

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

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**Abstract:** 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 defense rests on a philosophical analysis of the notion of ‘a Jewish State’ and a Rawlsian conception of democracy.

The term ‘a Jewish and democratic state’ that appears in the constitutional language of Israel is commonly understood as a combination of the two independent terms, namely ‘a Jewish state’ and ‘a democratic state’. The most fundamental question regarding both the theoretical meaning and the practical significance of this combination is whether a state can be simultaneously ‘a Jewish state’ and ‘a democratic state’. Since interpretations have been numerous and opinions divided, it would be helpful to sketch a map of possible interpretations of this combination of terms; not only to make it easier for citizens to navigate this map and formulate an opinion on the issue but, mainly, to mark the ‘High Road’ on this map and then evaluate the present deep nature of the State of Israel and its civil society as well as emergent dangers and prospects.

The paper will outline a conception of the state being a Jewish one and a conception of the state being a democratic one, which are compatible with each other. It will be claimed that a couple of conceptions constitute the ‘High Road’ of the map, the proper way of understanding the combination ‘a Jewish and democratic state’ in the constitutional context. It will then be argued that when the two conceptions are applied to Israel, in the present, the state is Jewish but is not of the desired democratic profile.

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## THE MAP OF INTERPRETATIONS

We organize the map of possible interpretations of the term ‘a Jewish and democratic state’, when understood as a combination of the terms ‘a Jewish state’ and ‘a democratic state’, around a number of *crossroads*. Each crossroads manifests a distinction between different classes of interpretations of the related terms. After presenting the crossroads themselves, we will be able to identify which ‘High Road’ best serves to connect them.

The first crossroads is the *crossroads of compatibility*, where we ask the major question about the combination ‘a Jewish and democratic state’: Is there a conceptual contradiction between the claim that Israel is properly described as ‘a Jewish state’ and the claim that it is simultaneously properly described as ‘a democratic state?’ The question of contradiction has two natural possible answers, and a third response.

The two answers are obvious. One is positive – ‘there is a conceptual contradiction’ between the claim that the state is Jewish and the claim that the state is democratic. The other is negative – ‘there is no conceptual contradiction’ between the two claims. In addition to these two answers, there is a third, less obvious but acceptable response. The third response avoids both a positive answer and a negative answer by claiming that there is no real basis for either a positive claim or a negative claim. This response contends that the meanings of the terms ‘a Jewish state’ and ‘a democratic state’ are commonly defined in such a vague way as to make it impossible to say whether the terms create a contradiction between the claim that the state is Jewish and the claim that the state is democratic. It may also be the case that the meaning of one of these two expressions is defined clearly and precisely, while the meaning of the other is defined vaguely and indistinctly. If this is the case, there is room for neither a positive nor a negative answer.

Three roads emerge, therefore, from the crossroads of compatibility, and we will now examine each one individually. The first, the *road of contradiction*, is based on some argument that there is a conceptual contradiction between the claim that the state is Jewish and the claim that the state is democratic. (Later on, we will encounter the second and third roads that emerge from the crossroads of compatibility.) Those taking the first road quickly find themselves at the second crossroads, the *crossroads of decision*. If a conceptual contradiction exists between the claim that the state is Jewish and the claim that the state is democratic, the state will not be able to function simultaneously as both a Jewish and democratic state in certain practical situations. Hence, there is no choice but to decide either not to function as one or not to function as the other. This is the decision that needs to be made at the crossroads of decision. The third road is the *road of cooperation*, to be explained later.

Four roads emerge from the *crossroads of decision* as well, each one leading to a decision with different content. One road clearly and consistently favours the state's functioning as a Jewish state over its functioning as a democratic state in every instance wherein it cannot function simultaneously as both. This is the road of an all-encompassing decision – the road of *a state that is Jewish more than it is democratic*. The second road clearly and consistently favours the state's functioning as a democratic state over its functioning as a Jewish state in every instance wherein it cannot function as both. This, too, is a road of an all-encompassing decision – the road of *a state that is more democratic than it is Jewish*.

Alongside these two roads, there is a third one that refrains from a sweeping preference for either side. Those taking this road do not need to commit themselves in advance always to act according to one form of preference in cases of contradiction between functioning as a Jewish state and as a democratic state. People taking this road choose the freedom to act in a variety of ways, according to their views under various circumstances. At crossroads with contradictions between functioning as a Jewish state and functioning as a democratic state, they may prefer functioning as a Jewish state in some instances and as a democratic state in other instances. This is a road of spot decisions, the road of *the state is sometimes more Jewish than democratic and sometimes more democratic than Jewish*.

In addition to these three possibilities, there is a fourth road. Like the first two roads, the fourth road is one of overall decision; but like the third road it does not involve committing oneself to always favouring one of the two fundamental attributes of the state over the other. This road demands compromise between functioning as a Jewish state and functioning as a democratic state when it is not possible to function simultaneously as both. At each crossroads of compatibility between Jewish state and democratic state, this road will not involve functioning only as a Jewish state or only as a democratic state, although it will be similar to both. It is the road of *the state as a compromise between a Jewish state and a democratic state*.

From the crossroads of compatibility there emerges not only the road of contradiction but also the *road of cooperation*. This is the road taken by all who believe that the state can simultaneously be both a Jewish state and a democratic state. Those who take this road reach a number of similarly structured crossroads that differ from one another in content. Each one is a *crossroads of appearances*, seemingly revealing, within the state's civil arrangements, not only an apparent contradiction between being a Jewish state and being a democratic state, but also an apparent practical path constituting a clear deviation from the path of a Jewish state or a clear deviation from the path of a democratic state. One such crossroads of appearances is the crossroads of the *Law of Return*, which distinguishes between Jews and their families and all others within the context of

the naturalization process of the democratic state. Another crossroads of appearances is the crossroads of the state's *emblems*, all of which (except for the institution of presidency) reflect the state being Jewish and contain no expression at all of the existence of large national and religious minorities among the citizens of the democratic state. Still another crossroads of appearances is the crossroads of *personal status* in Israel, which puts the institution of marriage and divorce in the state under the jurisdiction of certain bodies of certain religious denominations, such as orthodox Jewry, even when it involves citizens of other Jewish denominations and even when it involves Jewish citizens of the state who are interested in exercising what they take to be a basic right in a democratic state, namely that of being 'free of religion' in terms of personal status as well.

At each crossroads of appearances the following question arises: are the current arrangements with respect to the issue under consideration at that specific crossroads justified or not, from the point of view of the road of cooperation conception which rejects all claims of a conceptual contradiction between the idea of Israel as a Jewish state and the idea of Israel as a democratic state? If the arrangements in question are justified, traversing the crossroads of appearances does not involve any required modification of the prevailing arrangements. In this case, the crossroads is exited by way of the road of *understanding and loyalty*, which focuses on improving understanding of the arrangements and enhancing adherence to those arrangements and loyalty to the underlying principles by strengthening appropriate education. In contrast, if the arrangements in question are not justified, the crossroads of appearances is exited by way of the road of *striving for improvement*, which demands making an effort to change the nature of the arrangements in order to make room for alternative ones that are appropriate for a state that is both a Jewish state and a democratic state. (In the sequel, we will indicate our preferences with respect to some of the crossroads of appearances and the roads that we take to fit them best.)

Those who take the road of contradiction and those who take the road of cooperation adopt a definite position that commits them in terms of the conceptual relations that they assume to hold between a certain conception of a Jewish state and a certain conception of a democratic state. In order to be able to act in accordance with such positions responsibly and convincingly, they must be equipped with genuine arguments substantiating their position. Every argument that aims at a definite conclusion regarding whether there is a conceptual contradiction between the two components of the combination of a Jewish and democratic state must be based on certain assumptions regarding the nature of a Jewish state and the nature of a democratic state. In order for an argument to be valid and of practicable value, assumptions regarding the nature of the Jewish state and

the democratic state cannot be narrow, vague or cut off from reality. It stands to reason that only broad, developed concepts of principle can constitute a basis for valid, practical arguments along the road of contradiction or the road of cooperation.

In order to hold clear positions about the nature of a Jewish state and the nature of a democratic state, which enable us to give a positive or negative answer to the question of whether there is a conceptual contradiction between the claim that the state is Jewish and the claim that it is democratic, two other central crossroads must be traversed: the *crossroads of the Jewish state* and the *crossroads of the democratic state*. Each one of these crossroads involves choosing from amongst various conceptions of these two key concepts.

The primary choice at the crossroads of the Jewish state is between the *road of the people* and the *road of religion*. Those who take the first road see the Jewish state as the state of the Jewish people or as the state of the Jews, who are regarded as members of one people: the Jewish people. Based on this approach, the concept of the Jewish people is similar to the concept of the Greek people or the Turkish people, and other similar concepts. The similarity between these concepts is reflected in a number of basic components of national identity. First, there is no simple, single criterion that enables people to identify with the people or identify other members of their people. The content of one person's national identity may be significantly different from the content of another's, despite the fact that both see themselves and the other as members of the same people. National identity is not a common denominator. Secondly, there is a certain group of aspects, a common pool of national ingredients generally taken as being present through the history of a given people. These characteristics include association with a specific ethnic group, a religion or denomination, a language or dialect, a territory, a culture, narratives, etc. Thirdly, the content of a person's national identity is composed of several national ingredients taken from that common pool of national ingredients. People may build their national identity out of different ingredients, but they will be choosing them from the same common pool of national ingredients.

Those who take the second road, the road of religion, depict the Jewish people's national identity in religious terms. They regard their connection to the Jewish religion as being not only a connection to one national ingredient of the Jewish people among others, but as the connection that constitutes their national identity. Those who take this road do not deny the existence of the Jewish people, but rather the validity of any characterization of the national identity of the Jewish people that is *not* depicted in terms of the Jewish religion as they portray it. Those choosing the road of religion believe that 'Israel is defined by its Torah alone', to use a famous historical expression.

Those taking the road of religion are soon likely to find themselves at another crossroads of significant decision: the *crossroads of religious identity*. After all, there is no one single mandatory concept of the identity of the Jewish religion. Whoever attempts to characterize the Jewish people in religious terms does so according to a certain conception of the Jewish religion, which is often different from other conceptions of the Jewish religion. Judaism has known many disagreements and differing streams throughout its history. As not all disagreements are practically expressed in life, they do not all come up for discussion at the crossroads of religious identity. Theological differences may run deep and be of major significance, like the difference between two concepts of divinity. Disagreements, however, may also be such that they do not affect the nature of the Sabbath on the one hand, or the identity of the Jewish people on the other. The crossroads of religious identity presents only issues that commit disputants to certain practical ways of expressing their views. Therefore, roads based on the various religious denominations and other traditions emerge from the crossroads of religious identity. These roads differ from one another on practical issues, beginning with answers to the question ‘who is a Jew?’, continuing with the question ‘what are the formative principles of political life in Israel?’ and on to the question ‘what should the social status of women be?’ The Orthodox road, the road of ‘Beta Israel’ from Ethiopia, the Conservative road and the Reform road differ from one another with regard to the answers to such questions.

Here, we are not in need of a complete, detailed map of the crossroads of religious identity and the many roads emerging from it. However, two additions that may assist us in sketching such a map are in order at this juncture. First, what appears from afar to be a single united religious denomination or even movement is likely to appear from a closer, more accurate look to be a complex network of different roads, streams that differ from one another in their prioritization of values to be reflected in adherents’ lives. One example of differing values is the relative importance of conscription service in the IDF (Israel Defense Force) compared to studying the Talmud in some ‘Yeshiva’ (college of religious studies). Secondly, alongside religious streams there are cultural streams, which give religious ideas, practices and institutions an important place in shaping ways of life, albeit not necessarily a fundamental or central place, and certainly not an exclusive place. People who describe themselves as ‘traditionalist’ but not ‘orthodox’ belong to such Israeli cultural streams. It seems reasonable to assume that among those taking this road are people who use the religious tradition component of their cultural outlook when trying to answer the questions arising at the religious identity crossroads.

This would be the place to mention again the third road emerging from the crossroads of compatibility. In contrast to those taking one of the first two roads, those who take this road are not equipped with any

complete conception of the nature of the Jewish state and the nature of the democratic state. On the contrary, their starting premise is that there is no such conception as the nature of a Jewish state or the nature of a democratic state, so that no conclusions can be reached regarding the question of whether there is a conceptual contradiction between the combination 'a Jewish and democratic state'. This road is the *road of fog*. (As will soon become clear, this road is to our mind rather theoretically weak and practically dangerous, but nevertheless it should not be ignored, either on the theoretical level or on the practical one, where it seems to have gained some popularity).

What do those taking this road do upon reaching the crossroads of appearances, where a practical issue raises the question: how should a Jewish and democratic state function when faced with the serious, but disputed claim that it cannot simultaneously function properly as both a Jewish state and a democratic state? Because they are not equipped with a complete comprehension of the nature of a Jewish state and the nature of a democratic state, the basis of action of those taking the road of fog must rest on a different foundation. For this reason, those who leave the crossroads of compatibility by way of the road of fog will necessarily reach the *crossroads of the third foundation*, where they can choose a foundation for assessing and making a decision at every crossroads of appearances other than a complete conception of the nature of a Jewish state and the nature of a democratic state. A common though inconspicuous example of such a third foundation is that of groups who are hardly interested in anything beyond their own political and economic power.

#### THE HIGH ROAD

Now that we have a sketch of the map of the various interpretations of the term a 'Jewish and democratic state', including the major crossroads of necessary interpretative decisions, we can delineate on this map what we regard as its *High Road*.

The first stop on the High Road is a full understanding of the significance of finding a contradiction within a given conceptual system. A contradiction between claims about reality, which are supposed to reflect the facts as they are within a certain realm, tells us that we do not have a true picture of what exists in that realm. A contradiction within a system of instructions regarding proper behaviour in a certain realm tells us that we do not really have an appropriate picture of what is proper behaviour in that realm. A contradiction within a system of factual assertions or practical instructions is, then, a symptom of a fundamental problem or a local defect in the system. Therefore, the first natural step in confronting such contradictions is exposing their roots. If we have two contradictory factual assertions, the act of exposition indicates the grounds of each of

them, whether they are some more general claims taken for granted or some empirical information taken to be true. In the case of two contradictory instructions, the act of exposition indicates the grounds of each of them, whether in the form of some more general instructions taken to be valid or some special instructions of some particular validity. After exposing the roots of the contradiction, the second step involves attempting to modify the underlying sources of the contradiction in such a way as to remove it from the system, on the one hand, and not distort the system and make it worthless or less valuable, on the other hand. While the need of proposing a balanced change, which can preserve the theoretical and practical value of the system and rid it of the scourge of the contradiction in question, is likely to make it more difficult to formulate the second step, there is no justifiable way to circumvent it. A contradiction is a symptom, and the illness causing it must be cured.

From time to time, we hear voices of acceptance of such contradictions. A widespread popular cliché tells us that ‘life is full of contradictions’. This cliché, like all such clichés, should not be taken as a shining crystal of deep wisdom, but rather as a crude mass of shallow babble. Quite often, when we feel as if we are living in the midst of contradictions, these contradictions are in our inner world of personal desires. Indeed, people often distinguish within themselves the desire to achieve two different goals, although these goals can be achieved neither simultaneously nor consecutively under current conditions. However, when facing such contradictory goals people do not simply carry on, ignoring the contradiction, but rather decide between them, giving one a primary status (at least for the time being) and the other a secondary status. In this way, they dispel the contradiction between them. From this point onward, they do not describe their desires in terms of contradictory goals, but rather in more complex and accurate terms that do not include the contradiction in question. From this point on, we can say that they desire the primary goal as it is, and at the same time they also desire the secondary goal, to the extent that it can coexist with the primary goal.

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 favouring one of the two conflicting ideas either locally or in a sweeping manner. From the moment of decision (in favour 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.

The manner in which these methods differ from one another has to be explained. The method of decision has a value-based foundation while

the method of improvement by modification has a conceptual foundation. Those attempting to decide between the idea of a Jewish state and the idea of a democratic state, whether in a certain context or overall, cannot do so without a value foundation that assigns preference to one of these two ideas over the other. In contrast, those attempting to modify the roots of the contradiction apparently emerging from the combination of the idea of a Jewish state and the idea of a democratic state must modify the conception of a Jewish state or the conception of a democratic state, or both, in order to continue seeing them as reasonable, on one hand, and in order to eliminate the contradiction between the two former conceptions, on the other. Emending a conception does not involve a value-based decision or a change in one's values. It is, rather, a conceptual act that is natural and widespread in any world of ideas. In every such world, one's conception is a general picture portrayed around a number of clear constants. The conception itself is not a predefined, given constant. For instance, a person may hold a conception of the idea of nationalism. This person's conception will be a general picture of nationalism, emerging as a framework for describing and explaining specific examples within the realm of nationalism, beginning with the clear existence of a conscious identity among a given ethnic group and concluding with the existence of an ongoing desire to be free of the rule of any other ethnic group. Such a conception of nationalism or related ideas is likely to run into difficulty in the presence of another constant that is clearly relevant, but that is inconsistent with the overall picture. For example, a certain conception of nationalism can claim that characteristics of nationalism evolve and develop through extended, implicit processes that form a development of a tradition. However, it is impossible to continue defending such a claim when faced with clear examples of 'creating tradition' through explicit, decisive acts. Similarly, another widespread conception of nationalism is formulated in terms of distinguishing between two foci of group identification – the nation in question as a strong focus, and humanity in general as a weaker focus – with no intermediate foci between nation and humanity. Again, it is impossible to defend such a view in light of the variety of foci of group identification, which includes, say, the 'nation' between the 'people' and 'humanity'. In such instances, those holding these conceptions of nationalism will improve upon them, replacing them with more sophisticated versions that, on one hand, remain reasonable conceptions of nationalism and, on the other hand, are impervious to the criticism aimed at those two contradictory examples. This is how a conceptual emendation is made to the idea of nationalism, yielding a similar, more successful concept.

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 favour of one component of the combination at the expense of another. The method of improvement has three advantages over the method of decision.

First, wherever a conception can be improved, the possibility of doing so should be considered. An emended conception will not be absolutely perfect, but it will be less flawed than the unimproved conception that preceded it. Reason dictates that use of an improved conception is preferable to comparable uses of less successful conceptions, *ceteris paribus*. We do not always bother to improve conceptions that we hold. A conception can be so reasonable, stable and seemingly devoid of contradictions and other problems that its holders never feel compelled to improve it unless faced with a certain contradiction, lack of clarity or lack of a position on an important issue. The 'price' in attention, effort or other resources paid in order to improve an existing conception does not always seem reasonable ahead of time. People holding a conception that they regard as correct and without visible disadvantages are naturally unwilling to put into assessing and improving this conception what they would be willing to invest in reassessing the same conception when faced with a contradiction, or some other significant shortcoming.

Therefore, if a given conception of the Jewish and democratic state involves a contradiction, when based on a certain conception of a Jewish state and a certain conception of a democratic state, and if one or both of these conceptions can be modified so as to yield reasonable conceptions of a Jewish state and of a democratic state, on the one hand, and eliminate the contradiction between the conception of a Jewish state and that of a democratic state, on the other hand, then it is advisable to introduce appropriate amendments in order to arrive at a more sophisticated conception of the combination, stemming from more sophisticated conceptions of its components. Thus, for example, in order to properly address issues related to the role to be played by Arab citizens of Israel *qua* a Jewish and a democratic state, one should introduce a broader view of Israel, within a justified world order, in which all peoples have a practical way of exercising their right of self-determination, as long as they are willing to respect the right of all peoples to exercise the same right, in their homeland. When there is no state in which a people enjoys political independence, members of that people consider themselves to be victims of discrimination where they live as a minority, no matter what political conditions obtain. Much of what seems to be discrimination against Arab citizens of Israel will evaporate the minute Palestinians have their own state alongside Israel. The introduction of a conception of a democratic state as a nation state, within the framework of the international system of peoples, states and nation states, is an introduction of a more sophisticated conception of a democratic state, one that may well

remove tensions and apparent contradictions that emerge when a simpler conception is used.

Secondly, both the method of improvement and the method of decision involve giving up elements of the conceptions of Israel as a Jewish state and Israel as a democratic state. The method of improvement requires giving up the flawed part of the conception. However, despite the fact that it is flawed, those holding the conception have become used to thinking in its terms and basing their actions on it. This concession is accompanied by the psychological difficulty of giving up habits of thought and action. While this difficulty should not be belittled, it can be eased by the understanding that it is better to establish alternative practices, since those will reflect an improved conception, leading to better comprehension and more successful action.

In contrast, the method of decision involves giving up the practical possibility of realizing the given conception of Israel as a Jewish state or the given conception of Israel as a democratic state, or both. Here, it is not a flawed element that is being given up but a part that, though without flaws, cannot be realized under the circumstances in which the decision between the two conceptions is made. Here, the difficulty is not psychological but conceptual. The problem of conceding cannot be solved by psychological means, due to the fact that the blow of conceding a fundamental component of one's views for the sake of another component cannot be softened through means that are suited for replacing any one part with an improved version thereof. We can therefore say that the toll collected by a decision-based concession is much higher than the toll collected by the improvement-based concession. In instances where it is possible to choose between these two methods, the method of improvement is preferable to the method of decision, since it provides more benefits yet carries a lower price tag, so to speak.

Thirdly, and presently most importantly, using the method of decision rather than the method of improvement results in conceding at the deepest foundation of people's existence. A state with a low democratic profile, one which cannot be raised due to a fundamental decision made against democracy, is a state whose moral nature is patently problematic. It is consequently a state whose moral foundation for making moral demands of its citizens, its institutions, its neighbours, and all others is weaker than that of a civilized state with a moral profile that is high and that can constantly be raised. Likewise, a state that has relinquished parts of its being a nation state, where a certain people exercises its right of self-determination, is a state that has relinquished the only road open to that people to become 'independent in their sovereign state', to use the words of the Israeli Proclamation of Independence. It is therefore not merely a case of a state detrimentally changing the status of its people within the community of peoples, but one whose very nature reflects despair over that

people's ability to be a 'free people' in the fullest sense of the expression. Under ordinary circumstances, there are no reasons for such despair.

The road of emendation for the sake of improvement is, therefore, preferable to the road of decision. Preferable to both of these, however, is the road of cooperation, which is based on two conceptions between which there is no contradiction: a complete conception of the idea of a Jewish state and a complete conception of the idea of a democratic state.

The road of cooperation leads those who travel it to crossroads of appearances, which appear to contain contradictions between the two conceptions. If the road of cooperation is well paved – if the conceptions on which it is based are rich and stable – it traverses all of these crossroads without changing its nature. Upon entering a crossroads of appearances it encounters an image of a contradiction, but upon exiting it leaves behind a different image, one from which the contradiction has vanished, one suiting the road of cooperation itself.

The road of improvement distances those who take it from the road of decision. Furthermore, those who properly travel the road of improvement also find themselves travelling the road of cooperation most of the time. A series of emendations of given conceptions of a Jewish state and of a democratic state is likely to lead to improved versions of both conceptions, which are acceptable as well as consistent with one another. Faced with contradictions between the two conceptions, hasty observers rush to get on the road of decision and level-headed observers attempt to get on the road of improvement. But the nimble observer will search out the road of cooperation which, if it has been paved, is the High Road.

The Israeli legislature made abstruse use of the notion of a 'Jewish and democratic state' in Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. The context in which this term is used in these two constitutional laws offers not even the slightest hint of the legislator's interpretation of this unique term, and no indication of its place on the map of its possible interpretations. One may claim that the legislators' abstruseness indicates their implicit view that the term is subject to the interpretation of the courts, and that the courts are to determine the place of the expression on the map of possible interpretations, according to their understanding. Apparently, the courts may interpret the constitutional term 'Jewish and democratic state' as an expression that contains a contradiction between the idea of a Jewish state and the idea of a democratic state, just as they may interpret it in another way.

Two arguments tip the scales against this claim. First, if the legislator had noticed the contradiction contained in the law it had formulated, then presumably it would have included some sort of practical mechanism to provide for decision making in situations where the contradiction takes on the practical form of two contradicting instructions. Both Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation make

constitutional use of the term a 'Jewish and democratic state'. The fact that neither piece of legislation provides a built-in mechanism for practical decision making in cases where the idea of Jewish state and the idea of democratic state contradict one another indicates that the legislator did not believe that a contradiction exists. In this way, the legislator indicated to the citizenry and courts the appropriate road for interpreting the law – the road of cooperation. The legislator, in the customary manner, did not demarcate the road of cooperation, since legislators as a principle do not explicitly endorse one specific conception of a Jewish state or a democratic state. The legislator did not explicitly delineate the road, but implicitly he did mark it, in all the laws that are naturally interpreted as manifestations of the idea of Israel being a democratic state and all the laws that are naturally interpreted as manifestations of the idea of Israel being a Jewish state. The fact that both ideas are inscribed in the law-books of the state of Israel, without an added mechanism for dealing with contradictions in the instructions of the law, speaks for itself unequivocally: according to the implicit opinion of the legislator, there is no contradiction between the idea of a Jewish state as embodied in the law and the idea of a democratic state as embodied in the law.

Secondly, if the road of cooperation is in fact the High Road, it is only fitting that the citizens and the courts try to travel it to the best of their ability as well, before they dare to take a different road. If the legal interpretation of the laws of the state allows for two acceptable and mutually consistent conceptions of a Jewish state and a democratic state, then wherever the courts and the citizens must interpret the notion of 'a Jewish and democratic state' it is appropriate that they do so according to those conceptions rather than by a pair of conceptions that contradict each other and render the notion of 'a Jewish and democratic state' a hopeless mine of problems and controversies. Indeed, the former rather than the latter conceptions should be used not only when some legal action is taken by a court, but whenever a person acts *qua* citizen of a democratic state, whether one is a decision maker, who has to allocate resources in a fair way, is an educator, who has to nurture protection of human dignity and mutual tolerance, or is a citizen under no official capacity, who has to accommodate one's own form of life into one's society.

#### THE PRESENT NATURE OF ISRAEL

The map of interpretations of the notion of 'a Jewish and democratic state' has been drawn on a seemingly theoretical level. However, as a matter of fact, each crossroads and way that appear in that map are not empty nodes of an abstract graph but rather actual foci of views held by some faction or other within the society of citizens of Israel. Some of those crossroads and

ways have been frequently used within the frameworks of public debates and political activities.

It is seemingly natural to pose the question of the extent to which a certain crossroads or way that appears in the map of interpretations has gained public, judicial or political support during the short history of the State of Israel or during its more recent decades. As much as this question seems fascinating, we should not be tempted to indulge ourselves in an attempt to answer it systematically and precisely. The reason for that is simple: The major issue of whether the notion of 'a Jewish and democratic state' should be interpreted as one that gives rise to a contradiction or not has not been adequately discussed in the public arena. There have been hardly a score or two of scholars who have discussed some aspects of the problem and their writings have not so far provided a commonly used theoretical framework for public debates related to some aspect of the issue.<sup>1</sup> Hence, the present distribution of support over crossroads and ways of the map of interpretations does not reflect articulated conceptions and entrenched positions but rather a societal mood which to a large extent is merely the fallout of a temporary political climate. The only significant facet of the present distribution of support over the map of interpretation is the fact that there is no crossroads or way that appears in the map that has not been supported by one group or another since the constitutional basic laws that use the notion of 'a Jewish and democratic state' have come into effect.

Instead of trying to find out the nature of the present distribution of support over the map of interpretations, we should try to find out the nature of the present distribution of practical manifestations of the High Road interpretation of the notion of 'a Jewish and democratic state', one that includes a conception of 'a Jewish state' and a conception of 'a democratic state' that are both acceptable as such and compatible with each other.

Israel is a Jewish state according to every conception of 'a Jewish state' that requires the following conditions to obtain:

1. The state is considered, both by itself and by almost all of the international community of states, to be the state where the Jewish people exercise their right of self-determination;
2. The territory of the state is part of the territory of the historical homeland of the Jewish people;
3. A vast and stable majority of the citizens of Israel are Jews, which results in a viable, normal and common form of Jewish life that includes a natural sense of national independence on all levels;
4. The emblems of the state (except for the presidency) – its flag, anthem, symbol, calendar of festivals and memorial days, capital – bear conspicuous Jewish significance rooted in the history and

traditions of the Jewish people; most importantly, the nature of those emblems signifies the rationale of the very existence of the State of Israel, not only from the point of view of its Jewish citizens and other Jews, but also from the international point of view of the UN, as expressed by its 1947 resolution;

5. The state enhances the project of establishing, developing and protecting itself as a state in which the Jewish people exercise their right of self-determination by an appropriate naturalization procedure (Law of Return) intended and enacted as a form of affirmative action;
6. The state shoulders practical responsibility for the present conditions and future fate of the Jewish people.

Notice that we have not included in the present list of conditions the following one:

7. Public life of Jews in Israel carries a distinct Jewish appearance.

On several occasions, condition 7, under some particular interpretation, has been used as grounds for political demands and even legislation. Thus, for example, public presentation of leavened bread during Passover for purposes of sale is prohibited by law. Here, ‘Jewish appearance’ was taken to mean appearance according to a strict Jewish orthodox practice with respect to leavened bread during Passover. However, according to our High Road conception of the notion of ‘a Jewish state’, condition 7, under a different appropriate interpretation, follows from condition 3. The appearance of life in a Jewish town in Israel reflects the spectrum of Jewish identities of the Jews in that community and in that crucial sense it is a Jewish appearance. The Saturday morning view of Tel Aviv includes Jews going to their synagogues, other Jews enjoying themselves at the beach and yet other Jews traveling to museums or country sites. Such a view emerges from an accumulation of personal decisions made by various Jews as to how to spend Saturday morning. Each personal decision reflects an underlying Jewish identity. The emerging spectrum is an accurate appearance of the Jewish community of Tel Aviv. Indeed, the same applies to the Jewish society of Israel. Its appearance is Jewish, since it reflects the given spectrum of Jewish identities and their practical manifestations among Jews in Israel.

Each of conditions 1–6 is a necessary condition for Israel being a Jewish state. Moreover, according to our conception of ‘a Jewish state’, their combination seems to be a sufficient condition for Israel being a Jewish state.

Notice that the present conception of ‘a Jewish state’ is compatible with the state being a democracy as well. To be sure, such conditions can obtain

in a state which is not a democracy. Our conception of 'a Jewish state' does not require that the state be a democracy, which means that there is a theoretical possibility of the state being Jewish and not democratic. However, it is important to realize that our conception of 'a Jewish state' does not require that the state be not democratic. Holding that conception of 'a Jewish state' can well constitute one significant part of a conception of 'a Jewish and democratic state' that does not involve an internal contradiction.

The claim that conditions 1–6 are compatible with a reasonable conception of democracy is not self-evident, but we will not presently indulge in its defence, since we have done it, in detail, elsewhere.<sup>1</sup>

Israel is, then, a Jewish state, according to a reasonable conception of 'a Jewish state' that is compatible with the state also being a democracy. Now the question arises: is Israel a democratic state as well, according to some acceptable conception of democracy? A simple affirmative answer to this question would, however, be inappropriate. If we use a certain philosophical conception of democracy, such as the one that emerges from John Rawls' *A Theory of Justice*,<sup>2</sup> to evaluate the *democratic profile* of the actual regime of any state commonly held to be a democracy, we always encounter significant gaps between the theoretical ideal and the actual situation. There is no perfect democracy. The paramount question is, therefore, not whether by and large Israel is a democracy, but rather what is its democratic profile.

In a nutshell, the democratic profile of Israel, during the sixth decade of its existence is not impressive. Here are the major reasons for Israel not enjoying a high democratic profile:

1. Israel does not have a fully fledged constitutional document that commits it to a comprehensive family of moral principles that underlie regimes that are commonly held to be of a democratic nature. The class of basic laws of Israel does not constitute a fully fledged constitution; this unfortunate situation, which stems from an extremely unjustified decision of the constitutional council to avoid writing a complete constitution and render itself a parliament, has resulted in an unstable commitment to the moral principles of democracy on the part of the legislator and the citizenry, though not on the part of the judiciary;
2. Israel does not have a constitutional bill of rights. Some of the basic rights are protected by two basic laws, but many do not. Some of the latter are protected by verdicts of the Supreme Court of the state;
3. Israel has laws that are blatantly incompatible with certain basic rights. Most conspicuous are those that put aspects of civil status, such as marriage and divorce, under the jurisdiction of the courts of religious denominations, whether or not the parties to a case under

- consideration have consented to such religious adjudication or not;
4. Israel has a legal system that protects laws from judicial review even if they are incompatible with basic laws that protect basic rights, in case those basic laws have been enacted later than the other laws had been;
  5. Israel has laws that enable the authorities to restrict civil liberties beyond what is justified by principles of democracy. An example is the freedom of the press which is governed by an act put into effect by the British Mandate in the 1930s. It prohibits, for example, publication of a newspaper without a licence issued in advance by the Ministry of Internal Affairs at its discretion;
  6. Israel has a legal system that enables introduction, development and protection of laws and regulation that are discriminatory. The most important example is that of exemption of ultra-orthodox Jews from conscription on reasons of personal or cultural objection;
  7. Israel has a legal system and a legislative culture that allow sectorial legislation, which introduces implicit forms of discrimination; the law that exempts ultra-orthodox Jews, *qua* ultra-orthodox Jews, from IDF conscription is again a conspicuous example;
  8. Israel has a civil political culture that does not include a consensual support of the principles of democracy. Polls show wide support for violation of law and even for violence when major political issues or any religious issue are under consideration. The assassination of Prime Minister Rabin is the most horrible and important manifestation of this attitude;
  9. Israel has a state-supported educational system, major parts of which do not count commitment to and enhancement of democracy among their educational goals;
  10. Israel rules territories that were captured from neighbouring states during the 1967 Six Day War. Although the war itself was clearly pre-emptive and therefore just, in those territories that have not been conceded to a party to an accord signed with Israel a form of government has taken place since then which is a mixture of international law, military regulations and Israeli legal arrangements reflecting debated policies rather than democratic principles. Thereby, a form of government that is not of a democratic nature has gained natural legitimacy in various circles of Israeli citizenry.

The democratic profile of Israel is not as high as it should be 57 years after the proclamation of independence, let alone as high as it should have been according to the theoretical models. Many individuals and organizations, including state organs such as the Supreme Court of the state, have been engaged in constant, often successful attempts to raise the democratic profile of the state. For our present purposes it is important to

notice that the democratic regime of Israel can be improved, on every level related to the above mentioned ten aspects, in a way that would be clearly compatible with the state being Jewish, in the sense outlined earlier in this section. Although some of those ten aspects are directly related to major debates about the desired nature of Israel as a Jewish state, none of them is a necessary result of Israel being such a state. There is a way to improve the regime and society of Israel in a way that would render it both the state of the Jewish people, in a reasonable and significant way, and a democratic state of an impressively high profile.

## NOTES

1. Cf. Ruth Gavison, *Can Israel be Both Jewish and Democratic*, Jerusalem and Tel Aviv, 1999; Asa Kasher, *Spirit of a Man*, Tel Aviv, 2000; Ron Margolin (ed.), *The State of Israel as a Jewish and Democratic State*, Jerusalem, 1999 (all Hebrew).
2. John Rawls, *A Theory of Justice*, revised edn., Cambridge, MA, 1999.

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