RIVISTA DI
DIRITTI COMPARATI

# Liberal Zionism As a Constitutional Project: From an Utopia to a Myth? *

*Gábor Halmai*

CONTENTS: 1. Introduction; 2. Promises of Liberal Zionism: Herzl, Jabotinsky, Ben-Gurion, Bret Shalom and the Declaration of Independence; 3. Divergence from Half-hearted Liberalism: The Failed Constitution and the Strengthening of Religious Zionism; 4. Hope and Despair: Barak's 'Constitutional Revolution' and the Nation-State Law; 5. Conclusions, Perspectives.

## *1. Introduction*

The main motivation of Theodor Herzl to start the Zionist movement was the growing anti-Semitism in Europe and all over the world. The current new wave of anti-Semitism due to the war in Gaza is blaming Zionism. Are we talking about the same concept, which once emerged as a consequence of and later became a reason for a racist idea? Yitzhak Laor a prominent Israeli poet, in his book, *The Myth of Liberal Zionism* published in 2009[1] heavily criticizes famous Israeli writers like Amos Oz, David Grossman and A.B. Yehoshua, representatives of the 'peace camp' for promoting the liberal character of Zionism, while not denying that millions of Palestinians can be removed from their land, denied their human rights, fenced in huge 'ghettoes' like Gaza, and even killed in the name of a Jewish and democratic state. In August 2025, David Grossman, the only living among the criticized admitted that he came to the realization that Israel is committing genocide by killing more than 60.000 Gazans ever since the legitimate war started after the October 7 2023 massacre of 1200 Israelis by the terrorists of Hamas.[2]

The main objective of this paper is to find out, whether Zionism has indeed been a liberal ideology on which a democratic state and its constitutional system can be established. To answer this question first I discuss one representative of three different types of Zionism[3] in different periods of time before and after the establishment of

* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

[1] Y. Laor, *The Myth of Liberal Zionism*, London, 2009.

[2] *'With Immense Pain and a Broken Heart'. Leading Israeli Author David Grossman Calls Gaza War a 'Genocide'*, Haaretz, 1 August 2025, available at: https://www.haaretz.com/israel-news/2025-08-01/ty-article/leading-israeli-author-david-grossman-calls-gaza-war-a-genocide/00000198-6606-dc50-a9bf-ef7702510000

[3] About the religious, general, labor and revisionist movements of Zionism from the late 19th till the end of the 20th century see Y. Gorny, *Thoughts on Zionism as a Utopian Ideology*, in *Modern Judaism*, 1998, p. 241 ss.

the State of Israel trying to compare the potential liberal character of their views. I start with Theodor Herzl, founder of the Zionist movement and his revisionist challenger Vladimir Jabotinsky, followed by David Ben-Gurion, the founding father of the State. Next I analyse the Declaration of Independence, the founding document of the state, along with the draft constitution prepared by Leo Kohn, and the reasons of its failure. The Basic Laws and their activist interpretation 'constitutional revolution' called by Aharon Barak the long-serving President of the Supreme Court will also be subject of investigation for their liberalism. The 2018 Basic Law: Israel as a Nation State of the Jewish People is openly denying the concept of liberal Zionism accompanied by the consecutive Netanyahu governments' rejection of equal rights for Palestinian residents or even citizens of the country. This transparent end of any possibility of liberal Zionism demand an answer to my initial research question, whether liberal Zionism has been an utopian project, what Theodor Herzl explicitly denied, or a myth altogether as Yitzhak Laor's book title indicates. Looking for my own response to this question I'll also analyse scholarly thought on the liberalism of Zionism, with special attention to two liberal Jewish intellectuals, Isaiah Berlin and Hannah Arendt, how their Zionist convictions has or has not changed as a reaction to the establishment of and the developments in the State of Israel.

While being a constitutional law scholar my research method in this paper is not a purely legal analysis as it also wants to understand what boils in the Israeli society that is reflected in concepts, such as Zionism as well as in constitutional and legal documents. Constitutions on the one hand order society and provide a constraining mechanism on politics, on the other hand, they are also symbolic statements of the people, their identity and their aspirations.[4] The research, therefore needs to empirically explore the internal forces within a country and analyze the national political and constitutional cultures, the citizens' identification with the political and constitutional system, as well as the forms of their engagement.

In addition to the doctrinal and socio-legal analysis of the history of the State of Israel, as well in the history of ideas regarding Zionism, the paper also aims to use process-tracing as a method in social sciences for tracing causal mechanisms of the changes in Israel.[5] I will start with the descriptive component of process tracing with taking good snapshots of a series of specific moments in the country's transformation from more liberal to 'illiberal democracy'. The aim is to characterize key steps in the process of Israel, which permits good analysis of change and sequence.[6]

*2. Promises of Liberal Zionism: Herzl, Jabotinsky, Ben-Gurion, Bret Shalom and the Declaration of Independence*

[4] M. Loughlin – N. Walker, *Introduction*, in M. Loughlin – N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constituent Form*, Oxford, 2007, p. 1.

[5] About the method see D. Beach, *Process-Tracing Methods in Social Science*, in *Oxford Research Encyclopedias*, https://doi.org/10.1093/acrefore/9780190228637.

[6] See D. Collier, *Understanding Process Tracing*, in *Political Science and Politics*, 2011, p. 823 ss., p. 824.

The search for the liberal roots of Zionism should start with the Jewish Enlightenment (Haskalah) of the last two decades of the 18th century and in the 19th century encouraged adoption of secular European culture, and has started a 'Kulturkampf' between secular and religious Jews. Haskalah challenged the normative starting point of Judaism, which has been a collective conception of subjectivity, in opposition to Western Christianity's emphasis on individual choice and belief, as well as the rabbinical leadership, opposed the limitation of Judaism to the dimensions of Halakhic religion, and aspired to improve the lives of Jews by striving for their integration into Western culture.[7] Zionism, as a national movement of the Jews, claimed that Jews represent a common and single people, and that the only way they could live freely as Jews was to dwell in a Jewish state. Besides responding to the distressing condition of the Jewish existence in Eastern and Central Europe Zionists also reacted to this 'schism' with divided approaches: Ahad Ha-Am aimed at transforming Jewish religion into a spiritual national culture; political Zionists, like Theodor Herzl and Vladimir Jabotinsky opted for the European culture; religious Zionists preferred a Halakhic approach, and Micha Yosef Berdyczewski a Hebrew cultural approach. Parallel with this development, the legal system during the British Mandate (1918-1948) underwent an intensive process of Anglicization and liberalization due to the extensive borrowing from English law. The political Zionists wanted to adopt this English law instead of the Hebrew-Jewish law preferred by the spiritual-cultural Zionists.

The Zionist movement initiated by Theodor Herzl at the First Zionist Congress in Basel in 1897, which envisaged to rebuild the Jewish people's national home in Eretz Israel, their historic and religious homeland through colonizing Palestine was criticized not only by Orthodox and Reform rabbis but also by secular Jewish liberals and socialists, as pursuing a non-liberal utopian idea of a Jewish State in the Land of Israel. The fact that about 650.000 Arabs lived in Palestine was first mentioned during the Second Zionist Congress in the Summer of 1898, however with the claim that there are no international guarantees needed for the Jewish immigration. In his novel *Altneuland* ('Old-New Land') published in 1902 Herzl portrays a multi-ethnic society with equal rights for the non-Jewish citizens based on universal suffrage stemming both from the European tradition and the principles drawn from Judaism. These are the central assumption of the new both democratic and Jewish nation-state, in which the Arabs however constitute a national minority, but are not considered as constituent part of the nation. As an explanation for this Herzl's Zionist manifesto *Der Judenstaat* ('The Jewish State') had adopted degrading European imperialist representations of non-European 'barbaric' natives, and spoke about the moral obligation of Jews to civilize the Arabs of Palestine: «we should there form a part of a wall of defense for

[7] About the Jewish Enlightement see S. Feiner (trans. Ch. Naor), *The Jewish Enlightment*, Philadelphia, 2004.

Europe in Asia, an outpost of civilization against barbarism. We should as a neutral state remain in contact with all Europe, which would have to guarantee our existence».

Herzl seemingly also had problems with democracy and his idea about Jewishness wasn't clear either. In *The Jewish State* he rejects popular democracy as form of government proposing an aristocratic republic instead. In his diary he said the following about democracy: «I am against democracy because it is extreme in its approval and disapproval, tends to idle parliamentary babble, and produces that base class of men, the professional politicians. Nor are the present-day nations really suited to the democratic form of government; and I believe they will become less and less suited to it. For democracy presupposes a very simple morality, and our morality is becoming ever more complex with the advance of commerce and civilization. Le ressort d'une démocratie est la vertu [the concern of a democracy is virtue], said wise Montesquieu».[8] The problem with the Jewishness of the future state envisaged by Herzl and the later founding fathers is that they failed to indicate what this is supposed to mean beyond the objection to a theocracy.[9] It is true, however that at the time of writing of the novel Nakba hasn't yet happened, and there was no Arab national movement in existence yet.[10] Secularism, the other important element of liberal Zionism and sounding utopian in today's Israel is – again with the undefined term of Jewishness of the state – mirrored in the following quote from Herzl's *The Jewish State*: «while we respect our rabbis, we will keep them to their synagogues, just as army will be kept to its barracks».

In *Altneuland*, written years before his death in 1904, Herzl, without foreseeing the growing tensions between the Jewish and Arab population, projected the Jewish Palestine as becoming a democratic state based on universal suffrage by 1923. This was the year, when Vladimir Jabotinsky left the Zionist Organization led by Herzl's successor, Chaim Weizmann, the first President of the State of Israel. Jabotinsky rejected the 1922 White Paper, issued by Winston Churchill, Secretary of State for the Colonies in the British government, which limited the Jewish immigration in order to comply with the 1917 Balfour Declaration emphasizing that while a Jewish national home was to be established in Palestine, it did not imply the creation of a wholly Jewish state. He argued for an independent Jewish solution of the Jewish question, and insisted on the political sovereignty of the Jewish within the historical borders of Eretz Israel, not accepting the British plans to detach the territories East from the Jordan river.

In 1922, as an alternative to the Churchill White Paper, and as a reaction to the British plan to establish a Legislative Council in Palestine as well as to an Arab initiative for an Arab-Jewish emirate in Palestine and Transjordan, Jabotinsky presented a

[8] The R. Patai (ed.), *Complete Diaries of Theodor Herzl*, New York – London, 1960, vol. I, p. 169.
[9] See this criticism in R. Hirschl, *Constitutional Theocracy*, Cambridge (MA), 2010, p. 140.
[10] See this point in S. Avineri, *Rereading Herzl's Old-New Land*, in *Jewish Review of Books*, Summer 2012.

constitutional framework recommending an emir as the head of that state with a Jewish Prime Minister with extensive competences and a bi-cameral parliament with a lower chamber elected by all (literate) citizens and an upper chamber consisting of representatives of Arab Muslims, Arab Christians, Palestinian Jews, and Jews from the Jewish diaspora.[11] Before his death in 1940, Jabotinsky in another constitutional plan for the future Jewish-Arab state once more repeated his idea about the separation of power between Jews and Arabs: «in every Cabinet where the Prime Minister is a Jew, the vice-premiership shall be offered to an Arab, and vice-versa».[12]

It isn't easy to interpret these proposals of a committed Zionist for a bi-national maybe even federal state. One possible explanation may be provided by Jabotinsky's testimony in 1936 to the British Royal Commission of Inquiry (the Peel Commission), which recommended the division of Israel into a Jewish and an Arab state. In this he talked about his commitment to the idea that a country's national identity is determined de-facto by the majority: «the best way and the natural way is that the 'natural' character of a state should guaranteed ipso facto by the presence of a certain majority».[13] And this was the very reason that he opposed any limitation of the Jewish immigration by the British government. This emphasis on majority identity meant that even if the new State of Israel will be a bi-national entity, its national identity is Jewish.

The same motivation may have driven the constitutional ideas of David Ben-Gurion the head of the Jewish Agency from 1935, and later president of the Jewish Agency Executive, the de facto leader of the Jewish community in Mandatory Palestine, the primary founder and first Prime Minister of the State of Israel, who as a Socialist politician and founder of the unified labor federation for both Jewish and Arab workers was an ideological opponent of Jabotinsky. Despite these ideological differences, similarly to Jabotinsky, Ben-Gurion also advocated a bicameral system with a lower chamber selected through proportional elections, and an upper house with equal representation of Jews and Arabs. Both of them advocated the equal constitutional status of the Hebrew and Arabic language. And Ben-Gurion's constitutional plans were also based on Jewish demographic growth.[14] While the

[11] A. Naor, *Jabotinsky's Constitutional Guidelines for Israel*, in A. Bareli – P. Ginossar (eds.), *In the Eye of the Storm: Essays on Ze'ev Jabotinsky*, Kefar Habad, 2004, p. 51 (Hebrew, quoted by A. Likhovski – A. Shahal, *The History of Israeli Pre-State Constitutionalism*, in A. Barak – B. Medina – Y. Roznai (eds.), *The Oxford Handbook of the Israeli Constitution*, Oxford, forthcoming, available at https://ssrn.com/abstract=3931266.

[12] Z. Jabotinsky, *The Jewish War Front*, Westport, Conn., 1975 (first published 1940), pp. 216–17, quoted by A. Likhovski – A. Shahal, *The History of Israeli Pre-State Constitutionalism*, in A. Barak – B. Medina – Y. Roznai (eds.), *The Oxford Handbook of the Israeli Constitution*, Oxford, forthcoming, available at https://ssrn.com/abstract=3931266.

[13] E. Jabotinsky (ed.), *Z. Jabotinsky's Speeches 1927-1940*, Jerusalem, 1947, p. 220 ss. (Hebrew, quoted by A. Likhovski – A. Shahal, *The History of Israeli Pre-State Constitutionalism*, fn. 12).

[14] D. Ben-Gurion, *An International Labor Alliance in Palestine (Proposal for the General Convention of the Histadrut)*, in Our Neighbors and Us (Davar 1931) 188-96 (in Hebrew, quoted by A. Likhovski – A. Shahal, *The History of Israeli Pre-State Constitutionalism*, fn. 12).

increase of the Jewish population was indeed significant, especially during the Fifth Aliyah between 1929 and 1939 around 250,000 Jews arriving in Mandatory Palestine mainly due to the rise of Nazism in Germany, and the large influx of Jewish immigrants from Central and Eastern Europe. However, even with this trend the percentage of Jews by 1947 barely reached one-third of the entire population, and the 82 % majority in 1948 was due to Nakba, the expulsion of about 750.000 Arabs from the territory of the newly established State of Israel.[15]

There is a scholarly discussion about the reasons for such similarities of the constitutional plans of ideologically very different Zionists thinkers. While Herzl hadn't yet realized the dangers of an openly nation-state approach for the Jewish people only, Jabotinsky and Ben-Gurion first because of the British opposition expressed in the Balfour Declaration and later reacting to the Arab uprising[16] needed to be more cautious and advocating a bi-national/federal solution with the hope of a Jewish majority. It is hard to prove, whether Jabotinsky and Ben-Gurion have both started with Herzl's proudly accepted utopian vision, and changed their views adopting to the circumstances, or the less radical plans were tactics to buy more time till the hoped Jewish majority will be reached.[17] Some scholars seem to be convinced that the constitutional plans of both Jabotinsky and Ben-Gurion were based on their frank intention to establish a bi-national or federal state. They argue that it was only after WWII and the Holocaust that Zionist constitutional thinking has changed to advocate a Jewish nation-state constitutional system. Others, without challenging this view diagnose that the Jewish nation-state approach was already present in the pre-state period as well.[18]

The State of Israel was established on May 14, 1948, through the Declaration of Independence, which after announcing the Land of Israel, Palestine as the birthplace of the Jewish people, explicitly proclaims the Jewishness of the State: «we, members of the People's Council…hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel». Following Herzl's intentions the text affirmed the equal rights for all residents (NB not citizens! – G.H) with the following

---

[15] About the plan of the expulsion see first W. Khalidi, *Plan Dalet: The Zionist Master Plan for the Conquest of Palestine,* Beirut, 1961, later also confirmed by L. Pappé, *The Ethnic Cleansing of Palestine,* Oxford, 2006.

[16] Based on rumors about the eventual occupation of the Temple Mount in Jerusalem by Jews, a violent Arab uprising started in August 1929 in Jerusalem and Hebron, later spreading to Safad and Tiberias. After this, Irgun Bet, a Jewish militia was established from the members of Haganah to attack Palestinians. See B. Morris, Righteous Victims: A History of the Zionist-Arab Conflict 1888-2001, New York, 2001, pp. 111-120.

[17] J. Heller, Ben-Gurion, *Weizmann and Jabotinsky on the Arab Question: A Comparison* in A. Shapira et al. (eds.) *The Age of Zionism*, Jerusalem, 2000, p. 203 (in Hebrew, quoted by A. Likhovski – A. Shahal, fn. 12.

[18] See the opinion of Assaf Likhovski and Aviram Shahal in their excellent study based on many Hebrew sources, upon which I heavily relied on when describing the pre-state aspects of Israeli constitutionalism: quoted by A. Likhovski – A. Shahal, fn. 12.

formulation: «(The State of Israel)…will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations». On the other hand, the Declaration again following Herzl's ideas does not consider the Arab citizens of the state as part of the nation, it rather indicates the recognition of the Arabs as national minority, also denying the possibility that Palestine is the birthplace of an Arab national identity.[19] Mirroring Herzl's aversion to democracy is also telling that the word democracy did not become part of the final draft of the Declaration.[20]

A liberal, binational movement was certainly present outside mainstream Zionism from the 1920s onwards. The proponents of such humanist pacifist thinkers mostly from Eastern Europe first assembled in Bret Shalom established by Arthur Ruppin, Jichak Epstein, Haim Kalvaryski and Rabbi Binyamin (Yehoshua Radler-Feldmanin) Jerusalem in 1925. Later Martin Buber, Gershom Scholem and Ernst Simon also joined also representing cultural Zionism with Arab-Jewish state based on equal rights of all citizens, opposing the exclusively Jewish nation-state. Sharing the optimism of the universalist wilsinian vision of the early 1920s they envisioned a confederative system, based on the multiethnic Swiss or Finnish statehood.[21] After the 1929 Arab uprising their pacifist position became even more marginalized, which lead to the dissulution of the movement. In the 1930s first the Socialist HaShomer HaTzair, later Pinhas Rutenberg, Gad Frumkin, Moshe Smilansky, Moshe Novomeysky and Judah Magnes, known as 'the Five' followed by the League for Jewish-Arab Rapprochment and Cooperation represented the idea of binationalism.[22] In 1942 with the participation of Martin Buber, Judah Mages and Moses Smilansky Ihud (Union) urging the union between Jews and Arabs followed by an eventual political and economic confederation of Palestine, Trans-Jordan, Syria and Lebanon.[23] After the 1947 UN Partition Plan and Nakba the binational thoughts became anti-Zionist.

The State of Israel was originally a nationalist state for the Jewish people. However, there are authors who claim that the Israeli state sponsors a particular

[19] See O. Kamir, *The Declaration has Two Faces: The Interesting Story of the 'Zionist Declaration of Independence' and the 'Democratic Declaration of Independence'*, in *Iyoni Mishpat (Tel Aviv University Law Review)*, 2000, pp. 473 ss. (Hebrew, quoted by N. Sultany, *Liberal Zionism, Comparative Constitutionalism, and the Project of Normalizing Israel*, Research Repository, University of London, 2014, accessible at https://soas-repository.worktribe.com/output/370618/liberal-zionism-comparative-constitutionalism-and-the-project-of-normalizing-israel.

[20] Y. Shachar, *The Earlier Draft of the Declaration of Independence*, *Iyoni Mishpat*, 2002, p. 532 (Hebrew, quoted by N. Sultany, fn. 19).

[21] Memorandum by the Bret Shalom Society on an Arab Policy for the Jewish Agency, Jerusalem, 1930.

[22] See I. Kolatt, *The Zionist Movement and the Arabs*, Studies in Zionism, 1982, pp. 129 ss.

[23] M. Buber – J. Mages – M. Smilansky, *Palestine: A Bi-National State*, Jerusalem, 1946.

communitarianism founded on a particular kind of vision for Jewish statehood. That statehood's mission would promote Jewish culture embodied in the norms governing symbols and language, the Law of Return benefitting diaspora Jews, vesting some state functions in religious courts, and the absence of civil marriage. While the Israeli polity protects individual rights such as religious freedom, it also subordinates those rights to Jewish unity. This legitimates restrictions on Anti-Jewish speech or action, and therefore, communitarian priorities may «suppress the liberal inclinations of its citizens».[24] The original 1950 Law of Return, stated that «every Jew has the right to come to this country as an oleh» without defining who counted as a Jew. Ben-Gurion's government maintained that Jewish status was a matter of self-determination. But after more and more immigrants to Israel (especially from Poland and Russia) were deemed not Jewish by birth, the Law of return was amended in 1970 to define who was a Jew: «anyone born of a Jewish mother or who converted».[25] Currently there are also demands to make citizenship for the Arab minority less inclusive, and even to amend the Law of Return so as to give Orthodox rabbis the authority to determine whom the state of Israel recognizes as a Jew.

*3. Divergence from Half-hearted Liberalism: The Failed Constitution and the Strengthening of Religious Zionism*

Following the UN Partition Plan of 1947, which proposed dividing Palestine into a Jewish and an Arab state, mandated that both states adopt a fully liberal democratic and egalitarian constitution as a prerequisite for a liberal Zionist statehood. The Israeli Declaration of Independence as a mainly political document transferred the powers of the People's Council as a purely ethnic, national Jewish body to the Provisional State Council and its executive, the People's Administration, the Provisional Government of the Jewish State, as state organs. Besides the Provisional State Council as a legislative body, the Declaration also established the Constituent Assembly mandated with adopting a constitution by no later than October 1, 1948. When the Assembly convened it renamed itself to 'The First Knesset', which have been entrusted with both constituent and legislative power.[26]

But there were several arguments against the enactment of a written Constitution.[27] One of the fiercest opponents of the project of drafting a constitution was David Ben-Gurion, Israel's first Prime Minister. One of the major obstructions in adopting a Constitution comes from orthodox and secularist circles taking a decisive

[24] See B. Breslin, *The Communitarian Constitution,* Baltimore, 2004. p. 186.

[25] The catalyst for change was the public outcry after a ruling of the Supreme Court, which allowed the child of a Jewish father and non-Jewish mother to be registered as Jewish, in accordance with the father's wishes. H.C. 58/68 *Shalit v. Minister of the Interior* 23(2) P.D. 477, available in English in *Israel Law Reports*, Special Volume (1962-1969), p. 35-191.

[26] The Second Knesset (Transition) Law (1951, 5 L.S.I. 94) stipulated that the Second Knesset, and mutatis mutandis every subsequent Knesset enjoys all the powers of the First Senate.

[27] See for instance A. Shapira, *Why Israel Has No Constitution*, in *St. Louis U. Law Journal,* 1993, p. 283 ss.

position on the unresolved questions of the relationship between religion and state, and the national and cultural or religious nature of the declared Jewishness of the state. In other words, the main reason of uncertainty was the profound ideological rift in Israeli society between the secular and the religious vision of the state.

Another reason for Ben-Gurion was that he considered the establishment of the state less than Zionism's original idea to absorb Jews from all over the world in Palestine/Israel, and till this aim cannot be fulfilled the mission is not accomplished. In a speech delivered in 1951 in front of the American Zionist Organization he confessed: «Zionism is a dream while the state is a fact. The state only speaks in the name of its citizens and its laws are only valid for its citizens within its sovereign borders. However, not all Jews can take part in this sovereignty, but rather only few of them... As a citizen of Israel my relation to the people of Israel has priority over my relation to my state because the state is just a tool, and at this point in time the state absorbed only a small part of the nation... the state is a tool and an instrument, but it is not the only tool».[28] This also means that the difference between the actual and the potential citizens of the Jewish state is not crucial from the Zionist point of views, which relativizes the importance of the borders as well.[29]

The more pragmatic reason for Ben-Gurion opposing the constitution was his fear from ideological and cultural disputes over the content of the constitution, which could have turned into a Kulturkampf that would divert the Israeli society from the realization of Zionism, and his republican 'civicism' (Mamlakhtiyut).[30] In 1949 he said the following in front of the Knesset's Constitution, Law and Justice Committee: «It is an empty argument that will take up our time in the Knesset and the press for nothing, and will divert us from the path of the (Zionist) enterprise».[31] Other scholars argue that Ben-Gurion also opposed enacting a constitution primarily because he wanted the least restrictions on his government's power.[32] Among the reasons was also the fact that most of Jews were abroad and it seemed unfair to entrench a constitution by a minority; the British experience was also an argument against adopting a constitution, and religious people objected because for them there was already a constitution – the Bible. The founders of the American constitution needed a written

[28] D. Ben-Gurion, Speech delivered to the American Zionist Movement in May 1951 in New York, in *Collected papers: David Ben-Gurion, Figures and Leaders*, published by the former Israeli Ministry of Media and Propaganda (Mishrad Hahasbara), quoted by R. Zreik, *The Persistence of the Exception: Some Remarks on the Story of Israeli Constitutionalism*, in R. Lentin (ed.), *Thinking Palestine,* 2008, London, p. 131-147.

[29] O. Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine*, Philadelphia, 2006.

[30] See this reasoning N. Kedar, *Ben-Gurion's Opposition to a Written Constitution*, in *Journal of Modern Jewish Studies*, 2013, p. 1 ss.

[31] Protocols of the Knesset's Constitution, Law and Justice Committee, 13 July 1949, 13. Israel State Archives (hereinafter: ISA), k/21, quoted in N. Kedar, *Ben-Gurion's Opposition to a Written Constitution*, in *Journal of Modern Jewish Studies*, 2013, p. 1 ss.

[32] R. Gavison, *The Controversy over Israel's Bill of Rights*, in *Israel Yearbook of Human Rights*, 1985, p. 113 ss., p. 134.

document to affirm their existence as a nation, while founders of the new State of Israel were still struggling over the very definition of nationhood.[33] In this context some political-legal issues have arisen, such as the question 'who is a Jew?', which is particularly relevant in matters of marriage and divorce. Further problems have arisen under the Law of Return and the rights to automatic citizenship for Jewish immigrants, which does not permit Arabs to reunite with their families who live in the West Bank, the Gaza Strip or elsewhere. These problems are also related to the fundamental characteristic of the Jewish law that there is no distinction between law and equity, between legal and ethical norms.[34] The position of the religious representatives was that a Jewish state should have Jewish laws. For instance, the Orthodox Agudat Israel Party demanded that the legal system be based on the Halakha (Jewish religious law), and opposed the constitution with the following argument: «there is no place in Israel for any constitution created by man. If it contradicts the Torah – it is inadmissible, and if it is concurrent with the Torah – it is redundant».[35] Ben-Gurion, and his governing Labor (Mapai) Party vehemently objected to the aspiration for establishing a 'theocratic state', holding that the success of the Zionist project required fostering a new Jewish identity – Israeli. But Ben-Gurion clearly advocated for leaving the identity issues outside the scope of Israeli law.[36] Orthodox representatives feared that a constitution and law would entrench secular principles, leading to a Kulturkampf, hence similar to Ben-Gurion they also opposed the constitutional and legal entrenchment of identity issues. The difference between Ben-Gurion's and the orthodoxs' opposition is that Ben-Gurion's was rather a temporary, tactical and not a principled one, although even for the long run he did oppose a too entranched and rigid text not to tie down future generations.[37]

Despite these inititial oppositions the third detailed draft constitutions intended to serve as the basis for political discussion prepared by the German-born religious Zionist, Leo Kohn, the secretary of the political department of the Jewish Agency, who was also involved in the drafting the 1937 Irish constitution was submitted to the Provisional State Council in October 1948.[38] Kohn unsuccessfully tried to balance the religious and the Jewish nationalistic characters of the constitutional text, but he was criticized by both religious Zionists rabbis not being religious enough and secular left-wing Zionists to be too religious.

---

[33] See G.J. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States*, Princeton, 1993, p. 115.

[34] See H.H. Cohn, *The Spirit of Israel Law*, in *Israel Law Review*, 1974, p. 456 ss.

[35] Knesset Record 4 (1950): 744, quoted by H. Lerner, 2011, *Making Constitutions in Deeply Divided Societies*, Cambridge, 2011, p. 60.

[36] See N. Kedar, *Law and Identity in Israel: A Century of Debate*, Cambridge, 2019.

[37] See S. Aronson, *David Ben-Gurion and the British Constitutional Model*, in *Israel Studies*, 1998, p. 193 ss.

[38] See A. Radzyner, *A Constitution for Israel: The Design of the Leo Kohn Proposal, 1948,* in Israel Studies, 2010, p. 1 ss.

Since both secular and religious parties opposed it, albeit for different reasons, and despite the large majority of the secular camp (only sixteen out of the 120 members represented the religious parties), the Knesset decided in June 1950 not to adopt Kohn's draft, and not having a constitution in a single document at all. Following a heated debate on the religious and secular vision of Israel as a Jewish state, a compromised resolution was passed. Named after its initiator, Haim Harari, the chair of the Knesset's Constitutional and Legislative Committee, it outlined that the Basic Laws collectively would form the state constitution.[39]

*4. Hope and Despair: Barak's 'Constitutional Revolution' and the Nation-State Law*

In contrast to the relatively straightforward process of enacting the first nine Basic Laws after 1958, primarily addressing institutional considerations and essentially formalizing the existing government structure, objections arose from religious parties regarding the two draft Basic Laws on Human Rights from 1992, the Basic Law on Human Dignity and Liberty and on Freedom of Occupation respectively. They contended that these laws would undermine the religious status quo. Justice Aharon Barak, the Court's Chief Justice for twelve years, and the person most closely identified with the Court's activism, in his opinion in the case Migdal characterized the enactment of these two Basic Laws in 1992, and declaring unconstitutional legislations through judicial review void even in the absence of authorization in a silent constitution as a 'constitutional revolution'.[40] In another landmark case Ka'adan v. Israel Land Authority in 2000 the court held it illegal for the state to discriminate between Jewish and Arab citizens in the allocation of state land.

These two Basic Laws on declaring the State of Israel as a 'Jewish and democratic state' also has got alternative interpretations. Courts and scholars are divided over whether the term 'Jewish' should be read as referring to Judaism as a religion, to Jewish nationality, or to Jewish morality. Although the majority of views are that this 'constitutional' provision does not mandate the state to become a theocracy, because it is certainly excluded by the democratic character, but rather mandates to 'integrate' or 'harmonize' the two poles. This phrase leaves ample room for competing interpretations.[41]

Justice Barak proposed two concepts as defining the 'Jewish state': a) a 'national concept' of the State of Israel as a 'national home to the Jewish people', and b) as

[39] About the constitution making attempts, including the Knesset debates see H. Lerner, *Making Constitutions in Deeply Divided Societies, Cambridge*, 2011, Ch. 3.

[40] *United Mizrahi Bank Ltd. V. Migdal Village*, Supreme Court, CA 6821/93, 49(4)P.D.221 (1995).

[41] See R. Gavison, *Jewish and Democratic? A Rejoinder to the 'Ethnic Democracy' Debate*, in *Israel Studies,* 1999, pp. 44 ss; Ead., *Can Israel Be Both Jewish and Democratic?*, in *Moment,* 2000, p. 115 ss.; H. Lerner, *Democracy, Constitutionalism, and Identity: The Anomaly of the Israel Case*, in *Constellations,* 2004, p. 237 ss.; N. N. Rouhana, *Jewish and Democratic? The Price of National Self-Deception*, in *Journal of Palestine Studies,* 2006, p. 64 ss.; A. Ravitzky – M. Kremnitzer (eds.), *The Jewishness of the State,* The Israel Democracy Institute, 2007; A. Rubinstein, *Can Israel Be Both Democratic and Jewish?*, Interdisciplinary Center (IDC) Herzlyah-Radzyer School of Law, 2009.

values derived from the Halakha (which in Barak's interpretation intends to prevent the direct application of the Halakha as part of Israeli law). In other words, Barak suggested that a national, secular concept, should dominate a strictly religious one. In opposition to Barak's approach, Justice Elon included Jewish religion in the term 'Jewish', and argued that following the enactment of the Basic Laws, applying Jewish law became a legal duty incumbent on every judge in the country.[42] Elon also claimed that, since the term 'Jewish state' is mentioned first in the phrase, this is superior to that of developing the country's law as democratic law.[43] In Barak's view the 'Jewish state' and 'democratic state' concept should be approached on equal terms at peace with each other without raising any contradictions: «an appropriate analysis does not have to intensify these contradictions. On the contrary, in a purposeful analysis, based on constitutional unity and normativity, harmony, aspires to find that which is unifying and common, while preventing contradictions and reducing points of friction. We must strive to find the common denominator and synthesis between the values of Israel as a Jewish state and the values of Israel as a democratic state.»[44] Barak also emphasizes the fact that most of the population of Israel is secular and that some of its citizens are not Jewish. Regarding the democratic character of the state Barak indicates that it establishes provisions for both majority rule and the preservation of human rights: «the values of the state of Israel are the same values that are being reflected on a given time the premise of modern democracy. This democracy is based mainly on two foundations: the first is the government of the people. A democratic regime is one where the people determine their destiny. The people choose their representatives and the latter determine the result on a majority vote. The second foundation is human rights. A democratic regime is one that holds and develops human rights. Only the combination of both tiers can lead to a true democracy».[45] Once one of these tiers is removed from the equation, it is analogous to losing its essence.[46]

But besides the interpretations of Barak and Elon, emphasizing the national, Zionist character and the Halakha-values on the one hand, and Judaism based on the Halakhic commandments on the other, there are other possible interpretations of the

[42] More radically opposing Elon's view some scholars take the position against interpreting the term Jewish in the Basic laws to include the Jewish religion altogether: see A. Levontin, *Jewish and Democratic – Personal Reflections*, in J. E. Davis (ed.), *The State of Israel: Between Judaism and Democracy*, The Israel Democracy Institute, 2000, p. 251.

[43] Cf. M. Elon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom*, in A. Maoz (ed.), *Israel as a Jewish and Democratic State*, Jewish Law Association Studies, 2011.

[44] A. Barak, *The Values of the State of Israel as a Jewish and Democratic State*, Jewish Virtual Library Publications, August 2009.

[45] A. Barak, *The State of Israel as a Jewish and Democratic Country*, in *Yiune Mishpat,* 2000, p. 9.

[46] A. Barak, *Legal Interpretation, Vol. C. Constitutional Interpretation*, (Hebrew), Jerusalem, 1994, p. 336.

'Jewish state' concept. One of them excludes the Arab, the other the mostly overlapping Muslim, part of the population.[47] In other words, the 'Jewishness' of the State means that while the Jewish people are entitled to use the state as a means of exercising their right to national self-determination, the Arabs are entitled to their rights on an individual basis only, i.e., as citizens of the state, but not in any way as a collective entity. This is generally true today, even though the Arab citizens currently enjoy some rights that are of collective nature: a) Under Article 82 of the Palestine Order-in-Council, 1922, which is part of Israeli law, Arabic is an 'official language', b) the Arabs run a separate educational system, c) Israel preserves the millet system, which allows its Arab citizens (as well as its Jewish citizens) autonomy in the sphere of family law, which means that under Israeli law it is religious law that governs the family sphere, and religious courts have jurisdiction,[48] d) in certain areas there exist an affirmative action doctrine in favor of Arab citizens, e) under Israeli law the Arabs are entitled to maintain their religious sabbaticals and holidays. But more importantly, Israeli law prohibits Israel's Arab citizens from taking action aimed at changing Israel's current identity as the Jewish people's nation-state. For instance Section 7a(a)(1) of the Basic Law provides that no party will be allowed to participate in elections to the Knesset if its platform or actions amount to the 'denial of Israel's existence as a Jewish and democratic state'. Also Section 5 of the Parties Law of 1992 provides that no party will be registered if its goals and actions amount to the 'denial of Israel's existence as a Jewish and democratic state'. Section 134(c) of the Knesset Bylaws provides that the Knesset speaker will not approve the submission of any draft legislation, which «denies the existence of the State of Israel as the Jewish people's state».[49]

This concept of limited collective rights for Palestinian Arabs is based on Jabotinsky's policy regarding the Arab question: to erect an 'iron wall' of Jewish military force. For the leader of Revisionist Zionism the iron wall was a means to the end of breaking Arab resistance after 1936 to help the onward march of Zionism. In his manifesto titled *The Iron Wall. Colonisation of Palestine. Agreement with Arabs Impossible at presnt. Zionism Must Go Forward* from 1923 Jabotinsky makes it clear that «I consider it utterly impossible to eject the Arabs from Palestine», and although he declares himself «prepared to take an oath binding ourself and our descendants that we shall never do

[47] In April 2010 20,4 % of Israel's citizens were Arabs against 75,5% Jews. Among the Arabs 83% was Muslim, 8% Christians, and 8% Druze.

[48] Jewish, Muslim, and Druze religious courts, which are established under state law and constitute state organs, are fully financed by the state as are other courts of law. The state also pays the salaries of the Chief Rabbis of the state and of local rabbis who are elected according to law. But Israel still lacks a comprehensive clear scheme of equal distribution of state funding among the various religious communities. Jewish religious institutions generally enjoy substantially more state funding than do other religions, and most of that funding goes to Orthodox institutions. See A. Maoz, *Religious Human Rights in the State of Israel*, in J. D. van de Vyer – J. Witte, Jr. (eds.) *Religious HR in Global Perspective: Legal Perspectives,* The Hague, 1996.

[49] See M. Mautner, *Law and Culture of Israel*, Oxford, 2011, p. 53-194.

anything contrary to the principle of equal rights, and that we shall never try to eject anyone. But it is quite another question, whether it is always possible to realise a peaceful aim by peaceful means. For the answer to this question does not depend on our attitude to the Arabs, but entirely on the attitude of the Arabs to us and to Zionism».[50] Once Arab resistance had been broken there would be time to offer the Palestinians civil and certain collective rights. This was the very reason that Albert Einstein in the early days, before Israel existed, was opposed to the idea of the Jewish state. He thought that «the first and most important necessity is the creation of a modus vivendi with the Arab people». After the State of Israel was established, Einstein gave his full support, but he said that a peaceful and permanent presence of Jews in Palestine could only be possible if they worked side by side with Arabs under the conditions of social and political equality.[51] Actually there were some moments of hopes for this equality. David Ben-Gurion speaking in late 1947, after the United Nation's vote for partition, to a meeting of Mapai said the followings: «In our state there will be non-Jews as well, and all of them will be equal citizens... we are obliged to do… full and real equality, de jure and de facto, of all the state's citizens, gradual equalization of the economic, social, and cultural standards of living of the Arab community with the Jewish community, recognition of the Arab language as the language of the Arab citizens in the administration, courts of justice, and above all, in schools; municipal autonomy in villages and cities, and so on».[52]

But Avi Shlaim convincingly proves in his book, it was the Labor Zionists, led by the same David Ben-Gurion, who gradually came around to Jabotinsky's point of view that Jewish military power was the key factor in the struggle for a state, none of the governments over which Ben-Gurion presided lived up to the commitments he described.[53] Michael Walzer argues that the crucial reason for this was the invasion of the new state in 1948 by five Arab armies.[54] But as we also know, in July 1948 the Israeli army attacked the Palestinian village of Lydda killing more than 200 residents, and deporting the survivals upon Ben-Gurion's instruction. Altogether 750,000 Palestinians were expelled from their homes, and several thousand of them were shot and killed when they tried to sneak back home.[55] This ethnic 'cleansing' was an integral

[50] The Iron Wall, Original in Russian, in Razsviet, 4 November 1923, https://acrobat.adobe.com/id/urn:aaid:sc:eu:852b61e8-5b7e-4fb2-827e-b19722871e90.

[51] Einstein wrote an article with the title *Jew and Arab*: see F. Dyson, *Einstein as a Jew and a Philosopher*, in *The New York Review of Books,* 7 May 2015.

[52] Quoted by E. Karsh, *Fabricating Israeli History: The 'New Historians'*, London, 1997, p. 67.

[53] See A. Shlaim, *The Iron Wall: Israel and the Arab World,* London, 2000, Prologue: *The Zionist Foundations*.

[54] See M. Walzer, *The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions,* New Haven, 2015, p. 100.

[55] See Nathan Thrall's review of Ari Shavit's 2013 book *My Promised Land. The Triumph and Tragedy of Israel*, which reports on the massacre in Lydda, but legitimizes it with the Zionist cause: N. Thrall, *Feeling Good about Feeling Bad*, *London Review of Books,* 2014, no. 19, p. 29-34.

part of the Zionist mission to create a state with the largest possible Jewish majority.[56] In a later book, Avi Shlaim calls the aftermath of the 1967 War when Israel occupied the West Bank, the Gaza Strip, the Sinai Peninsula and the Golan Heights, Zionism's transformation from a legitimate movement of national self-determination to an ideology tightly entwined with a colonial occupation, in which the equality Ben-Gurion promised has never been realized.[57]

As a response to the Supreme Court's activism, Jewish nationalists consistently made efforts to propose a new Basic Law, defining Israel as the nation-state of the Jewish people and aiming to restore the balance between the country's Jewish and democratic values, allegedly tilted in favour of the latter. This new Basic Law was finally enacted in 2018,[58] undermining the possibility of one Israeli demos, preventing Israel from becoming a binational state, and fulfilling the ideals of liberal Zionism. The law declares that the «Land of Israel is the historical homeland of the Jewish People»[59] and that «the realization of the right to national self-determination in the State of Israel is exclusive to the Jewish People».[60] Hebrew is the official language of the state, while Arabic was relegated from an official language to a language that «has a special status». Israel is to «be open to Jewish immigration»,[61] and is also supposed to actively «preserve the cultural, historical, and religious heritage of the Jewish People»,[62] and Jewish settlement is a national state interest.[63] Unsurprisingly, Jewish symbols and holidays receive exclusive recognition as being those of the state.[64]

As demonstrated, the State of Israel, self-defined either as Jewish and democratic or only as Jewish, does not treat all its citizens equally. This stems largely from the fact that religion is an inseparable part of its Jewish identity. The changes removed the sovereignty from the citizens, and shifted it to all Jews, many of whom are not citizens of Israel (citizenship has become empty of meaning because it belongs exclusive to one ethnic group, and gives a privilege that is not part of the democratic way. In a seminal decision of the Israeli Supreme Court from 1970, regarding how to register children of a mother who was not Jewish, one of the justices, though in the minority, wrote: «Jewish nationalism cannot be detached from its religious foundations». Jewish

[56] About this process see S. Haddad, *The Dispossessed*, in *The Slate Magazine,* May 14 2015.

[57] See A. Shlaim, *Israel and Palestine: Reappraisals, Revisions, Refutations,* London, 2009. Eversince the 2008 invasion of Gaza, Shlaim keeps criticizing the Zionist colonial project beyond the Green Line: see Id., *How Israel Brought Gaza to a Brink of Humanitarian Catastrophe*, in *The Guardian*, 6 January 2009; *Israel Needs to Learn Some Manners*, in *The New York Times,* 30 January 2014.

[58] https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf

[59] § 1 (a)_Basic Law: Israel – The Nation-State of the Jewish People, SH 2743 (2018), 898. _

[60] Ibid, § 1 (c)

[61] Ibid, § 5.

[62] Ibid, § 6 (c)

[63] Ibid, § 7.

[64] Ibid, § 2, 8, 10.

identity seems to defeat 'Israeliness' as a collective identity[65], and Judaism appears more and more to serve as extremely strong 'social glue' in Israel today. The process in which there is a strengthening of religious elements in society is called 'religionization'[66]. That Jewish Israelis' changed attitudes toward religion is proved by public opinion surveys, which show, not only that religious groups are increasing in number, while the secular groups are shrinking, and the secular sector is no longer a majority, but a strong correlation between Israeli-Jewish self-definition along the religiosity continuum and the respondents' perception of the relative importance of Halakha compared to democratic principles.[67]

The political background behind this phenomena is certainly the decay of the political left and the rise of the nationalist right, which have created a comfortable setting in which religious power can flourish. This meant the collapse of secular, liberal

[65] In terms of nationality, until this very day a citizen of the State of Israel cannot be registered as an 'Israeli' in public record. It is either under such definition as a 'Jew' and 'Arab' a 'Druz', or nothing.

[66] See the special forum devoted to the 'Religionization' of Israeli Society in the *Israel Studies Review*, 2012, no. 1, p. 1 ss. The strong presence of religion in certain parts of the world is also called 'desecuralization'. About the general critique of secularization theories see P. Berger, *Desecularization of the World*, Washington, D.C., 1999. Vyacheslav Karpov proposes that this term perfectly fits what happened during the Soviet ear and after its demise: see V. Karpov, *Desecularization. A Conceptual Framework*, in *Journal of Church and State,* 2010, p. 232 ss. Christopher Marsh's book investigates the same development in contemporary Russia and China: see C. Marsh, *Religion and the State in Russia and China,* New York, 2011. Other authors continue to affirm the central thesis of secularization theory, that more modernity means less religion. See for instance S. Bruce, *The Curious Case of Unnecessary Recantation: Berger and Secularization*, in L. Woodhead – P. Heelas (eds.), *Peter Berger and the Study of Religion,* London – New York, 2001. A study on 'America's Changing Religious Landscape' published by the Pew Research Center in May 2015 accounts nearly 23% of all Americans who describe themselves as atheist, agnostics or 'nothing in particular', which means the rise of religiously unaffiliated. See Peter Manseau, 'Thou Shalt Worship None of the Above', *The New York Times,* May 17, 2015. Some even argue that more and more Arabs turn their backs on religion. Thomas Friedman argued that the horrors committed in the name of Islam by terrorist groups like ISIS are to blame: see T. Friedman, *How ISIS Drives Muslims from Islam*, in *The New York Times,* 6 December 2014. Ahmed Benchemsi claims that for the vast majority of the increased number of Arab atheist, the road to disbelief begins with personal doubts, quoting atheist activists he interviewed that «atheism is spreading like wildfire» as «the symptom of a much bigger thing, which is the battle against oppression», and even being confident that «the future of the Arab world belongs to secularism»: see A. Benchemsi, *The Spread of Disbelief in the Arab World*, in *The New Republic,* May 2015.

[67] Approximately 20% of Israelis describe themselves as 'religious', about 40% consider themselves 'traditional', and over 40% identify as completely secular: see S. Shetreet, *The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel*, in W. Brugger – M. Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law*, Berlin, 2007, p. 134. The proportion of the ultra-Orthodox population has risen dramatically in recent years, now numbering one million. Between 1990 and 2008, the percentgae of ultra-Orthodox Jews in Israel rose from 3% to 9% of the Jewish population, and increase partially explained by the fact that religious Jews, and Haredim in particular, tend to have high birth rates: see E. Bronner – I. Kershner, *Israelis Facing a Seismic Rift Over Role of Women*, in *The New York Times*, 14 January 2012.

Zionist hegemony, and a rise of an Orthodox Jewish approach. Another interpretation of the same development is that we are witnessing the birth of a new, religious form of Zionism. Certainly Zionism has moved a long way from the ideology of its 'founding fathers', and it has pressed territorial claims, religious exclusivity, and political extremism.[68] This clearly due in part to the failure of political leaders to reach a two-state territorial solution to the Israeli-Palestinian conflict. That failure has led to a post-territorial nationalism, basing itself in a collective Israeli identity firmly rooted in religion.[69] In other words, religion plays a legitimating role in efforts by the current political leadership of Israel, to keep the status quo of a one-state solution on the basis of one nation.[70] But the deep polarization beyond this particular Basic Law is also a sign of the lack of one Jewish demos, and this identitarian and ontological fracture of the demos makes a 'Two State Solution', as well as democracy in Israel impossible.[71]

*5. Conclusions, perspectives*

Israel, after the repeated failures of the 'peace process' and the two-state solution, faces very limited options. It either remains Jewish but ceases to be a democracy, or else it could become a genuinely multi-ethnic democracy, but would in that case cease to be 'Jewish'.[72] This choice became even more realistic after Likud won the March 2015 elections, as Prime Minister Netanyahu declared that he will never permit a two state-solution between Israelis and Palestinians, adding: «anyone who is going to establish a Palestinian state, anyone who is going to evacuate territories today, is simply giving a base for attacks to the radical Islam against Israel». In a 2019 statement Netanyahu made it clear that even Hamas' support isn't a too big price to pay to avoiding the two-state solution: «whoever opposes a Palestinian state must support delivery of funds to Gaza because maintaining separation between the PA in

[68] See T. Judt, *Israel Without Clichés*, in *The New York Times*, 9 June 2010.

[69] Cf. Yoram Peri's introduction to the debate on the 'Religionization' of Israeli Society, in *Israel Studies Review*, 2012, no. 1, p. 2-3.

[70] About the role of religion in national legitimation in Israel see U. Abulof, *The Roles of Religion in National Legitimation: Judaism and Zionism's Elusive Quest for Legitimacy*, in *Journal for the Scientific Study of Religion,* 2014, p. 515 ss. See also the failed attempts against the one-state status quo without any binational approach by Ruvi Rivlin, the current conservative President of Israel in D. Remnick, *The One-State Reality. Israel's Conservative President Speaks Up for Civility and Pays a Price*, in *The New Yorker,* 17 November 2014.

[71] About the relationship of demos and democracy in Israel, see J.H.H. Weiler, *No Demos – No Democracy: Is There Still a Jewish Demos in Israel?*, in *ICON-S-IL Blog*, 28 November 2024.

[72] These alternatives were drawn up by Tony Judt first in 2003 and then in draft paper written in the summer of 2009, published in 2015: see T. Judt, *Israel: The Alternative*, in *The New York Review of Books,* October 2003; Id., *What Is to Be Done?*, in Jennifer Homans (ed.), *When the Facts Change: Essays, 1999-2010,* New York, 2015, Ch. 13. In the latter work Judt also mentions a third outcome, whereby Israel forcibly removes a majority of its Arabs (or makes it intolerable for them to remain) would indeed ensure the survival of a Jewish democracy, but at a grotesque and ultimately self-destructive price. In his last interview Judt again promotes a binational or federal arrangement as the only viable solution in the current circumstances of Israel: see M. Michaeli, *Tony Judt's Final Words on Israel*, in *The Atlantic, 14* September 2011.

the West Bank and Hamas in Gaza will prevent the establishment of a Palestinian state».[73]

After the early 2023 elections the new government of Benjamin Netanyahu supported by far-right nationalist and ultra-Orthodox parties initiated a judicial reform aiming at dismantling separation of power and establishing an unbound executive. The amendment to the Basic Law on the Judiciary has the following main objectives[74]: a) to introduce a government majority in the judicial appointment committee, b) to require 80% or more of all Supreme Court justices to struck down unconstitutional primary legislation, c) to determine that a decision regarding the judicial review of a statute will not serve as a precedent regarding any other statute, d) to override the Court's rulings by a majority decision of the parliament, e) to prohibit judicial review of Basic Laws, f) to prohibit the review of administrative action based on the reasonableness doctrine.[75]

The reform package met huge opposition also beyond the Knesset. Weekly street demonstrations from mid January 2023 on Saturday nights in cities throughout the country organized by a web of non-partisan civil society organizations, student protesters, LGBT groups, members of the 'Anti-Occupation Bloc' comprising of organizations supporting Palestinian rights have involved several hundreds of thousands of people.[76] Different parts of the society opposed the legislation by writing letters, petitions and memorandums.[77] Three-hundred sixty-seven Israeli economists, as well as senior foreign ones warned about the financial implications of the planned legislation.[78] Leaders of the very successful Israeli tech industry signed a letter saying that the changes would distance international investors from Israel, and also Israeli companies announced that they will move their money out of the country.[79] Maybe

[73] *Netanyahu: Money to Hamas part of strategy to keep Palestinians divided*, in *The Jerusalem Post*, 19 March 2019, available at: https://www.jpost.com/arab-israeli-conflict/netanyahu-money-to-hamas-part-of-strategy-to-keep-palestinians-divided-583082.

[74] See these elements discussed in details A. Gross, *The Populist Constitutional Revolution in Israel*, in Verfassungsblog, 19 January 2023, available at: https://verfassungsblog.de/populist-const-rev-israel/

[75] *Israel's Recent "Unreasonableness Amendment" and its Implications*, in *Forum for Democracy*, available at: https://www.lawprofsforum.org/post/israel-s-recent-unreasonableness-amendment-and-its-implications. This issue has passed as the first piece of the legislation package on July 24, 2023, and became the first subject of Supreme Court review.

[76] P. Beinart, *You Can't Save Democracy in a Jewish State*, in *The New York Times*, 19 February 2023, www.nytimes.com/2023/02/19/opinion/israel-democracy-protests.html. On 25 March I had the opportunity to participate at the weekly protest event in Jerusalem- https://www.facebook.com/photo/?fbid=10233535329470898&set=a.10231006106801912.

[77] See an overview of such action A. Gross, *The Battle Over the Populist Constitutional Coup in Israel*, in *Verfassungsblog*, 31 March 2023, available at: https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel/.

[78] https://www.timesofisrael.com/hundreds-of-top-economists-warn-judicial-overhaul-could-cripple-economy/.

[79] https://en.globes.co.il/en/article-papaya-global-moving-all-money-out-of-israel-1001436560 https://en.globes.co.il/en/article-papaya-global-moving-all-money-out-of-israel-1001436560.

the most influential opposition came from the military: more than thousand Air Force officers protested and announced that they would not attend regular trainings.

Representatives of the legal profession have particularly been active: former Israeli attorney generals and state attorneys, as well as retired judges protested against the plan.[80] Legal scholars have been among the most organized.[81] The newly established Israeli Law Professors' Forum for Democracy issued a public statement[82] and several position papers criticizing various elements of the proposed judicial overhaul.[83] Several dozens of constitutional law professors also engaged in popular education about the importance of liberal constitutional democracy.[84] Some Israeli constitutional law professors expressed their conviction that with the public engagement in constitutional matters Israel has reached a constitutional moment.[85] Opposition leader Yair Lapid has even introduced the plan to enact a new constitution.

This exceptional constitutional moment, when two-third of the population opposed the judicial overhaul, and thought that the Supreme Court has to annul the unconstitutional laws of the reform has been interrupted by Hamas' genocidal attack on 7 October 2023. The war in Gaza has not only suspending the judicial reform, but with its decision of 1 January 2024 the Supreme Court struck down key judicial overhaul legislation ruling that reasonableness law undermines Israel's democratic character as the state's identity. 13 out of the 15 justices asserted the Court's right in principle to strike down Basic Laws. [86] Using Aharon Barak's mentioned metaphor, constitutional scholars started to talk about a second and permanent constitutional

[80] https://www.timesofisrael.com/78-retired-judges-warn-against-incoming-governments-judicial-reforms/.

[81] G. Halmai, *Illiberal Constitutionalization and Scholarly Resistance: The Cases of Israel and Hungary*, in *Journal of Illiberalism Studies*, 2024, p. 33.

[82] *Preliminary Response of The Israeli Law Professors Forum for Democracy to the President's Proposal*, available at: https://lawprofsforum.wixsite.com/home/post/preliminary-response-of-the-israeli-law-professors-forum-for-democracy-to-the-president-s-proposal.

[83] https://www.lawprofsforum.org/en.

[84] See Maximilian Steinbeis' interview with Tamar Hostovsky Brandes, available at: https://verfassungsblog.de/verfassungsschutz/. At a conference organized by the Israel Democracy Institute in Jerusalem on 26 March 2023 also constitutional law professors from other countries warned about the dangers of the capture of independent judiciary to democracy: see J. Sharon, *Legal scholars from Poland, Hungary warn of judicial overhaul's dangers to democracy*, in The Times of Israel, 27 March 2023, available at: https://www.timesofisrael.com/legal-scholars-from-poland-hungary-warn-of-judicial-overhauls-dangers-to-democracy/?fbclid=IwAR0l6IXRmPEO_DfKuba0HYnLEgjKje4-XmaJBWfwAedr88j1yIhw5Auqc5E

[85] D. Lustig – R. Levine-Schnur, *Welcome to the Constitutional Moment*, in *Telem Online,* 2023, available at https://telem.berl.org.il/7542/; Y. Dolan, *Israel's Constitutional Moment*, in *Israel Law Review*, 2023, p. 521 ss.

[86] https://www.timesofisrael.com/in-historic-ruling-high-court-strikes-down-key-judicial-overhaul-legislation/.

revolution.[87] On the other hand, even though the long war made it clear that the Palestinian issue calls for a constitutional solution[88], the mood of the society[89], including that of scholars[90], moved away from the two-state solution and the reality of a new constitution for Israel based on equal right of all its citizens. Also the Supreme Court, which has been very active in cases in which the protection of the democratic institutional structure is at stake, while refusing to provide the most basic guarantees against property or habeas corpus rights violations that occur to Palestinian Arabs in Gaza and the Occupied Territories.[91] In another case decided in July 2024 the Court failed to rule on the contempt of court motion submitted against security forces for their continuing failure contrary to a court ruling to protect Palestinians who were displaced from their homes in the West Bank village of Khirbet Zanuta by extremist settlers.[92] This latter judgment fits into the long-standing jurisprudence of the Supreme Court as High Court even since the famous Elon Moreh decision of 1979, which does not rule out entirely the use of private land for settlements.[93]

---

[87] https://www.timesofisrael.com/will-the-high-court-rulings-against-the-judicial-overhaul-become-a-permanent-revolution/.

[88] G. Halmai, *Is There a 'Constitutional Moment' in Israel and Hungary?*, in *Israeli Law Review*, 2023, p. 426 ss.

[89] According to a recent survey more than 80 per cent of Israeli Jews support the expulison of Gazans. See S. Hazkani – T. Sorek, *Yes to Transfer: 82% of Jewish Israelis Back Expelling Gazans*, in *Haaretz*, 28 May 2025. In another survey has shown that 62% of Israeli Jews supported Israel's complete withdrwal from Gaza, but here the question was put as part of a deal including the release of all hostages: see T. Hermann – L. Yohanini – Y. Kaplan, *Even on the Rights, Largest Share of Israelis Support Hostage Deal That Includes Full Withdrawal from Gaza*, in *Israeli Voice Index*, Israel Democracy Institute, 3 September 2025.

[90] One sign of this support is that PM Netanyahu appointed former Supreme Court President Aharon Barak to the Judicial Panel of the International Court of Justice to represent Israel in the genocide case brought before ICJ by South Africa. See https://www.haaretz.com/israel-news/2024-01-07/ty-article/.premium/israel-appoints-ex-top-court-president-aharon-barak-to-judge-panel-in-icj-hearing/0000018c-e4f0-db55-a39e-f7f4a4a60000. But it needs to be added that, in the ICJ's first provisional measures order of 26 January 2024 in the *South Africa v. Israel* genocide proceedings, ad hoc judge Barak voted with the majority on Israel's obligation to prevent and punish the incitement to genocide. He also joined joined ICJ's second order of 28 March 2024 where the Court ordered unanimously Israel to «[T]ake all necessary and effective measures to ensure, without delay … the unhindered provision … of urgently needed basic services and humanitarian assistance …». These documents have been published by concerned Israeli interenational law scholars: see K. Ambos, *Respect for International Law in Gaza: The Perspective of Israeli Scholars*, in *Verfassungsblog*, 23 July 2025.

[91] See O. Bassok, *Democracy Washing: The Israeli Supreme Court's Selective Activism*, in *Verfassungsblog*, 20 June 2025.

[92] See O. Bassok, *A Tale of Contempt*, in *Fathom*, May 2025, available at: https://fathomjournal.org/a-tale-of-contempt/.

[93] In the HCJ 390/79 decision the Court, while ordered to dismantling the settlement, because it was established on land seized from Arab owners, but did not exclude such use to cases, in which it could be shown that the settlement would fulfill a specific and defined military purpose. See D. Kretzmer, *Symposium on Revisiting Israel's Settlements. Settlements in the Supreme Court of Israel*, in *AJIL Unbound*, 2017, p. 41 ss.

This is one of the reasons that the Palestinian-Arab minority has been rather silent both on the judicial overhaul, and the eventual constitutional moments. As Michael Karayanni, an Arab-Israeli professor of international law at Hebrew University in Jerusalem explains from the vantage point of of this minority Israel's constitutional order has exhibited a state of democratic deficit from its very establishment to the present day.[94] Therefore, the Palestinian agrees with the government that the activist role of the judiciary may threaten democracy, but this democracy has an original deficit, and the anti-reform camp also seeks to preserve this status quo with the inferior citizen status of the indigenous Palestinian-Arab minority.

It is also clear that the Netanyahu government's genocidal reaction[95] to Hamas's genocide, and the consequent reoccupation of Gaza as grave violations of international law[96] will have their own 'boomerang effect' on internal democracy.[97] In early July 2025 the Prime Minister again made it clear his government's opposition to the two-state solution by stating that «any future Palestinian state would be a platform to destroy Israel».[98] The current government's approach of Zionism is the most radical ever, maintaining the State of Israel as a predominantly homogenous ethnic as opposed to a civic polity transferring the power from the demos to the ethnos, and taking over all Palestinian lands.[99]

In other words, giving up the two-state solution, even if because 'the reality has changed' also ends any immediate hope for now for the position of liberal Zionism, which claims that Jews could have a state of their own, without depriving Palestinians

---

[94] M. Karayanni, *A 'Thrid Camp' in Israrel's Constitutional Upheaval: The Voice of the Silent Palestinian-Arab Minority*, in *ICON*, 2024, p. 938 ss.

[95] O. Bartov, *Genocide is the only term that fits*, in *Democracy and Society, IPS Journal*, 07 August 2025. Also the Resolution of the International Association of Genocide Scholars on the Situation in Gaza passed on 31 August 2025 and accessible at https://genocidescholars.org/wp-content/uploads/2025/08/IAGS-Resolution-on-Gaza-FINAL.pdf «*Declares* that Israel's policies and actions in Gaza meet the legal definition of genocide in Article II of the United Nations Convention for the Prevention and Punishment of the Crime of Genocide (1948); *Declares* that Israel's policies and actions in Gaza constitute war crimes and crimes against humanity as defined in international humanitarian law and the Rome Statute of the International Criminal Court».

[96] See A. Gross, *The Writing on the Wall. Rethinking the International Law of Occupation*, Cambridge, 2017.

[97] See M. Goldmann, *The Boomerang Effect: How Disrespect forInternational Law Threatens Democracy*, in *EJIL:TALK!,* 23 July 2025. About the violations of international human rights and international humanitarian law by Israel in Gaza, see I. Bantekas – S.S. Jabe, *The human rights obligations of belligerent occupiers: Israel and the Gazan population*, in *Journal of Conflict & Security Law*, 2025, p. 103.

[98] https://www.reuters.com/world/middle-east/netanyahu-says-any-future-palestinian-state-would-be-platform-destroy-israel-2025-07-08/.

[99] Raef Zreik argues that this is the default Zionist position, which keeps the state 'on hold' as an unending project of 'state of emergency' *à la* Carl Schmitt of absorbing Jewish immigrants and taking over Palestinian lands stemming from Ben-Gurion's quoted 1951 statement about the not accomplished main task of the State of Israel: see R. Zreik, *The Presistance of the Exception: Some Remarks on the Story of Israeli Constitutionalism*, in *Thinking Palestine,* 2008, p. 131 ss.

of their legitimate national aspirations.[100] Together with the traditional two-state solution the possibilities of a two-state confederation are also dead now.[101]

The one-state solution means that Israel will become, in time, either a non-Jewish democracy or Jewish non-democracy. The first can be covered by the concept of egalitarian binationalism, which recognizes and promotes the existence of two national groups with equal rights to self-determination.[102] Since this concept accepts the right to national self-determination of both national groups while insisting that this right ought to not be realized in the form of an exclusive ethnic nation-state, it is incompatible with every forms of Zionism, except in the practice never existed egalitarian liberal one. Because of the non-feasibility of the first approach the current status quo is likely to stay with us for the foreseeable future as a type of settler colonialism.[103]

If we consider a liberal democratic polity being a state of those who hold its citizenship, the question arises, whether Israel as a Jewish State can be considered as democratic and liberal, and whether liberal Zionism, as a constitutional and legal project, which started as half-heartedly liberal utopian endeavour became an oxymoronic myth.

***

**Abstract:** This paper examines whether Zionism has ever truly been a liberal ideology capable of grounding a democratic state. It retraces the evolution of Zionist thought from Herzl, Jabotinsky, and Ben-Gurion to Israel's Declaration of Independence, Leo Kohn's draft constitution, and the Basic Laws, as well as Aharon Barak's concept of "constitutional revolution." The analysis addresses the 2018 Nation-State Law and the collapse of liberal Zionism, engaging with critics. Combining doctrinal, socio-legal, and process-tracing methods, the study explores Zionism's liberal claims against Israel's political and constitutional trajectory.

---

[100] See J. Freedland, *The Liberal Zionists*, in *The New York Review of Books,* 14 August 2014; Id., *Liberal Zionism After Gaza*, in *The New York Review of Books Blog,* 26 July 2014.

[101] About this scenario, see O.M. Dajani – D. Scheindlin, *'Stuck Together'? Can a Two-State Confederation End the Israeli-Palestinian Conflict?*, in A.Ü. Bâli – O.M. Dajani, *Federalism and Decentralization in the Contemporary Middle East and North Africa*, Cambridge, 2023, p. 245 ss.

[102] See B. Bashir, *Interrogating Modernity and Egalitarian Binationalism in Palestine/Israel*, available at: https://contendingmodernities.nd.edu/theorizing-modernities/interrogating-modernity-egalitarian-binationalism/.

[103] About particular examples of the idea in history see A. Rana, *Who's Afraid of 'Settler Colonialism"?*, in *Dissent*, Fall 2025, available at: https://www.dissentmagazine.org/article/whos-afraid-of-settler-colonialism/.

**Keywords**: Zionism, Declaration of Independence, State of Israel, Basic Laws, constitutional revolution

***

**Gábor Halmai** – Professor emeritus, Eötvös Loránd University, Budapest (halmai.gabor@tatk.elte.hu)