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## What is Left from the Identity of the State of Israel Proclaimed in the Declaration of Independence?

**Abstract:** The purpose of this article is twofold. First, to look at the Identity of Israel as both Jewish and democratic State in its Declaration of Independence and the status it acquired over the years within the Constitutional and law system. The second, to examine, through the evolution of the enounced principle of equality in the situation of economic, gender, religious and national minorities, how it was implemented and what has changed after 70 years. From the outset, the Declaration was not given a constitutional status but later the Supreme Court gave it an interpretive quality. With the two Basic Laws on Human Rights, limited as they were, it gave the Supreme Court much more advantage to intervene and impose the Identity of the State as Jewish and democratic in its interpretations of laws in spite of strong criticism and even to influence and criticize the *Knesset* legislation. However, Israel is still not a true liberal Democracy since the rights within it are determined more according to the ethnic-national religious belonging of the person than according to its citizenship and the principle of equality is only partially adopted in practice with different degrees as regards the various minorities. In some aspects, it even moves away from the original intended Identity of an exemplary liberal Democratic Nation State.

**Keywords:** *Israel's identity; Declaration of Independence; principle of equality; Basic Laws of 1992/94*

### Introduction

The Identity of the State of Israel was defined on May 14<sup>th</sup>, 1948 at the proclamation of the Declaration of Independence following the U.N. General Assembly recommendation n°181, on the 29<sup>th</sup> November 1947, to create a Jewish State in Palestine. The aim of this article is twofold. First, to look at its content, meaning and its status within the Constitutional and law system in the State and its evolution over the years and second, to question what remains of this identity 70 years later. What has changed or has been added to it through the cultural, juridical, social and political evolution of State and society.

## The content of the Declaration of Independence

The Declaration of Independence stated: “This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable. This right is the natural right of the Jewish people to be masters of their own fate, like all other Nations, in their own sovereign State” (*The Declaration of the Establishment of the State of Israel*). The text of the declaration insists thus on the creation of a Jewish State as a Nation-State and as such “open to Jewish immigration and for the Ingathering of the Exiles” (ibid.). This principle was set forth in legal and practical terms in the Law of Return, passed two years later by the Israeli Parliament in 1950. Yet, at the same time in the following sentence, it promises to “foster the development of the country for the benefit of all<sup>1</sup> its inhabitants” and to be “based on freedom, justice and peace” (ibid.). Moreover, it was “to ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex and to guarantee freedom of religion, conscience, language, education and culture” (ibid.). Thus, not only formal equality (i.e., in law and justice), but also equality in the implementation of these rights in all areas of life. Furthermore, as for the Arab inhabitants, it reassured them that they would “participate in the up building of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions” (ibid.). The phrasing of the appeal to “the Arab inhabitants of the State of Israel” makes it clear that it is addressed to an Arab people. Moreover, in accordance with the U.N. recommendation, it also promised to be faithful to the principles of the Charter of the United Nations and to safeguard the Holy Places of all religions.

This impressive text is important not only in terms of implementing basic universal democratic principles but also in terms of its domestic educational and cultural function as well as for legitimisation and propaganda purposes abroad. In few words, it gives expression to the basic guidelines of the new Israeli polity and as the Supreme Court – *Bagatz* - subsequently ruled in October 1948, “this expresses the vision and the credo of the people regarding the character, the goals and values of Israeli society and its State” (*Bagatz* 48/10). In fact, the text is similar to two other significant declarations in the early stages of nationalism and democracy in the world: *The Declaration of Independence of the United States of America* from 4<sup>th</sup> July 1776 and the *French Declaration of Human and Citizens’ Rights* voted by the National Constituent Assembly on the 27<sup>th</sup> of August 1789. It also followed numerous Declarations of Independence all over the world proclaimed by a large number of States since then.

Two points in the Declaration deserve emphasis. First, the guidelines indicating that the fundamentals of freedom, justice and peace be those “envisaged by the prophets of Israel” underscores the message of Israel as a Jewish state. – though, the authors of the Declaration

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<sup>1</sup> This underlining as well as the followers are my own in order to insist on certain points sometimes forgotten.

undoubtedly regarded this vision as a source of significant universal cultural values (*The Declaration of the Establishment of the State of Israel*) and being themselves in a very large majority non-religious. Second, the list of egalitarian principles assured not only the rights and equality of the individual citizen, but also indirectly, collective rights. For the notion of freedom of religion is meaningless unless it implies freedom for every organised religion. Similarly, the freedoms of language, education and culture are meaningful only if they entitle every national group to speak its own language, to educate its children according to its goals and to maintain its own culture (Gutmann & Pinhas 1999, p.59). It seems evident that it was the intent of the authors of the Declaration to assure hereby the rights of religious and national minorities including the Arabs. However, as we shall see, less thought was given to individuals and groups within the Jewish majority in their diversity of fate and practice of Judaism. Yet, the struggle to implement these rights for both the Jewish majority and the Arab minority continues to this very day as well as the one between groups within the Jewish majority as we shall see onwards.

## **The Emergence of the Declaration of Independence**

The origins and drive of the Declaration of Independence derive from the U.N. recommendation on *The Future Government of Palestine* containing the plan of partition and “placing minority, women’s, and religious rights under the protection of the United Nations and the International Court of Justice”. The plan provided specific guarantees of fundamental human rights and the new States had to acknowledge the stipulated rights in a Declaration, which was tantamount to a treaty. The text stated, “that the stipulations contained in the Declaration are to be recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them”. (*Futur gouvernement de la Palestine*, 1947). Abba Eban, Israel’s representative to the U.N., said, in the debate there regarding the admission of Israel to membership in the United Nations on the 11<sup>th</sup> May 1949 that the rights stipulated in the U.N. recommendation of partition had been constitutionally embodied as the Fundamental law of the State of Israel as required. This was done he said through the Declaration of the Establishment of the State of Israel on the 14<sup>th</sup> May 1948. Abba Eban’s explanations and Israel’s undertakings were noted in the text of the General Assembly recommendation 273 (III): Admission of Israel to membership in the United Nations, 11<sup>th</sup> May 1949. However, as we shall see farther on, this was quite in contrary to the views in Israel itself including the judicial system with the Supreme Court at its head.

The ethos, values and principles guiding the new Zionist society of the *Yishuv* in Palestine and its political leadership also inspired the content and values of the Declaration. As for its advanced social aspect, it derived from the leftist ideology of the majority of its political parties and movements from the communists on the far left to the religious labour in the centre, all of whom signed the Declaration. It is true that the word “Democracy” does not

appear in this impressive text, though it appeared in the first draft of 9<sup>th</sup> May 1948, which was written by Zvi Berenson, the *Histadrut* trade union's legal adviser, but there can be no doubt that the Declaration's authors and signatories intended to establish an exemplary democratic regime. Perhaps they thought that the rest of the detailed final document's contents made it unnecessary to cite "Democracy" specifically (*The Declaration of the Establishment of the State of Israel*). Alternatively, maybe that some with authoritarian and security tendencies like the head of the Jewish agency, David Ben Gurion or the religious Orthodox parties with restrictive view on the subject preferred to avoid it officially. In fact, the final text was elaborated by Moshe Shertok (Sharett) from labour *Mapai*, Aaron Zisling from leftist *Mapam* and Yehuda Leib Maimon from the National Religious Party, approved and corrected by David Ben Gurion, before the unanimous vote in favour at the State Council. Yet, subsequently at the first regular meeting of the State Council, the ultra-Orthodox representatives took exception to the entire Declaration stating that it greatly offended their sensitivities.

Another question relates to the precise meaning of the term "Jewish State," which recurs four times in the Declaration, and which has since prompted much public debate in Israel and which has recently grown in intensity and even had a clear misinterpretation by the authorities and several political parties. It is clear that at the time of the writing of the Declaration, this had hardly occasioned either discussion or questions. The reference was both to the "Jewish State" mentioned by the U.N. recommendation, and to the State of the "Jewish people," mentioned several times in the Declaration as *Am Yehudi* ("Jewish people"), and once each as *Am Yisrael* ("people of Israel") and *ha'Am ha'Ivri* ("the Hebrew people"). Thus, the Declaration referred to a Nation-State and there was not any connotation to any religious meaning of the term or to the Jewish religion as again the vast majority of the authors and signatories were non-religious (*The Declaration of the Establishment of the State of Israel*). A good example was the issue over the inclusion of 'God' in the last section of the document, as in the American one among others, with the first draft using alternatively the phrase "thrusting in the Rock of Israel". The two rabbis, Moshe Shapira and Yehuda Leib Maimon argued for its inclusion, saying that it could not be omitted, with Moshe Shapira supporting the wording "God of Israel" or even "the Almighty and Redeemer of Israel". However, Aaron Zisling, a member of the secularist leftist *Mapam* strongly opposed it. At the end, the phrase "The Rock of Israel" was accepted as a final compromise, which could be interpreted as either referring to God, or to the land of *Eretz Israel* (the land of Israel) or alternatively the destiny of Israel. David Ben-Gurion, an atheist himself, saying: "Each of us, in his own way, believes in the "Rock of Israel" as he conceives it and I should like to make one request: Don't let me put this phrase to a vote". Although Aaron Zisling still opposed its use, the phrase was accepted without a vote<sup>2</sup>.

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<sup>2</sup> Unfortunately, for a long time now the Ministry of Foreign Affairs and the *Knesset* as well as the Israeli Government publish the text of the Declaration in foreign languages with the wording "Placing our

## The Declaration and the Supreme Court

As mentioned before, from the outset, and in contradiction to Abba Eban's assurances in the U.N., the Israeli Parliament, the *Knesset*, maintains that the declaration is neither a law nor an ordinary legal document. Even the Supreme Court followed suit and ruled that the guarantees in the Declaration were merely guiding principles, and that the text was not a constitutional law, thus making a practical ruling on the upholding or nullification of various ordinances and statutes. The arguments were that the Council of the State, which signed the text, was both provisional and not officially elected, but only representative of the *Yishuv* and the Zionist movement. Moreover, there were supposed to be elections to a Constitutional Assembly later that year, which was supposed to draft Israel's Constitution that was to define the State, its Identity and its Regime as mentioned in the Declaration. Thus, Doctor Moshe Zemora, Head of the Supreme Court, made it clear in his ruling in October 1948 that "though the Declaration expressed the vision and the credo of the people, it is not a constitutional law that fixes the practice in regards to the implementation of different Governmental decrees and Parliament laws or their cancelation" (*Bagatz* 48/10). Thereby, whenever an explicit statutory measure of the *Knesset* leaves no room for doubt, it is honoured even if inconsistent with the principles in the Declaration of Independence. This may be regarded as a very minimalist view for the interpretation of the Declaration especially, since, in contradiction to the text of the Declaration, the First *Knesset* seated as a Constitutional Assembly decided, in 1950, after a long debate and with the majority of *Mapai* and the religious front, not to immediately vote on a Constitution<sup>3</sup>.

Thus, not surprisingly, later, other interpretations of the Supreme Court were heard from time to time, seeking to broaden, if only slightly, the legal validity of this document. Two examples follow - the first by Justice Shmuel Agranat in 1953 saying: "It is true that the Declaration is not a constitutional law that makes a practical ruling on the upholding or nullification of various ordinances and statutes. But insofar as it expresses the vision and credo of the people, we are obligated to take heed of the matters set forth therein when we seek to interpret and construe the laws of the State". Excerpts from a ruling of Justice Zvi Berenson is the second example: "The legal force [of the Declaration] exists in the [rule] that every legal provision should be interpreted in its light and to the extent possible, in keeping with its guiding principles and not contrary thereto. However, when an explicit statutory measure of the *Knesset* leaves no room for doubt, it should be honoured even if

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trust in the Almighty" or "in God we trust" instead of "In thrusting the Rock of Israel". This is a flagrant example of the influence of the Jewish religion and its political parties on the institutions of the State on its essence and symbols since its independence.

<sup>3</sup> This, in spite of the fact, that on the eve of the elections to the Constitutional Assembly, *Mapai's* platform still insisted on the need of a Constitution that would guarantee equal rights to every citizen and child in all fields. (*Bamahane*, 1949, 1, 20)

inconsistent with the principles in the Declaration of Independence”. Here the Declaration serves as an interpretive tool; thus, one may state that, at least within this constraint, it has a legal validity of sorts or represents a legal norm that expresses the values of the State. A subsequent ruling reflects this thinking: “The democratic character of the State of Israel finds its expression in the Declaration of Independence. These principles light our path and represent the credo of the people, in the light of which laws are interpreted and basic principles determined” (Gutmann & Pinhas, 1999, pp. 66–67).

### **The basic laws of 1992/94**

The abandoning of the adoption of a Constitution led to a series of Basic Laws since 1958 on different aspects of the Regime in Israel but without any reference to a Bill of Rights. However, several were proposed and rejected, as were some Constitution projects, all mainly due to the fierce opposition of the religious parties and the strong reticence of Prime Minister David Ben Gurion. The passing of the Basic Laws named “Human Dignity and Liberty” and “Freedom of Occupation” in 1992 and their revision in 1994 has been called a “Constitutional Revolution,” because these laws introduced the constitutional protection of human rights for the first time, though not of all rights but in fact only a small minority. Moreover, in the Basic Law “Human Dignity and Liberty” it was clearly stipulated that it does not put in question the validity of normal laws existing prior to its adoption. Thus, a major restriction to it was introduced mainly not to infringe on the “status quo” existing since the early years of the State in all related religious affairs strongly protected by the religious sector and parties.

Nevertheless, these two Basic Laws were a step forward, since they begin with the same meaningful clause: “Fundamental human rights in Israel are based on recognition of the value of man, the sanctity of human life and freedom, and shall be honoured in the spirit of the principles in the Declaration of the Establishment of the State of Israel”. Thus, added constitutional principles were included onto those already mentioned in the Declaration and the principles set forth in the Declaration have become a substantive, binding component of legislation and law through mentioning the Declaration. As mentioned before, neither the Declaration nor any previous Basic Law or other enactment of the State contained the word “Democracy” or derivatives thereof. No “Democratic State” is mentioned alongside a “Jewish State,” although it is clear that the founders had such a State in mind. This rather regrettable omission has been also set right by the two aforementioned Basic Laws, for both contain the identical clause (except for two or three words): “The purpose of this Basic Law is to protect ... in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic State”.

Now more than before judges have time after time incorporated statements in their verdicts referring to Israel as a democratic State by citing principles in the Declaration. Moreover, based on these two Basic Laws the Supreme Court decided it has the authority to overrule laws legislated through proper procedures by the *Knesset* based on their content, if

it is considered by the Justices as impinging disproportionately on Israel's values as a Jewish and Democratic State. In consequence, the political power of the Supreme Court has been significantly expanded in comparison to the elected *Knesset*. Thus, some in the political arena as well as in the legal, academic and public spheres criticize this, fearing an increase of the Supreme Court engagement in policymaking in an undemocratic procedure, and a political polarisation within the society especially between the secular, national religious and ultra-orthodox over the Justices' decisions taken.

### **The Jewish and Democratic principles**

Since the passage of these two Basic Laws, the two definitive characteristics of the State – the Jewish and the democratic – have been inextricably intertwined. However, if the legislators had hoped that this formulation would put to rest the tension and the debate existing almost since the creation of the State, over Israel being Jewish and democratic at the same time, the opposite has occurred. From the moment these Basic Laws were passed, public debate over this issue and its implications has recurred, and more vehemently so. The question was, how to balance between the two and can such a dual Identity really exist – since Israel has to serve the needs of all its citizens equally, regardless of whether they are Jewish or not, religious or not, as a democratic State. However, at the same time, as an officially Jewish State it has to pursue particular goals related to the Jewish Nation and Judaism. In fact, if Israel truly wants to be both a democratic and a Jewish State, its definition of Democracy should be less than just formal and instrumental and the definition of Jewishness must become more inclusive and expanded to afford rights and official recognition for all. Thus, one can consider such a symbiosis as being not only necessary but also possible since national harmony requires a full concurrence between these two adhesive attributes. Several views expressed by a number of researchers in the Israel Democracy Institute as well as secular, left and centre political figures follow this line. However, once the term “Jewish State” was put not only into the Declaration but reiterated in the two Basic Laws, it exerted a powerful influence on the development of Israel society and politics. Since it reinforced all the exclusivist tendencies – religious and/or nationalist – existing, and providing a ready-made justification for discriminating against non-Jews, specifically Arabs, and even atheist, secular and Jews other than Orthodox.

Taking into account the reality in Israel, some academics on the opposite side argue to the contrary, believing that the two principles clash in substantive ways and cannot be attained in tandem in the State. Thus, they demonstrate that, since the proclamation of the Declaration, all public life in Israel is based on a built-in discrimination against secular Jews, non-Jews, and especially the Palestinian Arabs citizens (at present about 19 percent of all citizens). The State, in fact, transferring some of its universalistic legislative and juridical powers to the particular domain of *Halakhic* Judaism and delineates its collective identity and the criteria for membership in it, according to non-civic criteria. They argue

that Israel sanctioned status and privilege afforded to Orthodox Judaism, not extended to non-Orthodox streams of Judaism and maintain a clear discrimination of the non-Jewish minority since it did not achieve full equality either as individuals or as a group up to this very day. In spite of all the good intentions of the Supreme Court, David Kretzmer, Nadim Rouhana and Ilan Peleg among others insist there exists in essence a clear contradiction between the reality of the “Jewish State” and the conduct of a liberal “Democratic State.” Israel is in fact not a true Democracy since the rights within it are determined more according to the ethnic-national religious belonging of the person than according to its citizenship. (Kimmerling 2005, Smooha 1990).

Thus, they say, one principle must yield to the other: either Jewishness to Democracy or vice versa. According to them if the democratic character of Israel is to be upheld, there exist only two possible models: one is to turn Israel into a modern, civil state, like the United States, with total separation between state and religion, as well as between state and people. Citizens would derive their rights solely from citizenship (which the Americans call nationality), irrespective of ethnic origin, religion, language, race or gender. Indeed, unlike the current situation in Israel, it should be forbidden even to mention these elements in official documents. The state as such will be neither Jewish nor non-Jewish, but a civil community belonging to all its citizens. A second model is to acknowledge the fact that citizens belong to different nations and to give them official status, allowing the Palestinian-Arab citizens of Israel to form national institutions, which would enjoy autonomy in the fields of education, language, culture, etc. (Avnery 1998).

At the other end of the spectrum, some like the nationalist-religious, even consider the two unequal values in status *a priori*, citing the order in which the two determining words appear in the foregoing clause in the two Basic Laws, meaning Jewish supersedes over democratic. The religious parties and Orthodox groups in Israel insist even further that the meaning of a Jewish State is only a religious State. Indeed, they demand a State governed by the religious laws, the *Halacha*, and claim to abolish the laws enacted by the *Knesset*. A “Jewish State”, they proclaim, cannot be “like other States”, meaning a democratic one, because it must serve only the fulfilment of Jewish religious aspirations. However, the testimony of the person who wrote the original draft, and who put those two crucial words “Jewish state” into it - former Supreme Court Judge Zvi Berenson, at the time the legal adviser of the socialist trade union *Histadrut*, is quite different. He stresses that there is no ideological significance in a religious sense as regards the term “Jewish State” (Avnery 1998).

In fact, a stand will have to be taken on the principles, the meaning and the practical significance of each of these terms. At the time the Declaration was written, in the middle of the independence war, a tacit and largely unarticulated consent existed concerning the essence of the Jewish State, and disagreements were, for some time, put aside. The same may be said, even more explicitly, about the democratic character of the State – a matter in which few took great interest. In fact, in spite of a long debate and several disagreements surrounding the Declaration before the proclamation ceremony the representatives of all



sectors of the *Yishuv* voted for it unanimously. Was it just the need to benefit from the approval of the United Nations and its members? Now, amazingly, as I mentioned earlier, voices are being heard from different parts, demonstrating not only a misunderstanding of the principles of Democracy, but also a disregard for them. In recent decades, the domestic dispute over the Jewish character concerning both the national and the religious sense of the State has become very bitter. Dissent ranges from the conceptual and the ideological to the practical – the place of the Arabs in society and their rights and obligations, Sabbath and Jewish holidays observance, marriage and divorce laws, the army burden and budgets for religious institutions – with a tendency to adopt radical and excessively rigid positions instead of compromising inclusive ones. Furthermore, the political arrangements governing the status, powers and functions of religion in society (called the “*status quo*” on religious affairs) are steadily crumbling while constantly contested by the non-Orthodox and fear and recriminations from all parts are growing amid rising social tension between seculars and religious and Jews and Arabs.

### **Equality principal and reality**

Even though there is no universally accepted definition of democracy, equality has been identified with freedom as one of the important characteristics of this regime since long ago. These principles are reflected in all citizens being equal before the law and having equal access to power. To that was added later the notion of minority rights as both individuals as well as a group. Let us have a look now at the development of the fundamental principle of equality within the Declaration of Independence in the reality of Israel in several social domains and its evolution. This crucial principal within the Declaration indeed referred to complete equality and, perhaps even, to equal opportunity. Therefore, it is essential to check to what extent such equality has been achieved and whether the current trend in Israeli political, legal and societal spheres is leading toward greater or lesser equality.

### **Socio-economic equality**

When the State was founded, Jewish Israeli society was rather egalitarian in many social and economic aspects, as a continuation of the situation in the *Yishuv* with its egalitarian ethos and a pioneering simple way of life. In certain senses, this characteristic has gathered strength economically up to the ‘70s with the *Mapai* Government slowly but surely providing social and financial allocations. It meant to diminish inequality among the recent immigrating population and between it and the more established one. However, there were pockets of blatant inequality in resource allocation for development purposes mainly in the Arab sector but also to a minor extent in the periphery. However, since then, and with the right wing liberal government of the *Likud* and its followers the inequality in the country has increased. The State is now among the world’s most developed ones with regard to its

economy, science and culture and its standard of living and quality of life have been rising steadily since the '90s, despite the impediments of its security situation. Nevertheless, though all citizens have benefited from these trends – it was not shared equally, as Israel is second to the U.S. among the developed countries in which the income gap is actually widening very quickly and is now the highest among the OECD countries concerning economic inequality. Poverty in the State is increasing also and it reached a quarter of the population, touching mainly children, single parent families and large families.

## Equality and gender

As for women's equality, the *Equality of Women's Rights Law* (1951) was meant to make the Declaration's assurance in this respect effective. However, this law makes a significant exception: in all matters of marital status, women's equality does not apply. Indeed, this exclusion has been expanded to cover all matters related to so-called religious institutions of the State, such as rabbinical courts and religious councils, with some minor exceptions such as recent court decisions regarding women's groups right to pray as they like before the Wailing wall in Jerusalem. Since 1951, there have been many initiatives by members of the *Knesset* to introduce a constitutional Bill of Rights, however, they have almost all been marked by the same unwillingness to insist on the right of women to equality in marriage and divorce. The only constitutional proposal that has uncompromisingly insisted upon equality for women in the personal law was that proposed by Member of *Knesset*, Shulamit Aloni, but her attempts were consistently met with a solid wall of parliamentary opposition. Even the law prescribing equal wages for men and women (1964) falls far short of full implementation and the gap is still important even today.

Although the 1992 Basic Law "Human Dignity and Liberty" like the one of the same year on "Freedom of occupation" does not expressly include the principle of equality, the courts have interpreted these two Basic Laws as securing the principle of gender equality as a basic principle of the legal system. The development of the principle of equality has had to contend with its incompatibility with the religious personal law and with the clash between the Jewish and democratic values of the State. These clashes had a different impact as to the private sphere – the family – and to the public sphere – economic political and military life. In family law, religious values exercise a significant restraint over the development of gender equality jurisprudence, while in the public sphere, the reach of religious norms is far more limited, and an impressive body of gender equality jurisprudence has been developed. However, the Supreme Court's readiness to ascertain whether the inclusion of women was prohibited by the *halakha*, as a relevant issue in determining the right of women to participate in religious public bodies, indicated a preparedness to tolerate the encroachment of inegalitarian *halakhic* values on areas of public life. This, since the bodies in question were, as the Court itself stressed, public bodies set up under the secular law. Nevertheless, in 1990, in the context of the issue of the equal retirement age for women, the

Supreme Court, for the first time, gave a decisive, unambiguous ruling on the supremacy of the principle of equality under the Women's Equal Rights Law. In the last decade of the twentieth century, the Court broke away from the limits of formal equality and incorporated concepts of affirmative action and accommodation into the principle of equal opportunity itself. Furthermore, the Court analysed the need to prevent violence against women in the context of women's human rights referring to human dignity and equality. In addition, in 1995, in the Miller case where the petitioner had been refused entry to the pilot's course of the Israel Air Force on the grounds of her sex, a majority of three to two accepted Miller's petition to the Supreme Court to integrate the course (Raday 2001).

On the other hand, legislation on matters not connected with the religious jurisdiction over personal law has been developed in a progressive way since the late 1980s. In fact, it became clear that the participation of women in organizations, in military service, in politics and in the professions was mainly formal, that presence was not power and that women were subject to disadvantage in comparison to men. In 1998, the *Knesset* adopted a law prohibiting sexual harassment in the workplace, which extended its prohibitions beyond the workplace to other dependent relationships, in education, healthcare and the military, and to non-dependent relationships where there are repeated acts of harassment. A law guaranteeing women's right to fill any role in the military, provided they are capable of doing so, was introduced and in 2000, an amendment to the *Women's Equal Rights Law* consolidated the principles of equality with affirmative action and accommodation, which had been introduced in case law and legislation as basic principles of the legal system. At the same time, the *Prevention of Violence in the Family Law* was passed, the definition of rape was broadened and prohibition of marital rape, already well established in the case law of the Supreme Court based on Jewish Law principles, was given statutory force. Nevertheless, despite the progress made in legislative policy on women's equality in the period since 1987, Israel has fallen behind advances made in most European countries (*ibid.*).

As for women's representation in the political institutions of the State, the starting point was very low: The first *Knesset* had only 11 women out of 120 Parliament Members, thus less than 10%. For 50 years, the number varied very little and only in 1999, it reached 14 female Members. Since then, a steady increase of the number of women in the *Knesset* occurred to achieve 29 in 2015, thus, almost a quarter of the Parliament Members. Nevertheless, it is still low in comparison to other States – thus, Israel is rated 58<sup>th</sup> among the world's States with presence of women in their Parliament. Just like the low representation of women in the *Knesset*, a minimal representation of them could be found in the Government, in spite of the fact that Golda Meir was elected Prime Minister in 1969, being, thus, one of the first women in the world occupying this post. In fact, since 1949 Governments had only one woman minister with total absence between 1966 and 1969, between 1974 and 1986 and again between 1988 and 1992. At last, the Government had two women ministers since 1992 and 3 since 2003, yet, with between 10 and 20% of the members of the Government, Israel was placed on the 95<sup>th</sup> place among the countries in the world and 29<sup>th</sup> among the

34 ones of the OECD regarding the number of women in Government. Since 2013 though, a record of four women's ministers was attained, representing, at last, 20% of the Government members. (Schenhav 2016).

Important progress in the number of women was also noted within the judicial system, including the Supreme Court, and recently two Supreme Court women Presidents were elected one after the other. This increase is manifested also in the upper management of public administration and public enterprises, as well as academia and at the top of several left and centre political parties, but it still falls short from equality with men and in comparison, with many other Democracies. In fact, in spite of notable changes in Israeli society it is still rather male dominated and misogynistic, even if it is less so than in the past, and a glass ceiling still prevents women achieving the top posts of responsibility as in other modern democracies. (ibid.)

A remarkable positive development concerns the gay, lesbian, bisexual and transgender minority that was not even mentioned in the Declaration of Independence and was hardly tolerated until the '70s. Yet, in the last decades, it has gained recognition for its members. They have the possibility to benefit from the full legal and financial status of concubines as couples and even to register their marriages conducted abroad in Israel's Ministry of Interior's register. Nevertheless, here again, without the existence of civil marriage in Israel their status falls short of other religiously married couples in Israel, especially regarding adoption and paternity or maternity status. Recently even, some of their possibilities for adoption abroad accepted beforehand were rejected by the civilian courts.

## **Equality and the Jewish religion and community**

It has become clear that intricate problems are involved in honouring freedom of religion, conscience and faith in a country where religion (or to be more precise, religions) holds an official status and wields State-sponsored administrative and judicial functions. A situation existing since the mid nineteenth century under the Ottoman Empire and prolonged under the British Mandate. Yet, contrary to the situation in the British Mandate, freedom of religion in Israel is, primarily, the power granted to the religious establishment to set norms and rules of behaviour for its consenting and even non-consenting adherents. The definition of citizenship, moreover, (at least with respect to Jews) is also fundamentally Orthodox religious and in accord with religious *Halachic* law. In fact, Israeli's formal stance on its status as a Jewish State appears to be tied to Judaism as a religion and specifically to Orthodox Judaism. There is no official separation between State and religion in the country and this clearly contradicts the Declaration of Independence and since freedom from religion and freedom of religion are two of the expected values of a modern Democracy, Israel's Democracy is clearly flawed.

This official role of Orthodox Judaism is anchored in the "Status Quo" Agreement in Israel based on the letter sent by the leaders of the Jewish Agency to the authorities of the

ultra-Orthodox, *Agudat Yisrael* party in June 1947. This afforded Orthodox an official role in Israeli socio-political life to the exclusion of other denominations of Judaism. Since then, religion in Israel is unusually obtrusive in both public and private life. The Israeli Government prevents the establishment of civil marriages and counteracts until this very day members of different religions to marry between each other and even members of different streams of Judaism in Israel from doing so. Thus, the Orthodox Judaism holds a virtual monopoly on religious marriages and burials. This also gave the religious authorities the full possibility to determine who is a Jew concerning personal status. The question concerns over 300,000 persons who are regarded as non-Jews according to the *Halacha*, since the big wave of immigration from the ex-Soviet Union in the '90s. Moreover, in 2008 the Israeli Great Rabbinical Court decided that all conversions conducted by the National Conversion Authority, headed by Rabbi Haim Druckman, to help this community to integrate fully the Israeli society, were suspect and may be invalid.

Another aspect refers to the Israeli Government's decision to impose from the creation of the State, according to the "Status quo" Agreement, restrictions on public transportation and opening of public places during Shabbat and Jewish holidays, thus, restricting movement and entertainment of the non-religious majority. However, in the last decades, a liberalisation has taken place in many municipalities concerning opening of public places; yet the Government, under pressure from the religious parties in the coalition, decided very recently to restrict this again by law. Moreover, through the years since the '70s, the various Governments even increased considerably public funding towards the Orthodox educational sector, including *Yeshivot*, in comparison to the one allocated to the public educational sector. It also allotted generous public funds to Orthodox synagogues while non-Orthodox religious organisations are not publicly financed.

As regards to the conservative and liberal streams in Judaism, a majority of world Judaism, which was marginalized in Israel at its creation, the authorities still do not recognise them officially; though they are now more visible and integrated partly in the society. Still, as was shown recently, they cannot benefit from Government's support, as demonstrated in the annulment of the agreement by the Government, which previously approved it, on a location for them to pray in front of the Wailing Wall. There has been an outpouring of outrage from liberal and non-religious Jews in Israel as well as from American Jews, reflecting alienation from Israel's religious shift to the extreme but the right-wing Government maintained its position under the Orthodox lobby and parties.

There have also been occasional grievances, and public debate sometimes erupts over the case of inequality in obligations, such as carrying the burden of obligatory military service, especially the induction of students in *Yeshivot*. These religious exemptions are given only to the ultra-Orthodox groups but not necessarily to non-Orthodox including conscientious objectors. This led some years ago to massive secular demonstrations and the creation of political parties fighting to implement the law of obligatory military service to all Jews. Lastly, several times in the past and recently in 2015, the Supreme Court rejected

appeals by citizens to be identified in the national registry as “Israeli” rather than by religion or ethnicity, declaring that doing so would have “weighty implications” and could endanger the State’s founding principles. Thus, even the most liberal institution of the State, which should maintain and foster citizens and human rights in Israel, is influenced by religious and nationalist considerations.

Religious commandments – or religiously derived principles – are not law in Israel unless they are incorporated into a law. However, one can hardly say that the Government’s performance, as shown above, has always studiously corresponded to the spirit of this ruling especially in its attempts to introduce Jewish religious law into the Israeli legal code. Yet, over time, the Supreme Court and other court’s decisions have expanded the freedom of religion significantly by including in it the freedom from religion. Therefore, the courts have stipulated that both freedom of religion and freedom from religion, to which both citizens and residents are entitled, are overarching values in Israel – originating in the rule of law (in its substantive sense) and in rulings by the courts. Thus, following the Supreme Court’s fundamental ruling of 1963 in the Funk – Schlesinger case, Israeli authorities must register couples married civilly abroad as fully married. Nevertheless, in its decision of 2006 the Supreme Court decided that the rabbinical court system has jurisdiction over the divorce of couples married civilly abroad and that it has exclusive jurisdiction over the dissolution of civil marriages of Jews residing in Israel (Triger 2012). This decision was based on *Halachic* principles and pre-approved by a rabbinical court panel, thus showing the lack of openness even from the Supreme Court on the issue concerning non-religious Israelis.

Since the creation of the State, the inequality between religious and non-religious Jews and between the members of the Orthodox stream of Judaism and those from other streams of Judaism in a variety of areas is still a source of tension and frustration. Many secular or non-religious Jews resent very deeply the interference of the Orthodox establishment in all aspects of their daily life. This, especially, since it clearly contradicts their feelings of liberty and the principles in the Declaration of Independence.

## **Equality and the Arab minority**

Looking at the situation of the Arab national minority the situation from the outset was even grimmer. At the end of the War of Independence, it was not self-understood that Israeli Arabs could take part in elections. Only after long and secret deliberations, it was so decided. Some believe that the decision was taken for purely partisan reasons. David Ben-Gurion’s *Mapai* party held absolute power over the Arabs in Israel, through the machinery of “military government,” and they could be easily coerced to vote for the “right” party. For a long time, their votes were crucial for the hegemony of *Mapai* (Avnery 1998). In fact, since the creation of the State the Arab minority was subject to a harsh military regime with movement restrictions and large-scale expropriations as well as prevention of inhabitants of several villages to return to their homes. Though the regime was finally abolished in 1966, certain

of these measures lingered on for quite some time and the educational system remained under strict control of the State authorities in comparison to the other educational systems in Israel including the Orthodox educational system. Moreover, one can argue along with Yoav Mehozy that the authorities prevented a certain assimilation of this minority into society apart from voting to the Parliament. Thus through these mechanisms as well as the refusal in the '50s and '60s to Arab's political associations that espoused nationalist views or challenged the Jewish character of the State to organize or run candidates, even if their programs were clearly non-violent, (Mehozay 2012).

The term "Jew," indeed, does not appear in any law except the Law of Return, but in many regulations, there is a provision saying that certain rights, mainly financial and social, accrue only to people "to whom the Law of Return would be applicable," a roundabout way of saying "Jews." There is no pretence in Israel that Arab towns and villages are receiving Government handouts at the same level to the ones granted to their Jewish counterparts, or that development plans also apply to Arab municipalities. Many rights and privileges are quite openly restricted to Jews by the simple device of turning their administration over to the Jewish Agency, a Zionist body which has official functions in Israel and which excludes, of course, Arabs (Avnery 1998). The statutes of the Government-run Land Authority officially forbid the sale or lease of "national land" to non-Jews, and this is incorporated into its regulations. Laws that allow committees to screen potential residents of small communities and that prohibit funding for groups that commemorate the Nakba, or catastrophe, as Palestinians call their flight or expulsion when Israel was established, were adopted and are still maintained. In this case, the Basic Law Human Dignity and Freedom did not change much in spite of appeals to the Supreme Court, which in other cases regarding this time the appeals from the Jewish community would intervene frequently and in favour of the plaintiffs (separate from issues related to the Jewish law).

Moreover, because Arabs are generally exempt from military service, programs favouring veterans for housing, jobs, bank loans and scholarships also disadvantage them. Resources allocated to the Arab sector in education, infrastructure, creation of habitat and industrial and commercial centres are extremely limited especially in comparison to those allocated to the Jewish one. Work opportunities for Arabs in the Jewish economic sector are still rather limited, though have progressed since the first decades, and the number of them in high administration and public companies as well as the juridical sphere is very small. One can see recently though, many in the medical and pharmacology spheres as well as in academia domains that unlike scientific, industrial research, technology and armament are not related to the military sector. As for the promise of appropriate representation in all the permanent institutions of the state little has been done apart from their presence in the Parliament just as little came from repeated Governmental promises to improve the above situation. All such clear violations of the Declaration's promise of equality "irrespective of..." are routinely justified by Jews in Israel in different levels of society by citing the "Jewishness" of the State, also based on the Declaration and its need for security.

Not surprisingly thus, that in 2006, following the second *Intifada* in the Palestinian territories, and the harsh reaction of Israeli police towards Arab demonstrations leading to 13 dead, leading Arab politicians, intellectuals and activists in Israel signed *The Future Vision of the Palestinian Arabs in Israel*. There they rejected the designation of the State as a “Jewish” one, arguing that it was exclusionary and denied the Arabs full equality. While de-legitimizing the Zionist enterprise as “colonialist” and “imperialist” they sought at the same time to obtain recognition of the Palestinians in Israel as a national minority by the Jewish majority. This radical evolution within the Arab population since the ‘60s expresses also the frustrations of this community regarding unfulfilled promises of improving its situation in all fields for several decades. No serious reaction by the authorities came in order to calm this rejection and to approach its demands, but rather incomprehension and a series of attacks on the loyalty of this minority.

Moreover, in the last decade, Jewish ultra-nationalists and some sections of its population want to deprive the Arabs of their right to vote, or to strip them of full citizenship, or maybe to evict them from the State altogether. Even the Government and Parliament, in recent years, has tried to limit the rights of this minority through law projects and laws. One important example is the law project *Israel as the Nation-State of the Jewish people*, which concern among others the abolishment of the status of Arabic as official language, which was anyway only implemented in a very limited way. Furthermore, the original draft of the Bill, approved by the cabinet on November 23rd, 2014, wanted to not only remove Arabic as an official language alongside Hebrew, but also increase the influence of Jewish law, reduce the power of the Supreme Court and entrench the automatic citizenship of Jews worldwide and Jewish symbols of the State. In spite of long debates, the difference between the draft project of 2014 and the new one voted in 2017 is very limited. It still does not mention the word “equality” or provide rights for non-Jews, though it preserves voting rights for all citizens and “individual rights according to the law” but still denies the Arabs national rights as a minority (*Israel as the Nation-State of the Jewish people*). Excluding the principle of equality from the new law is likely to have serious consequences. Thus, even the law in its current form is unacceptable and will inevitably lead to clashes between different groups within the Zionist majority, and, of course, will only heighten tensions between Jews and non-Jews. In fact, this legislation voted by Prime Minister Benjamin Netanyahu and other ultranationalist politicians within the Government this autumn, before a final vote in the *Knesset* soon, already increases fear among left and centre parties that it would put the State’s Jewishness above its democratic character. It will thus, expose the inherent tension in the Nation’s core principles with a law that would subject a fifth of its citizens to permanent second-class status, not least because these Arab and even Druse minorities are indigenous minorities.

Not surprisingly, critics included also various eminent academics such as Ruth Gavison, a law professor at the Hebrew University, Amal Jamal, a political scientist at the Tel Aviv University, and Yohanan Plesner, president of the Israel Democracy Institute. As well as Shabtai Shavit, former chief of the *Mossad* spy agency, the Israeli President Reuven



Rivlin and leaders of the Jewish Diaspora, who all denounced the proposal as superfluous, redundant, embarrassing, dangerous and ill timed. Within the Arab minority's political and intellectual elite as well as in the Jewish extreme left, the dominant view is that if the law were officialised it would just unmask what they call a facade of a Democracy that has long been discriminatory and would show the long-time reality existing in the State<sup>4</sup>.

On the other hand, proponents of the legislation, argue that it is a necessary counterbalance to the aspiration of some Israeli Palestinians for autonomy and to counter the Palestinian President, Mahmoud Abbas's refusal to recognise Israel as a Jewish State and finally to balance the existing laws promoting equality. An argument hardly acceptable since the real essence of what this State is about is real equality in the democratic sense of the term while having at the same time a Nation-State of the Jewish people. Moreover, as we have seen, very few laws promoting full equality were passed and fewer were really implemented especially regarding the Arab minority. In fact, without having a Constitution the contradicting balance between these two constitutional principles - the democratic and the Jewish characters of the State - may put at risk the basic Identity of Israel as pronounced in the Declaration of Independence and reiterated in the two mentioned Basic Laws in spite of the generally positive intervention of the Supreme Court.

In matter of fact, the rising discrimination and discriminatory expressions over the Arab minority was aggravated since the last wars of Israel with the *Hamas* authorities in Gaza in 2013 and especially in 2015. Thus, Avigdor Liberman, Israel's foreign minister at the time has reiterated his call for a transfer of Arab-Israeli towns to a future Palestinian State and Benjamin Netanyahu, meanwhile, has raised the possibility of revoking citizenship or residency rights of relatives of people who attack Jews or anyone who expresses support for the attackers. Not surprisingly, in such an atmosphere the Israeli Democracy Institute surveys show waning support among Israeli Arabs for the State's defining itself as both Jewish and democratic, from two-thirds in 2003 to less than half in 2012 in a continuing trend. Similar results and tendencies were found in Sammy Smootha surveys.

## Conclusion

To conclude, the Identity of the State of Israel as defined in the Declaration of Independence was clearly a liberal democratic Nation-State, yet, it was almost immediately eroded with the imposition of the military regime, the concessions to the religious sector, the abandonment of the obligation to adopt a Constitution and the non-binding role of the Declaration itself. Nevertheless, slowly through the decisions of the Supreme Court and the interpretations of

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<sup>4</sup> In fact, on January 27, 2016, the *Knesset* rejected a bill which was put forth by, Jamal Zahalka, an Arab member of the *Knesset* calling for adding a clause on equality to Israel's Basic Law on human dignity and liberty, thus stipulating the equality of all citizens in the State. (<http://www.middleeastmonitor.com/news/middle-east/23610>).

the two Basic Laws of 1992/1994, which integrated its values announced in the Declaration it regained a certain degree of its original Identity though it is still lacking on major aspects. Thus, the principle of equality, which is the basis of a Democracy, is only partially adopted in practice with different degrees of implementation as regards the various minorities. The evolution of it in the last 70 years shows contrasting tendencies. While in the socio-economic field, there is a clear regression in the last decades, concerning gender minorities, there is almost a spectacular advancement, apart from that which concerns marriages and divorces. On the religious domain with certain advancement regarding seculars, while a clear increase of advantages to the religious sector, the battle between the two is becoming fierce. As for the Arab minority, in spite of certain improvement since the creation of the State, tension is growing due to Government attempts to restrict their rights instead of expanding them. In fact, the rights within the State are determined more according to the ethnic-national religious belonging of the person than according to their citizenship, thus equally, and in some aspects, it even moves away from its original intended Identity of an exemplary liberal Democratic Nation State.

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