Yet this institutional aspect of the conflict deepens the suspiciousness between the groups, and weakens the status of the HCJ among the ultra orthodox, who resent its tendency to be for religious pluralism.

The more difficult matters are those in which the non-orthodox demand, and the reasons for orthodox objection, may be more complex. This are the demands by the non-orthodox streams that they be allowed to convert and to perform marriages and divorces in Israel, and that these will be recognized by the state, and that they should be allowed to join the religious councils as members.

On the face of it, the matter of religious councils should be easy to resolve on the level of principle. The non-orthodox claim seems very powerful, and the orthodox objection thus seems quite arbitrary and power-seeking. A closer examination shows that even this matter is not so simple. Religious councils are administrative state bodies, which are responsible for the provision of religious services. In terms of religious law, they are subject to the instructions of the local rabbis. The law specifies that members of the councils should be elected by the Chief Rabbinate and by the local authorities. In addition, the candidates nominated by the parties comprising the local authorities must be affirmed by the local council as a whole. In the first years of the state, this arrangement worked satisfactorily for all concerned. Most local authorities were controlled by Zionist parties, and the secular ones had no problem
nominating to the religious councils people acceptable to the NRP and to the religious establishment. The picture changed in the places in which the anti-religious-establishment Meretz party, and the ultra-orthodox, gained substantial representation. Two conflicts developed. The NRP and the ultra-orthodox parties started fighting over places in the councils. Meretz, on the other hand, insisted on candidates affiliated with the non-orthodox streams. The religious establishment, orthodox and ultra-orthodox alike, united against this idea. The non-orthodox streams, on the other hand, took the matter to court. In a series of decisions, the courts ruled that non-orthodox candidates could not be banned from the councils. The court even went as far as ruling that a woman reform candidate was a member of the council (in Netanya). Yet to this day, no religious council in Israel met and acted with a non-orthodox member...

The insistence of the religious establishment is in part a matter of political struggle over positions of power and income. But their refusal to obey the court, which is far more extreme than their refusal to do so on other matters, is based on a deeper fear. Their perception is that non-orthodox (as distinct from secular) members will ‘ruin’ true religion, as they have done wherever they became active. They object to the possibility that such people may invoke their beliefs on Jewish life and practices into decision-making within Israel.

144Another issue had been resolved earlier: traditionally, all members of the religious councils were men. At a certain point, the Labor party in Yeruham elected an orthodox woman as its candidate – Mrs. Leah Shakdiel. The religious establishment objected, ACRI took the case to court, and the orthodox judge Menahem Elon ruled that under both Israeli law and Jewish law women could serve as members of religious councils. Mrs Shakdiel indeed served, but the number of women on religious councils is still extremely low.
In any event, the practical situation is now totally deadlocked, with the courts paying a high price because their decisions were ignored by the political system and by the religious establishment. From their perspective, the courts acted as they had to. The present law does give the parties in the local authorities the power to nominate some members of the religious councils, and it does not specify that they must be religious or orthodox. The only way for the court to avoid deciding the cases as it did was to hold the question non-justiciable. Now that it did not do it, the only way to get out of the impasse is to change the law. The present structure of the religious councils is anyway inadequate. The councils are much too big, and their work is not efficient. Often, religious councils were accused of corruption. It is better to place the administrative authority for religious services in the hands of a professional body. The budget should be allocated to different communities and streams according to their relative size. Each stream and community will then seek religious guidance from its own authorities. If this legal arrangement is not feasible, it seems better to exclude non-orthodox members from the councils by an explicit law. At least this law will permit the work of religious councils, and will not involve the court in constant battles with the religious establishment. The rights of the non-orthodox communities to their right share in the resources should be guaranteed without their representation in the councils themselves.

But the religious councils issue is an easy one compared to the deepest controversy between orthodox and non-orthodox groups: What are the defining limits of the Jewish collective? And who has the power to decide these limits, and to proclaim a person a Jew by birth or conversion? Orthodox people insist they have the monopoly over these issues. Non-orthodox people insist as emphatically that they have an equally valid claim to these powers within Judaism. Indeed, the criteria used
by the various groups may generate differences. Two obvious ones relate to children of Jewish fathers whose mother is not Jewish, who are seen as Jews by the Reform movement; and to those converted to Judaism in ways not recognized by orthodox interpretations of conversion. In Israel, the most acute problem today is that of conversion. For others, the determination of whether or not they are Jews is not controversial. In a generation or two, however, we may have a growing number of people, whose religious affiliation as Jews will be controversial, such as the children of women who converted to Judaism in a way not recognized by the orthodox establishment.

The orthodox position on this issue is clear and consistent: There is no long-term existence of Judaism without religious observance. Mixed marriages should not be allowed. Jewish identity must be exclusively defined according to Jewish law. Their objection to the non-orthodox movements stems from the fact that they are willing to adopt a more lenient attitude to Judaism, and to accord the stamp of Jewish religiosity to ways of life not insisting on these elements.145

It must be conceded that the attitude of the orthodox establishment has some historical support. Often, people who gave up the orthodox way of life and chose integration within the larger society became more vulnerable to assimilation and to mixed marriages. Often, children of mixed marriages were not raised Jewish and were lost to Judaism. On the other hand, one may present an opposite argument. The increase in the number of people affiliated with the non-orthodox streams reflects the

145 There is a difference in this sense between the Reform and the conservative movements. The Reform movement claims that Jewish religiosity is not defined by classical Jewish law. Conservatives concede that Jewish law governs, but their interpretations of this law are sometimes different from those given by some orthodox authorities.
fact that many people who do not want to be observant do want to maintain their Jewish affiliation. If the non-orthodox streams had not been available, a small number would probably stay orthodox. But the large majority of them would have stopped keeping any Jewish rituals, and thus would lose touch with the Jewish component of their identity. Under this description, the non-orthodox streams are a way of keeping more Jews in the fold, even if it is a non-observant fold. The non-orthodox streams thus open up new ways of being Jewish, which in turn increase the likelihood that people will remain proud Jews even if they do not observe.

The debate between these attitudes cannot be decided by logic alone. At the moment, it appears as if the non-orthodox model is working. The majority of Jews in Western democracies do not belong to orthodox communities. And some non-orthodox Jewish communities have been around for more than two or three generations. It is hard to know what would have happened if non-orthodox movements had not appeared. Probably, some Jews who are now non-orthodox would have remained orthodox. Others would have assimilated. And some forms of secular Jewish identity and culture could have developed. It is also impossible to assess the effect of the establishment of Israel on Jewish identity within it and abroad. But it does seem certain that had the non-orthodox movements not appeared, the number of those actively affiliated with Judaism would have decreased dramatically. In the short-term, then, history seems to support the argument than the religious pluralism with Judaism is good for the Jewish people.

The fact that Jewish identity outside of Israel is maintained mainly through affiliations with religious communities is not necessary – but neither is it accidental.
Very few maintain their Jewish identity through an explicitly secular Zionism. Others seek to maintain an active cultural Jewish identity, which is often a-Zionist or even anti-Zionist, in other ways. But the easiest and most common way of being Jewish in America is by maintaining some ties with Jewish communities, or at least with Jewish traditions like the Passover Seder. Most Jewish communities are religious. Israel has provided a different route for maintaining Jewish identity, which is not available abroad. It is based on the fact that Israel is the only place in the world in which there is a Jewish majority, so the default public culture is Jewish and Hebrew. In this sense, Israel is indeed a significant contribution to the removal of the ‘Jewish problem’, which is the fact that Jews are everywhere a minority, often hated, feared and persecuted. Political Zionism thus permits the development of a cultural Judaism which is not exhausted by religiosity.

Against this background we should return to the demand made by non-orthodox streams that Israel should recognize them as valid forms of Judaism, and grant them the power to perform marriages and divorces, and to convert. The issue of conversion is sharper, because it is directed at the essence of the debate: Who is a Jew? And how can a person become Jewish?

All agree that a person born to a Jewish mother, who does not observe and is not familiar with Jewish rituals and prayers and heritage, is a Jew. If this person lives here, he is an Israeli-Jew. Many secular Jews report that they see the Israeli component of their identity as more central than the Jewish one. As time goes by, there will be more and more people at this person’s age, who seem very much like

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146 These groups are often connected to the Yiddish tradition of Judaism, and come from the heritage of groups such as the Bund and other radical socialist groups.
him or her, with the only exception that they are not Jews under Jewish law in its orthodox interpretation. They are born here, speak Hebrew, attend Israeli Jewish public schools, read the same books and newspapers, watch the same TV programs and movies, serve in the army and sometimes dies for the country. They also see this country as their homeland. Many of them will see themselves as ‘Jewish’ in nationality and culture. Their tendency to feel this way will depend on a number of factors, including the strength or their alternative national or cultural identity, and the willingness of the state of Israel to recognize ‘Israeliness’ as a national, not just a civic, identity.

Some of these people may decide to make life simpler and convert. It will indeed be simpler only if the recognized conversion may allow them to be Jewish without strict observance. But others may argue that there is no reason why the sole way of joining the Jewish people should be the religious mode of conversion. Once we accept that the Jewish people is not exhausted by religion, why should not there be a way of becoming Jewish by nationality and culture without becoming Jewish by religion? Many of these people may therefore object not to the orthodox monopoly over conversion, but to the religious monopoly over modes of becoming Jewish. In practical terms, non-orthodox conversion may be more attractive than the orthodox one to many candidates. The studies and the process may be more in line with the aspirations and the life styles of many candidates. This conversion may permit the candidate to avoid interaction with people and institutions from which they feel alienated. More important, reform conversion does not require the convert to observe Jewish law. But most of those who might be converted are not members of non-orthodox communities, and do not want to become ones. The real challenge they are
making is that it is unclear to them why joining the collective living here, half of which does not observe, requires either observance or even a religious ceremony.

I have argued above that Israel as a Jewish nation-state can only be justified if it has a majority of Jews who are interested in keeping up their Jewish identities. If we count as Jews only observant Jews – this condition is not met today even within the green line. The justification of the enterprise of Jewish political sovereignty therefore depends on the concession that Jews cannot be just those people who observe. On the other hand, Jewish identity does presuppose an ability to distinguish between Jews and non-Jews. Furthermore, to justify a Jewish claim for self-determination, the affiliation cannot be the civic bonds of Israeliness. After all, many citizens of Israel are non-Jews, and in many instances their religious and national identities are contradictory to Jewishness. The people-hood of Jews must be based on some agreed upon criteria of membership in the Jewish people. It follows that those who are interested in the viability of the enterprise of Israel as a state exercising the right of the Jewish people to self-determination must provide a definition of Jews that is more inclusive than those who observe. This in itself could be solved, in the short term, by accepting the definition of ‘Jews’ according to Jewish law under the orthodox interpretation. In fact, this was the answer a majority of the ‘Sages of Israel’ gave David ben Gurion when asked about this question. However, this answer alienates large groups of those now living in Israel, sharing its goals, and willing to tie their fate with that of the Jewish State. Further, it alienates many Jewish communities abroad, who feel that Israel does not recognize their version of Jewishness.
However, the inclusiveness of conceptions of membership in the Jewish people for purposes of self-determination runs counter to the orthodox insistence that Jews may only marry Jews. The freedom of religion of the orthodox requires that they do have the power to decide who is a member of their religious community. If the state, for its own political purposes, decides to broaden the definition of ‘a member of the Jewish people’ for purposes of Return or registration, this will not change the marriage rules of the orthodox community. Such a willingness to adopt an ‘inclusive’ definition of ‘Jewish’ for some purposes will therefore create a division between identification of a person as a ‘Jew’ in different contexts.

Orthodox Jews use this as a reason for maintaining the present situation: there should be one definition of Jewishness, and it should be theirs. Non-orthodox Jews respond that the definition should be inclusive, and if orthodox Jews do not want to accept it – the state should grant them autonomy, but should take away their present monopoly. To this the orthodox respond that this will undermine one of the main rationales of the Jewish State. It will force them to behave in Israel as they must behave in other countries – keep their own, private, records of Jewishness. Israel should be a state where Jews can assume that those identified as Jews can be partners in marriage. If people are going to be defined as Jews in all public records without an ability to identify who is Jewish by Jewish law and who is not – Jewish orthodoxy will be privatized in the Jewish State!

So the choice is between maintaining the unity of the status of Jews, by excluding all those who are not seen as Jewish by the orthodox interpretation of Jewish law, or by creating a multiplicity of contexts in which people may be identified as Jews in
different ways. One main way will remain the Jewish orthodox way. But alongside it, there will be admitted other ways of defining Jewishness, both non-orthodox and cultural and non-religious. Multiplicity of such senses may be the natural way to go in a society, which does not attach legal implications to membership in the Jewish collective. This is not the case in Israel, and in the foreseeable future it cannot be. The question of identifying people as Jews must therefore be dealt with for all the contexts in which such consequences are relevant: Return, registration (under both religion and nationality) and personal status.

Marriage and Divorce

Under Israeli law, matters of marriage and divorce are controlled exclusively by religious laws and courts. As we saw, Israel inherited this ‘millet’ system from the Mandatory and Ottoman regimes. Moreover, it seems that this system is supported by a majority of Israeli Arabs, since it helps them to resist assimilation. Formally, therefore, this situation cannot be connected to the ‘Jewishness’ of Israel. At the same time, it seems clear that in the absence of orthodox pressure, Israel would have introduced at its inception an alternative system of civil marriage and divorce.

It is quite possible that most of the Jewish couples in Israel would have opted for a religious marriage even if they had the legal option of a civil marriage. The same is true for the Arabs in Israel. But the legal possibility of a civil marriage would have solved some of the nagging practical problems in contemporary Israel.
I do not believe that an orthodox monopoly over marriage and divorce is required by the Jewishness of Israel. Clearly this is the case when we talk of Israel as the nation-state of the Jewish people. But this seems correct even if we see the Jewishness of the state as taking inspiration from Jewish religion, or even as seeking to maintain the unity of the Jewish people and discourage people from mixed marriages. After all, there is no democracy, even those with an established religion like England and Ireland, which does not provide the possibility of civil marriages. An orthodox (or even religious) monopoly over marriage and divorce is also more harmful than other forms of religious monopolies, such as dietary regulation. It offends against some basic human rights. First is the right to establish a family with a person of one’s choice irrespective of their religion or race. Under Israeli law, a person cannot marry a person of another religion, and even within Judaism there are various rules limiting the possibility of marriage (other than universally accepted rules of incest). Second is the right to freedom from religion (or the right of non-orthodox Jews to their own freedom of religion). This right requires that people who are not religious will not be required to go through an important passage of their life through a religious ceremony. Last but not least, the laws of personal status in Judaism (as well as in Islam) are seen by many as discriminatory against women.

We saw that the Israeli ‘solution’ to these problems is the willingness to accept and even encourage practical ways to mitigate them: Israel recognizes marriages performed abroad. In some cases it recognizes private marriages performed in Israel itself. Israel’s recognition of common law marriages is one of the broadest in Western countries. In terms of the laws of divorce, couples married legally in

147 The most important ones are the rule that a Cohen cannot marry a divorcee, and the rule that bastards – children born to a married woman to a man who was not her husband – cannot marry for 10 generations.
religious courts are often worse off than couples married in alternative ways. There is therefore an anomaly here. On paper, the religious monopoly creates serious problems to those who are unable or willing to marry under them. In reality, the more serious practical difficulties are the ones created under religious laws of personal status, which apply to those who did marry under the law. Another anomaly created by Israeli law affects orthodox Jews. For secular people, the orthodox monopoly means religious coercion: They must marry under Jewish law. For orthodox people, on the other hand, the same religious monopoly creates a mirror-difficulty: They cannot choose to marry under Jewish law without seeking state recognition. This is an option they do have in a legal system under which religious marriages without a state license do not count as legal marriages.

Many argue that the legal arrangement on matters of marriage and divorce is inconsistent with ‘democracy’. Since I advocate a thin conception of democracy, I do not believe this is the case. The majority may decide that they want a religious monopoly over such matters. However, a commitment to human rights does suggest that these laws should be changed. While some scholars have argued that the legal situation in Israel does not violate rights, most concede that it does. However, it is not enough to point out that the present legal arrangement violates rights. One should also investigate whether the feasible alternatives improve the human rights situation sufficiently to justify the change. On paper, the most attractive alternative is the one suggested by Pinhas Shiffman: The only way to gain state recognition of marriage

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148 It is unclear whether Jewish law regards civil marriage between Jews as a marriage, which requires dissolution if the parties want a divorce. If there is a requirement of Jewish divorce, which is not followed, the children of the woman from another man, even if he is her husband, may be bastards under Jewish law. If there is no such requirement, divorce between such parties may be much easier than it is under Jewish law.

149 This interpretation is corroborated by the fact that Israel added a reservation on this point when it ratified the International Covenant on Civil and Political Rights in 1992.
would be by a civil ceremony. Divorce, too, will be regulated by the state. In addition, anyone interested would be free to conduct religious services if they want to.\footnote{Shiffman (1995). It should be noted that Shiffman is an orthodox man.} A person who chose to perform a religious marriage will be under an obligation to also dissolve it under religious law. Shiffman’s arguments in support of his proposal are quite powerful. This arrangement will go a long way towards strengthening a sense of civic cohesion, without distinction of religion or national origin. It will make the performance of a religious ceremony a matter of choice, thus giving clear weight to the right of freedom from religion. And it will permit religious people to marry under their religious law without seeking state recognition of the marriage, this increasing their freedom. Finally, this is the easiest arrangement in terms of education. The state is neutral, and the religious communities have full autonomy. If I had to choose an arrangement in the abstract, without awareness to the special features of Israeli society, this is the arrangement I would have recommended.

However, this arrangement is not practical in Israel in the foreseeable future, because of the nature of most of the sub-cultures in it. Most people in Israel, Jews and non-Jews alike, see the marriage ceremony as a form of membership in a community. A civil ceremony at the state’s registrar, or even a party thrown to family and friends after the event, just do not fulfill this function. For most people in Israel, and in the world, the basic rites of passage get their meaning from social forms which are usually connected to primordial rituals. Consequently, the declaration of the state that the only marriage recognized by it must be civil will bring about a dangerous disconnection between what the state recognizes and what is meaningful to the parties. It is hard to believe that mandatory civil marriages will indeed obscure the
differences between communities so that it will become natural and frequent for people to marry across religions and communities. It is very unlikely that Israel will soon have a unified civic community, in which all religious and national affiliations are totally and effectively privatized. Mandatory and exclusive civil marriages, in the circumstances of Israel, are likely to raise enormous amounts of civil unrest and hostility.

Mandatory and exclusive civil marriages also sharpen a problem existing for the secular Jewish public. Religious communities have very structured and full-bodied rituals to perform a marriage. Non-religious communities lack this cultural depth. It is thus not surprising that a full two thirds of Jews in Israel say that they would marry in a religious ceremony even if there is an option of a civil one. The religious service offers a welcome structure, and a sense of continuity with an old-age tradition. The partial alienation, which may be felt by secular families is easily ‘compensated’ for in the ‘secular’ party which follows. We should note that this need may well be met by a non-orthodox religious ceremony, and some couples indeed prefer such ceremonies. In them they have the combination of traditional structure and the liberty to make the ceremony more suitable to their preferences. Often, the variation strengthens the theme of equality between the couple. This seems an interesting cultural process. It suggests that even critics of the orthodox monopoly are reluctant to give tradition completely up. It is to be expected that anger at the new proposal from Moslem and Christian circles will be even more pronounced than it would be from Jewish circles.

Against this background, the US arrangement seems preferable and more suitable to the conditions in Israel: All couples need to obtain a state license, to ensure that the
general legal requirements (such as age, no incest, no bigamy) are met. Once the license is obtained, the couple may choose the ceremony they want. They may opt for a civil ceremony at some state’s official office. Or they may perform a religious ceremony through any clergyman recognized for this purpose by the state. The state itself does not put substantive controls on the identity of religious people who can perform marriages. Divorces must be obtained in civil courts, and people married under religious law may also obtain a religious one. In fact, in some states laws are aware of the difficulties one may have in obtaining religious divorce, and they make the decree of a civil marriage dependent on the parties’ cooperation in obtaining a religious divorce as well.

If this arrangement is in fact adopted, it will create serious problems for the rabbinical courts and orthodox communities. It might be very difficult to know if people married in a civil marriage or a non-orthodox one are considered Jewish by Jewish law under orthodox interpretation. For those who really care about the threat of mixed marriages, this may mean social seclusion and private family books. Under the present arrangement, one may assume that every person married in a rabbinical court is indeed Jewish, so their children are Jewish by birth. A practical solution to this problem is to make the records transparent. Marriage and divorce records will specify the identity of the body who performed or decreed the marriage or the divorce. Similarly, when a person is converted, it will be recorded who and where performed the conversion. In this way, the public records will still contain the information that orthodox people need to follow their religion, while the state will recognize a more inclusive version of Jewishness for its purposes.
The proposed arrangement is more radical than some other proposals, which sought to leave the religious monopoly as it is, but add civil arrangements for those who cannot marry under religious law. The attractiveness of this proposal from the point of view of the orthodox establishment is double: First, those who can marry under Jewish law will be forced to do so. Secondly, the civil arrangement will be the exception, so that anyone can know that those who chose them are ‘suspect’ in some way. In addition, the latter arrangement communicates an attitude less hospitable to mixed marriages.

I cannot deny the argument made by the orthodox that the proposed change will be seen as more lenient to mixed marriages. It may even be that the availability of a legal framework permitting such marriages will lead to a slight increase in such weddings. However, I do not believe this likelihood justifies then present situation. Furthermore, the change in the law may in fact strengthen, rather than weaken, the educational and social position vis-a-vis such marriages. We return, again, to the questions of Jewish identity and its strength. The matter of mixed marriages is not related to the divide between religious and secular Jews, but to the divide between those for whom Jewish identity is central and crucial and those for whom it is a relatively weak component of their identity. People with a strong Jewish identity, religious or secular, will be very aware of the heavy price, which will be paid, in terms of Jewish identity, within a mixed couple. The picture will be even more complicated when we think of the education of children in such households. In fact, it is important that people, religious and secular, will not rely too much on the laws in these matters. These matters should be a part of the picture of the good life of people themselves.
The proposed arrangement will provide for religious pluralism and freedom from
religion. The orthodox monopoly will be removed. But the transparency of the
records will allow the orthodox protect both their own freedom of religion and their
wish not to be seen as a sect or a privatized stream. The state will keep its records in
such a way that the various streams and individuals who care about the differences
will be able to use them for their purposes. Thus, they will be able to ascertain
whether the person called a Jew in the records is regarded as a Jew by their rules; and
if they recognize their marriages, divorces or conversions.

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We can conclude that all the contexts, in which legal arrangements depend on
the religious or national identity of individuals, the state may run into trouble. These
arrangements are dictated by neither the democratic nature of the state or by its
Jewishness. In some cases, changing them is required by a commitment to democracy
or, more often, to human rights. In many of these matters, the state gave up to
pressure by orthodox establishments, and granted them monopolies which do not
enjoy the support of the population at large.

These close links between Jewish identity and matters of religion, nationality and
citizenship bring to the fore deep and pervasive controversies. These controversies, at
times on the verge of cultural wars, threaten the solidarity between Jews in Israel and
abroad. They also burden the delicate balance between civic groups within Israel. As a result, these controversies limit the ability of Israeli society to invest its attention and powers in dealing with its existential problems. These tensions are ideological, and cannot be ‘resolved’. If Israeli society wishes to survive, it must concede that an agreement about a political framework must be reached. These agreed-upon arrangements will free the state, the law and the courts from the need to decide these questions one-by-one, as they arise. Instead, the laws will reflect the social agreement reached, and the agreement will be drafted so that all internal religious questions are left out of the courts. Ambiguous and charged terms such as “Jew” will be defined in the law in a clear way, and there will be no aspiration that the application of laws seeks to do justice to a pre-legal, intuitive sense of Jewish identity.

The constitutional arrangement that will be adopted on these matters does not have to take the form of a US-like separation, or of a declaration that Israel is a secular state, as was done (with limited success) in France and in Turkey. These are permissible frameworks, but they are not the only ones that may be justified. It is only crucial that the adopted arrangement leave matters of religion and identity to the respective communities and their leaders. The state must provide basic services to all its residents. These include arrangements for matters such as marriage, divorce, and burial. These arrangements must be dignified and accessible to all. Once these basic constraints are met, Israel can explore the arrangements most suitable to its structure and its pluralistic population.
Chapter VI: A Jewish and Democratic State: An Interim Balance

My basic approach is that it is important and justified to seek and grant meaning to the deep preference of the large majority of Jews in Israel that there state be democratic, but will also be the only state in the world which reflects some Jewish distinctness. One may even say that making this effort is required by the democratic nature of Israel. Ignoring this deep preference of most of the Jewish citizens of the state may itself create a serious tension between democracy and the state’s identity. The effort to accommodate the two is desirable for political as well as ideological reasons. A conception of the state that is incompatible with the deep preferences of a large majority of its population may well lead to deep unrest and to violence. Ideologically, giving up on the idea of a state that is in some senses Jewish is giving up on the ideal of Jewish political self-determination. The implication is that political Zionism is, and maybe has always been, misguided and misconceived. While some have been advancing this view for a long time, this conclusion implies a major re-assessment of one of the major movements of national liberation of the 20th century. The reluctance to endorse it a-priori thus seems to me unjustified. I prefer a systematic and serious attempt to study the tension between these elements and seek to mitigate it, rather than argue at the outset for a solution that is either purely Jewish or totally democratic.

Democracy is a vulnerable type of political regime. There are waves of democratization – and waves of their collapse. In most parts of the world, countries do not attain democracy, or lose their democratic regimes, because of their ‘Jewishness’.

151 The ambiguity of “Jewish distinctness” allows most of the Jews, who differ bitterly about the meaning of the Jewishness of Israel, to unite against the views of those who advocate that Israel be a neutral liberal democracy, devoid of any Jewish distinctness.
In fact, even Israel’s bitter critics concede that, in the region, Israel is the state with the most developed democratic regime. Many democracies have stable particularistic ethnic and national cultures, which do not undermine their democracy. True, the nation-state is under attack in all parts of the Western world. On the other hand, the drive for ethnic and national self-determination is anything but weakening in many parts of the world. Primordial affiliations of religion and ethnic origin prove to be much more resistant than many had expected (or hoped). In Israel, too, some of the threats to democracy do not stem from the Jewishness of the state in any of its many senses. In short, it will be a mistake to think that the Jewishness of Israel is the immanent and only enemy of democracy in it.

On the other hand, Jews and Jewishness may be under threat, in Israel as well as in other places, because of forces, which are not related to democracy. In general, the rights of Jews to life, and their civil and political rights, are more protected in democratic countries than they are in other countries. On the other hand, liberal democracies create for Jews risks of assimilation and loss of identity.

These general observations suffice to suggest that there is nothing in the nature of the combination, in Israel, between Jewishness and democracy, that justifies an a priori rejection of the possibility of a combination of the two. Yet we saw that in Israel, the combination does indeed cause unique issues. Since Israel is the only country in the world with a Jewish majority, it is also the only state in the world in which democracy and some sense of Jewishness may in fact reinforce each other. On the other hand, a serious challenge to the democratic nature of the state stems from
certain readings of its Jewishness. And a serious threat to its Jewishness may follow from a blind commitment to some readings of what is implied by democracy.

My decision to concentrate on studying ways of combining democracy and a Jewish distinctness is based on my conclusion that such a combination is possible, and on the normative conclusion that, under present circumstances, it is preferable to all available plausible alternatives from the perspectives of all concerned. Nonetheless it is important to stress that while the combination is possible, it is not inevitable or even self-evident. In both of the major divides – these between Jews and Arabs and between secular and religious Jews – the cohesiveness and the willingness to accept compromise are weakening. This fact may undermine the conditions for the stability of the combination between democracy and Jewish distinctness. The impressive achievements of the first 50 years of Israel’s existence do not guarantee that Israel can continue to be a stable and a flourishing state.

The achievements are truly impressive. Political Zionism has led, together with other complex political and social forces, to the establishment of the state of Israel. Israel managed to withstand an early challenge to its integrity and security, and managed to build a state with a large Jewish majority. Israel is now the home of almost a half of the Jewish people in the world, and is a lively center of Jewish life. The generation of the Founding Fathers, the last generation of the exile, was probably more familiar with things Jewish, and more Zionist in its aspirations, than the present generations of Jews living in Israel. However, for Jews living in Israel, the existence of a state with a Jewish majority, whose language is a rich and lively Hebrew, and whose public culture is Jewish and Hebrew, are all things taken for
granted. Israel is a country illustrating development, initiative, energy and commitment. The development of Israel democracy, both within the Jewish sectors and among Jews and Arabs, is impressive. Israel today has more freedom of expression and of protest, and more freedom of political and social association, than it had when it was founded. The situation of the Israeli Arabs is improving, and their political power is on the rise. Similarly, access of groups that used to be on the periphery to the center has also greatly improved. Israel sees processes of maturing of political processes and institutions, an increased interest in the transparency and integrity of the political echelons, and an empowerment of civil society and its institutions. All of these are aided by a strong and independent judicial system, headed by Israel’s Supreme Court, and by a strengthened state controller, and robust public and press coverage. The ‘third sector’ of NGOs and civil society has become much more pronounced and visible. All these processes are still in place despite the fact that since October 2000, and for over a year, Israel has been in the midst of a violent confrontation with its Palestinian neighbors, facing an economic crisis that was worsened by the September 11 2001 attacks on the USA.

Yet justified pride in these achievements should not make us oblivious to the challenges of the present and the future. Israel has not yet reached a political agreement with its neighbors. In particular, it has found no adequate response to the Palestinian claim that they should be allowed to exercise their own right to self-determination in a state of their own. As a result, Israel has been controlling, for over 30 years now, all the land that belonged to the pre-1947 Palestine. This occupation inevitably leads to systematic efforts at surveillance and control over the Palestinian population, large parts of which seek to resist it. The Oslo process, which started in
1993, was an attempt to end this situation by an agreement between the parties. The process raised mixed feelings among both Jews and Palestinians, leading to intensive acts of protest on both sides. The protest led to the assassination of PM Rabin in November 1995, and to a series of terrorist attacks on Jewish civilians. As a result, the process was halted by Netanyahu’s government in 1996-1999, and collapsed after the failed Camp David talks in 2000. At this moment (January 2002), a years’ long cycle of violence left hundreds dead on both sides, with a political arrangement seeming unlikely in the near future.

In Israel, these developments are having mixed effects. The tensions within Israel among Jews and Arabs have never been deeper. In October 2000, just as the unrest started in the territories, violent protests and demonstrations started in many concentration of Arab population in Israel. 12 civilians were killed in clashes with police before order was restored. As a result, a majority of Arabs has boycotted the 2001 election of the PM. As prospects of a political agreement with the Palestinians seem further away, the predicament of the Israeli Arabs grows. Claims for greater civic equality are made, but at the same time the challenge of the legitimacy of Israel’s Jewish nature, and active support of the forces fighting against it, become more visible. These in turn raise a public debate about the loyalty of the Arab citizens of Israel to their country. While there seems to be some debate within the Arab population on the stance they should take under these circumstances, the vocal and political representation is, on the whole, conflictual and radicalized152.

152 An illustration is the fact that a group of Arab MPs tabled a private bill seeking to legitimate the right of an occupied population to resist the occupation…
This debate, as well as the continuing debate over the future of the territories, increase the intensity of the right-left divide. There are some voices among the Jewish population calling for an immediate return to the negotiating table, coupled with a refusal to serve in the IDF. On the other hand, the state of emergency and the reality of daily violence have created an incentive for a unity government, in which Labor and Likkud cooperate. There are some initiatives to seek a new Jewish agreement on this range of issues. On the other hand, the internal Jewish divides are deep, and there is opposition from some of these groups to these attempts and compromises. Forces within the Jewish sector are therefore mixed, and pulling in different directions.

The continuing security challenge does not allow the systematic treatment of Israel’s serious social problems. At the same time, high unemployment and growing gaps seriously affect the ability of Israeli society to withstand a prolonged war of attrition. Israeli society has stood the challenge of the second uprising surprisingly well. It is not clear how much longer it can take it without serious erosion.

Ironically, despite the serious security and economic problems in Israel, it is still a haven for many. Jews and family members of Jews come under the law of return, and there is an estimated quarter of a million foreign workers in Israel, over half of them illegal. The demographic issues become even more charged when we recall that one of the primary stumbling blocks of the political agreement with the Palestinian is the resolution of the problem of the refugees. The official Palestinian position has always been that the issue should be resolved by letting the refugees (and their descendants) choose between actually returning to their homes and settling down
elsewhere with compensation. The Israeli position on this issue, as on many others, is not very clear. Initially, and for many years, Israel expressed a clear and unequivocal objection to any ‘actual return’ as part of the negotiated deal. In Camp David and Taba, it seems that some Israeli politicians are willing to consider various formulas that might concede a principle of ‘return’ with some practical caps on the persons that will be allowed to return to Israel itself.

In this book I made a deliberate decision not to discuss the issues of the contours of the political arrangement between Israel and the Palestinians in the territories occupied by Israel in 1967. This decision is based on the realization that tensions between democracy and the Jewish distinctiveness of Israel will persist even if the solution to this tension is the establishment of a Palestinian state alongside Israel. In fact, this development was the assumption against which I have conducted my analysis. This assumption seemed plausible at the time (1995-1997).

At this time, as the prospects of an early agreement seem dimmer, I must address the present situation as well. It is important to see that the overall picture has not changed despite the political upheavels of the 1990s. The justification for allowing Jews to have self determination in their ancient homeland, that led to the 1947 UN decision, has not weakened over time. To the contrary, it has strengthened. Nonetheless, this right does not detract from the parallel right of the Palestinians to enjoy political self-determination in their homeland. The question of how to accommodate these rights is still unresolved.
In principle, there are only two possible ‘solutions’ to the problem. One is a single bi-national state over the whole of Palestine. The other is a partition of the land between the two peoples, so that each will have its own nation-state, in which it is a strong majority, while its members may live as a minority in the nation-state of the other people. A third possibility, of a neutral civic state, privatizing the national and religious affiliations of all its citizens, does not seem attractive to either side. To be practical, both solutions require some kind of a reconciliation that will give both peoples, and their members, adequate levels of physical and cultural security. Unfortunately, there are forces within both peoples who object to these solutions, and seek to undermine their prospects in various ways. These are the issues that any responsible political process among the parties will have to address. All I can say here is this:

Under present circumstances, there is a Jewish majority within pre-1967 Israel, but there is no such majority in Palestine as a whole. I see no moral justification and no political feasibility for continued Jewish control over the whole of the land, and its continued monopoly over its other resources. The present situation, under which the PA has jurisdiction over most of the Palestinian population, but has no effective control over the land, its resources and its borders, cannot be the basis of a stable, long-term political arrangement. Even if security considerations prevent, at this time, the establishment of a viable Palestinian state, Israel should make all necessary arrangements not to create a situation under which its possibility is maintained.
It is my firm belief that under the circumstances of the region, the only feasible solution for the foreseeable future is that of two nation-states living in peace next to each other. While Israel has legitimate security interests in minimizing the danger that it will be threatened by the Palestinians, it has an existential interest in facilitating effective self-determination for them. Additional Jewish settlement in the midst of Palestinian population seems a recipe for disaster, creating unnecessary barriers against a possible partition. On the other hand, the idea that a future Palestinian state will be, or can be, Jews-free, is unacceptable. The Jews who now live in areas which may in the future be within the Palestinian state should be allowed to choose whether to leave due to the changed political situation, or to stay within them.

In addition, all this discussion is political. It is misleading, even dangerous, to conduct it exclusively or mainly in terms of human rights protected by international law. Of course, there are aspects of human rights involved. But, as in most cases of serious human disputes, human rights talk in itself cannot resolve the issues. There are conflicts between rights and between rights and other legitimate interests. These conflicts need to be addressed, and they can only be addressed by negotiations.

Yes, Palestinians have a right to political self-determination in their homeland. But the realization of this right cannot be allowed to undermine the right of Jews to self-determination. It is sad that the refusal of the Arabs, understandable as it may be, prevented the 14th of May 1948 from being the Day of Independence of both the Jewish and the Arab states in Palestine. The fact that only the Jewish state was then founded is not the fault of the Jews. And the Jews can seek to ascertain that any
agreement that is reached will contain sufficient guarantees that Israel’s power to defend itself is not seriously harmed. On the other hand, Israel will not gain security by an extended control over a large Palestinian population, which does not enjoy civil and political rights. These constraints, hopefully, will generate in both people a leadership that will reach an agreement that will benefit both of them and the region as a whole.

I will return now to Israel itself. Despite its complex social and political situation, Israel can maintain its democracy and its identity as the home of the Jewish people. The stronger its democratic features – the better will be the chances that the various groups within it can co-exist in its framework. This is why all these groups should accept the demands of democracy, and affirm the legitimacy of its basic institutions. I do not expect these groups to affirm democracy if they believe that such an affirmation contradicts their existential interests. My cautious optimism, when it exists, is based on my belief that each of them does get significant benefits from the continuation and stability of Israeli democracy. Nonetheless, it seems that the majority groups in Israel has not yet drawn the right balance in relations to the ‘strongest’ minorities – both Arabs and Haredim. Not enough is done to help them feel full members of the polity, and in turn they are not required to affirm a minimal sense of commitment and allegiance to the state which, after all is said and done, does give them reasonable levels of welfare, freedom and security. The failure exists for both groups, but is much more serious concerning the Arabs.

It is possible that, despite the difficulties in the political process culminating in over a year of violence between Israel and the Palestinians, and despite other sources
of instability within Israel, the co-existence between groups within Israel will continue, and may even get stronger. There are strong forces, economic as well as social and political, which support the status quo and push towards making it more stable. However, such a development cannot be taken for granted. There are forces and processes, which make the situation quite volatile. Israel needs to think of ways to improve the prospects of stable co-existence between groups in Israel.

There is a large number of ominous signs. The short-lived Barak government (June 1999 to February 2001) lost its Knesset majority in the summer of 2000, as Barak left for the fateful Camp David summit. For complex reasons, the negotiations with the Palestinians collapsed, leading to the beginning of the second intifada (uprising) in the territories. At the beginning of the uprising, Israeli Arabs protested violently, and the riots escalated when two Arab youngsters were killed by the police. In a few days, main arteries were closed, and 14 people were killed, 13 of which Arabs. The shock upset the delicate fabric between Jews and Arabs in Israel, leading to an almost general ban on the 2001 elections in the Arab sector. These events are now being investigated by a special Commission of Inquiry. Since February 2001 Israel has a broad ‘unity’ government, headed by Ariel Sharon. The continuing violence, and the absence of a political horizon and negotiations, are eroding the hope and the sensitivity to the needs of the other within Israel and the region. The economic situation in the region is hard, with growing gaps within Israel and growing despair around it. The social and economic gaps within Israel converge, as we saw, with some of the ethnic and national rifts.
It seems that these facts require that a new ‘social covenant’ among the main parts of Israeli society about the conditions for their co-existence within a single political framework. All main three groups – secular Jews, religious Jews and Arabs – must make painful compromises to secure a shared political framework. As far as I can see, it is in the interest of all three groups to make the effort and find the necessary compromise, that may permit a long-term co-existence. I cannot identify the contours of such a compromise, because there are a number of possibilities that may be available. More important, a compromise cannot be real unless it is reached by a serious and equal negotiation among the parties concerned. It follows that we should resist the temptation to permit one group, the one to which we belong, capitalize on its present transitory advantage, since such ‘gimmicks’ may undermine the trust among the parties in an irreversible way. My purpose therefore is to stress the necessity of agreement, and to identify some of the constraints that every such agreement will have to meet.

In terms of the general structure of decision-making mechanisms and the shared political framework, it seems that Israel does need a written, formal and entrenched constitution, established in a process of broad negotiation and deliberation. This social contract may facilitate an agreement not on values, aspirations, narratives or conceptions of the good, but on a shared political framework, which will attend to the basic interests of all groups. The social contract (or at least the social understandings) must include three ingredients: a shared commitment to some framework rules; shared normative constraints such as respect for human rights; and an agreement concerning decision-making procedures which will include structured participation of representatives of all main groups within Israeli society.
The rationale behind my support for a constitution for Israel leads me to object to the constitutional process as it has been developing in the last decade. Within the Jewish groups, this process deepens the tensions between secular and religious instead of providing a political framework in which they can share. The process is led by a political group, which is secular, liberal and Western in orientation. It makes the court, which is a non-representative body belonging to the same group, an active political actor, and the court aspires to determine questions which should be left to the decision of the political system. It thus deepens resentment and frustration instead of providing a shared framework all can identify with. In terms of the Jewish-Arab tension, the court at best is a real asset, and at worst it does not improve things and legitimizes the political status quo. In recent years, the court has delivered a number of decisions actively supporting Arabs’ claims for equality under the law. The Arabs will thus not have a problem with a Bill of Rights and judicial review. But they are usually left out of constitutional deliberations and debates. And the 1992 laws, which were dubbed by Aharon Barak ‘the constitutional revolution’, also declared that Israel is a Jewish and democratic state, something Arabs feel quite strongly about. The constitutional process consolidates the existing status quo in terms of political power, and this too is unattractive to Arabs (and other groups whose political strength is on the rise, such as the new immigrants from Russia and the oriental haredim). This status quo does not recognize the Arabs as a national minority, and does not recognize its collective rights or their claims to cultural and educational autonomy. It may well be that the solutions to these issues will not meet the demands of the Arabs, but if they participate in the negotiations in a serious way, they can at least make demands concerning the constitutional entrenchment of some of these principles.
The 1992 basic laws did increase the visibility of the tensions between the Jewish and the democratic components in Israel’s self-definition. The laws generated, as we saw, some claims that the combination was impossible or unjustified. But on the whole they did not generate, to date, a sober and realistic discussion of the social complexity of the two main rifts affected by these tensions. It is not clear which of the rifts is the greater victim of this neglect. Among many Jews, the tension between Jewishness and democracy is seen as an internal Jewish tension. Secular, liberal Jews want ‘democracy’, while orthodox and national Jews want ‘a Jewish state’. As we saw, there are tensions among democracy and some senses of Jewishness, which are indeed related to the religious interpretation of ‘Jewishness’. However, concentrating on these tensions obscures the great variety of opinions among non-religious Zionist Jews concerning the Jewishness of Israel. Such exclusive reading tends to strengthen the pernicious and misleading perception as if secular Zionists have no interest in maintaining some Jewish distinctness to the state. It serves those who see Jewishness as a necessarily religious affiliation. However, Zionism will not survive in Israel if it does not affirm the possibility of non-religious Jewish identity, because it is among secular Jews that this identity is insecure. Thinking about the tension between Jewishness and democracy in exclusive Jewish terms also aids in the persistence of the distancing and the repression of the seriousness and intensity of the predicament of the non-Jewish minority, who is required to pledge allegiance to a state which excludes it, by definition, from full and equal partnership. Finally, seeing the tension as an internal Jewish problem prevents us from seeing the important relations between the two rifts - the Jewish one and the Jewish-Arab one. Xenophobia is not an exclusively religious phenomenon. It is true that religios wars take a place of pride in
the history of group conflicts, but we have seen many group conflicts waged between people belonging to the same religion... Similarly, the fact that within Judaism (and most other religions) it is possible to find religious justifications, and even mandates, for religious holy wars, should not mislead us. Discriminatory and xenophobic attitudes towards Arabs are not the exclusive domain of religious Jews. The particularistic national-cultural conception of Judaism generates suspicion and fear towards Arabs as well, and a tendency to define the Arab as ‘the enemy’. These tendencies clearly are strengthened by the persistent violent conflict between the two peoples. Sentiments in the Western world after the September 11 2001 attacks on the US, as well as attitudes in Europe, are similarly complex, with religious, security, cultural and economic factors all intertwined.

Finding an acceptable and stable arrangement for Israel’s existential problems requires awareness to the complexity of the tensions between Jewishness and democracy. Such awareness creates new problems and highlights old ones, but it is on the whole beneficial and necessary. It is the only attitude that may guarantee that we offer and consider serious solutions, and not hide behind slogans which do not face and acknowledge the real problems we face.

One structural implication relates to the nature of the democratic regime that Israel must have. We draw a distinction between majoritarian and power-sharing democracies. England is still the paradigmatic example of a winner-takes-all situation, although even there the model does not seem to be working very well any

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I want to emphasize again that the two main rifts are not exhaustive. Among Jews it is important to distinguish between ‘universalists’ and ‘nationalists’. This rift is related but is not identical with that between religious and secular Jews. There are universalists among religious Jews, even among orthodox Jews, and there are many ‘nationalists’ among secular Jews. In fact, the Zionist movement, which was mostly non-religious, was all distinctively ‘nationalistic’.
more. The reason is quite obvious: majoritarian democracies may work well, and be quite effective, in homogenous societies without chronic minorities. In such societies, whoever is in power may well seek to implement their distinctive policies, because they’ll be judged by the sense of the population as a whole that the government promotes their interests. Even if there is a deep public debate around the identification of public interest and the public good, the population is sufficiently homogenous that no government can ignore the interests of large segments of it. The structural features of such societies mean that there are social constraints, which limit the powers of government. It is less likely to harm in a serious or irreversible ways democratic structures or the rights and interests of the opposition group, because there is a reasonable chance that the opposition will become the government in the near future. However, these structural guarantees are missing in deeply divided societies. They are especially weak for the protection of chronic minorities, especially those deemed threatening. Under such circumstances, a majority of both contending powers may unite to persecute and oppress the threatening minority. It follows that pure majoritarian democracy is ill-suited for deeply divided societies with chronic minorities, like Israel. In such societies, stable democracy requires structures of power sharing even during regular politics, and a victory in the elections should not be allowed to be seen as a mandate to implement the party program in its pure form. Clearly, there are institutional and structural implications to the analysis of Israeli society, which should be reflected in its constitutional structures and the type of democracy it should adopt.

This insight dictated the decision-making mechanism adopted to resolve differences among Jewish groups in the state’s early years. As we saw, the secular
majority did not use its dominance to dictate arrangements, and refrained from separating state and religion as some of its leaders wanted. Instead, a constructive modus vivendi was sought between the various groups, giving each of them veto power over those arrangements that seemed crucial to them. In other countries, the same insight led to the creation of multi-cultural societies, and to constitutional structures which entrench power-sharing mechanisms between groups (such as in Belgium and Austria). Other rifted societies used federalist solutions, which combined a loose cohesiveness with autonomy and control of various groups within their own ‘units’. What is common to all such arrangements is that they require some basic understanding among all major groups about a political framework within which they can all coexist in a stable way. Such understandings in turn require direct and detailed negotiations among the groups, and it further requires the entrenchment of the understandings in law or even in a constitution, where they will not be vulnerable to changing majorities. Clearly, these arrangements do not follow inevitably from moral or normative principles alone. They reflect also the realities of power. But only a serious process of negotiations will guarantee that the arrangements adopted are truly responsive to the needs and sensitivities of all the major groups. And that it contains an adequate response to the major issues on the agenda.

It follows that I think that awareness to the complexities of the tensions between Jewishness and democracy in Israel should start all major groups in Israel on a serious process of reaching a ‘social contract’. The proposed contract should not be drafted by the ‘enlightened’ elites, even if they really try to respond to the needs of the other groups, including the Arabs and the haredim. The ‘others’ should themselves be offered the opportunity to participate fully in the process of
deliberation and drafting. At the same time, these groups should not be allowed to have a veto power over the prospect of reaching such a covenant. And they should not be allowed to prevent a situation in which some shared basic principles are removed from the realm of ‘regular politics’, where everything is up for grabs.

Two things are crucial in this process. First, the agreement must be general, but it must also deal with the details. No one can make progress while making very vague and general statements, without committing oneself to specific arrangements. The Kinneret covenant, therefore, cannot stand on its own. This is not the kind of process I have in mind. The agreement must include reference to the main decision-making mechanisms, which will form the state’s material constitution. And it must be a ‘package deal’ in which each group can make gains while making concessions on other matters. It follows that the ‘package deal’ should be entrenched, so that it will not be vulnerable to changes by a simple majority, once the others have already made their concessions. Secondly, the body preparing this contract/constitution should be different and independent from the regular legislature, and the process of drafting, debating and ratification must also be independent of any particular knesset.154

Some may argue that such a process in Israel is doomed to fail, because a constitution cannot be enacted without certainty, and Israel does not face such a necessity at the moment. I beg to differ and say that the necessity does exist. True, there are groups whose interests it is to continue under the present arrangements, 

154Legislators may find it extremely hard to transcend their immediate political agendas and their legitimate wish to be re-elected. This is why they may find it hard to promote the long-term interests of society as a whole. The ratification process may, and should, include approval by the legislature. The majority the Bill should get should be at least as high as the one required for amending the document. But there must also be an element of broad public participation and support, which are required if the document is to fulfill its important functions.
under which everything is regular politics. This is especially true of the haredim, whose political power in everyday politics is greater than their influence over basic preferences of the population. The Arabs, too, may be ambivalent about such a process, for slightly different reasons. Unlike the haredim, the Arabs have not been very successful in using their political power, since they are not considered legitimate partners for government. On the other hand, their political situation has consistently improved over the last 50 years. They may well reason that time may be working in their favor, so that they can get more in 10 years than they can get now. More important, they may feel that participating in such a process may grant Israel and its future constitution a legitimacy that they do not wish to impart on it.

For these reasons, and others, it may be impossible to reach a social contract or a constitution in Israel. If all major groups agree to participate in the process, however, this in itself may be quite an achievement. Besides, such processes may have their own dynamics. Maybe the representatives of the different groups will come to realize that, since they cannot stop the process, they had better participate and try to gain as much as they can. An inclusive process might therefore be a major contribution to civic cohesion in Israel even if it fails to generate an agreement.

Let me illustrate my claim that all major groups may indeed benefit from participating in such a process by looking at one of the most controversial arrangements in present-day Israel: The Law of Return. The Arab preference is clear: the principle of Jewish return should be eroded as far as possible. If they had their way, Jews would have no privileges in the field of immigration. On the face of it, all Jews, and all Jewish citizens who acquired their citizenship under the law of return,
should be united against this position. This however is not the case, and Jewish interests themselves are mixed. Orthodox Jews believe that Jewish halachic identity is both necessary and sufficient to become a member of the Jewish state. They would like to minimize the application of the law to non-Jews under the halacha as they interpret it. They would therefore want to keep the religious definition of a Jew in the law of return, amended after the Shalit case, but limit the right of non-Jewish family members to immigrate. For secular Zionists, halachic Jewishness is neither sufficient nor necessary for membership. An anti-Zionist hared should not be eligible, because he does not aid the project of building a national home for Jews in Israel; and a person who has a national-cultural active Jewish identity despite the fact that the halacha does not see him as Jewish (say, because he was born to a Jewish father, not a Jewish mother) is to them a very welcome candidate. Finally, all Jews committed to the ideal of democracy must also require that people acquiring Israel’s citizenship should be required to affirm a commitment to the principles of democracy. In other words, various groups of Jews do have an interest to change the present immigration arrangements under the law of return. In addition, we saw that the present legal situation has the additional disadvantage of forcing the state and the courts to decide questions of religion and identity. Many believe that these are questions which are not amenable to legal resolution, and which threaten to give the state’s support to a certain religious interpretation, thus alienating all those who do not share it. Consequently, many may prefer an immigration arrangement, which will not require the courts to decide controversial religious and ideological issues.

This complex picture suggests that it may be possible to agree on an immigration policy, which might offer all groups some substantial advantages over
the existing legal situation. Immigration will be dealt with under general laws, which will not refer to national affiliation. All people acquiring Israeli citizenship will have to go through a period of adaptation. No one will acquire Israeli citizenship immediately and automatically. Naturalization will require, as it does in most other countries, some familiarity with Israel, its language, laws and culture. It will further require an oath of allegiance to the country and its democratic regime. There will be a debate about the principle of Return. It is likely that at this stage, a large majority will insist that it is kept. But it should relate to members of the Jewish people, and the criterion should not be exclusively religious. The decision should be made by the political system, and it should be inclusive. But the right to immigrate (and not necessarily to citizenship) should be granted only to those who are themselves members of the Jewish people, and to their nuclear families. Other members of the family should be eligible to policies of family reunion, which should be applied equally to all applicants, within the general constraints of the capacity and the needs of the country.

On the face of it, this arrangement should not be attractive to any of the groups, because it does not meet their political and ideological demands. But under present circumstances, it is unlikely that any single group may entrench in laws all of its preferences and aspirations. The proposed arrangements gives each of the groups some advantages over the existing situation, plus it gives all of them a promise of better relations with the other groups. Under the proposed arrangement, each of the Jewish groups will be free to give its own answer to Who is a Jew. Orthodox will not be compelled to recognize the Jewishness of those who were converted in a reform ceremony, and reform Jews will not be excluded by orthodox ones. The state will
decide who is eligible to Return, and this will be a political, not an ideological decision. All residents of the state will be entitled to basic rights such as marriage and burial, irrespective of their religious affiliation. Despite the narrowing down of those eligible for return, it is likely that the percentage of people affiliated with the Jewish people among those who immigrate will rise. It will be harder for non-Jews who are members of families of Jews for three generations to immigrate unless they have an independent tie to the Jewish people. If they do – the rationale of Return does apply to them. Family reunion arrangements, on the other hand, will be equal and limited, to make sure that Israel does not lose control over immigration to it, especially of family members of Palestinians. In addition, this arrangement may limit the number of Israeli citizens who live abroad, after getting automatic citizenship and leaving for absorption difficulties. Only those olim who in fact adapt to living in Israel will in fact get its citizenship. People will acquire the state’s citizenship only if they have lived in it for some time, and have the ability and the capacity to live in it and contribute to it. It seems to me that the complex of these outcomes is desirable to those who are interested in the strength and welfare of Israel, and to those interested in the autonomy of its religious groups in determining membership in them. It is also welcome to those who want to strengthen the civic affiliation to the state, irrespective of religious or national affiliation. And also to those who want to maintain, and even strengthen, the Jewish distinctness of Israel as a Jewish nation-state.

This is one illustration of an arrangement that might provide a better balance than existing arrangements between the aspirations of Israel to be the nation state of Jews and its commitment to be the state of all its citizens and residents, irrespective of religious or national affiliation. In this social contract, no group will come out fully
satisfied. But the contract may give each of the groups both arrangements it does not have now, and that it is unlikely to have without such a comprehensive package deal, and a commitment to the relative stability of their gains.

The Arabs will have to come to terms with the fact that for the foreseeable future, they will live as a minority in a country whose ethos and public culture are Hebrew and Jewish. If they are willing to concede the legitimacy of this state, and the legitimacy of the Jewish claim for self-determination, they may get a parallel recognition of their own right to cultural self-determination, of the harm done to them by the foundation of the state, of their right to participate in political decision-making and of their right to a fair share of the country's resources. The national and cultural affinity of the Palestinian citizens of Israel and their brethren outside Israel also needs to be recognized. But this becomes much more difficult so long as the relations between Israel and the Palestinians consist of violent conflict, and so long as Israel effectively controls all of the area between the Jordan and the sea.

The non-orthodox Jewish majority must accept that it cannot enact a majoritarian decision concerning collective identity. The orthodox minority, on the other hand, should remember that it is a minority. It will not always be the case that it will be the decisive parliamentary bloc. And once there is an effective government without them – they should fear a situation under which their basic rights and red lines are vulnerable to majority decisions. All groups should remember that a systemic and structured gap between sharing burdens and claiming rights is not stable. Similarly, huge gaps between the incomes and wealth of citizens, especially when they converge with ethnic and religious divides, are extremely dangerous. The state
should make every effort to reduce these sources of unrest and instability, and to create a better fit between burdens, participation and contribution.

Finally, Israel must recognize that the two rifts discussed in this book – that between Jewish conceptions of the Jewishness of the state and that between Jews and Arabs - are of equal importance and are intimately related. It is urgent that adequate responses are found to the issue raised in both of them. Even if these issues cannot be solved at one go or even in one generations – there should be a clear vision of the direction in which Israel must move to survive. It is crucial to strengthen the civic bonds of all citizens to their state. Only the creation of real space for a dignified and significant citizenship for non-Jews can ensure that Israel can continue to have some Jewish distinctness, but still be both democratic and just. At the same time, it is legitimate for Israel, as the only state in the world where Jewish-Hebrew culture is hegemonic, to strengthen this public culture and to deepen it. Making national-cultural Jewish identity, which is non-religious, deeper and richer in Israel may contribute to Jewish solidarity, shared as it may be by religious and non-religious alike. At the same time, Israel should stress a shared core of universal values and of skills to participate and compete in contemporary economies for all its educational systems.

An attempt to force on the Jewish people as a whole a single, orthodox, conception of Judaism will not increase unity among the people. To the contrary, it may create division and alienation. The test of the survival of the Jewish people, in Israel and abroad, is a complex matter of historical fact. A strong and robust Israel is an important ingredient in this process. But it is crucial to distinguish between the
state of Israel and the Jewish people, and between the state of Israel and Jewish
religion. Such distinctions are not only necessary to maintain a decent level of
democracy, stability and justice toward non-Jews. It is as important for the
improvement of Israel’s ability to contribute to the maintenance of a distinct Jewish
identity, for those who are interested in it, both in Israel and in the diaspora.