

JPPI Background Paper for: Jewish and Democratic: Perspectives from World Jewry

This paper intends to very briefly introduce the subject of Israel “as a Jewish and democratic state” to the moderators and participants of JPPI seminars in Jewish communities around the world. These seminars are intended to integrate perspectives from world Jewry into the process that is meant to end with new recommendations to the Israeli Minister of Justice and then potentially to new substantive legislation. This paper focuses on the questions that JPPI seminars are designed to assist answering, and is divided into four parts:

1. Background about the need for the process and how it will work.
2. Background on the main questions this process is supposed to address.
3. Specific questions for Jews around the world.
4. Supplement: Suggestions for further reading.

Background on the process and the need for it:

On August 12, 2013, Israel's justice minister, Tzipi Livni, appointed Prof. Ruth Gavison to assist her in preparing "a constitutional arrangement dealing with Israel's identity as a 'Jewish and democratic' state." On October 12, 2013, Prof. Gavison asked that JPPI utilize its "unique position" as the global Jewish policy institute to assemble and analyze the reflections and attitudes of Jews living outside Israel to express their voice in this endeavor. Political activity in the Knesset has stimulated an immediate pressing need for this process. Legislators from several parties are working to enshrine in greater detail the Jewish and democratic character of Israel in its Basic Laws.

The Knesset activity stems mainly from two trends its members aim to curb. One is internal in nature: some Knesset Members view certain rulings that Israel's High Court has based on the current formulation of the Basic Laws as "post-Zionist."¹ The other trend at least partly relates to events outside of Israel: Some Knesset Members wish to counteract the actions of those who strive to "cancel the right of the Jewish people to have a national home on its land."²

Minister of Justice Livni, aware of these facts but unsatisfied with what she perceives as partisan proposed legislation,³ appointed Gavison to draft a different legislative proposal. This means that Israeli legislators may soon enter a contentious debate in response to proposed legislative frameworks aiming to enshrine Israel's "Jewish and democratic" character.

The question of world Jewry's involvement arose at the beginning of Prof. Gavison's process for several reasons:

- If Israel is a "Jewish" state it is only natural to have global Jewish participation in understanding the meaning of such term.
- Jewish communities around the world were active participants in building the State of Israel so it is reasonable that they will be consulted as active partners on matters related to the core identity of the state that identifies itself as the state of all Jews.

- Legislation that changes or define the character of Israel more specifically, has the potential to impact how Israel relates to Jews around the world, and could also impact how they relate to Israel. So a consultative process to anticipate these mutual impacts is essential.

Hence, Prof. Gavison values the solicitation of the views and attitudes of world Jewry, and has asked JPPI to be the broker of this part of her process. JPPI intends to achieve this goal by various means, including organizing seminars in Jewish communities, calling for articles and briefs, conducting interviews, and more.

Background on the main questions this process is meant to consider

The 1947 UN mandate and Israel's Declaration of Independence both refer to a "Jewish state."⁴ Although Israel was established as a democracy, it first officially enshrined the descriptor "Jewish and democratic" in the early 1990s with the passing of two Basic Laws. Heated political debate preceded ratification of these Basic Laws and ended in compromise: The religious parties demanded that the term "Jewish" be added to the legislation's language to prevent judicial activism from eroding Jewish values dear to them. Parties on Israel's left insisted on the inclusion of "democratic,, to make sure that the core values of Israel as a democracy would not be compromised by the inclusion in law of the word "Jewish" (more on the history of the Basic Laws, and a lot more on different interpretations of them can be found in the materials attached to this paper).

This political debate itself aptly illustrates the nature of Israel as a Jewish and democratic state. It is an arrangement based on tug-of-war compromise, not on "broad constitutional consent."⁵ The need for compromise naturally arises from the inherent tension (some would argue, contradiction) between "Jewish" and "democratic" values and interests. The more "democracy" represents values of neutrality and equality, the less it will be compatible with an emphasis on "particularistic foundations on the state level."⁶ And the more "Jewish" frames the contours of policy-making, the less likely some policy will be compatible with neutral democratic values.

If the legislature strives to preserve, or strengthen, both the Jewish character of the state and its core democratic values, a balancing act is required. Its new law would have to attempt to ease the inherent tension between the two "values" and possibly to establish the mechanism, or lay out the principles, for resolving contradictions if and when they occur. The necessity to resolve such tensions is not uncommon in legislative work. Many commentators on the "Jewish and democratic" arrangement compare the tension between the two terms to the inherent tension between the two terms "freedom of speech" and the "right to privacy."⁷ Although both Jewish and democratic values are important and worth preserving, they are at times at odds, which requires judicious balancing.

There are two main fields in which the tension between "Jewish" and "democratic" often presents itself in Israel. There are internal Jewish debates over state-religion issues (such as marriage, conversion, jurisdiction over the Western Wall plaza etc), and the Jewish-Arab tensions integral to majority-minority relations in a state that isn't religiously-ethnically "neutral." Israel is not simply "Israeli and democratic," but

rather, “Jewish and democratic even though more than one fifth of its citizens are not Jewish.

In both these areas, Israel has to deal with occasional eruptions of tension – such as in the famous and controversial Kaadan case brought before the High Court. The court ruled in Kaadan that an Israeli Arab couple could not be barred from living in a community built solely for Jews.⁸ But Israel also has to grapple with long-term questions stemming from the “Jewish and democratic” nature of the country – such as the highly sensitive necessity of retaining a significant Jewish majority in Israel. Can Israel keep its Jewish majority without infringing on its democratic values? This is one question sure to evince spirited debate.

Similarly on issues related to the state’s Jewish character, it has to deal with events that demand a temporary judgment – should Women of the Wall be allowed to pray at the Kottel’s plaza? And it has to deal with the long-term and much more central repercussions of Jewish marriage. Israel currently only has a religious path to marriage, and for Jewish Israelis only an Orthodox-religious one controlled by the official rabbinate. Continuing this regime – on the (also disputed) premise that it makes the state more “Jewish” – or ending it – to make Israel more “democratic” – could have significant implications for Israel’s future character as a “Jewish and democratic state.” There is clearly a tension within Israeli society related to marriage, and its leaders and justices need to decide how urgent it is to defuse it, and whether it should be done in the legislature or the courts.

Specific questions for Jews around the world

Since the process we are dealing with needs to end with specific formulations, the following paragraphs present JPPI seminar discussants with two basic questions to ponder and attempt to answer:

What is world Jewry’s vision of a "Jewish and democratic" state? In what way should Israel reconcile its wish to clearly express its “Jewishness” with its desire to be a state that grants equal rights to all its citizens?

In attempting to answer this question we urge you to think about very specific dilemmas.

In thinking about relations between Israel’s Jewish majority and its non-Jewish citizens please consider some of the following questions: What Jewish symbols should Israel maintain, and what symbols should be dropped (if any) to accommodate non-Jewish sensitivities? Should the flag remain as it is even though Israel’s non-Jewish citizens might find it difficult to identify with the Star of David? Should the national anthem be one that specifically speaks of a “Jewish soul,” or should it be supplemented by an additional, not markedly Jewish verse, or replaced altogether? Should Israel keep the Jewish calendar as its temporal frame of reference for national holidays? Should Israeli legislation make Hebrew the only official state language, or should it include Arabic as an official language of equal or lesser stature, and if lesser, would this contradict the “democratic” nature of the state? What means are legitimate, if any, to preserve Israel’s Jewish majority? Could it preserve the Law of Return for Jews only while being “democratic”? Is it legitimate for it to actively encourage the

emigration of non-Jewish citizens? Can it keep imposing difficulties on non-Jewish citizens who wish to marry non-Israelis by not allowing their spouses become citizens?

Similarly, we would urge you to consider the meaning of a “Jewish and democratic state” in the internal Jewish discussion. Many questions related to the relationship between religion and state have obvious impact on the nature of a state as Jewish and as democratic. For example: Should the state assert itself in maintaining the Jewish Shabbat as a special day of rest? Should it make it unlawful to open a store on Shabbat – to both keep the religious nature of the day and guard the workers’ right to a day off? How should Israel differentiate between Jews and non-Jews – is this a matter of self-definition, or one of birth and conversion? If by birth, should it be only through matrilineal descent, or by patrilineal descent as well? Who should have the power to conduct and recognize conversions? Should Israel demand that the study of Jewish texts be part of the educational curriculum of all Jewish schools – and which texts? Should the state allow all interested institutions to grant Kosher certificates, or should it strictly regulate this field? If it maintains regulation, what standards should the state demand for the issuance of Kosher certification?

Should there be an explicit expression in Israeli law codifying the special relationship between the State of Israel and world Jewry? In this we refer both to symbolic expression and an actual framework governing practical matters such as the design and implementation of a structure that examines impacts of Israeli decision-making on world Jewry, and which clearly enumerates some of the State of Israel’s obligations to world Jewry.

Suggestions for further reading:

The issue of Israel as a Jewish and democratic state has been debated for many years. Scholars, leaders, jurists and political scientists have differed in their interpretation of the current law and in their understanding of the need for such a formulation. We encourage JPPI seminar participants to take the time to read at least some of the suggested material for further reading. The articles we chose to attach to this short introductory paper would greatly enrich and inform any conversation about Israel as a Jewish and democratic state.

Suggested articles, and brief descriptions of what you’ll find in them (direct quotations are in bold):

Can Israel be both Jewish and Democratic?

Written by Professor of Human Rights Law, Ruth Gavison, this essay argues that Israel can be both Jewish and democratic, and that in important senses it is just such a state. It is justifiable that Israel continues to combine its democratic nature with a distinctly Jewish nature, and that this combination may justify some modifications of the liberal conception of democracy advocated in many Western nations. While there are important tensions between democracy and the particularistic character of the Jewish state, the Jewish nature of Israel is in fact a consequence of democracy, as it is the strong preference of most of the Jewish majority.

Indeed, the interpretation of “Jewishness” adopted by most of the Jewish elites in Israel, and which 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 a sense that it has a majority, which will enable it to control immigration and security in a democratic state...

In principle, this conception of a Jewish and democratic state is not different from that of 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.

...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 within secure borders....

The Curious Case of Jewish Democracy

Written by former Israeli politician and law professor, Amnon Rubinstein, this article discusses the question: “can Israel be both Jewish and Democratic?” The article presents us with a short review of how this identity was created, how it is anchored in Israel’s constitutional and political institutions, and explores the validity of charges currently being brought against it. Prof. Rubinstein argues that “we need to define Israel’s Jewishness as national or cultural, rather than religious.”

The Jewish tradition formulated under circumstances of exile, persecution, and suffering, must be reinterpreted and adapted to the needs of modern, pluralistic society....

...A national-cultural reinterpretation of Jewish identity, of the kind proposed here, will have one more added benefit: Not only will it disentangle some of the most difficult problems of Jewish society, it will also alleviate the tensions that characterize its relations with the Palestinian people and the Israeli Arab minority. A non-religious, non-messianic view of the Jewish state, coupled with an emphasis of its democratic aspects, will solidify support for – and facilitate the achievement of – a two-state arrangement....

‘A Jewish and Democratic State’: Present Navigation in the Map of Interpretations

Written by philosopher Asa Kasher, this article “discusses the Israeli constitutional phrase ‘A Jewish and Democratic State.’ It presents the map of different interpretations of the phrase and proposes a method of navigating among them. Then, one interpretation of the phrase is defended in contrast with all the other ones, which are rejected. This is the interpretation according to which there is no inconsistency in the depiction of a state as being both a nation-state and a democracy.”

The interpretation of the term ‘Jewish and democratic state’ that yields a contradiction between the idea of a Jewish state and the idea of a democratic state leaves us no choice but to take significant steps to dispel the contradiction,

in one of two natural ways. One way – the method of decision – offers a mechanism for favoring one of the two conflicting ideas either locally or in a sweeping manner. From the moment of decision (in favor of one or the other idea), contradiction is dispelled. The other way – the method of improvement – involves exposing the roots of the contradiction and modifying some of them in order to dispel the contradiction...

... When discussing the appropriate interpretation of the notion of a Jewish and democratic state, the method of improvement is preferable to the method of decision. In other words, the method of improving upon what appears to be a combination containing a contradiction is preferable to the method of deciding in favor of one component of the combination at the expense of another.

The Values of the State of Israel as a Jewish and Democratic State

Written by former Chief Justice Aharon Barak, this article reflects the understanding of “Jewish and democratic” as compatible with strict observance of equality for all Israel’s citizens. Barak’s approach – a subject of much debate and criticism – attempts to ascertain that the Jewish component of “Jewish and democratic” never erodes the democratic values of the state.

All rights, upon which democracy is based, are built on equality. Equality lies at the foundation of social existence. An individual integrates into the general fabric of society and plays his part in the construction of society with the knowledge that others are doing the same. The need to guarantee equality is natural to the human being. It is based on considerations of justice and decency. A person who asks for recognition of his rights must also acknowledge the right of others to receive similar recognition. Nothing is more destructive to society than the feeling of its sons and daughters that they are being treated in a discriminatory manner. The feeling of discrimination is one of the most difficult feelings. It strikes at the uniting force within society and harms each person's right to self-determination. Do the values of Israel as a Jewish state detract from the principle of equality? The answer is negative. As values of the State of Israel as a Jewish state are also values of a democratic state, they support the principle of equality. From the heritage aspect of the State of Israel, equality is a basic value. It is expressed in the imperative "you shall have only one law, the stranger shall be as a citizen."

The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis

Written by former High Court Justice Menachem Elon, this approach is believed by many to be in direct contrast to Justice Barak’s. Elon believes that the inclusion of the “Jewish and democratic” formulation in the Basic Laws makes it obligatory for the courts to consult the Hebrew law as they balance contradictory values in cases before them.

The “purpose” section of the new Basic Laws entails a substantial and even revolutionary change in the approach to statutory construction. Previously, the courts viewed basic rights from the vantage point of a freedom-loving democracy. The courts were not required to apply the values of the State of Israel as a Jewish state, although some judges, particularly those on the Supreme

Court, voluntarily did so, reflecting the statement of principles in the Israeli Declaration of Independence.

Since the enactment of the Basic Laws, this dual-value objective is one which the courts must attempt to reach in interpreting and giving content to these two Basic Laws. This requirement also applies to the “balancing” section, which permits the limitation of a basic right. One of the conditions set forth in this balancing section is that the limiting statute must reflect the values of the State of Israel: the values of a Jewish and democratic state. Moreover, the limitation must be for a proper purpose and only to the extent necessary.

¹ Yariv Levin, Likud MK. See (Hebrew):

<http://pelephoneportal.invokemobile.com/nana/iarticle.aspx?ServiceID=126&ArticleID=987073>

² Former Kadima Minister Avi Dichter, initiator of previous drafts of the proposed legislation. See (Hebrew):

<http://www.ynet.co.il/articles/0,7340,L-4103660,00.html>

³ Livni says that in the current proposals "each political side attempts to force its worldview on the others". See (Hebrew):

<http://www.globes.co.il/news/article.aspx?did=1000873524>

⁴ See: The Curious Case of Jewish Democracy, By Amnon Rubinstein, Azure, Summer 2010.

⁵ Ruth Gavison, a Jewish and democratic state (Hebrew) in: "Multiculturalism in a Jewish and democratic state", page 217.

⁶ Gavison, 123.

⁷ See, for example: Ruth Gavison, "Thoughts on the meaning and the implications of 'Jewish' in the expression 'Jewish and democratic'", In: "On the Jewishness of a democratic state" (editors: Ravitzki and Stern), page 127.

⁸ The Kaadan case is one of the most controversial rulings of recent years, and it is the case that convinced many Israelis of the need to bolster Israel's legal "Jewish" character. Example that can help understand the points made by critics of the court ruling, see: Is This Land Still Our Land? The Expropriation of Zionism, Azure, spring 2009 (<http://azure.org.il/include/print.php?id=492>).