

The International Advisory Council
of The Israel Democracy Institute

Annual Retreat
Jerusalem, May 28-31, 2010

**Democratic State Building in Israel:
Principal Challenges and Possible Solutions**

Background Materials

◀ Table of Contents

5 Foreword

Political Reform

7 The Need for Political Reform, Arye Carmon

19 Performance of Israeli Democracy, Ofer Kenig

23 The Research Group of IDI's Forum for Political Reform: Objectives and Modus Operandi, Gideon Rahat

27 Forecast of Muslim and Ultra-Orthodox Voting Patterns Based on Demographic Predictions, Nir Atmor

29 The Emergence of Antipolitical Sentiment in Israel, Tamar Hermann

Religion and State

39 Human Rights in Judaism: A New Project at IDI, Yedidia Z. Stern

43 From Ruth to Natasha: On the Future of Conversion in Israel, Yedidia Z. Stern

Israel's Economy

53 OECD Economic Surveys: Israel 2009

65 The Political Economics of the Municipalities, Avi Ben-Bassat, Momi Dahan

71 The Balance of Power in the Budgeting Process, Avi Ben-Bassat, Momi Dahan

80 Why is Poverty Widespread in Israel? Momi Dahan

National Security

- 83 Israel's Response to Allegations Concerning the Operation in Gaza,
Ido Rosenzweig and Yuval Shany
- 97 Administrative Detention in a Jewish and Democratic State – A Reexamination,
Elad Gil, Supervised by Mordechai Kremnitzer
- 103 The Legal Battle Against the Financing of Terrorism in Israel, Gilad Noam,
Supervised by Yuval Shany
- 108 An Israeli, Even Though He Has Sinned, Is Still an Israeli? Revoking Citizenship
on Grounds of Disloyalty, Efrat Rahaf, Supervised by Mordechai Kremnitzer
- 115 Collateral Damage: The Harming of Innocents in the War Against Terror,
David Enoch, Iddo Porat, Re'em Segev, Mordechai Kremnitzer

Appendix

- 119 The 2009 Israeli Democracy Index: Auditing Israeli Democracy – Twenty Years
of Immigration from the Soviet Union, Asher Arian, Michael Philippov,
Anna Knafelman
- 123 Contributors

Foreword

Dear friends,

The second meeting of IDI's International Advisory Council will focus on some of the principal challenges of democratic state-building in Israel. The two major issues on the agenda will be the urgent need for political reform in Israel and the delicate balance between national security and human rights in the struggle against terrorism.

We have assembled the following materials in order to expose conference participants to our thinking on these issues prior to the discussions in Jerusalem at the end of May. Although by no means a comprehensive treatment of these complex matters, this booklet offers an introduction to some of the pertinent issues. I hope you enjoy reading these essays and look forward to a spirited discussion.

Best wishes,



Arye Carmon
President

Political Reform

◀ The Need for Political Reform

Arye Carmon

Israeli Democracy: Outstanding Achievements, Worrisome Future

Since 1948, Israel's parliamentary system of government has enabled successive governments to realize outstanding achievements while withstanding enormous external and internal pressures. The balance sheet of Israel's democracy includes fateful decisions on war and peace; the absorption of successive waves of immigration that have increased the country's population almost tenfold over the last six decades; extraordinary accomplishments in developing the economy, and remarkable success in upholding human rights. Notably, all this has been achieved without a constitution.

Given Israel's deep internal divisions and shallow democratic tradition, there is no doubt that parliamentary democracy is the appropriate form of government for the State of Israel. In recent years, however, Israeli democracy has sustained a number of severe blows and is, in fact, fighting for its survival. The system must be strengthened soon to enable Israel to meet the challenges ahead.

1. Symptoms

Every democracy hopes to achieve an optimal balance between political representation and governance. In Israel, these two elements are on a collision course that could pose an existential threat to the state. Symptoms of the worrisome state of Israeli democracy include the following:

- **Sectoralization of the political process** – Sectoral parties (i.e., the Arab parties, Shas, and the ultra-Orthodox parties) promote separatist, sectoral concerns at the expense of national interests, intensifying the deep rifts in society.
- **Ongoing devaluation of the Knesset** – The status and political representativeness of the Knesset are both in constant decline. This is a result of the collapse of the major parties and of election campaigns that increasingly focus on key personalities rather than on ideas, platforms, and programs.
- **Rising tensions between the three branches of government** – These include conflicts between the courts and the cabinet, between the legislature and the judiciary, between the Knesset and the cabinet, and between central and local government.
- **Survivalist governance** – The lack of security that characterizes Israeli governance precludes certainty, continuity, and long-term planning regarding political, economic, social, and cultural processes.

-
- **Decline in public confidence** – There has been a steady deterioration in the public’s trust in its elected officials and democratic institutions.
 - **Excessive centralization of the public sector** – The concentration of enormous power in the hands of a small number of officials, combined with minimal requirements of transparency and accountability, limits the ability of public servants to implement government decisions efficiently and effectively, and leads to widespread disorder and declining levels of service.
 - **Juridification of politics** – The hyperactivity of key “gatekeepers” (e.g., the State Comptroller in the legislative branch and the Attorney General in the executive) imposes more and more restraints, stifling initiative and impeding democratic processes.
 - **Rise in political corruption** – The genuine increase in incidences of government corruption is paralleled by an excessive broadening of the concept of corruption in political discourse, which weakens governance and exacerbates anti-political sentiment.

2. The Way Forward

Although the situation of Israeli democracy is grave, it would be foolhardy to jump to the conclusion that Israel’s parliamentary system has outlived its usefulness.

Parliamentary Democracy: The Preferred System

Parliamentary democracy is a system that has successfully proved itself in the vast majority of advanced countries. It has also proved itself in Israel over the course of decades. It was the misguided attempt in 1992 to introduce direct elections of the prime minister – a hybrid of parliamentary and presidential elections in which each citizen cast two ballots, one for prime minister and one for a party – that is most responsible for producing the instability we are experiencing today. Given Israel’s deep social divisions, the lack of a tradition of democratic government and the absence of an entrenched constitutional order, the introduction of another presidential two-vote model could prove extremely dangerous for Israel, as it could easily disintegrate into Putinism, the model of democracy developed in Russia.

The Root of the Problem: Non-Adaptation to Change

The shaky state of Israeli democracy does not stem from the shortcomings of the parliamentary system, but rather from a failure to adapt to the sweeping demographic and political changes that have taken place in the State of Israel over the last six decades, and during the last twenty years in particular. These developments include the following:

-
- **The tremendous growth of Israel's population:** In the course of six decades, Israel's population has increased nearly tenfold. Yet Israeli political institutions have remained unchanged.
 - **The growth of three subgroups in Israeli society:** Ultra-Orthodox Jews, Israeli Arabs, and immigrants from the Former Soviet Union play an important role in Israeli society. To varying degrees, these vastly different populations share a disturbing characteristic: limited acceptance of the basic parameters of democratic rule in Israel.
 - **The lack of defined borders:** Israel has avoided a final decision on the physical borders of Israel as a Jewish and democratic state. This indecision erodes Israel's democratic legitimacy, tends to undermine the rule of law, and fuels the link between religion and nationalism.
 - **Widening ideological divides:** Israeli society is increasingly characterized by disputes over national identity. On one extreme are views that emphasize the Jewish aspects of the State at the expense of its democratic character; on the other are ultra-liberal views that sanctify the universal characteristics of Israeli democracy and reject its particular Jewish elements. A variety of groups including religious nationalists, traditionalists, and secular nationalists are between these two extremes.
 - **The information, technology, and media revolution:** The revolutionary development of information technology has transformed the role of the media and the balance of power in the field of communications. These changes have had a transformative effect on the shaping of public opinion and the public sphere.

The Need to Reform Rather than Replace the System

In light of the many changes taking place in Israel and around the world, efforts must be made to fix Israel's democratic system. Rather than abandoning the system, we must reform and adapt it to the changing reality around us.

Key Elements of the Requisite Reform

Based on the model presented by parliamentary democracies that belong to the OECD and have populations of similar size to that of the State of Israel, we propose a series of changes in the legislative and executive branches. These reforms are designed to ensure governmental stability, to rehabilitate the Israeli public's confidence in its institutions, to strengthen Israel's parliamentary democracy, and to preserve the balance between political representation and governmental effectiveness. The plan includes proposals for the immediate, the medium-term and the long-term future, and is divided into two main parts:

1. Adopting a Constitution

Over time and with obvious limitations, the Israeli Supreme Court has partially succeeded in compensating for the lack of a constitution. In light of the increasing vulnerability of the court, the establishment of a constitution for Israel is more important now than ever before. The absence of guaranteed protections for human rights, the lack of defined “rules of the game” governing the political process in Israel, and the ongoing struggles between government authorities make it imperative to adopt a constitution, which can provide a framework for the future of democracy in Israel. A constitution that is enacted by the Knesset and ratified by popular referendum will secure the foundations of Israeli democracy and accelerate the processes of reform outlined below.

2. Implementing Political Reforms

The Knesset

The following reforms will buttress the Knesset’s status as the foundation of the three branches of Israeli government, improve the quality of the Knesset’s work, and transform the legislative process into a more accurate reflection of the needs of Israeli society.

a. Increasing the number of Knesset members (long-term)

Today, much of the Knesset’s workload rests on the narrow shoulders of 80-90 members who are available for parliamentary activity, while the remaining 30-40 MKs are busy fulfilling executive responsibilities as ministers or deputy ministers. The first step in improving the Knesset’s functional capacity is to increase the ratio of MKs to population to the level of the average OECD parliament. According to the European model, the number of Knesset members should be increased to 180 and the cabinet should not exceed 18 members. Increasing the size of the Knesset will achieve the following objectives:

- **Improvement of parliamentary performance:** Every Knesset member will be able to focus on a single committee instead of serving on three or four committees, as is currently the case.
- **Enhancement of the status and caliber of legislators:** A clear distinction will be made between parliamentary service and service in the government.
- **Correction of the imbalance between private and governmental legislation:** In OECD countries, the government initiates 90% of legislation; in Israel, the ratio is reversed.
- **Ensuring efficient and transparent supervision of the Knesset:** This reform would bring Israel in line with the European model, in which parliament serves as the watchdog of the government, and not vice versa.

b. Improving the work of the Knesset committees (short-term)

The following changes to Knesset committee procedures will enable the legislature to fulfill its supervisory responsibilities more effectively:

- **Restructuring the Knesset committees:** The existing parliamentary committees should be reorganized so that each committee corresponds to a single government ministry (e.g., Education, Health, Interior, etc.)
- **Limiting the number of committee members:** The number of Knesset members on each permanent committee should be limited to 10-12.
- **Instituting mandatory attendance rules:** Committee members should be required to attend committee meetings, in order to guarantee a quorum for deliberations and decision-making.
- **Increasing professional resources:** Financial and legal consultation services to committees should be increased. Budgets should be allocated to enable permanent committees to hire experts.
- **Strengthening ties with the State Comptroller's Office:** Relations between Knesset committees and the State Comptroller should be improved.
- **Integrating committee work into other processes:** Each Knesset committee should become involved in setting the priorities and national budget for its designated ministry.

c. The legislative process (short-term)

The following legislative reforms will increase the representativeness and professionalism of the Knesset and boost the efficiency of its legislative activity:

- **Reducing private legislation:** Following a reform that was approved as a bill by the 16th Knesset, the support of at least six Knesset members will be required for submitting a private member's bill.
- **Setting quotas and time frames:** The number of legislative proposals that may be introduced should be limited and specific dates should be set for the submission of private initiatives.
- **Instituting attendance requirements:** Mandatory attendance of at least half the Knesset members (a quorum) should be required for second and third readings of private legislation.
- **Abolishing regular passage of the Economic Arrangements Law:** The passage of last-minute amendments to the budget was originally intended for times of economic crisis, but has become an annual ritual. The use of this law should be limited in accordance with its original purpose.

-
- **Introducing legislation by the public:** Any group of 50,000 voters should be entitled to submit an external bill to the Knesset.

d. Constructive votes of no-confidence (short-term)

In order to stabilize the government and enhance its ability to govern, changes should be made in the nature of no-confidence votes, so that they take the form of a vote of confidence in an alternative candidate for prime minister. The signatures of at least 61 Knesset members will be required to support votes of confidence in alternative candidates.

The Electoral System

Changes in the electoral system should also be enacted in order to increase the status of the political parties, reestablish large political blocs (preferably no more than two), and ensure a four-year term. These changes will ensure that the government has maximal ability to govern over time, combat party corruption, restore the public's confidence in the electoral system, and enhance the public's motivation to participate in the democratic process.

Proposed reforms in the electoral system include:

a. Introduction of regional elections (long-term)

Proportional representation in the Knesset should be bolstered by having a given number of Knesset members elected on the basis of electoral districts, while the remainder should continue to be elected on the basis of national party lists.

Introducing regional elections, which will foster accountability to actual constituencies, will achieve the following goals:

- **Strengthening of party branches:** Regional elections will strengthen party branches in the field, thereby revitalizing party politics and restoring the connection between voters and their representatives without harming the principle of proportionality.
- **Integration of the periphery:** Regional elections will strengthen the periphery by providing representation to all parts of the country. This will ensure representation of the interests of the periphery and will provide further impetus for the decentralization of political power, which is an important aspect of the reform.
- **Increase in voter participation:** Assuming that local political involvement encourages more active national participation, introducing regional elections is likely to boost voter participation rates.

b. Enhancement of the status and quality of the parties (short-term)

Strong parties, which see the collective good rather than sectoral interests as their *raison d'être*, are vital in a representative parliamentary democracy. Political parties are the main intermediary between citizens, decision-makers, and the executive. The party

is the arena in which beliefs are consolidated and transformed into a platform of policy and action for execution by party leadership. The following steps will address the decline in the status and quality of Israeli political parties:

- Establish a body within each party that will administer and supervise registration in its voter registry under the oversight of a judge, or transfer supervision of party membership to the Israeli Party Registrar.
- Make party membership contingent on personal interviews.
- Tighten the candidacy requirements for party posts.
- Limit voting rights to individuals who have been party members for at least two consecutive years.
- Appoint a screening committee within each party that will assess the suitability of prospective party members and ensure their identification with party values.

c. Raising the electoral threshold (short-term)

Israel's electoral threshold should be increased gradually from its current 2% to 3%. This will achieve the following objectives:

- **Reduce the number of political parties in Israel.** This will curb extremism in the Knesset without harming the principle of representation.
- **Encourage parties to form larger alliances prior to elections.** This will reduce the percentage of wasted votes and decrease the impact of sectoral interests.
- **Strengthen the large parties.** This will ease the task of forming a government and will facilitate more effective governance.

Further increases of the electoral threshold may be undertaken in the future, based on an assessment of the impact of this reform. Raising the threshold to about 4% would eliminate small factions with fewer than five Knesset members and would thus strengthen the larger parties.

d. Introduction of "priority right" for the premiership (short-term)

A major source of government instability is the uncertainty surrounding the identity of the prime minister in the days and weeks following election night. This uncertainty provides fertile ground for extortion on the part of prospective coalition partners. To remedy this, the head of the party that received the largest number of votes should be appointed prime minister as soon as the votes are tallied. Immediate certainty regarding the identity of the prime minister will bolster his or her standing, strengthen the large parties and deprive the small parties of their disproportional bargaining power. Additional means of strengthening the prime minister's standing should also be considered, such as holding new elections if the prime minister is unable to establish a coalition within a reasonable period of time.

e. Integration of “primaries” into the national elections (short-term)

Abolishing the existing system of so-called “primary elections” would neutralize intra-party corruption and eliminate the inclusion of fictitious voters in the party’s registry. Making primary elections an integral part of the national elections will empower the electorate as a whole to shape the party list. According to our proposal, each ballot would contain the party symbol followed by a list of candidates chosen by the party’s institutions. Voters would select a legally established number of names from the list of the party of his or her choice.

This change would significantly broaden the circle of citizens who determine the composition of the factions in the Knesset. It would eliminate vote contractors and fictitious party members. The elimination of party primaries would also reduce the dependence of politicians on financial contributions. It would also enhance the status of the parties, inasmuch as a given candidate’s personal success would depend on the success of his or her party.

Reforms in the Executive Branch: The Government

The reforms envisioned for the executive branch seek to decentralize authority and hasten the adoption of accountability and transparency as the guiding values for policy implementation in the public sector. Implementing reforms in the executive branch is essential for completing the process of legislative reform, as they will empower the government to speed the process of reform.

a. Decentralization of the executive branch

The operational failures of the executive branch are rooted in longstanding structural features of the Israeli governmental system. The most prominent of these structural problems is over-centralization, which erodes the efficiency of the executive branch and its overburdened agencies. Decentralizing the public sector requires comprehensive structural reforms that will include the following:

- **Establish executive agencies:** As in the developed OECD democracies, the government should not involve itself in implementation; rather, it should formulate policy, determine standards for implementation, allocate resources, provide oversight, and measure and evaluate success. Implementation itself should be entrusted to executive agencies that will be created to put principles and policies into practice. These executive agencies will maintain public assets, improve public welfare, and effectively execute government decisions.
- **Distinguish between regulatory bodies and executive bodies:** A distinction should be made between government bodies that are responsible for regulation (e.g., the Antitrust Authority, the Patent Office, and the Council for Higher Education) and bodies that are involved in implementing government policy (e.g., the Chief Scientist, the Agricultural Research Administration, and the Professional Training Division). This division between regulatory bodies and executive bodies is crucial for distributing authority and responsibility in a manner conducive to effective governance.

Regulatory bodies should be granted the status of governmental support units, with separate budgeting and accounting, while executive agencies should be incorporated as non-profit government organizations and granted supervisory responsibilities by law.

- Define the responsibilities of government ministries: Government ministries should be transformed into planning bodies that are responsible for implementation but do not handle implementation themselves. Each ministry should assume full responsibility for government policy in its area of activity. It should set policy, define standards, and engage in planning, budgeting, supervision, and evaluation, but not engage in actual implementation. Exceptions to this rule include the Prime Minister's Office, the Ministry of Finance, and the Ministry of Justice.
- Assign a unique status to the Prime Minister's Office: The Prime Minister's Office should serve as an umbrella agency that is responsible for the guidance, coordination, and supervision of the work of the various government ministries. This unique role should be reflected in its organizational structure, which should include a national council on economics and society, a policy planning division, a national security council, a government secretariat, and a division that will coordinate, monitor, and follow up the implementation of government decisions.

b. Establishment of norms of accountability, reporting, and transparency

The norms of accountability, reporting, and transparency in the public sector should be thoroughly revised as part of the reform. These norms should emphasize integrity and responsible organizational conduct as ideals in public service. This reform should define powers, responsibilities, and norms of accountability in a positive and proactive manner at the outset, rather than reacting to the lack of definition with a war on corruption.

c. Restoring the authority and independence of local government

Strengthening local government is vital to the decentralization of the Israeli system of governance. The structure proposed in IDI's Constitution by Consensus may serve as a model for the desired status of local government. Legislation should be passed to enable substantial devolution of responsibility from the central government to municipal authorities. The Minister of the Interior's authority to intervene in local affairs should be limited. This sort of legislation would strengthen local government in the following ways:

- Grant municipalities the power to collect taxes and to administer municipal services in the realms of education, social services, immigrant absorption, tourism, and religious services.
- Expand local authority over infrastructure and transportation.
- Increase autonomy for local planning and construction boards.
- Encourage cooperative land use by adjacent communities.

-
- Accord greater freedom of action to large municipalities with robust professional administrations and proven long-term results.
 - Regulate relationships between elected officials and professionals in the local government.

d. Increasing citizen participation

The government should also pursue measures to increase the public's participation in the democratic experience, to deepen its trust in the political system, and to enhance the legitimacy of government decisions. These measures include increasing the transparency of decision-making and implementation processes in the civil service, making detailed information accessible to the public, and developing mechanisms for consulting with the public, as an integral part of policy planning in various fields.

The Law Enforcement System

Law enforcement components can be found within all the three branches of government. The legislative branch hosts the State Comptroller; the executive branch includes the Attorney General, the State Prosecutor, and the police; and the judicial branch contains the courts. The proposed reforms in the law enforcement system are intended to achieve the following:

- Strike a balance between the effectiveness of law enforcement and the efficacy and stability of government.
- Restore public trust in the law enforcement system and in the institutions of representative government.
- Secure the independence of the courts and restore them to their former status.

The following reforms are proposed for the various bodies that comprise the law enforcement system:

- a. The Supreme Court:** The Supreme Court bears the responsibility for safeguarding the fundamental rights of Israeli citizens. In order for the court to sustain this burden, it is imperative to adopt, in a consensual manner, a constitution for the State of Israel. In addition, statutory legislation should be passed to grant the judiciary maximal autonomy and eliminate its dependence on the executive branch.
- b. The Attorney-General:** The responsibilities of the Prosecutor General and the Attorney General should be divided. The continued fusion of these two functions in a single office headed by a single individual is untenable, particularly because there are inherent conflicts of interests between the two.
- c. The State Comptroller:** Like its counterparts in most developed democracies, the Israeli State Comptroller provides the legislature with reliable and objective information about the government's activities and plays a crucial role in ensuring

responsible government. However, reforms are necessary to clarify the Comptroller's status in relation to the Knesset, the Supreme Court, the Attorney General, and the executive authorities, and to define its function as the Knesset's arm for exerting fiscal supervision over the government.

- d. **Legislation:** The proposed reform in the law enforcement system must also be accompanied by relevant legislative changes. For example, the vague language of the law prohibiting fraud and breach of trust must be clarified. Detailed legislation is necessary so that there are clear guidelines for proper conduct in borderline situations.

The Case Against Presidentialism

The reforms outlined above are designed to mend and strengthen Israel's system of parliamentary democracy. In the absence of a constitution, the situation in Israel is exceedingly fluid and conducive to rapid, ill-advised reform motivated by the search for a quick fix to the country's myriad problems. In this context, it is necessary to warn again of the dangers of adopting a presidential system in Israel. Presidentialism is often invoked as a panacea for the present deficiencies of Israel's political system. It could, however, bring about the end of democracy in the State of Israel.

In Israel's divided society, a presidential system, absent a federal component like that of the United States, would render it impossible to craft a proper balance between representativeness and efficient governance in Israel. It would exacerbate the fragmentation of the party system along sectoral lines and would undermine government efficiency and stability. Surrounded by numerous small parties, the president would have no allies and would confront an oppositional Knesset. In the resulting chaotic state of affairs, the president would have no recourse but to build ad hoc coalitions to gain support for major decisions, in a closed-door process lacking in transparency; this in contrast to the parliamentary system, in which coalition building is a transparent and healthy process that occurs within the political sphere.

Fusing two incompatible systems of government – a majority system to elect a president and a proportional system to elect a legislature – is not a viable option. This hybrid would result in a lack of clarity as to who represents the public: the president elected by the one method, or the members of parliament elected by the other? This would exacerbate the public's distrust of democratic institutions and undermine the government's legitimacy. Adopting a presidential system also would increase governmental centralization and would put an end to the move towards decentralization, which is vital for increasing government efficiency. It would also limit citizens' participation in government.

The folly of adopting a presidential system in Israel is magnified tenfold when one takes into account Israel's extremely heterogeneous society and the rudimentary nature of the Jewish democratic tradition. Israel, which exists under severe internal and external

pressures, cannot afford to centralize power in the hands of a president. Were a presidential system to be adopted in Israel, we would risk the degeneration of Israel's vibrant political system into a form of authoritarianism. The model that should inspire Israeli democracy in the 21st century is to be found in the parliamentary democracies that make up the vast majority of OECD member nations.

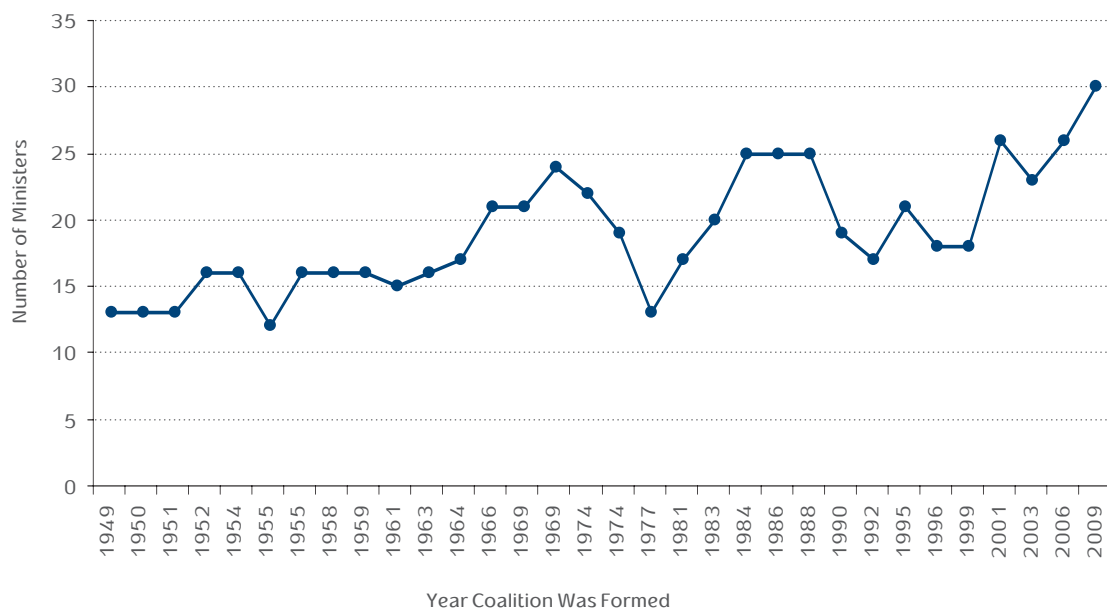
Performance of Israeli Democracy

Ofer Kenig

The State of Israel is often described as an island of democracy surrounded by a sea of autocracy. Despite its geographical location in the Middle East, Israel is also generally considered a western country. But the image – and reality – of Israel as a modern, functioning Western democracy is marred somewhat by the plague of political instability. Many Israelis complain that their state more closely resembles a chaotic oriental bazaar than the ideal assumed to be presented by the orderly, civilized world to the West. Frequent elections, large, unstable cabinets, and an ineffective legislature are among the most often cited indicators of the instability of the Israeli regime when compared to western nations.

1. The Swelling of the Executive

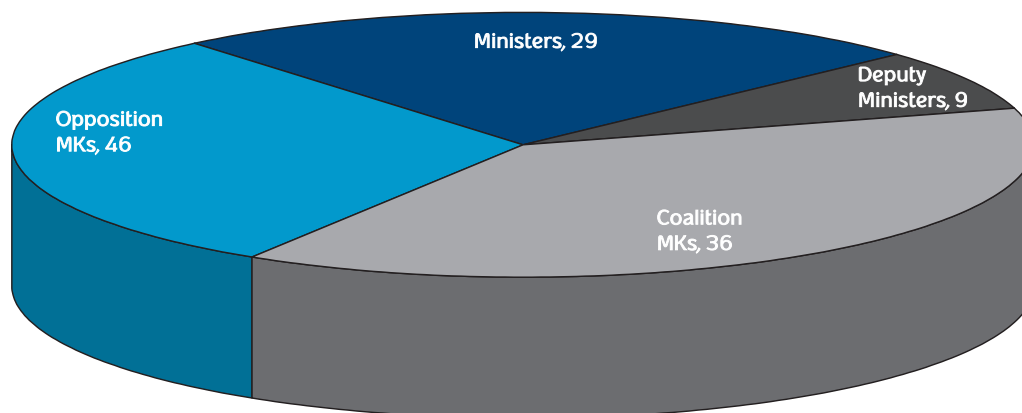
Figure 1
Number of Ministers Since 1948



Source: Data from the Knesset website as adapted by the author.

2. Knesset in Overload

Figure 2
The 120 Members of the 18th Knesset

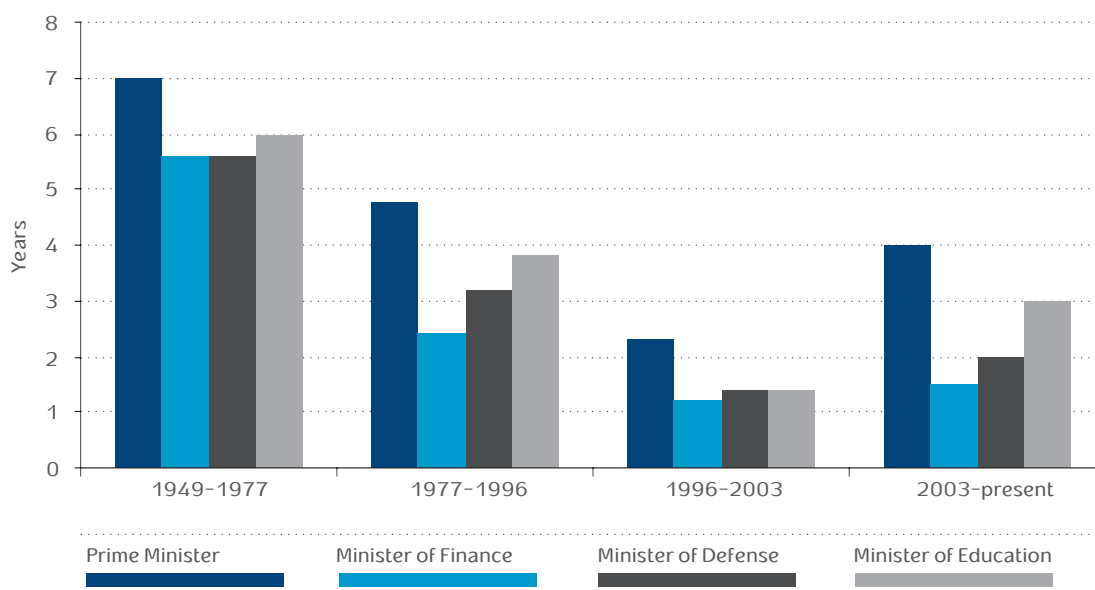


- The largest number of ministerial positions in history
- Only 82 of the 120 MKs hold no executive position and are thus free to devote 100% of their time to legislative duties.
- Of these, less than half belong to coalition parties and only 13 belong to the ruling party.
- A proliferation of private bills cripples the overburdened Knesset's ability to function.

Source: Data from the Knesset website as adapted by the author.

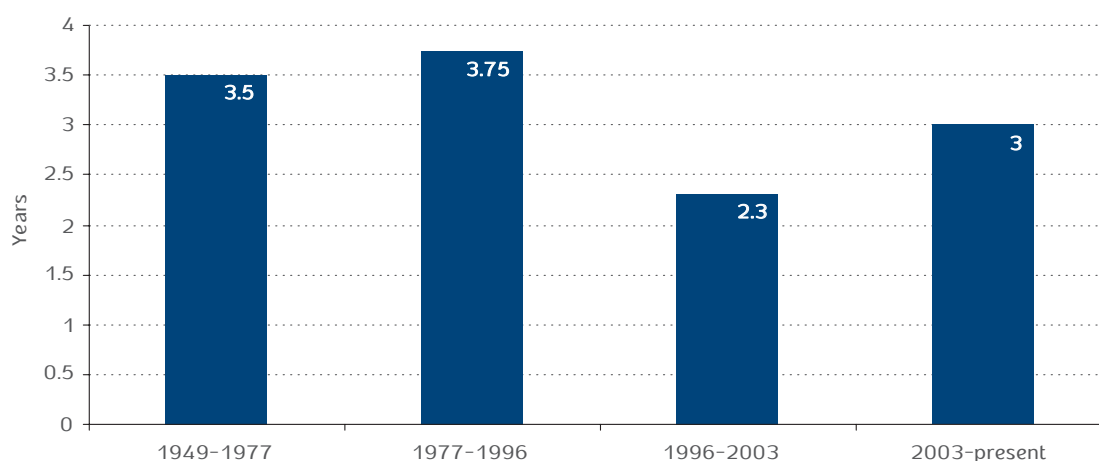
3. Instability in the Halls of Government

Figure 3
Average Term Length of Key Ministerial Positions



Source: Data from the Knesset website as adapted by the author.

Figure 4
Average Knesset Lifespan



Source: Data from the Knesset website as adapted by the author.

4. Where Does Israel Stand?

	Israel	United States	France	Germany	Great Britain	Canada
Human Development Index	0.935 (27)	0.956 (13)	0.961 (8)	0.947 (21)	0.947 (21)	0.966 (4)
Corruption Perceptions Index	6.1 (32)	7.5 (19)	6.9 (24)	8 (14)	7.7 (17)	8.7 (8)
% of Women in Knesset	18.30% (77)	16.80% (86)	18.90% (73)	32.80% (17)	19.50% (69)	22.10% (52)
Gini Index	39.2 (63)	40.8 (71)	32.7 (26)	28.3 (11)	36 (47)	32.6 (24)

The Gini index reflects the level of income inequality in a given nation. The values run from [0] to [100], where the most unequal society will be one in which a single person receives 100% of the total income and the remaining people receive none (G=100), and the most equal society will be one in which every person receives the same percentage of the total income (G=0).

References:

- United Nations, UN Human development report, 2007-8.
- Transparency International, Corruption Perceptions Index, 2009.
- Inter-Parliamentary Union (IPU), Women in Parliaments, 2010.

◀ The Research Group of IDI's Forum for Political Reform: Objectives and Modus Operandi

Gideon Rahat

In the fall of 2009, IDI launched The Forum for Political Reform in Israel. Led by former Chief Justice Meir Shamgar, this prestigious group of retired judges and politicians, academics, businessmen and public figures aims to assemble a package of reforms to Israel's electoral system, the government and the political party structure. Over the course of 2009–2010, Forum members will work together to formulate practical proposals for structural reform, with a special emphasis on strengthening the Knesset through fundamental changes to Israel's electoral system. To assist the Forum, IDI created a ten-member research team headed by Dr. Gideon Rahat, a leading authority on political reform.

Objectives of the Research Group

1. Reexamine the projected impact of proposed reforms in the following areas: the electoral system, governance, political parties and the legislature.
2. Formulate concrete, implementable, research-based proposals for legislation and policy-making concerning changes and improvements in the Israeli electoral system, the structure and functioning of the political parties and the legislature, and the system of governance.

Methods

Comparative empirical research (including a multinational comparison of established democracies and successful new ones) that will examine the suitability and effectiveness of various institutional mechanisms for improving, stabilizing, and preserving Israeli democracy.

Theoretical Foundation

Political institutions influence the behavior of politicians and the public. Better and more suitable institutions will create incentives for more positive behavior, attract better people to politics, bolster Israeli democracy, and enhance its stability.

The values that need to be preserved/strengthened are numerous and contradictory, and the goal is to think of structures that will encourage the optimal balance between them:

- a. Representativeness vs. effectiveness and stability
- b. Effectiveness vs. checks and balances
- c. Personal responsiveness (connection between the voter-citizen and the elected representative) vs. party cohesion
- d. Trust vs. regulated conflict

The Electoral Arena

Background: The Israeli electoral system is seen as “extreme” due to its use of a single, national electoral district; a particularly high level of proportionality; and the lack of any personal component in the voting process. The idea is to consider moderate reforms that would change this situation: the adoption of a system of multi-member electoral districts; the introduction of a personal component into the party-list system; and an increase in the legal electoral threshold.

- Adopt multi-member electoral districts – to lessen (at least partly) the distance between the electorate and its representatives, and add an element of territorial representation.
- Introduce a personal component to the electoral system – to add an element of personal accountability within the framework of party politics.
- Increase the legal electoral threshold – to create incentives for citizens to vote for the larger parties, and for politicians and small parties to join forces.
- Encourage creation of pre-election coalitions – to strengthen the voters’ ability to identify viable governmental alternatives before the elections and encourage interest aggregation at an early stage.
- Create incentives to vote for large, aggregative parties – to strengthen those parties and politicians that settle their differences within their parties, thereby decreasing some of the pressure from sectarian interests.

The Party Arena

Background: The aggregative parties in Israel are suffering from a decline in public trust and from operational difficulties. Such a decline is also a well-known phenomenon

outside of Israel. The idea is to examine whether there are proven methods of handling these problems by looking at the experience of longstanding democracies as well as successful new democracies.

- Strengthen aggregative parties – so that interest aggregation will be conducted, for the most part, within the parties themselves rather than in government institutions.
- Strengthen party discipline and cohesion – so that the larger aggregative parties will be able to function effectively vis-à-vis the small and sectarian parties.
- Reform leadership and candidate selection methods – so that an optimal balance will be created between intraparty democracy and the needs of the party as an organization within the general democratic system.
- Enhance the quality of party membership – so that the party will have active and loyal members and will not be overly exposed to corrupt practices and pressure from special interests.
- Promote and reward party democracy – so that the democratic parties do not suffer from over-regulation while the non-democratic ones enjoy greater autonomy (unlike the current situation).
- Establish a code of ethics for political parties – so that there will be clear ethical guidelines to follow and a benchmark for assessing the parties' conduct.

The Government Arena

Background: One of the most frequently raised arguments is that Israeli governments suffer from a lack of stability that diminishes their governance capacity as well as the level of public trust. The goal is to systematically explore this argument by defining and operationalizing the concept of stability and comparing the present situation in Israel with that of other states (established democracies as well as successful new ones).

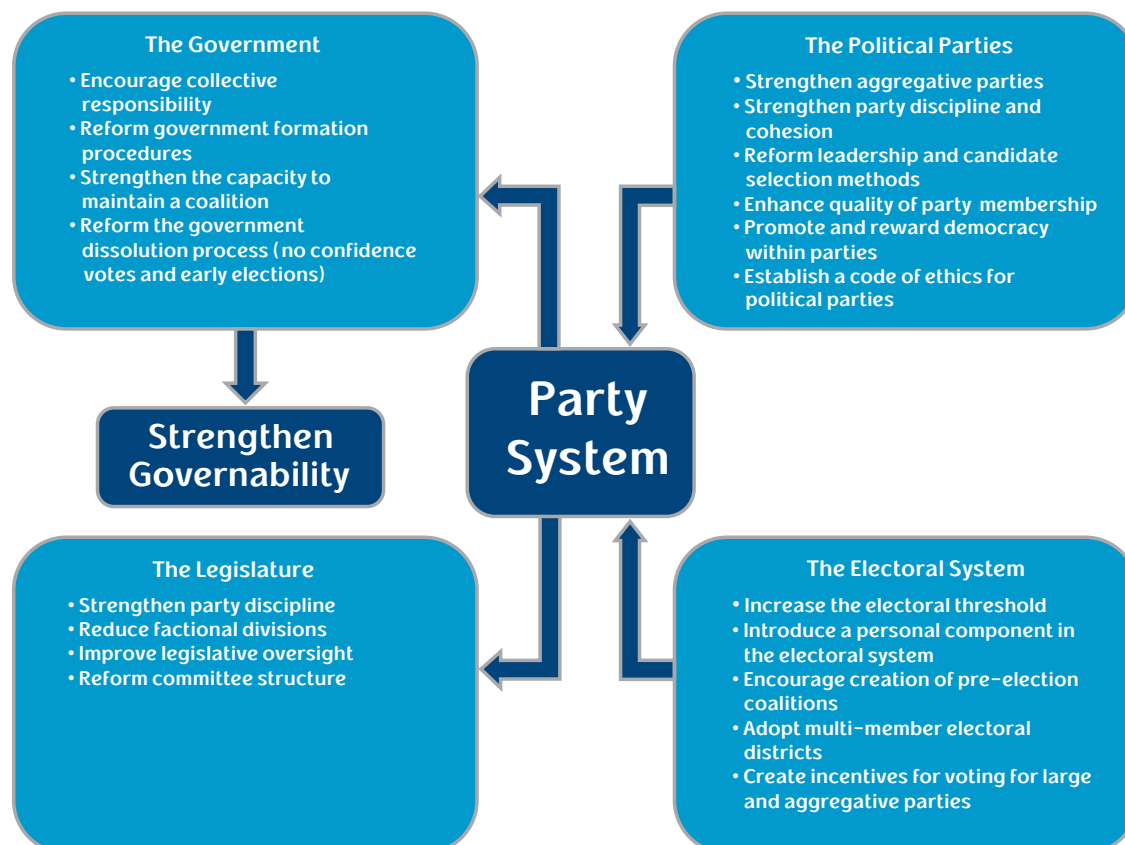
- Encourage collective responsibility – so that all ministers take responsibility (both blame and credit) for government actions.
- Reform procedures for government formation – so that a more cohesive government is likely to be created.
- Strengthen the ability to sustain a coalition – so that the government will be able to govern and be less vulnerable to coalition pressures.
- Reform the process of dissolving the government (no-confidence votes and early elections) – so that the government will be less susceptible to everyday coalition pressures but the system will still enjoy the flexibility of parliamentary regimes in which a government can be ousted and elections can be called earlier than scheduled in cases of deadlock.

The Legislative Arena

Background: The legislative branch in Israel, i.e., the Knesset, is very active in the area of private legislation, but relatively weak in its oversight functions. While the Knesset is quite representative (although not with regard to women), it suffers from a serious problem of trust. There is room to improve the Knesset's functioning and to strengthen the public's trust, since the legislature is the institutional heart of a democratic regime, particularly in a parliamentary one.

- Strengthen party discipline – so that party considerations, as opposed to individualistic and often populist motives, will be the key to legislative politics, as should be the case in parliamentary regimes.
- Reduce factional divisions – so that the Knesset will be able to function in a more cohesive manner.
- Improve legislative oversight – so that the Knesset will serve as a system of checks and balances against the executive branch, in the name of the people and as their representative.
- Reform committee structure – so that the committees will be able to perform their function of oversight and scrutiny.

Reexamining Reform



Forecast of Muslim and Ultra-Orthodox Voting Patterns Based on Demographic Predictions

Nir Atmor

Based on Data from the Central Bureau of Statistics, March 16, 2010

Demographic Forecast: 2010–2030

	2010	2020	2030
Entire Population	7,577,600	8,770,000	9,984,600
Jews	5,691,400 (75.1%)	6,453,300 (73.6%)	7,205,400 (72.2%)
Arabs	1,552,800 (20.4%)	1,931,000 (22.0%)	2,361,600 (23.7%)

Israeli-Arab Muslims: Demographic Data

- Arab population, end of 2008: 1,468,800
- Arab Muslim population, end of 2008: 1,240,000
- Percentage of Arab Muslims under the age of 18: 49% (611,000)
- Number of eligible Arab Muslim voters: 636,2000

Predicted Voting for Arab Parties, 2020
(Current Number of Knesset Seats: 11)

	Model A Low Turnout (60%)	Model B Medium Turnout (75%)	Model C High Turnout (90%)
Number of Votes for Arab Parties	785,640 (17.5%)	982,050 (21.8%)	1,178,460 (26.2%)
Potential Number of Knesset Seats	21	26	31

Arab representation in the Knesset has the potential to increase from 11 seats to between 21-31 seats by 2020.

Ultra-Orthodox Jews (*Haredim*): Voting Patterns

United Torah Judaism (UTJ) Party

- 2003 General Elections: 135,000 votes
- 2009 General Elections: 148,000 votes
- Estimated number of eligible UTJ voters by 2020: 270,000-330,000

Predicted Voting for United Torah Judaism, 2020 (Current Number of Knesset Seats: 5)

	Model A Low Turnout (60%)	Model B Medium Turnout (75%)	Model C High Turnout (90%)
Number of Voters for UTJ	198,000 (4.4%)	247,500 (5.5%)	297,000 (6.6%)
Potential Number of Knesset Seats	5	7	8

* Based upon an assumption of 330,000 registered party members of United Torah Judaism (from among 4.5 million total voters).

United Torah Judaism's representation in the Knesset has the potential to increase from 5 seats (current) to up to 8 seats by 2020.

Summary

By 2020:

- Arab Parties may hold up to 31 seats
- UTJ may hold up to 8 Knesset seats
- If Shas maintains its current strength (11 seats) in 2020, then 50 Knesset seats – more than one third of the parliamentary positions – may be held by non-Zionist parties.

◀ The Emergence of Antipolitical Sentiment in Israel

Tamar Hermann

“Politics is dirty. It is something to work for, however, not to fear.”¹

Many liberal democracies currently seem to be suffering from a significant change for the worse in the attitudes and sentiments of the citizenry toward the political establishment – its institutions, procedures, and professional politicians. Although democracies are based on the theoretical notion of a “social contract” between the sovereign people and the rulers, “hale and hearty” contractual relations do not actually characterize many democracies: the citizens neither trust nor respect their representatives and the civil servants of the government, whom they consider inattentive and inept at best, and manipulative and corrupt at worst. Many consider the existing political procedures to be ineffective and arbitrary; the political structures are widely perceived as cumbersome, overly bureaucratic, too costly, and not worth using public funds to sustain them, given their poor performance. These negative images are fostered not only by the citizen’s firsthand experiences, but even more so by the media that strive to capture the attention of the potential audience by broadcasting often biased and speculative information and theories about the politicians’ substandard performance, unethical actions, and continual failures. Consequently, “Once something of a *bon mot*, conjuring a series of broadly positive connotations – typically associating politics with public scrutiny and accountability – ‘politics,’ has increasingly become a dirty word. Indeed, to attribute ‘political’ motivations to an actor’s conduct is now invariably to question that actor’s honesty, integrity or capacity to deliver an outcome that reflects anything other but his or her material self-interest – often, all three simultaneously.”²

In his 2007 cross-national study, *Why We Hate Politics*, the British scholar, Colin Hay, differentiated between formal manifestations of political disillusionment (low voter turnout and party membership) and informal manifestations of political disillusionment (defiant non-participation, mounting cynicism, decreased vertical [institutional] political trust, and movement to extra-parliamentary civil participation modes). This does not imply political apathy in the basic sense of the word “political,” because as Hay proves empirically, while disengaging from establishment-style politics, citizens express their social concerns and political drives through extra-parliamentary channels more than they had in the past. *The End of Politics – Explorations into Modern Antipolitics*, a 1997 volume of articles edited by the Austrian scholar, Andreas Schedler, argues that politics, in the conventional sense of the word, is no longer “in,” and opens with the following statement: “We live in antipolitical times... antipolitical discourses are nothing new

1 Schudson, M., “What’s Unusual about Covering Politics as Usual,” in Zelizer, B. and S. Allen, eds., *Journalism after September 11*, (London: Routledge, 2002), p. 36.

2 Hay, C., *Why We Hate Politics*, (Cambridge: Polity Press, 2007), p. 1.

in Western political history, but today, in the late twentieth century, they have gained renewed prominence. They now form an important, at times even hegemonic element of the ideological universe. And in all probability they have still not reached the peak of their global career.”³

Naturally, the specific sources of trouble and the antipolitical manifestations vary from one political context to the other. Still, the basic features described above seem to be universal. In 1992, E. J. Dionne, an American political scientist and columnist, published a book entitled *Why Americans Hate Politics* ⁴ in which he maintains that the fundamental cause of this phenomenon lies in the fact that since the 1960s, American liberal and conservative ideologies have presented the public with false choices. Consequently, politics has failed to fulfill its main function: meeting the common basic material and emotional needs of a society. Words, not actions, have taken over the political arena.

In his famous yet highly contested essay, which was later published as a book, *Bowling Alone*, Robert Putnam offers another answer to the question of why Americans have turned their backs on politics.⁵ Putnam propounds that as Americans have become more disconnected from their families, neighbors, communities, and the republic itself, American civil society has been crumbling. He argues that the organizations that gave life to democracy are fraying. Thus, Americans have disengaged from political involvement, which is manifested in decreased voter turnout rates and diminished participation in public meetings, committees, and political parties. Putnam also cites Americans’ growing distrust of government. While accepting the possibility that this lack of trust could be attributed to the long litany of political tragedies and scandals since the 1960s, he maintains that this explanation has its limitations when viewed in the context of other broader trends in civic engagement.

Although Russell Dalton observes in his book, *Democratic Challenges, Democratic Choices*, published in 2004, that such trends are indeed a function of scandals, poor performance and other government failures, he claims that the adverse change in public opinion regarding political establishments in advanced post-industrialized societies is primarily the result of the successful social modernization of these nations.⁶

The seminal work by Carl Boggs⁷ suggests that most Americans are becoming increasingly alienated from a political system that is commonly viewed as corrupt, authoritarian, and simply irrelevant to the most important challenges of our time. Citing ever-declining voter participation, Boggs asserts that justifiable feelings of disgust and

3 Schedler, A. 1997, Introduction, “Antipolitics – Closing and Colonizing the Public Sphere,” in A. Schedler, ed., *The End of Politics – Explorations into Modern Antipolitics*, (London: MacMillan Press, 1997), p.1.

4 Dionne, E. J., *Why Americans Hate Politics*, (NY: Simon & Schuster, 1992).

5 Putnam, R., “Bowling Alone: America’s Declining Social Capital,” *Journal of Democracy* 6, no. 1 (January 2000); Putnam, R., *Bowling Alone: The Collapse and Revival of American Community*, (NY: Simon & Schuster, 1995).

6 Dalton, R., *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies*, (NY: Oxford University Press, 2004).

7 Boggs, C., *The End of Politics – Corporate Power and the Decline of Public Sphere*, (NY: The Guilford Press, 2000).

pessimism have prompted Americans to retreat from political involvement. According to his analysis, this phenomenon is linked to global corporate capitalism, and the “all-consuming corporate agendas,” which together with the mass media have created the ‘unholy alliance’ that dominates American politics today.

In his 2006 book, *Why Politics Matters*,⁸ Gerry Stoker from Southampton University, England, suggests that in his country, and most probably in other liberal democracies as well, politics is failing because politicians have been repeatedly exposed as incompetent in dealing with the ever complicated problems confronting them. Moreover, he propounds that the growing political disillusionment reflects the emergence of a more critical citizenry and that politics is in trouble because more and more issues are moving beyond its control: “It is clear that in the eyes of many people, politicians are not the best advertisement for politics. Politics is often viewed as a rather grubby and unpleasant feature of modern life. People who take up politics as a trade or a vocation tend to attract more derision than admiration. Politics is something you apologize for, rather than being proud about.”⁹ Furthermore, the self-empowerment of the citizenry in many democracies through the attainment of higher levels of education, the greater variety of information channels, and the wider inculcation of participatory ideals have fueled the desire to always have their voices heard by the decision makers, and their corresponding disappointment at not being heeded apparently feeds these antipolitical sentiments.¹⁰ Indications of similar developments in other established democracies (e.g., Great Britain, Western Europe, the United States, etc.), as well as in younger democracies (for example, Central and Eastern Europe and non-Western democracies, such as India¹¹), are found in many other scholarly works.

However, it is important to emphasize that the globally prevalent antagonism toward democratically established political systems does not usually imply resentment towards basic democratic ideas or ideals. On the contrary – it seems that, in general, public support for democracy *per se* has been on the rise in recent years.¹²

8 Stoker, G., *Why Politics Matters – Making Democracy Work*, (London: Palgrave, 2006).

9 *op. cit.*, pp. 47-48.

10 In a survey conducted in the United States in early 2008, 81% of the interviewees maintained that the administration should take into consideration public opinion polls when making important decisions, because this may help them understand the people’s views. Ninety-four percent rejected the argument that the citizens have their say only on election day:

www.worldpublicopinion.org/pipa/articles/governance_bt/461.php?lb=btgov&pnt=461&nid=&id=

11 For more information about antipolitical manifestations in Eastern Europe, see Fairbanks, C., *The Public Void: Antipolitics in the Former Soviet Union*, in Schedler, *op. cit.*, pp. 91-114. For a highly interesting account of the Indian case and the increase in grassroots political violence as a result of neglect by the political and moneyed classes, see Roy, A., *Listening to Grasshoppers: Field Notes on Democracy*, (New Delhi: Hamish Hamilton, Penguin, 2009).

12 Hay, *op. cit.*, pp. 31-32.

Antipolitics in Israel

Israeli society,¹³ particularly its Jewish sector, has long been recognized for its high level of political awareness, knowledge, and involvement.¹⁴ This salient “political quality” has manifested itself in many ways: high voter turnout, impressive party membership, strong party identification, and the general public’s constant efforts to keep abreast of the political news. Furthermore, compared to most other liberal democracies, the average Israeli held and apparently still holds strong political opinions, which, it should be noted, are quite stable, presumably because they correlate closely with individual socio-demographic and sociopolitical characteristics.¹⁵

This significant, multifaceted, civil-political engagement that has characterized Israel may be explained by the relative youth of Israeli democracy (new democracies are known for being politically hyper-energetic)¹⁶ and by the existential security, economic, social, and other strategic dilemmas it has faced. It could also be interpreted as a fundamental aspect of the “normalization” process of the Jewish people after 2,000 years in the Diaspora, where they often distanced themselves from state affairs and from the ruling circles for the safety of the Jewish communities.¹⁷ “Doing politics” thus became a prime aim of the Zionist project, and those who made politics their vocation were respected for engaging in a virtuous mission as trustees of the common good and as delegates of the common will.¹⁸

13 This article deals mainly with the Jewish sector. The Arab sector, as a national minority, whose loyalty to the State of Israel has always been questioned by the majority and whose claim for national self-determination has been rejected, exhibits political attitudes and modes of political involvement, as well as attitudes toward politics that are basically different than those of the Jewish majority. It would do no justice to either sector if they are discussed together in a short paper such as this.

14 For a discussion of the high level of politicization of the Israeli Jewish sector, see e.g., Galnoor, I. *Steering the Polity: Communication and Politics in Israel*, (Tel Aviv: Am Oved, 1985), p. 330. [Hebrew]

15 For a study of the strong correlation, for example, between an individual’s socio-demographic/ socio-economic characteristics and position on the Israeli-Palestinian conflict, see, Yaar, E. and T. Hermann, “Divided yet United: Israeli Jewish Public Opinion on the Oslo Process,” *Journal of Peace Research* (September 2002): 597-613.

16 For an interesting account of the levels of participation and knowledge in the new African democracies see, Afrobarometer Briefing Paper No. 70, May 2009. For information about Europe, see EC, (2005), “Social Capital,” Special Eurobarometer 224, Europeans, Science and Technology, European Commission, Brussels.

17 E.g., Yaar, E., and Z. Shavit, eds., *Trends in Israeli Society*, vol. 1, (Tel Aviv: The Open University of Israel, 2000), p. 104. [Hebrew]

18 In general, the Arab sector apparently has shared the democratic aspirations of Israel, yet resented its Zionist self-definition, which has always been a thorn in its side. Therefore, the level of political interest, involvement, and engagement of Arab citizens of Israel has been primarily motivated by the effort to defend and expand their civil and national rights, as well as by the aspiration to transform Israel into a “state of all its citizens.” The Israeli Arab minority appears to be less concerned about its only partial success in achieving the first aim and its total failure, thus far, in promoting the latter in politics in general, and especially in establishment-style politics.

However, this remarkable “political state of mind” has gradually dissipated since the early 1990s. What then are the main manifestations of antipolitical sentiment in Israel today? In order to answer this question, the previously mentioned differentiation between formal and informal indicators will be employed. However, before presenting and analyzing the relevant data, it is important to insert a threefold “waiver”: First, the rise of antipolitical sentiments has not been accompanied by a decline in the Israeli Jewish sector’s patriotism.¹⁹ Second, the emergence of antipolitical sentiment in Israel does not mean that Israeli society has become depoliticized, i.e., uninterested in politics. In fact, the current level of interest in politics is quite impressive. Third, in Israel as in other democracies, the rise of antipolitics apparently does not imply a begrudging attitude toward democracy *per se*.²⁰

The first and unequivocal formal indication of a change of attitude regarding politics among Israelis is the decreasing voter turnout rate. Until 1969, the average voter turnout was around 82%, and between 1973 and 1999, it was somewhat lower at around 78%. In the 2000s, however, it dropped dramatically to around 64%. A deeper examination reveals that the low averages of the 2000 elections mask the significant, even lower turnout rate of the secular Israeli Jewish sector and the higher turnout of the ultra-Orthodox. This fact is important to the future of Israeli democracy, because the ultra-Orthodox sector’s primary commitment to liberal democratic values is uncertain, at the very least. The aggregated data also obscures the ongoing low voter turnout rate of the Israeli Arab sector, which reflects this sector’s alienation from Israel as a Zionist-Jewish state.²¹ Unlike in many other liberal democracies, where a decline in voter turnout is generally much more visible among the younger cohorts (e.g., see Stoker, 32), as previously noted, the decline in the voter turnout rate in Israel does not seem to be age-related.²²

Party membership has also dramatically declined. In a 2006 pre-election survey, the number of self-identified party members was only about 9%, and according to *The 2008 Israeli Democracy Index*, only about 4% of the interviewees reported that they were party members.²³ By their own definition, Israeli political parties are mass parties, not cadre parties, and, therefore, very low party membership rates are indeed bad news insofar as formal citizen political participation is concerned.

19 As indicated in the 2009 Patriotism Index: www.ynet.co.il/articles/0,7340,L-3663323,00.html [Hebrew]

20 Arian, A., Philippov, M., and Knafelman, A., *The 2009 Israeli Democracy Index: Auditing Israeli Democracy – Twenty Years of Immigration from the Soviet Union*, (Jerusalem: The Israel Democracy Institute, 2009), p. 11.

21 See, e.g., Schafferman, K. T., “Participation, Abstention and Boycott: Trends in Arab Voter Turnout in Israeli Elections, 2008”: www.idi.org.il/sites/english/ResearchAndPrograms/elections09/Pages/ArabVoterTurnout.aspx

22 See, e.g.: www.ynet.co.il/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3668577,00.html [Hebrew]

23 Arian, A., T. Hermann, N. Atmor, Y. Hadar, Y. Lebel and H. Zaban, *The 2008 Israeli Democracy Index: Auditing Israeli Democracy – Between the State and Civil Society*, (Jerusalem: The Israel Democracy Institute, 2008), p. 89.

Not only are the formal indicators – voter turnout and party membership – declining, but also the informal ones. Hence, the level of interest in the TV pre-election propaganda clips has drastically diminished: while in the late 1960s-early 70s, nearly half of Israelis reported that they watched them daily, in the last (2009) elections, this dropped to a single digit figure.²⁴ The data also suggests that the Internet alternative, that is, the parties' websites, were not massively visited by the eligible voters either.²⁵ This rather unexpected finding, in light of the huge success of Internet campaigns in other countries, especially in the United States, suggests that the citizens' lack of interest in the TV clips is not just the "natural" outcome of the changes in the Israeli media scene, including the introduction of a wide variety of TV channels by the cable and satellite services, but rather a significant indication of the actual decrease in the public's interest in the parties' campaign messages.

More informal evidence that supports the prevalence of antipolitical sentiments in Israel today can be found in the responses of the participants of *The 2008 Israeli Democracy Index* survey. A national representative sample of 1,201 adults (Jews and Arabs) was asked an open-ended question: "With what do you freely associate the word 'politics'?" Only 3% had positive free associations with the term "politics." This tiny minority was heavily outnumbered by those who expressed negative associations; one-third of the respondents mentioned unpleasant physical symptoms (e.g., nausea, headache, stomachache); one-third reported associations with negative modes of behavior (e.g., cheating, lying, corruption, even treason); 11% reported a sense of emptiness and gloom; 7% mentioned neutral terms, such as elections, parliament, law making, etc.; and 13% had no opinion.²⁶ In the same survey, the respondents were also asked what they would advise a family member or a close friend who was considering becoming a politician. Only 25% said that they would encourage their relative or friend to launch a political career (of these, only 7% would strongly recommend such a move). A strong indication of antipolitical sentiment is found in the plethora of data on the sharply declining trust of Israelis in the major democratic institutions: the political parties and the Knesset (Israeli parliament). According to the findings of *The 2009 Israeli Democracy Index*, less than a quarter (21%) expressed trust in the former and 38% in the latter.²⁷ Fifty percent of the respondents in this survey maintained that politicians are in politics only for the sake of personal gain.²⁸

24 For a discussion of the pre-elections party propaganda in the media see, e.g., Weiman, G., "Media, Propaganda and Elections Campaigns in Israel":

<http://lib.cet.ac.il/pages/item.asp?item=17085&kwd=2363> [Hebrew]

For the data on the rating in the 2009 elections see: www.midrug-tv.org.il/sripts/publicq.asp

25 Atmor, N., "The Internet Race: Parties and the Online Campaign in the 2006 Elections," in Arian, A. and M. Shamir, eds., *The Elections in Israel 2006*, (New Brunswick: Transaction, 2008), 295-322.

26 Arian, Hermann, Atmor, Hadar, Lebel and Zaban, p. 78.

27 Arian, Philippov and Knafelman, pp. 70-72.

28 *op. cit.*, p. 120.

Possible Sources of Antipolitics in Israel

The most immediate explanation that comes to mind is corruption, i.e., the use of one's public position for personal profit or personal benefit. In recent years, the frequent exposure by the media, the police, the State Comptroller, the Attorney General, and others of a number of cases in which top Israeli politicians were found guilty or were involved in deals and schemes that at least "smelled" of corruption has obviously contributed to the erosion of the citizens' trust in the political system.²⁹ It was found that 89% of the Israeli public believes that the Israeli system is extremely corrupt, while 37% even assesses that Israel is more corrupt than other democratic states.³⁰ A mirror image of this perception is the quite striking finding reported in *The 2008 Israeli Democracy Index*: the main quality Israelis seek in a politician is not a clear political worldview or knowledge of the political system, but rather "clean hands." The largest group, 44% of the respondents, identified this quality as the most important.³¹

However, the assertion that the frequent revelations of corruption in the upper echelons make people dislike politics is a truism mixed with over-simplicity. Antipolitical sentiments have deeper roots and the feeling that politicians are indifferent to the preferences of the people is one of them. Apparently, in Israel as in many other democracies, the citizens' sense that in accordance with the democratic creed, the sovereignty of the electorate should be supreme is practically nonexistent among their representatives. Therefore, it is no wonder that the prevalent civil self-perception is one of impotence, as reflected in *The 2009 Israeli Democracy Index*, which reveals that only 18% of the respondents feel that they can influence the government's policies in any way.³²

The problematic ideological ambiguity of the parties that Dionne observed in the American context may also be detected in Israel. Today, at least the larger parties do not present clearly distinguishable socioeconomic or even security-related worldviews and practices, unlike in the past when the parties' ideologies were clear and discernible.³³ Thus, half of the Israelis believe that whom you vote for – or do not vote for – makes no difference; it does not change the situation.³⁴ If the outcome of the elections, that is, who wins the elections, is politically insignificant, then voting also becomes insignificant.

Another important reason for the rise of antipolitics is the commonly held opinion that the politicians in office do not provide the nation with real leadership. According to an Israeli academic and sometimes political commentator, "As for the question of leadership, choosing between opposite standpoints, confronting ardently the opposition – on these matters, the government just talks but does nothing. And these are the causes of the

29 This sense of the people was confirmed by external and probably quite objective examination.

See: www.transparency.org/policy_research/surveys_indices/cpi

30 Arian, Philippov and Knafelman, p. 119.

31 Arian, Hermann, Atmor, Hadar, Lebel and Zaban, p. 89.

32 Arian, Philippov and Knafelman, p. 55.

33 See, e.g., Benn. A., "This is the right time for a Kadima and Labor merger," *Haaretz*, February 10 2009: www.haaretz.com/hasite/spages/1063125.html [Hebrew]

34 Arian, Philippov and Knafelman, p.118.

public's frustration: words that are not backed by actions."³⁵ However, the most severe yet hardly effective attack on Israeli leaders was voiced by David Grossman, the well-known author, in his November 4, 2006 speech at the public rally commemorating the assassination of Prime Minister Yitzhak Rabin:

Our military and political leadership is hollow. I am not even talking about the obvious blunders in running the war, of the collapse of the home front, nor of the large-scale and small-time corruption. I am talking about the fact that the people leading Israel today are unable to connect Israelis to their identity. Certainly not with the healthy, vitalizing, and productive areas of this identity, with those areas of identity and memory and fundamental values that would give us hope and strength, that would be the antidote to the waning of mutual trust, of the bonds to the land, that would give some meaning to the exhausting and despairing struggle for existence. The fundamental characteristics of the current Israeli leadership are primarily anxiety and intimidation, of the charade of power, the wink of the dirty deal, of selling out our most prized possessions. In this sense they are not true leaders, certainly they are not the leaders of a people in such a complicated position that has lost the way it so desperately needs. Sometimes it seems that the sound box of their self-importance, of their memories of history, of their vision, of what they really care for, exist only in the minuscule space between two headlines of a newspaper or between two investigations by the attorney general. Look at those who lead us. Not all of them, of course, but many among them. Behold their petrified, suspicious, sweaty conduct, the conduct of advocates and scoundrels. It is preposterous to expect to hear wisdom emerge from them, or that some vision or even just an original, truly creative, bold and ingenious idea would emanate from them.³⁶

Detrimental Ramifications

The prevalent impression among Israeli citizens that the political system is unprecedentedly and extremely corrupt, that the politicians are inattentive and incompetent, and that there is no difference between the various parties and candidates, since every "political" person is self-centered and Machiavellian, is not necessarily empirically correct. Indeed, it has already been suggested by certain scholars in other democracies that this state of mind represents "moral panic" rather than reality.³⁷ However, since the public operates under this impression and is motivated by sentiments of this nature, they are likely to have an impact on the political system in the years to come no less than, for example, structural or legal-procedural reforms. In fact, antipolitical sentiments are liable to have a variety of dangerous effects.

35 Kalderon, N., "On Despair and Grievance," *Ynet*, 20 July 2008: www.ynet.co.il/articles/0,7340,L-3570330,00.html [Hebrew]

36 www.paxchristi.org.uk/Documents/ME/Grossman_Rabin2006.pdf

37 Jones, K., "Professional Politicians as the Subjects of Moral Panic," *Australian Journal of Political Science*, 43, no. 2, (2008): 243-258.

First, widespread low levels of trust in political figures and procedures in response to recurring corruption scandals may shatter the entire system, as explained by the Israeli political scientist, Ze'ev Sternhell: "When the political elite is no longer trusted – the collapse of democracy is only a matter of time and circumstances."³⁸ On the other hand, ongoing discourse about corruption may give rise to a "witch hunt," which will lead to excessive waste of highly needed resources in order to "expose" real or imagined villains. It may also create an environment in which politicians will concentrate more on protecting themselves from such accusations than on performing their duties, which in turn will most probably further hamper their ability to deal effectively with the real problems facing the nation.

Second, the sense of deficient leadership may give rise to the call for a "strong leader," which poses obvious risks to democratic stability. This phenomenon has already emerged in the Israeli political scene. Third, declining voter turnout among the mainstream in the future may boost the political influence of small, yet highly mobilized minorities, whose commitment to democratic values is less than their commitment to other values, for example, religious (e.g., ultra-Orthodox Jews or Islamic fundamentalists), national (e.g., Arab nationalists), or ideological (e.g., settlers, or radical environmentalists). Furthermore, the decline in political interest and participation among the general public will clear the way for individuals and groups with specific interests, perhaps even organized crime, to reach the top political echelons, either personally or by proxy.

Last but not least, disappointment with established politics may also drive people to find community and solidarity in other spheres in lieu of national politics. This in turn may increase the pressure on politicians to promote parochial, sectarian interests rather than national interests, which may lead to further neglect of the weaker social groups and the poorer regions of the country.

In conclusion, although allegedly more subtle and hence less alarming than radical politics, for example, antipolitical sentiment poses a greater threat to the proper functioning and stability of democracy. Like termites, it gnaws away at the basic pillars on which the entire representative, liberal democratic system stands. This is detrimental to every democracy, but is particularly dangerous in Israel, which is constantly confronted with an excessive number of strategic challenges.

38 Sternhell, Z., "The Citizen Understands that Everything is for Sale," *Haaretz Online*, 25 May 2008: www.haaretz.com/hasite/spages/986349.html



Religion
and
State

Human Rights in Judaism: A New Project at IDI

Yedidia Z. Stern

IDI is about to launch a major new research project designed to give new meaning to the traditional definition of Israel as a Jewish and democratic state. Our goal is to reveal the common ground between “Jewish” and “democratic” by uncovering the roots of the doctrine of human rights in Jewish tradition. The centerpiece of this project is to train an elite cadre of scholars in this field.

The Problem: A Clash between Israel’s “Jewish” and “Democratic” Identities

Israel’s dual identity is expressed by its very definition as a “Jewish and democratic state,” as formulated in the Basic Laws passed by the Knesset in 1992. The broad acceptance of this definition in Israeli discourse indicates that it strikes a chord among the vast majority of the country’s Jewish citizens: they see Israeli sovereignty as an obligation to both identities simultaneously. This cultural dualism is potentially enriching; it enables individuals and communities to construct their identity through ideological negotiation and compromise, while simultaneously fostering the growth and development of subcultures that are continually challenged to evaluate, adjust, and refine their ideological underpinnings and relationship to one another. In practice, however, the positive potential of this fusion is stifled by growing tensions between two ostensibly rival cultures. Spokespeople for Israel’s “Jewish” and “democratic” cultures tend to present them as alternative identities that are mutually exclusive and perpetually at war with each other. The battle is fought over a broad range of issues, including intellectual influence, political power, and budgetary allocations. Although this conflict has been part of Zionism since the movement’s inception, a number of developments have led to its exacerbation during the past generation. Today, both internal factors – such as the State’s growing political instability – and external factors – such as the ascendance of postmodern ideas – combine to fan the flames of controversy. Israel now faces the threat of a destructive culture war.

Although a majority of Jews in Israel espouse a dual Jewish-democratic identity, in practice the matter remains unresolved. This indecision has a number of serious practical consequences. For example, Israel’s courts are called upon from time to time to interpret the words “Jewish and democratic state,” even though they are not empowered to determine vital questions of identity. The right place to settle the debate is the marketplace of ideas. The cumulative experience of the past two decades indicates that legal activism in issues of identity has a detrimental effect on the public’s faith in the judicial branch itself. It also contributes to rising tensions between the judiciary and the legislature.

The ongoing struggle over Israel's identity is liable to strengthen ideological extremists on both sides of the fence. There are already those who believe their obligation to "Judaism" necessarily entails a rejection of "democracy" and the world of liberal values associated with "the West." From this perspective, an acceptance of liberal values is capitulation to foreign culture – or Hellenization. The converse is true as well: There are those who hold that their primary obligation to "democracy" requires them to forsake "Judaism" and Jewish values, which are likened to shackles around the public's neck. They claim that the attempt to inculcate traditional Jewish values in national life is anachronistic, and see it as a return to the Diaspora and a waste of a singular historical opportunity to make the Jews "normal." The view that the tension between "Judaism" and "democracy" is inevitable and unsolvable is increasingly taking hold among a portion of the elites in both camps. More and more, intolerant voices on both sides are drowning out moderate, creative voices in the center.

The clash taking shape around the character of state and society in Israel is dangerous. The more that Jews in Israel are pushed to choose between the "twins struggling within" – to borrow a Biblical image – the more they will split into entrenched camps with little in common. This growing polarization, if unchecked, will undermine their ability to function together as a group. Israel's internal divisions, it would seem, constitute the modern-day parallel to the tragic internecine dispute that led to the loss of Jewish sovereignty 2,000 years ago.

But the danger is not Israel's alone: Many Jews who live in open societies outside of Israel lose their Jewish identity because they find it difficult to connect to the unique values that characterize Judaism and consider it an outmoded religion incompatible with modern liberal values. They find it difficult to answer such questions as: What is Judaism's contribution to the world? Is Judaism still relevant in a liberal, globalized world? Jewish continuity in the Diaspora hinges largely on the ability of Jews living in democratic societies to find particular Jewish meaning and significance within a liberal lifestyle and worldview.

The Proposed Solution: Development of a Jewish Human Rights Charter

The assertion that Jewish culture and liberal culture cannot, by their very nature, hold an intimate "conversation" with one another leads to the tragic conclusion that we must resign ourselves to choosing between two beloved parents, each of whom is very dear to us, but each of whom demands that we forsake the other. The implication is that we must break up the "Jewish-democratic" family and accept one of two options: **either** a Jewish existence isolated from the world at large, behind high walls, eventually leading to atrophy and irrelevance, **or** a directionless existence like "all the other nations," eventually leading to the loss of our unique Jewish identity. Yet this assertion is misleading. Although these cultural realms are distinct, and elements of each are certainly in tension with each other, they share considerable common ground. Contrary to common wisdom, Israel's "Jewish" and "democratic" identities often overlap. At times, these two identities are harmonious; at others, they overlap partially. Many of the tensions between the two are susceptible to dialectical resolution, while many of the

differences between them are alternatives that need not contradict one another. And in cases where the two traditions disagree, they are often not so distant from each other as to preclude fruitful dialogue and even mutually acceptable compromise. In short, the dual cultural influence on contemporary Jewish life need not be a divisive barrier; it can be an opportunity for cultural reconciliation and renaissance.

The Human Rights in Judaism Project aims to create a bridge between the universal and the particular characteristics that shape contemporary Jewish life, and to meet the needs of the many groups within the Jewish public, both in Israel and abroad, by pioneering an attempt to integrate Jewish identity and Western, liberal values. As stated above, the two sources of identity do not speak in a single voice on a broad range of topics – norms and values, beliefs and opinions, myths and ethos. But this does not obscure the overriding fact that there are important areas of discussion where consensus and overlap can be found. This project aims to analyze the potential common ground in one field: human rights.

Human rights lie at the core of liberal orthodoxy; the obligation to uphold them is the foundation of the modern, liberal-democratic state. Yet a considerable portion of the Israeli public regards the charter of human rights with suspicion. They consider the doctrine of human rights to be an alien import threatening the Jewishness of the State of Israel. At the same time, the most vocal defenders of human rights in Israel are precisely those most suspicious of Jewish tradition, which they perceive as a threat to Israel's democratic character. Indeed, the battle between Israel's "Jewish" and "democratic" camps is fought primarily over the strategic high ground of human rights. In other words, the definition, interpretation, and priority of human rights within the Jewish nation-state constitute constant points of friction between the two focal points of Israeli identity.

This is partly a result of the failure of Israel's founders to enact a constitution. In the absence of a full constitution, the State of Israel has enacted a series of basic laws that address human rights. But these laws remain crippled and limited. Repeated efforts to reinforce Israel's human rights charter have come to naught. A key reason for this failure is the widespread sense of an inherent conflict between human rights and Jewish tradition. The primary obstacle to broad acceptance of a constitution is the fear that a liberal constitution would bring the "struggle" over the character of the state to a unilateral conclusion, transforming the elliptical balance between Judaism and democracy into a democratic circle with liberal-Western identity at its center. Yet the lack of a human rights charter is undesirable for a democratic country and unthinkable for a Jewish country.

The appropriate response to this dilemma is to develop a Jewish human rights charter – a charter whose spirit is both uniquely Jewish and liberal. Though opponents will invariably rise up on both ideological extremes, we believe that a charter of this sort would be accepted by the vast majority of Israel's Jewish population. A Jewish doctrine of human rights, if widely accepted, could offer a remedy for Israel's embattled society. It would contain an agreed definition of the state as "Jewish and democratic"; expand the circle of consensus on the legitimacy and trajectory of the State of Israel; and help mitigate the rivalry between the sources of political and religious authority in Israel, opening the way to a richer and more harmonious existence under conditions

of cultural dualism. An accepted doctrine of human rights would also help ensure that Israel continues to be a unique nation–state without distancing the Jewish state from the family of democratic nations. Abroad, such a doctrine would bolster Israel’s legitimacy as a Jewish democracy and foster greater cohesion between the various components of the Jewish people.

To accomplish this, IDI’s Human Rights in Judaism Project will demonstrate the richness of the Jewish human rights lexicon and bring to light existing possibilities, within Jewish thought and *halakha* (Jewish law), for innovative answers to the question of human rights and obligations in a Jewish and democratic state. It is sometimes noted, but seldom explored in any depth, that liberal thought on human rights is informed to a great extent by Jewish ethics. The Jewish people were among the leading historical proponents of human rights and obligations. The idea that humanity was created in the divine image, and the ensuing practical–legal ramifications of this notion, form the foundation for Jewish thought and *halakha*.

The project will assess what Judaism, in the broadest sense of the term (jurisprudence, philosophy, culture, and historical memory), has to say about fundamental liberal rights such as liberty, dignity, welfare, occupation, equality, and freedom of expression. At the same time, we intend to take the opposite tack by examining the unique set of rights and obligations offered by the Jewish worldview, and exploring their relevance to sovereign life in the Jewish nation–state. This two–pronged approach will reveal areas of overlap and consensus between important parts of the liberal and Jewish lexicons, on one hand, and highlight areas of divergence between the two traditions in a way that enables each to be informed and enriched by its counterpart on the other.

The project aims to build the intellectual infrastructure – a canon, library, lexicon, discourse, and set of tools – which will be placed at the disposal of policymakers, legislators, judges, opinion makers, educators (of all sectors) and the public at large, for use in addressing the myriad practical questions that require solutions of a Jewish and liberal character.

◀ From Ruth to Natasha: On the Future of Conversion in Israel

Yedidia Z. Stern

Introduction

Conversion, the process by which non-Jews become Jews, has always occupied an important place on the Jewish agenda. From a theoretical standpoint, conversion is a fascinating phenomenon in many respects: religious and national, historical and social, philosophical and psychological. From a practical standpoint, conversion is an important social institution that is vital for Jewish continuity. Jewish attitudes toward conversion have evolved over the generations, reflecting the changing circumstances and needs of the Jewish collective. But never before has the controversy over this institution's definition been as critical for the future of the Jewish people as it is today. And never before has the controversy centered on the policies appropriate for the Jewish nation-state.

This paper begins with a discussion of the current problem, which stems from the gap between the liberal character of the State of Israel's immigration policy and the dogmatic manner in which *halakha* (traditional Jewish law, as distinct from Israeli law) is applied to the practice of conversion by the State's religious establishment. It then reviews the main phases in the evolution of the Jewish establishment's policy on conversion, from Ruth, the paradigmatic Jewish convert, to Natasha, her present-day counterpart in Israel. It concludes with a call for revising Israel's official policy on Orthodox Jewish conversion – in a manner that is fully compatible with the traditions of Jewish law – in order to respond to the very pressing needs of our times. Unless Israeli conversion policy changes soon, conversion may cease to be relevant as the defining mechanism of Jewish identity, and the Jewish people may be split in two. Such a development would change the face of Jewish history and destroy the delicate relationship between religion and nation in Judaism.

The Impact of the Law of Return

The era of globalization is characterized by movements of mass migration that stem from a variety of factors, including gaps in standards of living between different parts of the world. These trends of migration place pressure on the ports of entry of developed countries, which generally respond by enacting restrictive immigration policies.

The State of Israel's response to immigration, however, has been unique. Substantiating Zionism as the movement of Jewish national liberation, the State of Israel proudly enacted the Law of Return, which guarantees automatic entry to any Jew who wants to

come to Israel. This law is one of the primary instruments enabling Israel to fulfill its role as the Jewish nation-state. Since 1948, it has allowed millions of Jews to return to their homeland after centuries or millennia in exile. In fact, since the founding of the State, Israel's population has increased more than tenfold, to a large degree as a result of immigration under the Law of Return.

In practice, however, the Law of Return has thrown open Israel's gates more widely than was perhaps originally intended. In many families around the world, Jews, and non-Jews are intertwined, and the Law of Return ensures entry not only to Jews, but also to people who are related to them. The Law of Return defines a "Jew" as someone who was born to a Jewish mother or who has converted to Judaism. However, it also automatically grants the right of entry to anyone who is married to a Jew, whose father is a Jew, who is the grandchild of a Jew, or who is married to a child or grandchild of a Jew. What this means is that if a Jewish man married a non-Jewish woman in Russia 80 years ago, and the two of them passed away in their native country 20 years ago, all of their children and grandchildren, as well as their respective spouses, are automatically permitted to immigrate to Israel – even if they themselves have no connection to Judaism.

The Current Crisis

As a result of the Law of Return and the influx of about one million *olim* (new immigrants) from the former Soviet Union (FSU), there are now over 300,000 immigrants from the former Soviet Union who are citizens of the State of Israel, but are not Jews according to Jewish law. Each year that number swells by approximately 8,000 non-Jewish immigrants; in fact, the percentage of non-Jewish individuals immigrating to Israel under the Law of Return is steadily increasing from year to year. In addition, natural growth adds approximately 3,000 non-Jewish children to this group annually. Significantly, some 80% of children who have immigrated to Israel from the FSU since the year 2000 are not Jews according to Jewish law.

The situation has complex ramifications – both for the immigrants as individuals and for Israeli society as a whole.

On the level of individuals, basic human rights of non-Jewish immigrants are often violated in Israel. For example, the laws of marriage for Jews, Muslims, and Christians in Israel are determined in accordance with the practices of each religion. Since Jewish law does not sanction marriage between Jews and non-Jews, and since there is no civil marriage at present in Israel, non-Jewish immigrants cannot marry Jews. This means that 80% of the population of Israel is off-limits to them for the purpose of marriage. Once they marry (which can only happen outside of Israel), their status as non-Jews impedes their ability to adopt Jewish children. When they die – even as soldiers on the battlefield – they may not be buried in Jewish cemeteries. In other words, this sizable group is subject to real discrimination.

Marriage is an example of an individual issue that becomes a national issue, since there is concern that Orthodox Jews will introduce family lineage charts to distinguish

between Jewish and non-Jewish individuals for the purpose of marriage. The outcome of such an initiative would be a historic division of the Jewish people into two large segments that cannot marry each other.

In addition, Israeli society has tribal characteristics that make it difficult for non-Jewish immigrants to integrate. There have been several displays of anti-Israeli behavior, and even anti-Semitism, among alienated groups within the immigrant community in recent years. An immigrant child whose classmates are all going through the Jewish coming-of-age ritual, the *bar* or *bat mitzvah*, is likely to feel estranged when confronted with the fact that he or she may not take part in this rite of passage. This experience, and others like it, may jeopardize the ability of these children to identify with the Jewish state, and puts their long-term absorption in Israeli society at risk.

An additional national issue is the threat that a large non-Jewish population poses to the preservation of the Jewish character of the Jewish state. There is an ongoing and significant increase in the number of citizens in Israel today who are not Jews. It is impossible to anticipate the magnitude of non-Jewish immigration in the future and its impact on the Jewish character of the State.

The overall picture is not pretty: A sizable group of people living in Israel are sociologically Jews – their mother tongue is Hebrew, they are educated in Israeli schools, they serve in the Israeli army; but they are not Jews by religion, nor are they recognized as such by Israeli law. If this situation is allowed to continue, it could lead to tragedy, both on an individual plane and on the national level.

What is the solution to this problem?

The Option of Conversion

On the face of it, the solution seems obvious and readily available: Non-Jews who have immigrated to Israel because they are related to Jews should convert to Judaism. This would be in their personal interest as well as in the national interest. In fact, the number of immigrants who undergo the conversion process in Israel is extremely low: only 1,200-1,500 people convert each year, half of them in the framework of their army service. In other words, the total rate of conversion in Israel today is less than half of the natural growth rate of the non-Jewish immigrant community (some 3,000 births a year). If one considers the annual rate of non-Jewish immigration from the FSU as well (approximately 8,000 immigrants a year), the annual growth of this community is more than ten times the rate of conversion.

This statistic is surprising. Studies indicate that the vast majority of immigrants from the FSU want to be part of the Jewish people. According to one study, approximately two-thirds are either somewhat interested or very interested in being part of the Jewish people. Only ten percent of them choose to register as Christians in the Israeli population registry. In the Soviet Union, where religion is determined by paternity, these immigrants were considered Jewish if their fathers were Jewish. Consequently many of them see

themselves as Jews, even if Jewish law, which follows the matrilineal line of descent, says otherwise. Life in Israel, and in particular the security situation, further intensifies their sense of belonging and identification with the Jewish people.

Nevertheless, this desire to be Jewish is not reflected in demand for conversion. While prior to their immigration to Israel, nearly half of these immigrants express interest in conversion, this number drops after immigration. In fact, according to some studies, only six percent of the immigrant population is even considering going through the conversion process. What explains this lack of interest in conversion in Israel? The obstacle lies in the State of Israel's conversion policy and the excessive demands placed on would-be converts. Most immigrants from the former Soviet Union know that the conversion process is lengthy, complicated, and sometimes even humiliating, and they want nothing to do with it.

The State of Israel's Conversion Policy

As a general rule, the Chief Rabbinate of Israel recognizes conversion only if it is conducted by specific religious courts. The majority of judges on these courts make it difficult for candidates to complete the conversion process, which can often take upwards of a year. For them, the process is intended not only to convey information about Judaism to the potential convert, but also to test if he or she is religiously suited to joining the Jewish people in at least three respects:

1. **Sociologically:** Has the candidate joined a religious community? Are his or her children registered in religious schools or secular schools? (Rabbinic courts require converts to send their children to religious schools as a condition for conversion.)
2. **Psychologically:** Do the candidates consider themselves to be religious? What is their motivation for converting to Judaism?
3. **Behaviorally:** Do the candidates adhere to a traditionally religious lifestyle? Are they committed to strict Sabbath observance and to eating kosher food? Do the men wear skullcaps?

Candidates who meet all of these requirements are given an examination on Jewish law and observance by the religious court. If they do not fail, they are allowed to perform the rituals of circumcision and immersion in a ritual bath that complete the conversion process.

The problem with this process and its requirements is that the vast majority of non-Jewish immigrants have little interest in pursuing an observant lifestyle. They see themselves as joining a nation, not a religion. They do not want to be different from the secular Jewish majority in Israel, and cannot understand why they are being asked to do things that most Israelis who were born Jewish do not do. In practice, many immigrants, in order to convert, are forced to pretend to be someone they are not. As a result, the road to joining the Jewish nation is often paved with lies and deceit. It is not surprising that so few choose to go down this road.

The *Halakhic* Question

Given the current state of affairs, and assuming that the State of Israel wants to maintain conversion as a religious practice in accordance with the dictates of Jewish law, the central question is: Does Jewish law in fact require converts to Judaism to observe the *mitzvot* (commandments)?

This is a question about the essence of conversion in Jewish law. Is conversion the act of joining a religion or the act of joining a nation? If conversion is an act of joining the Jewish religion, one can understand the stringent policy of the religious courts. But if conversion is essentially an act of joining the Jewish people, it may be possible to accept converts without demanding that they fulfill prerequisites that pose near-insurmountable obstacles to conversion under present circumstances.

In past generations, this question was never fully explored because religion and nation were interwoven. It was clear that converts were joining a collective composed of both religion and nation, and that these elements were inseparable. However, this is no longer true. In our generation, most members of the Jewish people do not observe the commandments of the Jewish religion. They maintain their national identity even absent religious commitment. This leads to an additional question: If it is possible to be fully Jewish without religious commitment, might there be room to modify the guidelines for entry into the Jewish collective? Does acceptance of the yoke of *mitzvot* have to be an ironclad prerequisite for conversion? In fact, a variety of approaches to this question can be found in *halakhic* literature.

Traditional Approaches to Conversion

Within *halakhic* literature, different opinions regarding conversion can be found. Some rabbinic authorities see observance of the commandments as a condition for joining the nation of Israel, while others believe that joining the nation of Israel is a condition that obligates a person to observe the *mitzvot*.

The 9th-century Babylonian sage Saadya Gaon, for example, asserted that “Our nation is only a nation by virtue of its Torah” (*Emunot Ve’de-ot*, 3:7). This teaching reflects the opinion that there is no such thing as national existence without religion, and that religion is a necessary component in the forging of national identity.

On the other hand, there is also a clear tradition in Jewish law that sees Judaism as being first and foremost the condition of belonging to a specific “people” – in other words, the obligation to observe the *mitzvot* is a derivative obligation stemming from the condition of first being a part of the Jewish people. The Book of Ruth, which relates the story of Ruth the Moabite’s conversion to Judaism, hints at this approach. In asserting her conviction to join the Jewish people, Ruth says to her mother-in-law Naomi: “Your people shall be my people and your God, my God” (Ruth 1:17). This implies that one first joins the Jewish nation (“Your people shall be my people”) and only then becomes obligated to observe the *mitzvot* (“and your God, my God”). Ruth is the paradigmatic

convert, the great-grandmother of King David, from whose seed – according to tradition – the Messiah will come.

Contemporary religious authorities have also considered the possibility that adopting Jewish nationality might precede adopting the Jewish religion. These include two Chief Rabbis of Israel: Rabbi Shlomo Goren, who was the Ashkenazic Chief Rabbi from 1973-1983, and Rabbi Eliyahu Bakshi Doron, who was the Sephardic Chief Rabbi from 1993-2003. (Rabbi Bakshi Doron's opinion can be found in *Binyan Av*, responsum 22.) In Rabbi Goren's words: "The truth is that every conversion is based on the convert's desire to join the Jewish people... because according to *halakha*, only those who belong to the Jewish people are obligated to observe the *mitzvot*" ("*Kfira B'am Yisrael L'inyanei Giyur*" in *Shanah BeShanah*, 5743). In other words, conversion is not the act of adopting a new religion, but the act of joining a people.

Rabbi Goren's comment raises the question of the would-be convert's motivation for converting. There is a rabbinic stipulation that conversions can only be performed if the convert's motives for joining the Jewish people are pure. An example of such a stipulation can be found in the Talmud's statement: "Anyone who converts because of a woman, because of love, because of fear – he is not a convert" (Tractate *Yevamot* 24b). This position is in accordance with the view that conversion is the act of joining a religion rather than a people.

The vast majority of sources, however, state that we do not examine the convert's motives. The Talmud tells of a disagreement between Hillel and Shammai on this matter: "On one occasion, it happened that a certain non-Jew was passing behind a house of study, when he heard the voice of a teacher reciting: 'And these are the garments which they shall make; a breastplate, and an *ephod*' (Exodus 28:4). Said he, 'For whom are these?' 'For the High Priest,' he was told. The non-Jew said to himself, 'I will go and convert, so that I may be appointed a High Priest.' He went before Shammai and said to him: 'Make me a convert, on condition that you appoint me a High Priest.' But Shammai repulsed him with the builder's cubit that was in his hand. The non-Jew then went before Hillel, who made him a convert..." (Tractate *Shabbat* 31a).

Important rabbinic authorities in the Middle Ages, such as Rabbi Yitzchak Alfasi (known as the "Rif") and Rabbi Asher ben Yechiel (known as the "Rosh"), followed the example of Hillel and chose not to concern themselves with the motives of potential converts. Other authorities did pay attention to motives, and required that proselytes convert for altruistic reasons. But even purists like Maimonides and Rabbi Yosef Karo considered conversions that were driven by ulterior motives to be valid if the circumcision and ritual immersion ceremonies had already taken place.

Rabbinic authorities throughout the ages also considered the convert's commitment to observing the *mitzvot*. They differed as to whether or not a potential convert must agree to uphold the commandments of the Torah.

Until the 12th century, all religious authorities believed that circumcision and ritual immersion conducted under the auspices of a religious court were sufficient for conversion. Until that time, conversion was mainly a ceremonial procedure, a ceremony

of rebirth. Since the convert had not been present when the covenant was made at Mount Sinai, these authorities reasoned, he had to be born into the collective through a ceremony. According to this approach, the way to become Jewish is to be born Jewish – either biologically or ceremonially. Throughout this period of time, there is no evidence that converts were required to engage in preliminary studies or observe the *mitzvot* as a prerequisite for conversion.

In the 12th century, the *Baalei Tosafot*, a group of eminent Ashkenazi scholars, added the “acceptance of *mitzvot*” as a requirement for conversion. At first, this requirement was interpreted in a very narrow manner, and the motives and subsequent behavior of the convert were not examined. In the 14th century, however, Rabbi Menachem Hameiri stated: “Afterward, they inform him of the yoke of a few easy and a few serious commandments, and of their punishments... If he changes his mind, he leaves. And if he says ‘Be that as it may,’ he is accepted, and is circumcised without delay.”

It is significant that the present-day requirement that the convert accept fully the yoke of *mitzvot* began only in the late 19th century. The *Beit Yitzhak* responsa, which were compiled by Rabbi Yitzhak Shmelkish of Lvov, state: “A person who converts and accepts the yoke of the commandments, but has no real intention of observing the commandments, is not considered a convert – since it is his heart that the Merciful One desires...” (*Beit Yitzhak*, Part 2, No. 100). According to this source, the ceremony is no longer sufficient. This is an enormous change, which was likely a response to the rise of secularism, the struggle against the Reform movement, and the resistance to Zionism, which placed the national component of Jewish life at the center.

In contrast, Rabbi Shlomo Kluger, a contemporary of Rabbi Shmelkish, ruled differently: “Acceptance of the *mitzvot* is only a device. The primary features of conversion are circumcision and ritual immersion...If one was circumcised and ritually immersed for the purpose of conversion, but did not accept the yoke of the commandments beforehand, he is considered to be a convert according to the laws of the Torah, without question. The [prerequisite of] acceptance of the yoke of the commandments is only a rabbinic requirement” (Responsa *Tuv Ta’am Ve-da’at*, 230).

This inclusive position prevailed among various religious sages, especially the Sephardic authorities. Rabbi Benzion Uziel, Israel’s first Sephardic Chief Rabbi, asserted: “Based on the Torah, we are permitted and commanded to accept converts, men and women, even if we know they will not observe the commandments. They will pay the price for their sins, but we will be clean” (Responsa *Mishpetei Uziel, Even Ha-ezer*, No. 20).

Conclusion

For the most part, the Jewish legal tradition views conversion as a process of joining a people, the Jewish nation. Only after this process is completed is the convert obligated to observe the commandments. The current requirement that demands that candidates for conversion commit to joining the Jewish religion as a condition for admission to the nation is the outcome of a struggle over the meaning of Judaism and the place of religion in Jewish life.

What, then, should be the position of rabbis of our generation, and particularly rabbis in Israel, who are dealing with a reality of hundreds of thousands of non-Jewish immigrants who are *already* integrated into Israeli society?

There are very serious and strong arguments in favor of a stringent *halakhic* conversion policy. The rationale for this 'hard line' includes the fact that, due to the desirability of immigration to Israel, the State of Israel should set stringent criteria to stem the flow. It is not in the interest of the State of Israel to allow the Law of Return to be used by masses of people who do not identify as Jews, but who may decide to become Jewish because of economic or other opportunistic factors.

There are, however, other equally serious considerations that would argue in the opposite direction, and would favor a more lenient *halakhic* approach to conversion. For if a strict *halakhic* policy is adopted, and the difficulties described above continue on both the individual and the national levels, conversion may become irrelevant. A new historical conception may take root – an acceptance that it is possible to gain entry into the Jewish people without any religious procedure whatsoever. If conversion becomes irrelevant and there is massive absorption of "non-Jewish Jews" in Israel, the result could be the development of a norm in which Judaism exists as a sociological classification and nothing more. Were this to happen, we would be faced with a genuine revolution in the history of the Jewish people.

Moreover, if the conversion problem is not resolved, the Jewish people may split into subgroups that do not recognize each other and do not marry each other. The ability of these subgroups to function as one national entity would be greatly reduced.

An additional reason to consider a more inclusive approach to conversion in Israel is the future of Zionism. With every significant wave of immigration to the State of Israel today, the same question is raised anew: Should Israel accept or reject intermarried families? The more obstacles are put in the way of the would-be converts, the more obstacles are placed before immigration as a whole. Is it in the interest of the Jewish people to prevent immigration to Israel?

Looking beyond the State of Israel, we are all aware of the extent of assimilation in the Diaspora. What should *halakhic* policy be toward Jews who have already assimilated? Would it be right to give up on families in which a non-Jewish spouse is interested in joining the Jewish people? Would it be right to allow the decisions of one generation – the present generation – to cut off sizable portions of the Jewish people forever? For this reason, perhaps a *halakhic* policy should be adopted that would enable those families with an interest in being absorbed into the Jewish nation to convert.

Proposal

How should these very diverse considerations be balanced in the final analysis?

Jewish civilization is composed of elements of religion, culture, and nation. Today, as in the past, Jewish identity is formed by a combination of these three elements. Although it is possible to be Jewish without religious identity, it is impossible to deny that religion is a factor that preserved the Jewish people as a group during 2,000 years of exile. If we disconnect the process of conversion from its religious significance, we will disconnect ourselves from our historical memory. Indeed, it can be argued that there is no Jewish culture without Jewish tradition, and that tradition, in Jewish collective memory, is based on religious beliefs and practices. At the same time, Jewish religion must respond to reality if it is to be relevant to real life.

Therefore, the current proposal – which is rooted in the *halakhic* rulings surveyed in this article – is that the rabbinate should continue to be strict with any potential convert whose previous identity was not at all Jewish, and who is seeking to change his or her subjective identity through the act of conversion. On the other hand, it is proposed that the rabbinate should be lenient and accepting toward anyone whose previous subjective identity was Jewish, and who merely wishes to confirm this identity by the act of conversion.

How would this proposal be implemented in Israel today? The requirement of accepting “the yoke of the commandments” would be waived regarding potential converts who have already demonstrated their Jewishness – for example, a candidate for conversion who has served in the army, who speaks Hebrew, who identifies with the State of Israel and lives a Jewish life in the social, psychological, national, and Zionist realms. For such a person, conversion is not identity-forming; it simply confirms a previously existing identity. On the other hand, the requirement that a convert undertake to fulfill the commandments would still apply to anyone who seeks to join the Jewish people from the outside, and who has no substantial connection with them. This would prevent the dilution of the Jewish people by masses of converts who have no previous ties to the Jewish people and are not genuinely interested in becoming a part of the Jewish collective.

How would this distinction apply to cases outside of the State of Israel? A couple of mixed faith whose lifestyle exhibits obvious connections to Judaism – for example, they are part of a Jewish community, observe the festivals, belong to Jewish organizations, etc. – would be treated leniently if the non-Jewish partner sought to convert. In such a case, the process of conversion would consist of bestowing religious validity upon someone who has already joined the Jewish people sociologically.

According to this proposal, “secular conversion” – an oxymoron – should not be permitted; however, the gates of religious conversion should be opened wider. Although the personal identity of the convert and his or her sociological circumstances should not be considered sufficient conditions for becoming part of the Jewish people, they should merit greater leniency in the religious conversion process. If this view is adopted, religion would endow subjective feelings of identity and belonging with symbolic meaning, while subjective feelings of identity and belonging would acquire added validity from religion.

Opening the gates of conversion is essential to ensure that the Jewish people remains one people. This is true both in Israel, when dealing with immigrants from the former Soviet Union, and in the Diaspora, when dealing with mixed marriages.

Israel's Economy

OECD Economic Surveys: Israel 2009

Source: OECD Economic Surveys Israel 2009, © OECD, Vol. 2009/21, Supp. No.3, January 2010, pp. 6-16:

www.ihaklai.org.il/Portals/0/Documents/articles/OECD%20Economic%20Surveys%202009_%20Israel%20.pdf

Basic Statistics of Israel, 2008

THE LAND			
Area (1,000 km ²)	22.1	Land area (1,000 km ²)	21.6
THE PEOPLE			
Population, 31 December (1,000)	7,374.0	Civilian labour force (1,000)	2,957.1
<i>of which:</i>		<i>of which:</i>	
Jews	5,569.2	Jews	2,507.9
Arabs	1,487.6	Arabs	372.7
Population under 15 (% of total)	28.4	Employment (1,000)	2,776.7
Population aged 15 to 64 (% of total)	61.9	<i>of which (% of total):</i>	
Population over 65 (% of total)	9.7	Agriculture, forestry and fishing	1.7
Population of major urban areas (31 December, 1,000 persons)		Manufacturing	15.6
Tel Aviv district	1,227.0	Trade (wholesale and retail)	13.6
Jerusalem district	910.3	Business activity	14.0
Haifa	528.5	Education, health and community services	27.2
GENERAL GOVERNMENT			
Present composition of Knesset:		Present Government: coalition	
Kadima	28	Last general election: February 2009	
Likud	27	General Government (% of GDP)	
Yisrael Beitenu	15	Total expenditure	43.3
Labor Party	13	Total revenue	41.2
Shas	11	Gross public debt	78.0
Torah Judaism	5		
Political parties with less than five seats	21		
PRODUCTION			
Gross Domestic Production (NIS billions)	726.9	GDP per capita (NIS)	98,572
FOREIGN TRADE			
Main exports (percentage of total value):		Main imports (percentage of total value):	
Diamonds	25.3	Petroleum, petroleum products	16.7
Chemicals and related products	21.5	Chemicals and related	11.0
Telecommunications, sound recording and reproducing	6.7	Machinery and transport	27.7
Electrical machinery and appliances and parts	6.3	Road vehicles	6.4
Petroleum, petroleum products	5.0	Diamonds (gross)	14.4
THE CURRENCY			
Monetary unit: New Israeli Shekel		Currency unit per US dollar, average of daily figures	
		Year 2008	3.5849
		November 2009	3.7206

Note: For technical reasons, these figures use Israel's official statistics, which include data relating to the Golan Heights, East Jerusalem and Israeli settlements in the West Bank.

Executive Summary

Effective macroeconomic stabilisation policies along with market-oriented structural reforms have helped support a high average rate of growth. Also, the economy has weathered the recent global downturn well, and the policy responses have been generally appropriate. However:

- The Bank of Israel should cease heavy exchange-rate intervention to avoid damaging its credibility.
- As elsewhere, the authorities need to reflect on financial regulation; one useful change would be to transfer the Ministry of Finance's supervisory roles to a more independent body.

Levels of public debt and expenditure have been brought well within the range of OECD countries' outcomes. But slimmer government also means sharper trade-offs between reducing debt, accommodating legitimate spending demands and cutting taxes. Long-term fiscal sustainability needs to be reinforced.

- Caution in pursuing further corporate and personal income tax cuts, making the temporary increase in the VAT rate permanent, and the elimination of low-priority tax expenditures would all be helpful.
- The budget expenditure rule should be replaced by one anchored in a long-term debt goal, and measures should be implemented to make budgeting processes more transparent.

Secondary and tertiary attainment in the working-age population is impressive as a whole, but weak outcomes in the Arab and Ultra-orthodox communities are contributing to low employment rates and poverty. Also, international test scores indicate a more widespread problem of weak core skills.

- Reforms underway in state primary and secondary education (particularly the New Horizon programme) are welcome, and a similar package should be negotiated for upper-secondary schools.
- More strenuous efforts are required to level the educational playing field for Arab-Israelis.
- More vocationally oriented learning needs to be encouraged in the Ultra-orthodox community.
- Another attempt should be made to boost state tertiary-education funding while raising tuition fees and strengthening the student loan system.

The welcome "welfare to work" approach in social policy will help to enhance work incentives, thereby achieving a sustainable reduction in poverty levels. It should be

developed further and be accompanied by other measures that more strongly focus labour-market and social policies on low-income households:

- The Light for Employment programme and the earned-income tax credit (EITC) should be rolled out on a nationwide basis, though in both cases close monitoring must continue.
- The EITC should be raised along with an increase in the level and coverage of Income Support benefit. Savings on the universal child allowance should be considered.
- Labour-market regulation should be more uniformly enforced, particularly the minimum wage. At the same time its value relative to the average wage should be reduced progressively over time.

Despite much progress, there is plenty of scope to improve the business environment:

- OECD indicators suggest firms are overly hampered by regulation, calling for review.
- Support for investment, R&D and SMEs is complex and demands regular and rigorous programme assessment. Agricultural support should be pared back.
- General competition legislation and enforcement is suitable, but network-industry reform is lagging in some sectors, notably in the production and distribution of electricity.
- Strained road and rail infrastructure require continued policy attention.

Assessment and Recommendations

A small open economy with a dramatic history

Israel's economic development has certain parallels with that of some OECD countries, in particular its earlier move towards market-oriented policies that aided an expansion of high-value adding export sectors. A sea change in macroeconomic policy and a shift towards market-oriented structural reforms was prompted by chronic hyperinflation and unsustainable public-debt levels in the mid-1980s. Anti-inflationary measures were particularly successful, allowing the introduction of inflation targeting in the early 1990s, which brought price increases down to low, single-digit levels by the end of the decade. The early 1990s also saw the emergence of a world-class, export-based high-tech sector specialising in computer hardware and software, medical technologies and pharmaceuticals. Thus, the economy rode high on the dot-com bubble but also slumped following its collapse, with a recession in the early 2000s.

But Israel's unusual history and geopolitical situation means the economy is atypical in many respects. Significant financial and human resources are absorbed by a large defence force and civilian security services; military aid contributes to a large net

balance of inward transfers in the current account; and trade and investment flows are substantial with the wider world, but relatively limited with neighbouring economies. Furthermore, society is complicated, with many policy agendas rooted in ethnicity and religion. And the population has been profoundly shaped by immigration, most notably in recent history by a massive influx from the former Soviet Union in the early 1990s. Immigration flows have subsided since then, but population growth remains well above that in most OECD countries due to high birth rates in the Arab-Israeli and Ultra-orthodox Jewish (Haredi) communities.

A high average long-run growth rate but substantial room for catch-up

In light of the substantial and frequent past shocks to the economy, growth from mid-2003 to mid-2008 was uniquely stable, with almost constant annual real GDP growth at a little over 5%. And, despite past fits and starts and the current downturn, growth has averaged nearly 4% since the mid-1990s, a fast pace compared with most OECD countries. That said, per capita performance has been less impressive, and substantial gaps in living standards with those of top-flight countries remain. GDP per capita on a purchasing-power-parity basis is currently about 80% of the OECD average but, for instance, only 60% of that in the United States. The key challenge here is the need to increase productivity growth over the longer term through both improving the business environment and raising educational outcomes.

Recovery from the downturn is underway

The current downturn is the result of one of the few purely external shocks in Israel's recent history. Conservative lending by banks and relatively light exposure to foreign toxic assets saved the authorities from bailouts, takeovers or emergency surgery to financial-market regulation. Nevertheless, credit flows did contract severely, and the market for corporate bonds dried up completely at one point. This damped domestic demand at the same time as external demand was hit by the wider global recession. Real GDP growth was negative in the final quarter of 2008 and the first quarter of 2009 before turning positive again in the spring. For the full year it is expected to be near zero. For 2010 and 2011, according to OECD projections, growth may be about 2¼ and 3¼ per cent, respectively.

Monetary responses to the recession and recovery have been vigorous...

Following the deepening of global financial problems in September 2008, the Bank of Israel cut its policy rate aggressively. As with many OECD central banks, more unconventional steps were also taken to ease liquidity, including quantitative easing through the purchase of government bonds and technical adjustments to the management of liquidity. The Bank has also responded boldly as the downturn has receded. In August 2009 it raised its policy rate from 0.5 to 0.75% (and did so again in November), a still expansionary stance. No OECD central bank had yet raised rates at that stage in the cycle. In recent months, inflation has been ramped up by one-off factors. However, there are no signs of significant *upcoming* inflationary pressure; yield differentials between indexed and non-indexed bonds indicate that expectations of inflation one year ahead are well within the Bank's target band of 1 to 3%.

December-to-December inflation on OECD projections is expected to be 4.3% in 2009 and 2% in 2010 and 2011.

... and other policy responses generally appropriate

In addition, the government took several measures to assist the corporate bond market, and businesses and households more generally. Though individually helpful, these did not constitute a substantial fiscal boost to the economy. In the Israeli context this was sensible. Falling tax revenues have acted as a significant automatic stabiliser and have strained fiscal balances uncomfortably as it is. As elsewhere, the global financial crisis has prompted debate on the regulation and oversight of the financial sector. *Even though the current system has not shown itself to be obviously problematic, one useful change would be for the supervisory duties directly carried out from within the Ministry of Finance to be transferred to a more independent body;* such direct ministerial supervision is unusual.

A “clean float” policy on the shekel should be readopted

Until 2008, the Bank had been following an orthodox approach of non-intervention in the foreign exchange market. In March that year it began pre-announced, daily foreign-currency purchases of a fixed amount on the grounds that the strong position of the shekel provided an ideal opportunity to build up low foreign-exchange reserves. But intervention continued after reserve targets were met, and the Bank’s press releases increasingly referred to concerns about the level of the exchange rate. Regular interventions were stopped in early August 2009, but simultaneously the Bank announced a policy of *discretionary* intervention, and foreign-currency purchases have continued. Markets began to consider that there is a “dirty float” policy on the exchange rate and speculate as to what the Bank’s intervention price is. In October the Bank attempted to clarify its position, stating that current conditions are considered exceptional and that the market is expected to return to a situation where intervention is only rarely required.

The build-up of international reserves proved useful, attenuating external vulnerabilities when concerns about the downturn were at their greatest. *However, reserves are now more than adequate, and hence a “clean float” should be readopted as soon as possible.* Although the intervention has not been incompatible with inflation targeting thus far, the risk that it becomes so is greater the longer it is sustained. To wit, the pick-up in economic activity is likely to prompt monetary tightening at some point and in these conditions continued heavy intervention would work against the policy-rate hikes and would thus damage transparency and credibility in policy. Other objections to sustained intervention are the opportunity cost of holding extra reserves and the risk of associated capital losses.

Monetary policy is set to become better anchored through new legislation

While Israel was among the first countries to adopt inflation targeting, it was never enshrined in law. Recently, the Bank of Israel and the Ministry of Finance reached final agreement on the details of useful new legislation governing the Bank. The draft law

not only specifies inflation as the primary target of policy but also alters the conduct of policy. Most notably, policy-rate decisions will no longer be made solely by the governor but by majority vote in a new monetary committee. In addition, a board of directors will be appointed to manage the Bank. The Bank will retain its role of official advisor to the government on economic policy.

Commitment to reducing the debt-to-GDP ratio needs to accommodate the costs of achieving structural reform...

Trade-offs in fiscal policy between vital debt reduction, strong spending pressures and promised tax cuts have been heightened by the recent recession. Despite at times draconian past efforts at fiscal consolidation, the ratio of public debt to GDP has remained too high. The upswing to mid-2008 helped bring the ratio down to 78%. However, revenue losses incurred during the downturn are pushing it back up despite impressive efforts made to contain the deficit in the exceptional 2009-10 two-year budget. Central-government deficits are projected to turn out at around 5.5 and 5% of GDP for 2009 and 2010, respectively, and the debt-to-GDP ratio may reach 82% by the end of 2010. Substantial reduction in the debt ratio will require much lower deficits. Achieving this in 2011 may prove difficult because several temporary tax increases are scheduled to end. *Sustainable reductions in the deficit and debt need to be the central focus of fiscal policy.*

This is especially the case because the longer-term outlook for the public finances is mixed. Fiscal pressures due to population aging are expected to be relatively mild by OECD benchmarks, due to favourable demographics and fairly light commitments to pensions, health care and long-term care from the public purse. However, defence spending is several percentage points of GDP higher than most OECD countries. And civilian spending as a share of GDP has already been whittled down to a relatively low level. Thus, much of the low-hanging fruit for cutbacks through efficiency gains or cuts in services and transfers has probably been picked, though there remains some room to cut back on bureaucracy in some areas. Indeed, the analysis of education and welfare policies in this *Survey* illustrates that progress in structural reform will most likely require an initial fiscal investment.

... by not overplaying rate cuts in corporate and personal-income tax

Cuts in the headline rates of corporate tax and the upper rates of personal-income tax are a central theme in the current government's policies, based on a belief that they significantly boost competitiveness and, in some quarters, that they are largely self-financing. However, while such tax cuts have beneficial effects on incentives, some caution is in order. Tax burdens are not the only concern of investors (who are also put off by red tape), nor are headline rates the only determinant of effective tax rates. Rate cuts are generally not self-financing, and positive feedbacks on revenues are anyway neither immediate nor certain. Moreover, as mentioned, creating some budgetary headroom for structural reforms that would enhance competition and achieve social goals would be advantageous. Accordingly, a decision to go ahead with rate cuts in 2010 was surprising under the prevailing macroeconomic circumstances. However, in 2010 the cut will be smaller than originally planned, and the schedule of cuts for

subsequent years was pushed out, which is welcome in light of the uncertain fiscal outlook for that year.

Trade-offs in fiscal policy would be eased by making the recent temporary increase in the rate of VAT to 16.5% permanent. Also, the abolition of some VAT exemptions should be revisited, notably those on some tourist services (including those for the town of Eilat) and for fruit and vegetables. This said, the continued imposition of high purchase tax on cars lacks strong justification. The schedule of rates has been recently adjusted to reflect environmental considerations, but the attractive revenue-raising properties of such taxation probably remain the primary motivation. The environmental returns would be better sought by targeting car use (for instance, through more use of road pricing) rather than ownership. Increased revenues should also be sought by casting a wide net to weed out low-priority tax expenditures. There is room for some cutback in the context of welfare policy (see below). And tax support for the “advanced training funds” (Kranot Hishtalmut), which encourage medium-term saving, makes little sense, especially as, despite the name, the savings can be used for a wide variety of purposes. Finally, international comparison suggests there is room for simplifying tax procedures.

... and by reforms to the “spending rule” and budget processes

While the current budgeting rule that limits real public spending increases to 1.7% per year has played an important and constructive role in fiscal control, *it should be replaced in the not-too-distant future*. Complexities and discretionary leeway in its application undermine its outward simplicity, and the rule makes little sense for the long term. With annual population growth also at around 1.7% and only marginal decline in prospect, increases in GDP per capita of any substance imply public spending as a share of GDP will be continually eroded. Any new rule should be simple, credible and robust. *The alternative rules currently being discussed that anchor spending increases to an explicit debt-to-GDP goal and accommodate cyclical considerations would certainly be an improvement.* “Top down” fiscal discipline should be augmented by other measures. Particular consideration should be given to: requirements on spending ministries to submit more comprehensive multi-year spending plans; greater transparency in the budget material presented to the Knesset; and, obligatory periodic reporting on the long-term sustainability of public finances.

At present the Ministry of Finance not only has strong powers in directing aggregate fiscal policy, but it is also the progenitor of most economic reforms. In principle, a more even balance of expertise and influence across ministries may lend itself to better policymaking. On this basis, and with the budgeting reforms suggested above, line ministries ought to be given more leeway, for instance by cutting the number of budget lines. But caution is required. In the Israeli context the Ministry’s powers are arguably a necessary foil to the idiosyncrasies of Israel’s democratic system. Minor coalition parties are often relatively powerful because their Knesset seats are necessary to the government retaining office. In light of this, a more devolved structure might be more workable if a fiscal council were introduced, such as those in Austria, Sweden, Canada and the Netherlands, although other bodies already monitor public finances.

Tackling the high rates of poverty has to remain a priority

Despite the need for a tough fiscal regime, *Israel's deep socio-economic cleavages must be given due priority*. Just over 20% of households are below the relative poverty line compared with an OECD average of 11%. Poverty is concentrated among the 20% of the population who are Arab-Israelis whose poverty rate is around 50% and the (estimated) 8% who are Ultra-orthodox Jews whose poverty rate is around 60%. Both groups typically live and work in communities that are separate from the mainstream population and that are some distance from the core of economic activity. Both share the same immediate causes of poverty - low employment rates and large families - but the socio-economic backdrop differs enormously. Arab-Israeli poverty is fuelled by poor education feeding through to low-paid jobs for men and by cultural norms limiting learning and work for women. In addition, the OECD's parallel review of Israel's labour-market and social policies documents econometric evidence comparing wages and employment rates that points to discrimination against Arab-Israelis. In contrast, low material living standards among the highly insular Ultra-orthodox community stem more from choice than circumstance. The community puts a great emphasis on learning for men, but largely of a religious nature. Indeed the majority of adult men devote their lives to full-time religious study, with substantial implications for living standards. As for women, a large percentage (over 95%) participate in final examinations in secular subjects although often using a different system of coursework and tests from that used in mainstream education.

Unrealised educational potential and low employment rates represent not only hardship for those immediately concerned, but also untapped resources for the economy as a whole. Issues relating to these communities are core to many of the problems in education and labour-force participation discussed in Chapters 3 and 4 of this *Survey*. Work on solutions cannot wait. Rapid population growth means Arab-Israelis and Ultra-orthodox now account for over 45% of children currently starting primary school.

There are considerable strengths but also some profound weaknesses in the education system

In some dimensions the education system has coped well, considering Israel's high population growth and socio-economic diversity. Indeed, tertiary attainment in the working-age population is remarkably high. However, there are deep concerns regarding Arab-Israeli and Haredi education streams, which are separate from the rest of the population's. In addition, the OECD's PISA study, along with other international tests, indicates that there is a much more widespread problem of weak skills in mathematics, reading and science among secondary-school students. To the extent that workplace training and tertiary programmes fail to offset this deficiency, skills and tertiary qualifications are, on average, weaker than in most OECD countries, putting at risk further expansion of high value-adding activities.

In compulsory education some promising reforms are underway

The "New Horizon" deal struck between government and unions in primary and lower secondary education moves in the right direction, particularly its introduction of

additional classes for small groups of students. In light of this, the obstacles that have prevented a similar deal with upper-secondary school teachers should be overcome in the revived negotiations underway. Reforms outside the New Horizon deal, many of which are in the process of implementation, are also admirable, in particular, the extension of compulsory education, caps on class sizes and the efforts to shift away from rote learning. However, the measures being taken suggest that further reforms to the system of final examinations (Bagrut) may be required. The new funding formula (the Strauss Index), which factors in the socio-economic characteristics of schools' catchment areas, is also welcome. *Budgetary arrangements should be altered so that the formula, or other similar funding strategies, are used more widely. Alternative pathways in the teaching profession should also be expanded. A small-scale programme to bring professionals from other sectors, as well as other programmes to attract young teachers to the profession, reflect a promising approach and one which should be exploited further as a means of widening the pool of potential teachers and increasing flexibility in allocating teaching resources.*

A stronger focus on tackling weaknesses in Arab-Israeli and Ultra-orthodox education is required

More strenuous efforts should be made to level the playing field for the Arab-Israeli population. Despite the policy attention that has been paid to this issue, substantial gaps in educational inputs have remained, such as wide differences in average class size. The various targeted programmes should be evaluated and, if necessary, reformed. In addition, more general reforms in education should put a high priority on reducing inequalities. Equity targets for inputs and outcomes should be adopted.

For its part the Ultra-orthodox community needs to be encouraged to strengthen vocational skills in education as part of wider efforts for a more self-sufficient, and less poverty-ridden, balance between worship and work. With independence from mainstream state education, boys' schools often do not teach "secular" subjects such as mathematics and science. Girls' schools focus more on vocational skills, but early marriage and family life means education and job potential is often not fully realised. Despite this weak commitment to job-oriented skills, the state provides considerable funding for these schools. *Existing curriculum requirements on grants for teaching services in primary education need to be more stringently enforced. Similar conditions should be applied to secondary schools and other sources of state funding, such as infrastructure grants. Indeed, universal core curricula should be considered, which would apply to all schools whether or not they receive state funding.* In areas where schools choose not to accept the conditions for state funding, the budgetary savings could be used to subsidise optional out-of-school private-sector education and training.

... and reforms need to be pushed through in tertiary education

Tertiary-level reform should be brought back on track following the aborted 2008 "Shochat" measures that would have linked increased state funding to a commitment from providers to raise tuition fees and adopt a range of structural changes. *The overhaul had many strengths and should be revived, preferably with deeper changes in some areas. In particular, providers should be allowed greater leeway in setting*

tuition fees. Similarly, bolder reforms to make staff pay more transparent and flexible ought to be made. As well, disadvantaged groups' access to tertiary education should be monitored, and targeted measures adjusted as appropriate. The Shochat Committee proposed bolstering loans and stipends to counter the increase in tuition fees: *indeed no student should be denied access to higher education for financial reasons.* More generally, difficulties in implementing change suggest a need to strengthen government control over education policy in the tertiary sector. While the Ministry of Finance already plays a key role, the Ministry of Education does not, and the central body for tertiary education, the Council for Higher Education, has, at least in the past, represented mostly the interests of providers.

Laudable initiatives to encourage working are underway...

For some years, a “welfare-to-work” approach similar to that in a number of OECD countries has been underway. *First*, contracted private-sector services are partially replacing the regular public employment service (PES) in job placement and in administration of the “employment test” required for income support. The Light for Employment programme (famously known as the Wisconsin programme) operates in four areas, and nationwide rollout is planned after further parametric adjustments. This is broadly welcome. *However, the PES's future role must be firmly established prior to rollout and should dovetail appropriately with contracted services. Also, an open mind to further adjustment of the programme, post rollout, is imperative.* Significant uncertainties regarding the programme's effectiveness remain. *In particular, the lack of immediate competition between providers may prove to be a serious weakness.* *Second*, a small earned-income tax credit (EITC) is available in those areas where Light for Employment operates. Plans to expand this are also welcome. *Indeed, the credit should be increased, particularly if combined with other measures* (see below). That said, take-up so far has been limited and should be closely monitored. *Third*, admirable efforts are underway to help parents combine family and work through wider provision of daycare and early-childhood education. These include significant additional resources and requirements on municipalities in Arab-Israeli neighbourhoods to provide free services for three and four year-olds.

... but need to be backed by additional measures

However, other measures should be taken to tighten the focus of policy on low-income households. As regards the level of cash benefits, *some increase in income support should be made.* If backed by Light for Employment and a more generous EITC, this could reduce poverty levels without excessively compromising work incentives. *At minimum, universal child allowances should not be increased more than is currently scheduled and preferably savings should be sought, for instance by wider application of the lower rates that currently apply only to children born after May 2003.*

The coverage of income support also needs attention. Large numbers of working-age and pension-age households below the poverty threshold are seemingly not eligible for income support. Excessively stringent conditions on car ownership should be reviewed and a general investigation of the coverage of welfare support conducted. Conversely, relatively rapid growth in the numbers receiving disability benefit is somewhat worrying.

Initial processing and reviewing of benefit applications requires attention to curb inflows as a complementary move to the Laron Committee reforms that have made it easier for those already on disability benefit to work.

At the same time, there is room for savings in tax credits that primarily help middle and upper-income earners. In particular, the introduction of mandatory second-pillar pension savings weakens the case for tax breaks on such savings. Also, standard credits on earnings could be reduced. However, on the grounds of equal treatment, the basic credit should be made the same for men and women and those for children ought to be made claimable by either fathers or mothers (at present only the latter may do so).

Tighter enforcement of labour regulation is required, particularly as regards the minimum wage. Light application of the rules is notably contributing to employers' preference for non-Israeli workers in low-wage sectors, because these employees are typically more willing to accept below-minimum conditions. This said, the minimum is high in relation to the average market wage compared with OECD countries, risking negative employment effects, and *the ratio should be progressively reduced over time in parallel with increased enforcement*; there are better ways of ensuring workers a minimum standard of living (notably enhancing the EITC). Some sectors of the economy are dominated by non-Israeli workers under temporary work permits (around one quarter of which are cross-border workers; the remainder are from much further afield). *Measures to limit rent-taking in the permit system in these sectors should be taken*. For some years now it has been Israeli government policy to limit the number of permits given to temporary foreign workers so as to support wages at the low end of the earnings distribution.

There is plenty of scope to improve the business environment...

The business environment is broadly conducive to economic activity but could be further improved. The establishment of low inflation has been helpful, as have reductions in the overall "size" of government and concomitant cuts in tax rates. However, the longstanding presence of a large public debt may have been crowding out business investment, and the flaws in education and low employment rates are compromising the skill base. Also, the OECD's product-market regulation indicators suggest firms face excessive red tape in setting up and running business operations. The government intends to make the process of licensing new firms faster and less costly. A recent land reform includes provisions giving some lease-holders the option of technically owning land (or apartments). This is welcome but is unlikely to have a significant impact on property markets. However, the same legislation also aims to reform the Israeli Land Authority, which may well cut red tape in some aspects of property development.

Government support to business is wide-ranging, with three principal themes: promoting large-scale greenfield investment, small and medium-sized enterprises, and research and development. As elsewhere, the economic arguments for intervention rest on hard-to-measure spill-overs and externalities, and there are multiple options for intervention itself. In light of this, and as frequently recommended in reviews of OECD countries, *the authorities should ensure there are good processes for assessing, modifying, innovating, and where necessary, pruning programmes*.

Support for the agriculture sector remains substantial. Costs are held down by favourable water prices and access to cheap labour via the permit system for foreign and cross-border workers, though agreements have been reached that are reducing these supports. Revenues are notably supported by high seasonal import tariffs. The menu of support should be reduced and made less distorting, for instance through reduction in support payments based on input use.

... and challenges remain in network industries and transport infrastructure

Competition legislation and its enforcement by the competition authority (the Israeli Anti-Trust Authority) are in good shape. However, some areas of network-industry reform lag developments in many OECD countries. *In particular, the Israeli Electricity Corporation's stranglehold on production and distribution needs to be broken.* More generally, though privatisation has been substantial, strong powers have been retained through "golden shares" in some network companies and other enterprises. Also, there appears room to improve oversight in the telecommunications sector: at present there is no independent regulator. And there is ground to be covered in privatisation and exposure to competition in post, sea port and water services. Rapid increases in population and economic activity have generated problems in transport infrastructure, chiefly road congestion in major urban areas and poor public transport in peripheral areas. This will require continued policy attention.

◀ The Political Economics of the Municipalities

Edited by Avi Ben-Bassat and Momi Dahan

The Israel Democracy Institute

2009

Abstract*

Chapter 1: Crisis in the Municipalities – Efficiency versus Representation

Since 2001, many municipalities have been confronted with a serious financial crisis. The problems are not equally severe across the board; they are, however, particularly grave in the Arab communities. Several of the municipalities have had difficulties paying their suppliers, while others have withheld employees' salaries for prolonged periods. In many municipalities, the State has transferred administrative powers from the elected representatives to a specially appointed committee. Several factors have contributed to the scope of the crisis in the various municipalities, including the level of State funding, the political power of the mayor, and the quality of management.

The State assumed a greater role in the management of the municipalities in response to the large deficits that they had accumulated and to their impaired functioning. It should be noted that the extent of State involvement is proportional to the severity of the municipalities' problems. Since 2004, recovery plans have been formulated to aid municipalities in trouble, and a portion of government assistance has been made contingent on better tax collection. Accountants have been appointed to audit expenditures on an ongoing basis in many municipalities, and in a few cases, the collection of property taxes has been transferred to collectors employed by the State. It should be mentioned that all the intervention measures implemented by the State have contributed to the improved administration of the municipalities, but at the price of infringing the residents' representation in the management of their municipalities.

In an attempt to address problems in four major areas, we formulated the following recommendations, taking into account the causes of the crisis and how these proposals could contribute to streamlining the operation of the municipalities, while minimizing the harm to the residents' representation in local government.

- a. State financing for municipalities: We recommend that the balancing grant be raised to the level prescribed in the Gadish Committee's recommendations; however, a portion of the increase must be contingent on raising the collection rate of property taxes. In addition, the balancing grant to regional councils should be reduced, and

* This book was originally published in Hebrew. This abstract was translated to English by Karen Gold.

the resources thus freed should be used to augment the balancing grant of other municipalities.

- b. Financing of State services: The budget for education – both the state budget and the municipal budgets from separate, independent sources – should be allocated on the basis of socioeconomic parameters of the students in accordance with the recommendations of the Dovrat Committee. In addition, government outlays for recipients of welfare services should be universal and contingent on the gradually increasing municipal cost-sharing; the higher the socioeconomic level of the municipality, the greater its share of the cost.
- c. Merger of municipalities: The decision of whether or not to merge should rest with the municipalities themselves and should not be imposed. However, the advantage given to smaller municipalities in the allocation of balancing grants must be done away with, and the sums of money that become available should be considered as a factor that increases the weight given to the municipality's socioeconomic level in calculating the grant.
- d. Strengthening political stability and improving efficiency: In order to ultimately improve the functioning of the municipalities, we propose that the local electoral system be reexamined to determine what measures may be taken to bolster the status of mayors and to reduce political fragmentation in the local council. Additionally, the new Municipalities Bill should be adopted, and the threshold that is required to appoint an accountant to supervise spending in a municipality that has a budget deficit should be lowered.

Chapter 2: Politics of Crisis in Municipalities, 1997–2005

This chapter analyzes the factors influencing the budgetary status of municipalities in Israel as reflected in their debts and deficits relative to their revenues. This analysis was conducted in two parts: a cross-sectional analysis of 2004 and a panel analysis of the years 1997–2005. The findings show that politics at the local level have a profound effect on budgetary status. Specifically, the cross-sectional data indicate that at the municipal level, there is a correlation between a high degree of political competition and high debt. It was found that Jewish municipalities in which the mayor did not control the local council were characterized by relatively heavy debts. Similarly, Arab municipalities in which there was political competition between several *hamulot* (clans) suffered from high levels of debt. Meanwhile, an analysis of panel data found that municipalities in Israel are subject to the phenomenon of political budget cycles; that is, a rise in local government deficits during election years. Both cross-sectional and panel data indicate that macroeconomic and socioeconomic variables also influence the budgetary status of the municipalities, but – counter to the prevailing wisdom in the literature – the municipality's size has no significant effect on its level of debt.

Chapter 3: The Municipal Budgetary Process in Theory and in Practice

The budgetary process in the municipalities consists of four main stages: drawing-up of the budget by the municipality; approval of the budget by the municipal council; approval of the budget by the Ministry of the Interior; and implementation of the budget. The balance of power among the players involved in each of these stages, and in particular, the power of the central government, affects the fiscal stability of the local government. This balance is shaped by a combination of the legal principles of the budgetary process and their actual implementation.

An examination of the budgetary process in the municipalities indicates a considerable gap between the relative power of the Ministry of the Interior under the law and the degree of its predominance in practice. This gap is reflected in the approval process of the budget by the Ministry of the Interior, and the ministry's oversight and monitoring of the implementation of the budget by the municipalities. The vast majority of municipal budgets are approved after the fiscal year begins and, at times, even after it ends. For this reason, budgetary monitoring is carried out largely on a budget that has not been approved by the Ministry. In addition, the mechanism for budgetary oversight makes it difficult to identify the emergence of a municipal fiscal crisis in real time or soon after. Moreover, the Ministry of the Interior does not take full advantage of its powers under law, which could enhance the incentives for sound fiscal management of the municipalities. In effect, the ministry applies the full weight of its authority only after the fact – when there is already a budgetary crisis – through its powers under the legislative amendments of 2004, namely, the appointment of accounting supervisors, tax collectors, and special committees.

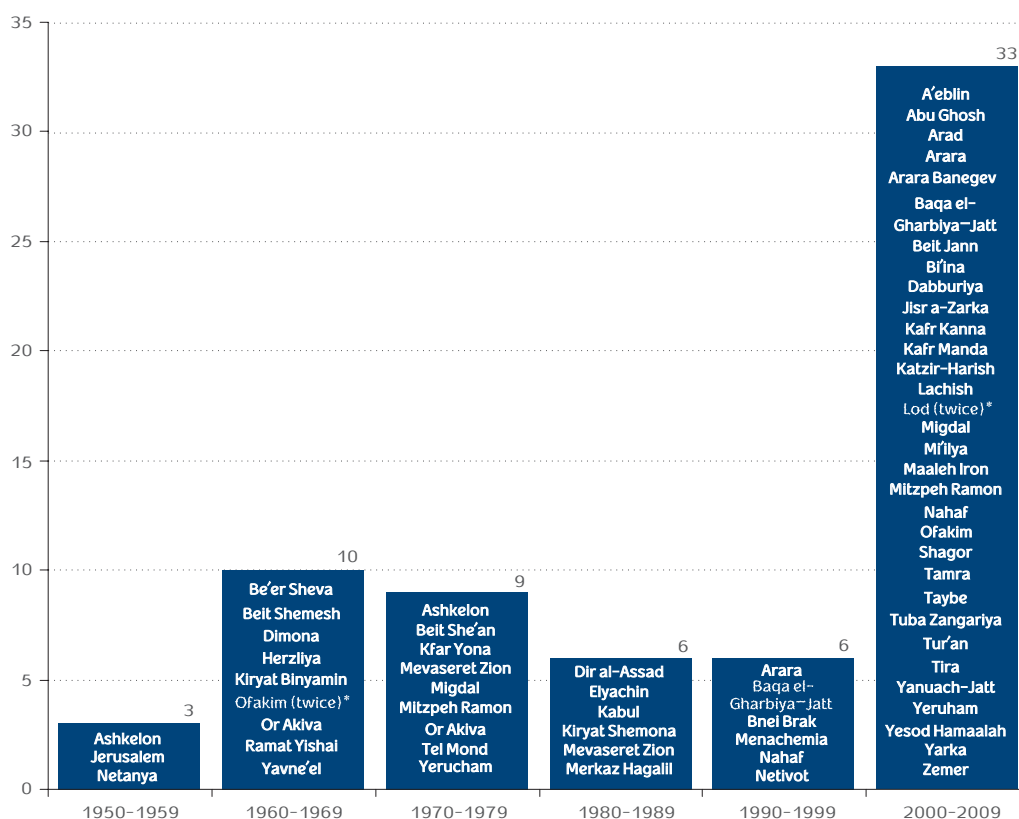
Additionally, the budgetary guidelines for welfare services, particularly the matching system, fail to minimize the exposure of welfare services (provided by the social services departments in the municipalities) to local fiscal crises. The dominant interpretation of the formula for allocating balancing grants leaves them open to lateral cuts in the state budget. In effect, the manner in which the balancing grants are budgeted allows central government to force local government, especially the weaker municipalities, to bear the burden of the State deficit.

Chapter 4: Social Identity and Municipal Elections

The fact that people vote in general elections is surprising from a rational choice perspective since the ability of a single vote to affect the outcome of elections is negligible. But in practice, the overwhelming majority of citizens in developed countries vote in general elections for the parliament and for the presidency. This gap between theoretical prediction and reality has earned the name, "the paradox of voting." In recent years, a new line of research has been developed that resolves the paradox of voting by combining group affiliation with the individual's decision on whether or not to vote. This study uses the unique social structure of the Arab population to examine the validity of this theory. For the first time, this paper presents a quantitative assessment

of the power of voting along *hamula* (clan) lines in Arab municipal elections. *Hamula* loyalties affect not only voting patterns (for whom to vote), but also the rate of voter turnout. In line with the theory of social identity, it was found that voter turnout in Arab municipalities is markedly higher in comparison with Jewish municipalities, even after adjusting for differences in income level, degree of political competition, and population size. The study also revealed an inverted-U relationship between the size of the *hamula* (calculated by the percentage of people with the same last name) and voter turnout rate. This finding is consistent with theoretical models that combine social identity to resolve the paradox of voting.

Figure 1
Local Authorities for which Appointed Committees were Established
(By Decade)



Note: In the following localities, only the local council was dissolved, while the head of the local authority continued to serve: Abu Ghosh, Beit Jann, Zemer, Tira, Mi'ilya and Mitzpeh Ramon.

* In this Local Authority two appointed committees were established in the same decade.

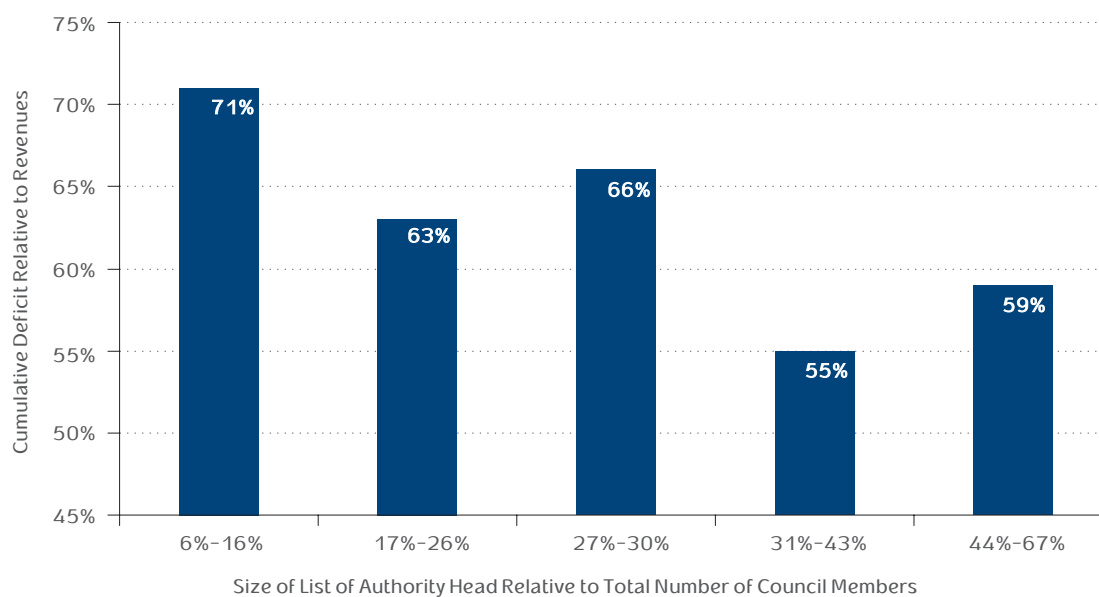
Source: The author's analyses of data from the *Appointed Committees*, (Knesset Research and Information Center, February 2008); Ministry of Interior – *Presentation of Appointed Committees*, December 2009; data from the School of Public Policy of the Hebrew University of Jerusalem.

Table 1
Political Distribution in Local Authorities

Number of Seats in Council	Number of Factions in Council	Number of Factions that Ran in Elections
7	4.2	5.4
9	5.5	8.3
11	6.6	9.5
13	8.0	13.1
15	8.2	12.3
17-31	9.4	13.9
All Authorities	7.0	10.7

Notes: The data represent the average for the last three elections.
The percentage of local authorities with 7-15 seats was 70% in 1998 and 82% in 2003.

Figure 2
Ratio of Debt to Local Revenues by Size of the List of the Head of the Authority (Jewish Authorities)



Source: The author's analyses of data from the Central Bureau of Statistics, Local Authorities in Israel 2006; Ministry of Interior, National Supervisor of Elections; Diskin, A., ed. *The Result of the Elections for the Local Authorities in 2003* (for the Ministry of the Interior, National Supervisor of Elections, 2004).

Figure 3
Residential Municipal Tax, by Cluster and Sector
(Net Annual Amount per Capita, 2006)

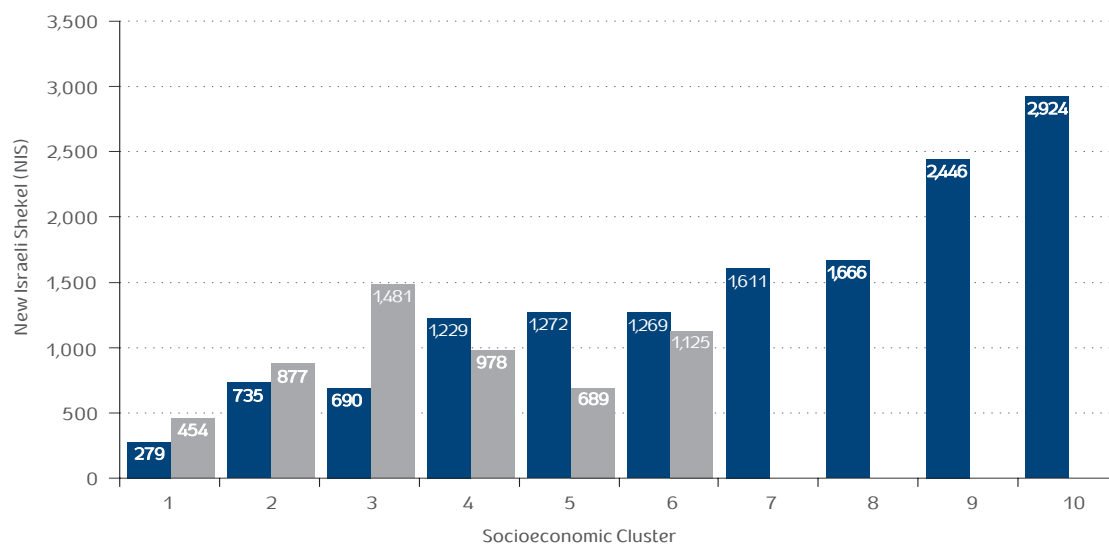
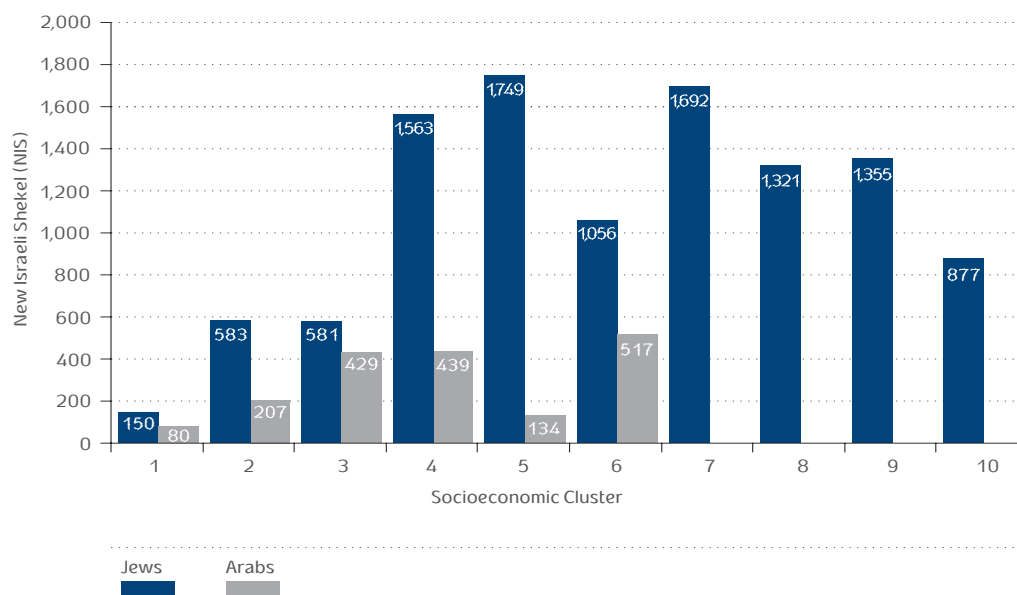


Figure 4
Other Municipal Tax, by Cluster and Sector
(Net Annual Amount per Capita, 2006)



Source: Avi Ben-Bassat and Momi Dahan (eds.), 2009. *Political Economics of the Local Authorities in Israel*, Jerusalem: The Israel Democracy Institute.

◀ The Balance of Power in the Budgeting Process

Avi Ben-Bassat and Momi Dahan

The Israel Democracy Institute

2006

Abstract*

Introduction

The budgeting process in Israel is unusually centralized, in all of its stages. This can be seen from an analysis of the decision-making process in Israel, especially in regard to the role of every institution in the budgeting process. At the stage of preparing the budget and summarizing the government's position, Israel chose to grant strategic power to the Minister of Finance and the Prime Minister, rather than full cooperation with the spending ministers (the cooperative model). These decisions contribute greatly to preserving fiscal discipline, but they exact a price. The almost exclusion of the spending ministries, in which much knowledge and expertise are concentrated, is likely to impair the desired public priorities and the efficiency of public services.

At the legislative stage, the government has preferential power over the members of the Knesset, and in the execution stage the Finance Ministry was allocated the power needed in the centralized model in order to ensure that the implementation of the budget ("with all its amendments") does not deviate from the budget approved by the Knesset.

The choice of the centralized process began after the stability program (1985), following the budget crisis during the years of the "lost decade" (1974-1985). In this period public spending reached 77% of the GDP, and the deficit in the budget amounted to 14% of the GDP. The repercussions of this policy on the rate of inflation and growth were destructive. As a result of the "lost decade," there was a shift to a more market-oriented view and fiscal discipline. The proportion of government expenditures in the GDP decreased slowly and today amounts to only 49%. The deficit in the budget of the public sector in general also decreased significantly, to an average level of 4% of the GNP during 1989-2004. These impressive results would not have occurred had the two main political parties not internalized the necessity of responsible budgetary management. The current levels of public expenditures and deficit allow us to re-evaluate whether such a high level of centralization is still necessary for planning and implementing the state budget.

* This book was originally published in Hebrew. This abstract was translated by Trudy Greener.

Another serious problem is the low level of transparency in the budgeting process. The central problem focuses on the most important stage – the deliberations in the government. For a discussion on the composition of the budget, the government receives the most meager data, which are not sufficient for rational decision-making. The data resting on the Knesset table are inestimably detailed. The dearth of material submitted to ministers during the preparation stage, and the short time allotted to them to shape their positions may harm the efficiency of public services allocation because the bulk of the knowledge and the expertise are located in the ministries.

The book presents additional important issues which have bearing on the efficiency in supplying public services, the possibilities for achieving budgetary discipline, and the reflection of societal priorities. Many countries in the western world equivocate concerning the desired solution to these issues. An issue that constantly arises in Israeli public debate is whether to move from an annual budget framework to a multi-year budgeting. An additional issue that is examined in the book are the advantages and disadvantages of moving from inputs (line items) to results-oriented budgeting. There are countries that have moved over, at least partially, to budget management according to results, i.e., the planning of the budget according to goals.

In the book we presented theoretical background regarding the issues involved in the budgetary process. We analyzed the Israeli experience and we made a comparison between the rules used in the budgetary process in Israel, and those used in the OECD countries.

Main Conclusions

Because of the great importance inherent in maintaining fiscal discipline, especially in light of the high inflation experience that Israel underwent in the past, the centralized process for reaching decisions should be preferred. This choice is in accordance with budgeting process in most of the OECD countries .

At the preparatory stage of the budget, it is desirable to leave in place the strategic power of the Finance Minister and Prime Minister, in relation to the executive ministers. But it is desirable to integrate into this model cooperative elements, as is done in most of the OECD countries. The advantageous use of the information that the executive ministries have regarding the public's demands and the production function of the services they control, may improve the efficiency of public services allocation and production.

The formula for a centralized model in which there are cooperative elements, is the division of the process of decision-making in the government into two stages. Expenditure, taxes, and deficit will be determined in the first stage . In this stage the Prime Minister and Finance Minister will be granted preferred status in the decision-making process, according to the arrangement in place today. After the expenditure and deficit are determined, a decision will be made as to the composition of the budget, through a system that will increase the involvement of the spending ministers

in determining its composition. A division of the process into two stages, together with a change in the balance of power between its players, will allow for the attainment of budgetary discipline, together with higher chances of reflecting better public priorities, and may contribute to more efficient public services.

The implementation of the latter recommendation also requires organizational changes in the government ministries. Since the 1980s, the stronger the position of the Finance Ministry became, the weaker the positions of the spending ministries became. As a result, their ability to attract top-rate personnel declined. The political instability in the past decade has further decreased the ability of the spending ministries to attract high quality officials. The suggested change in the balance of power may attract those people to come to spending ministries. This process will take place gradually, together with the expansion of their authority. The expansion of authority must come at the same time as the granting of responsibility to the ministries for providing the services they are responsible for.

The Knesset's authority for approving the Budget Law and the limitations on private legislation are consistent with a centralized budget process, and are similar to what is common in most of the OECD countries. Nonetheless, it is important to improve and strengthen the supervision role of the Knesset.

Detailed Recommendations

The recommendations are presented in the format of the working chapters in the book.

A. Balance of Power in the Budgeting Process

1. Government deliberations

- a. A series of discussions in the government on the budget will begin on April 1 and end on the eve of the Jewish New Year.
- b. The material for each of the budget discussions will be given to the participants at least two weeks in advance.
- c. The first discussion in the government: the Finance Minister and selected executive ministers will present the government with an input-output analysis of the current year in their ministries.
- d. Following this discussion, a meeting of the Committee of Ministers for the Economy will be held, in which the Finance Minister and the Economic Advisor to the Government will present their suggestions and budget priorities (at the level of clusters) for the coming year.
- e. The discussion about the order of priorities must be in line with the fiscal rules that the government had decided on (see the details in Section 3 below: The Order of Fiscal Goals in Israel).
- f. The second discussion in the government: a vote on the recommendation of the Finance Minister as to the order of priorities at the level of clusters (such as education, health, welfare, and security).

-
- g. The third discussion in the government: the Economic Advisor to the Government will present the government with a macro-economic report and growth forecast. The government decides to establish a “Department of the Economic Advisor to the Government” in the office of the Prime Minister (for details, see the Appendix, “The Economic Advisor to the Government”). Until the establishment of this department, the Research Division of the Bank of Israel will fulfill this above function.
 - h. A fourth discussion in the government: the Finance Minister will submit to the government a draft budget, according to the government ministries. The Economic Advisor to the Government will submit his opinion to the government about the Treasury’s proposal. At the end of the discussion the government will take a vote on the Finance Minister’s proposal.
 - i. The State Budget will be laid before the Knesset no later than the end of October.
 - j. The non-approval of the State Budget by the end of December will lead to the immediate dissolution of the Knesset and new elections.

2. Preparing the Budget

- a. After the second discussion, the Finance Minister will set the ceilings for expenditures for the government ministries and will request proposals and an analysis of new programs.
- b. The Finance Ministry will include the ministries in preparing the transitional pages for the next budget year. A summary of the transitional pages of every budgetary section – i.e., changes dictated in the various budget sections due to population growth, legislation, binding agreements, government decisions and budget agreements – will be signed by the person responsible for that budgetary section in the relevant ministry, and by the deputy responsible for budgets.
- c. If the parties do not reach an agreement about the summary of transitional pages, the disagreement will be brought for decision to the director of the ministry and the person responsible for budgets. In the absence of agreement between them, the amount of the transitional pages will be determined by the Finance Minister, after he takes counsel from the minister responsible for the budgetary item.
- d. The expenditure sections under the responsibility of the Finance Minister and the income sections will be handled by the Economic Advisor to the Government, rather than the Director of the Ministry. Until the establishment of the Department of the Economic Advisor to the Government, the Director of the Department of Research in the Bank of Israel will handle this, instead of the Director of the Ministry, and the Governor of the Bank of Israel instead of the minister responsible for the budget item.
- e. Every executive ministry will establish a Budget Unit whose function will be to build a budget proposal. The resources for the establishment of this unit will come from the budget of the executive ministry.
- f. The Finance Ministry and the relevant ministry will submit proposals for changes (additions and subtractions) in each of the executive ministries, subject to the ceiling for expenditures that had been set.
- g. A mechanism will be established for bi-lateral negotiation between the spending ministry and the Finance Ministry in all levels of management. Controversial issues will be submitted for bi-lateral negotiation between the Finance Minister and the spending minister.

-
- h. The discussion between the spending ministries and the Finance Minister will continue at least one month.

3. Gradual Decrease in Line Items

- a. Every budgetary item (of at least two digits level) will be divided into areas of activity (at the level of 4 digits), according to the expenditure goals, as determined jointly by the Finance Ministry and the relevant ministry.
- b. Every area of activity will be divided into plans for implementation (at the level of 6 digits), according to the economic classification of the expenditure: wages, purchases, support payments, transitional payments, investments, participation, reserve for cost increases – as determined jointly by the Finance Minister and the relevant ministry.
- c. Every executive plan will be detailed at a level known today as Regulations (at the level of 8 digits), as determined solely by the relevant ministry. The detailed work plan will be available to the public through the internet site of each ministry.
- d. A budgetary transfer between sections, between areas of activity and between programs, will require the approval of the Finance Ministry, as is done today, and in cases in which the law determines – the approval of the Finance Committee of the Knesset as well. The Finance Ministry must provide a detailed, written justification if it does not approve a budgetary transfer from section to section, between areas of activity and between programs. The minister responsible for the budgetary section may bring the disagreement to the Prime Minister for decision.
- e. A budgetary transfer from regulation line to regulation line will be done by the relevant ministry, with a report to the ministry comptroller. In unusual situations the ministry comptroller will be authorized to make the implementation of the change conditional on the approval of the Finance Minister. The Finance Minister may not delegate his authority to forbid the implementation of such changes by the ministry.
- f. The budget at the level of detail of regulation lines will be made available to the public on the internet site of the specified ministry. The implementation of the past budget, at the level of detail of regulation lines, will be presented to the public on the internet site of the specified ministry.
- g. The number of programs must be decreased gradually over five years. The number of programs should not be more than 500 after five years from the date of the implementation of the reform.

B. Should the Law of Arrangements be Abolished?

- a. To allow the use of the Law of Arrangements only during an economic crisis. An economic crisis is defined as an expected reduction in the per capita GNP in the next budget year.
- b. In any event, even during a crisis, the Law of Arrangements will not include proposals that are not of any direct budgetary importance.

C. Fiscal Rules in Israel

- a. To determine the target for the growth in real expenditures (minus interest) for a limited number of years. The target will be subject to the budgetary deficit ceiling, at the rate of 3% of the GNP.

-
- b. In countries with a coalition system, such as Denmark and Netherlands, the fiscal rules for expenditure, deficit, and debt were anchored in the coalition agreement signed immediately after the elections, even before the formation of the government. The agreement determines the framework for the budget elements through the entire term. The government decides to consider a framework that will, at the beginning of the term of office, outline a program for the development of the budget elements during its term.

D. Transparency

- a. A Department of the Economic Advisor to the Government will be established in the Prime Minister's office, headed by the Economic Advisor to the Government. Part of its functions will contribute to the improvement in transparency in conducting economic policy (for details of its functions and authority, see section 8 of the Recommendations: The Economic Advisor to the Government).
- b. Every recommendation that the Finance Ministry initiates and submits to the government must be accompanied by a presentation of the expected budgetary cost or saving.
- c. In the presentation of the budget documents, a distinction will be made between existing programs and new programs.
- d. The Finance Ministry will submit to the government, in advance of the third discussion, the group of tables that always appear in the book of the Main Points of the Budget, in the same format and according to the same level of detail that is submitted to the Knesset, but with the addition of the following change: The columns in the table of the budget proposal will include the actual budget for the previous year, the original budget for the previous year, a budget of changes for the previous year, an estimate concerning implementation in the current year, and a budget proposal for the coming year.

Below is a list of the Tables which must be presented to the government:

- Budget Proposal for the Fiscal Year
- Forecast of State Revenues and Loans for the Fiscal Year
- Estimated tax benefits for the Fiscal Year
- Draft Budget for Fiscal Year: Business Enterprises
- The Budget Deficit and its Financing for the Fiscal Year, in addition to an estimate for the implementation of the budget for the current year and the implementation of the budget for the previous year. The detail in the Table should be such that it is possible to calculate the deficit based on the sections appearing in the Table itself.
- Gross Expenditure by Economic Classification for the Fiscal Year, in addition to an estimate for the implementation of the budget for the current year and the implementation of the budget for the previous year
- Revenues and Loans for the Fiscal Year, in addition to the estimate for the implementation of the budget during the current year and the implementation of the budget for the previous year
- Peak in the Labor Force for the Fiscal Year, in addition to an estimate for the implementation of the budget for the current year and the implementation of the budget for the previous year

- Gross Expenditure according to the spending ministries for the fiscal year, in addition to the estimate for the implementation of the budget for the current year and the implementation of the budget in the previous year
 - Net Expenditure according to the spending ministries for the budget year, in addition to the estimate for the implementation of the budget for the current year and the implementation of the budget in the previous year
 - Debt Payments for the Fiscal Year, in addition to an estimate for the implementation of the budget for the current year, and the implementation of the budget during the previous year
 - Interest Payments for the Fiscal Year, in addition to an estimate for the implementation of the budget for the current year, and the implementation of the budget during the previous year.
- e. The explanatory notes accompanying the Tables in the blue books submitted to the Knesset will be submitted in a uniform format for all government ministries. The explanatory notes will include an analysis of the results achieved in the areas of activity of the relevant ministry, in comparison with the goals set in previous years. Extensive space should be devoted to a description of the purposes of the new expenditures.
 - f. The Finance Ministry will publicize quarterly, to the government and the public, all the agreements reached during the course of the year between employees of the budget department and the executive ministries concerning the expenditures of the ministries (“definite budgetary agreements”).
 - g. The monthly implementation of the government budget during the previous month will be publicized by government ministries (and not by clusters, as is the norm today).

E. Should We Move to a Multi-Year Budgeting?

- a. Not to move to a multi-year budget
- b. To cancel the multi-year budget in its present format
- c. In its stead, to draw up two forecasts (realistic and cautious) of the main fiscal variables for the next five years. These forecasts will be drawn up by the Economic Advisor to the Government, and will be submitted to the government, together with the State Budget.
- d. In countries with a coalition system, such as Denmark and Netherlands, the fiscal rules for expenditures, deficit, and debt are anchored in the coalition agreement signed immediately after the elections and even before the formation of the government. This agreement sets the guidelines for budget aggregates throughout the entire government term. Consideration of a format is recommended that will outline, at the beginning of the term, a plan for developing budget aggregates during the term.
- e. To improve the rules concerning the transfer of surpluses from year to year, and to anchor the new rules in the Basic Law of the Budget.
- f. To determine the definition of the required surplus in the Basic Law of the Budget.
- g. To set in the Basic Law for the Budget the date for the transfer of surpluses to the executive ministries.
- h. To cancel the reserve sections in the sections of the executive ministries that are not intended for general reserve or for price rises.

F. Should We Move to an Accrual Basis?

Not to move to an accounting system for the budget on a accrual basis.

G. Should We Move to a Results-based budgeting?

1. The number of budget items

The government decides to decrease the number of budget line items according to the format formulated in Section A (Balance of Power in the Budget Process, section 3).

2. Results-Based Budgeting

- a. Not to move to a results-based budgeting.
- b. To increase the importance of management according to results in the process of drawing up the budget in Israel. In every initiative for a new program or cancellation of an existing program, the initiator (the executive ministry or the Finance Ministry) will be required to prepare a well-reasoned memorandum of the policies that answers the following three questions: What is the purpose of the program? How does the executive ministry intend to achieve the purpose of the program? What is the budgetary cost necessary to do so?
- c. To carry out an evaluation of existing programs once every few years in order to examine their efficiency and their need. The Economic Advisor to the Government will conduct the evaluations.
- d. The government can ask the Economic Advisor to the Government to receive an evaluation of the programs in the socio-economic sector.

H. The Economic Advisor to the Government

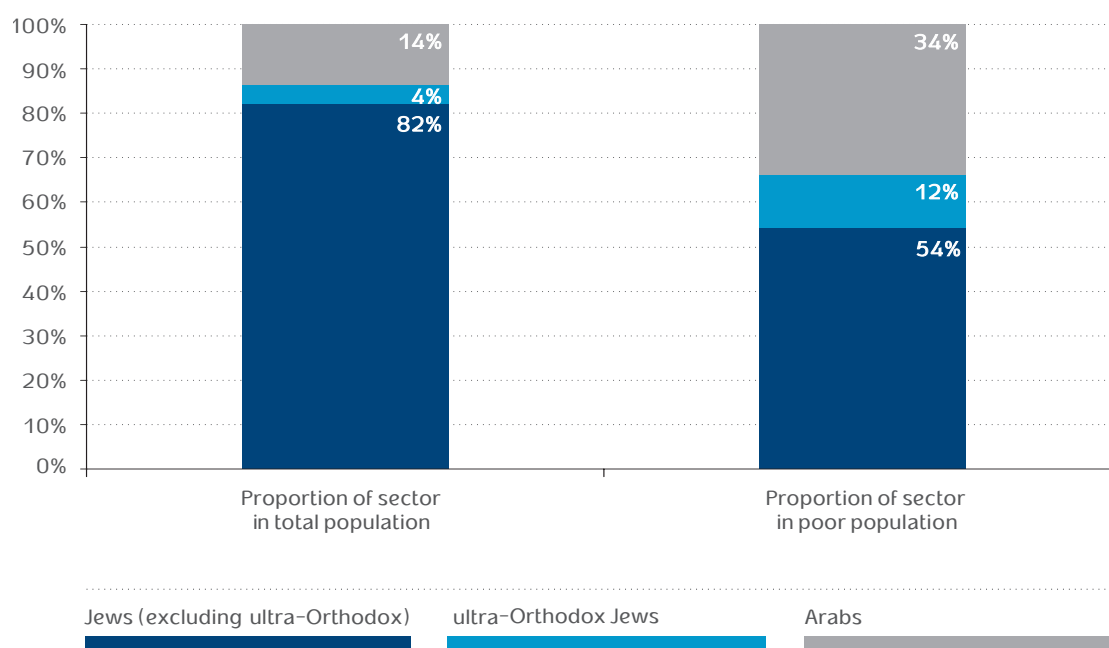
- a. A department in the Prime Minister's Office will be set up to deal with advice in planning and economic research (hereinafter, "The Economic Advisor to the Government").
- b. The Economic Advisor to the Government will head the department, and he will have an independent statutory position, like the Governor of the Bank of Israel.
- c. The functions of the Economic Advisor to the Government:
 - Preparation of a proposal for the order of priorities in the state budget at the level of clusters (such as education, health, welfare, and security). This proposal will be discussed, together with the proposal of the Finance Ministry, in the Ministerial Committee on the Economy, in the discussion prior to the second discussion in the government.
 - Preparation of the macro-economic forecast required in the preparation of the state budget.
 - Preparation of an opinion about the proposal of economic policy of the Finance Ministry in the areas of budget, taxation, and structural changes. The opinion will be distributed to the ministers together with the Finance Ministry's proposal and will be publicly publicized.
 - A cost-efficiency evaluation of all the new budgetary item proposals, main structural changes (according to his choice or at the request of the government) and investments in infrastructure.

-
- Writing a booklet “The national budget” that will be submitted to the government and the Knesset
 - Setting the rules for recording budgetary acts
 - Economic research in the areas of his activity
The government shall decide that, until the establishment of the department of the Economic Advisor to the Government, the Governor of the Bank of Israel will continue to fulfill the function of the economic advisor to the government, as is defined in the present law of the Bank of Israel. The Research Section of the Bank of Israel will be temporarily responsible for the preparation of the macro-economic forecasts used in the preparation of the budget.
 - The areas of activity of the Economic Advisor to the Government:
 - ♦ Budget and taxation
 - ♦ Public services, such as education and health
 - ♦ Labor and Welfare
 - ♦ Infrastructure and Quality of the Environment
 - ♦ Economic growth, personal capital, and technology
 - ♦ Market structure and regulation.
 - Appointment of the Economic Advisor to the Government:
 - ♦ The Economic Advisor to the Government will be appointed by the government, at the recommendation of the Prime Minister, for a term of five years.
 - ♦ The Economic Advisor to the Government will be an economist with high professional stature.
 - ♦ The government may terminate the Economic Advisor to the Government according to the same criteria set forth in the law for terminating the Governor of the Bank of Israel from his position.
 - ♦ The status of the Economic Advisor to the Government, its independence, and his functions shall be anchored in law.
 - Employees and budget:
 - ♦ The Department of the Economic Advisor to the Government will employ 15 economists, research assistants, and administrative staff.
 - ♦ The department will be part of the Prime Minister’s Office, and its activities will be financed from its budget.

Why is Poverty Widespread in Israel?

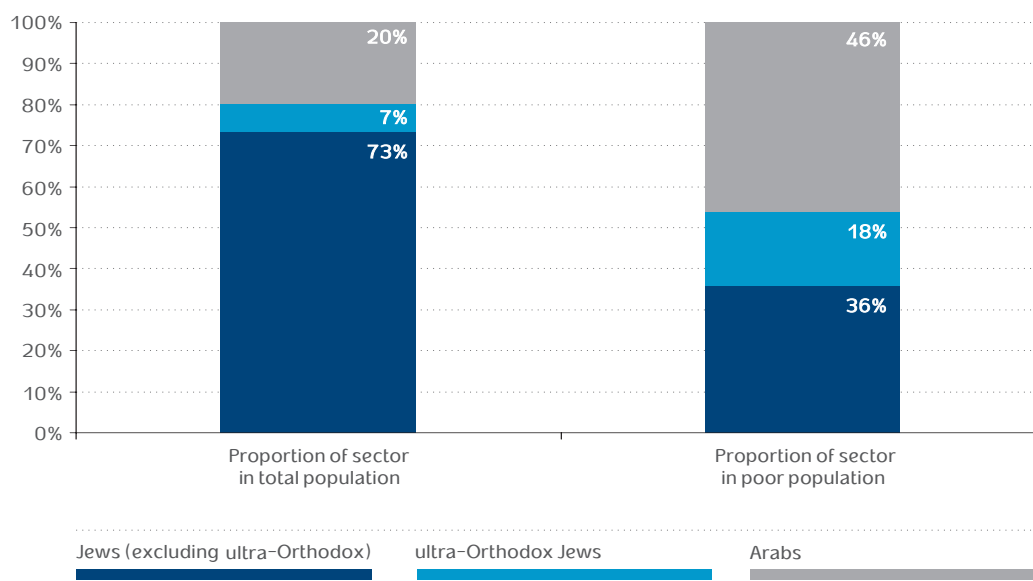
Momi Dahan

Figure 1
Poverty Levels by Sectors (Household)



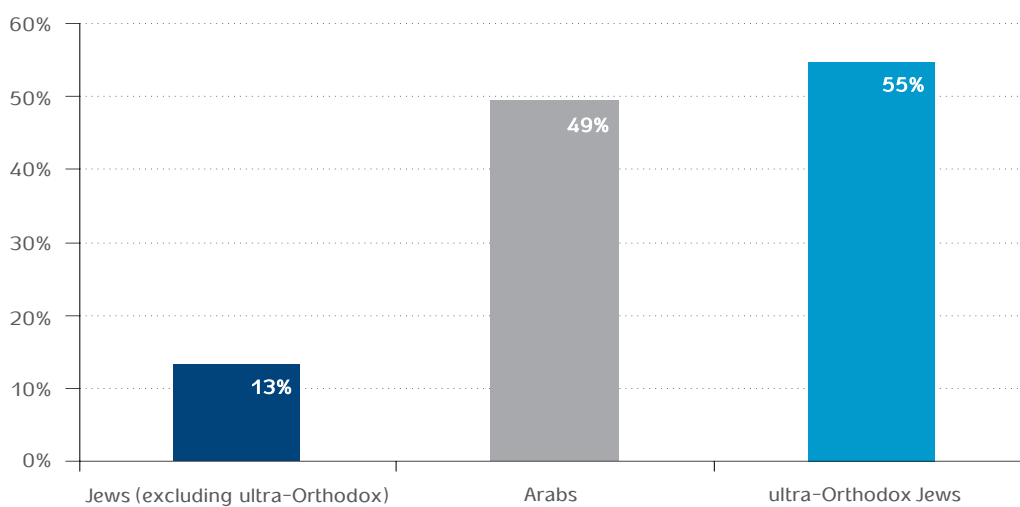
Source: Author's Statistical Analyses of Income Survey 2008 from database of The Hebrew University of Jerusalem, Israel Social Sciences Data Center (ISDC)

Figure 2
Poverty Levels by Sectors (Individual)



Source: Author's Statistical Analyses of Income Survey 2008 from database of The Hebrew University of Jerusalem, ISDC

Figure 3
Poverty Rate in Israel, 2008



Source: Author's Statistical Analyses of Income Survey 2008 from database of The Hebrew University of Jerusalem, ISDC

National
Security

◀ Israel's Response to Allegations Concerning the Operation in Gaza

Ido Rosenzweig and Yuval Shany

Introduction

On July 29, 2009, following Operation Cast Lead (the armed conflict between the Israel Defense Forces and Hamas, which took place between December 27, 2008 and January 17, 2009), the Israeli Ministry of Foreign Affairs published an extensive report on the operation.¹ Entitled "The Operation in Gaza: Factual and Legal Aspects," it was written in response to several critical reports published by NGOs and international organizations, which described Israel's conduct during this operation as contrary to international humanitarian law (IHL) and in some cases, even as constituting war crimes.²

Although reports presenting Israel's official perspective on the conduct of hostilities were also written after the previous Israeli operations in Lebanon³ and Gaza, the current report appears to offer one of the most detailed and comprehensive analyses of Israel's counter-terrorism efforts to date.

In this article, the IDI's *Terrorism and Democracy Newsletter* presents an extensive discussion of the official Israeli report on Operation Cast Lead and the subsequent update report.

Background

On December 27, 2008, Israel launched aerial attacks on Hamas' infrastructure in the Gaza Strip. This was the beginning of the armed conflict between Israel and Hamas known as Operation Cast Lead, which ended on January 17, 2009 with a unilateral ceasefire implemented by Israel. During the conflict, more than 1,300 Palestinians were killed and civilian infrastructures in Gaza suffered widespread damage; at the same time, over 800 rockets and mortar rounds were fired from the Gaza Strip into Israeli territory, killing four Israeli civilians, injuring 182, and striking schools and kindergartens.

1 www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf. See also www.mfa.gov.il/NR/rdonlyres/8DC5105D-A2A1-4709-9874-F42F1D1DA44B/0/TaubGazaLegalAspects270509.pps (hereinafter: "the Report" or "the July Report").

2 Discussions of these reports can be found in the fifth, sixth, and seventh issues of the *Terrorism and Democracy Newsletter*.

3 www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+Issues+of+proportionality+July+2006.htm

During the conflict and after the cessation of hostilities, numerous allegations were leveled against Israel and the Israel Defense Forces (IDF) pointing at the large number of casualties and the massive damage to civilian property and infrastructure on the Palestinian side as indicative of violations of the laws of war. Several fact-finding missions were sent to the region on behalf of human rights NGOs, the Arab League, and the United Nations. The reports written following these missions alleged that the IDF committed war crimes during the conflict.⁴ It should be noted that, by and large, Israel did not cooperate with these fact-finding missions.

Acknowledging the need to publicly respond to the allegations raised in these reports, Israel decided to publish its own version of the events that took place during Operation Cast Lead, which would include a discussion of the context in which the operation occurred, the applicable legal framework, and the conduct of the parties to the conflict. Published on July 29, 2009, the official Israeli report specifically addresses some of the alleged violations of international law and war crimes.

The report seeks not only to offer the Israeli version of events, but also to provide evidence of misconduct by Hamas (and other terrorist organizations) based on a variety of sources, including media reports and interviews, intelligence photos and documents, and transcripts of interrogations of Palestinian detainees.

The Report – The Applicable Legal Framework

One of the most pertinent questions in current international humanitarian law (IHL) debates concerns the legal categorization of Israel's counter-terrorism operations against Hamas and other Palestinian armed groups. Traditionally, IHL recognizes only two types of armed conflict: international armed conflict and non-international armed conflict. However, the armed conflict between Israel and the Palestinian armed groups does not fall neatly within either of the two existing frameworks.⁵ As a result, Israel decided unilaterally to cumulatively apply the rules of both international armed conflict and non-international armed conflict during its military operations in Gaza. Hence, the formal classification of the conflict is rendered a purely theoretical question in the particular circumstances of the case.

The report emphasizes that despite the fact that Hamas is a non-state armed group, it is still bound by IHL and must act in accordance with its relevant provisions (especially the principles on military necessity, distinction, and proportionality).

Finally, the report claims that the rules governing armed conflicts must be applied with analytical rigor. For example, there are many instances in which different organizations rushed to conclude that war crimes were committed solely on the basis of the number

⁴ See discussions of these reports in the fifth, sixth, seventh and eighth issues of the *Terrorism and Democracy Newsletter*.

⁵ "The Gaza Strip is neither a state nor a territory occupied or controlled by Israel," p. 11 of the report (paragraph 30).

of casualties in a certain operation. However, in order to reach such a conclusion, they should have conducted a comprehensive investigation of the specific incidents, taking into consideration all the relevant information that was available to the troops in the field at the time of that particular operation, and discounting the effects of operational mistakes.

The Report – The Context of the Operation

The report describes the events that led to the start of Operation Cast Lead, beginning with the Al-Aqsa Intifada in September, 2000 and including the implementation of the disengagement plan (the Israeli withdrawal from Gaza in 2005), the abduction of IDF Corporal Gilad Shalit in 2006, the takeover of the Gaza Strip by Hamas in 2007, and the massive rocket attacks directed against Israeli territory from the Gaza Strip throughout the years.

Israel maintains the position that Hamas broke the ceasefire that was in place between the parties to the conflict for much of 2008 by resuming the firing of rockets at Israeli territory. The strategic decision by Hamas to resume the rocket attacks left the Israeli government no choice but to resort to military force to defend its population.

Israel presents two arguments to support the legality of Operation Cast Lead, under *jus ad bellum* (international norms governing the right to resort to military force). The first argument views this specific conflagration as part of the ongoing conflict between Israel and Hamas, which began with the Al-Aqsa Intifada in September, 2000. The second argument justifies Israel's operation according to the principle of self-defense, which under customary international law allows a state to react with force to armed attacks directed against it, including armed attacks perpetrated by non-state armed groups.

The Report – The Use of Force

This section of the report provides a comprehensive description of legal standards governing the conduct of hostilities – namely, the principles of distinction and proportionality – in order to clarify the constitution of “legitimate actions” and “collateral damage” during warfare. It attempts to outline the conditions under which certain acts may be considered to be “war crimes.”

The report then goes on to provide a detailed description of breaches of IHL committed by Hamas, on one hand, and the IDF's efforts to comply with IHL provisions and principles, on the other hand.

With regard to Hamas, the report refers to the deliberate, systematic, and widespread rocket attacks directed against Israeli population centers, which violated the principle of distinction under IHL. The aim of these attacks was clearly to target and terrorize

civilians – an aim that the Hamas leadership repeatedly acknowledged and even flaunted. The intentional direct attack against civilian population centers constitutes a war crime.⁶

Another example of Hamas' breaches of IHL offered in the report is the use of civilian sites as a cover for military operations. Such conduct is in clear violation of the principle of distinction, which obliges the parties to distinguish, as much as possible, their combatant forces from their civilians, and to refrain from basing their operations in or near civilians or civilian objects. According to the report, Hamas deliberately launched rocket attacks from areas near schools, used hospitals as bases of operation, stored weapons in mosques, booby-trapped entire neighborhoods, and used the civilian population of Gaza (including children) as human shields.

According to the report, these actions were executed in order to achieve two goals. The first goal was to take advantage of the fact that Israel adheres to the rules of IHL and is sensitive to civilian casualties on the Palestinian side, and thereby to deter the IDF from attacking legitimate military targets. The second objective was to inflate the number of civilian casualties on the Palestinian side for propaganda purposes. In any event, the aforementioned strategy employed by Hamas constitutes a grave breach of the fundamental principle of distinction and qualifies as a war crime. The report notes that under IHL, the presence of civilians in the vicinity of a legitimate military target does not protect the latter from being targeted, but only affects the proportionality analysis of the situation. Hence, Israel's attacks on Hamas targets, while attempting to minimize civilian losses, were legitimate, and although the harm caused to civilians was regrettable, it was not necessarily unlawful.

The report offers various types of evidence to establish Hamas' abuse of civilian immunity: photos showing the positioning of rockets within residential areas and on top of houses and buildings (including in proximity to UN facilities); Palestinian testimonies concerning the use of human shields as the Hamas *modus operandi*; and the misuse of hospitals and mosques to conceal weapons, and of ambulances to transport fighters in and out of the combat areas.

According to the report, one of the most appalling methods employed by Hamas involved booby-trapping homes, roads, schools, and even entire neighborhoods, in order to transform these areas into death traps for Israeli forces. This practice exposed the local population to considerable danger as the use of booby-traps often created a multiplier effect with respect to collateral damage from IDF strikes and advancing forces. Since the IDF forces could not know in advance which areas were booby-trapped, it was virtually impossible to take these effects into account in the proportionality analyses.

The report also demonstrates how Hamas took advantage of humanitarian relief efforts in order to launch attacks and fire rockets. Moreover, in many cases, Hamas confiscated humanitarian aid and forced the civilian population to pay in order to receive it. According to the report, such willful and repeated interference in the supply of essential goods and service qualifies as a grave breach of IHL, and constitutes a war crime.

6 Rome Statute, art. 8(2)(b)(i).

The report then goes on to explain how the IDF took appropriate precautions to ensure that its actions were in accordance with international law. The report reiterates Israel's commitment to IHL, and states that IDF soldiers are taught these rules and trained accordingly to ensure that they are aware of these obligations during combat. This commitment is also reflected in IDF orders and, more specifically, in the IDF rules of engagement for Operation Cast Lead. Furthermore, during the conflict, IDF military lawyers were involved in advising commanders on numerous questions concerning international law. In order to ascertain that the relevant rules and orders were in fact complied with, the IDF developed several investigative mechanisms, intended to examine every claim or suspicion of a legal violation and to hold accountable those responsible when a violation occurs.

Israel acknowledges that despite all the training, supervision, and precautions, some operational errors did occur during Operation Cast Lead. However, based on the investigations that have been completed to date, such errors do not amount to violations of IHL. Israel stresses that all instances of alleged misconduct will be investigated, and action will be taken to prevent the recurrence of operational errors.

The report goes on to describe the IDF Rules of Engagement (ROE), which were in full compliance with the relevant IHL provisions and, in particular, with its four guiding principles: military necessity, distinction, proportionality, and humanity. The ROE also include a list of absolute prohibitions,⁷ and legal principles governing the approach to particular targets.⁸

The report explains that, as in all armed conflicts, IDF troops faced the difficult task of maintaining equilibrium between the two competing considerations that underlie IHL: military necessity and humanitarian considerations. The military necessities of Operation Cast Lead included the prevention of rocket attacks against Israel, the dismantling of terrorist infrastructure in the Gaza Strip and, at the same time, the protection of Israeli forces active in the theater of operations. The latter set of considerations played a considerable role during the hostilities in Gaza. Since Hamas conducted its warfare from urban areas and used tactics of booby-trapping and the mining of neighborhoods, buildings, roads, and tunnels, the danger to the safety and security of the IDF troops operating in the area was extremely high and must be taken into account as part of any IHL proportionality analysis.

In the report, Israel placed considerable emphasis on the application of the principle of distinction by its forces during Operation Cast Lead. The IDF attacked military targets directly linked to Hamas and to other terrorist organizations: rocket launchers, weapons stockpiles, command and control facilities, weapons factories, etc. According to IHL, the

7 Such as plunder, starvation of the population, poisoning of water resources, torture, rape, use of civilians as human shields, and perfidy.

8 These guidelines include attacks only against military targets, no attacks against civilian targets or medical facilities (unless they are being used as military objects), and an approach regarding cases of doubt and of dual use facilities.

mere fact that these military targets were hidden and embedded in civilian facilities, such as residential buildings, schools, or mosques, did not render them immune from attack.⁹

Regarding attacks on what was referred to as “ Hamas civilian ministries,” Israel stressed that Hamas is a terrorist organization: thus, many of the civilian elements of its regime in the Gaza Strip are also active components of its terrorist and military efforts. Hamas does not separate its civilian and military activities in the same manner in which a legitimate government might do.

The same logic was applied to attacks on Hamas forces, which were part of the “ internal security” apparatus. These forces, which include the local “ Hamas police force,” were, in fact, part of the armed forces of Hamas and, as such, were not afforded immunity from attacks. Moreover, according to the Israeli report, the claim that the casualties among the “ Hamas police force” were civilian casualties is false. The report provides several examples and evidence of the military functions assumed by the “ Hamas police force” and, therefore, rejects its claim to protection under the civilian immunity principle.

With regard to the precautions taken by the IDF during the conflict, the report asserts that Israel conducted itself in a restrained and careful manner. Targeting decisions were planned in advance and reviewed by several IDF authorities, including the Office of the Military Advocate General. Whenever possible, information on targets was cross-checked and verified according to the most updated intelligence sources; on numerous occasions, the process resulted in the cancellation of military operations (e.g., when the intelligence available was not sufficiently reliable or up-to-date and, especially, when the likelihood of collateral damage to civilians and their property was considered excessive relative to the anticipated military advantage).

The IDF made use of weaponry and methods that are meant to diminish the risk of incidental civilian harm. The use of pinpoint surgical aerial attacks, precision-guided missiles (which on several occasions were diverted moments before impact in order to spare civilians), advance notice and warnings, and ground operations (instead of aerial strikes) serve as examples of such tactics. Hamas, on the other hand, took advantage of these precautionary measures and placed the civilian population and the facilities used by the UN and by other international organizations and humanitarian agencies in substantial danger.

The *modus operandi* of Hamas presented Israel with complex operational, moral, and legal challenges, especially regarding the proportionality analysis. In fact, in some cases, the IDF refrained from engaging in certain military activities because of the potentially significant harm to sensitive sites, such as Shifa Hospital in Gaza City (Hamas used the hospital’s basement floor as the main headquarters for its military leadership). Still, in other cases, when it was necessary to proceed with military operations despite the risk to sensitive sites, the IDF took the aforementioned precautions in order to minimize harm to civilians.

⁹ The report goes on to give specific examples of military targets that were struck by the IDF during Operation Cast Lead (p. 86 of the report).

Concerning the controversial use of white phosphorous by the IDF during Operation Cast Lead, the report notes that the army employed two different types of munitions containing white phosphorous – both of which fully comply with the relevant provisions of international law. The first type involves exploding munitions, which were fired only at open and unpopulated areas. Such munitions were usually used for marking and signaling purposes (and not in any anti-personnel capacity).¹⁰ On January 7, 2009, as a precautionary measure, the IDF decided to desist from using these exploding munitions. The second type of munitions containing white phosphorus was primarily used in smoke projectiles designed to protect ground forces operating in urban areas. The report admits that these smoke projectiles may produce incidental incendiary effects. Nevertheless, international law does not prohibit them when the military benefit associated with their use exceeds the collateral harm they may inflict (in fact, the report alleges that without recourse to smoke projectiles, more massive artillery might have been employed, generating even greater collateral damage).

Throughout Operation Cast Lead, Israel exerted considerable effort to ensure that the humanitarian needs of the civilian population in Gaza were met. The IDF worked in cooperation with several UN missions and humanitarian organizations to deliver humanitarian relief, which included food, medical supplies, cooking gas, and diesel fuel. Moreover, during the conflict, the Israeli High Court of Justice reviewed these efforts, and upheld their compliance with both Israeli law and international law.¹¹ However, as mentioned, Hamas, whose fighters repeatedly tried to attack humanitarian convoys, hindered these relief efforts.

This part of the report concludes with an explanation of Israel's comprehensive system for investigating complaints and allegations of misconduct. This system includes the Military Justice System, which is an independent judicial system headed by the Military Advocate General (MAG). The decisions of the MAG regarding the opening of criminal investigations and the filing of indictments may be subject to further review by the Attorney General and the Israeli Supreme Court.¹²

The report claims that the IDF is in the process of conducting comprehensive investigations of its conduct during Operation Cast Lead. So far, the IDF has been examining about 100 complaints from a variety of sources, including UN inquiries¹³

¹⁰ In one single incident, in an open uninhabited area, ammunition containing phosphorous was used by ground forces to uncover tunnel entrances that served terrorist purposes.

¹¹ HCJ [High Court of Justice] 201/09 *Physicians for Human Rights et. al. v. The Prime Minister et. al.* See http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf

¹² The Spanish Court of Appeals has only lately referred to the investigations being conducted in Israel as genuine, legitimate, and impartial. See the eighth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/8th%20Newsletter/8th_main.aspx

¹³ The United Nations Secretary General established a UN Headquarters Board of Inquiry, see discussion in the fifth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/5th%20Newsletter/2/ReportoftheUNBoardofInquiryonOperationCastLead.aspx

and NGO reports.¹⁴ The report provides a list of investigations that are currently in progress: a partial list of 21 field investigations and a list of 13 criminal investigations, which include allegations regarding looting, the use of civilians as human shields, and mistreatment of Palestinian detainees. The conclusions of five previous internal investigations were published in April, 2009.¹⁵

Update

On January 29, 2010, six months after the publication of the original report, the Ministry of Foreign Affairs published an update, which is meant to provide more information on the methods of investigations employed by the IDF, and new developments regarding the investigations mentioned in the July report, as well as other investigations that have been initiated since (hereinafter: "Update Report"). The Update Report also responds to some of the specific allegations raised in the report of the UN Human Rights Council Fact-Finding Mission on the Gaza Conflict (the "Goldstone Report").¹⁶

Israel's System for Reviewing Misconduct Allegations – The Update Report begins with an overview of the IDF's investigative and judicial system for reviewing allegations of misconduct. This system, which involves internal disciplinary procedures, military police, prosecutors, and judges, is also subject to a review by civilian authorities (the Attorney General) and the judiciary (the High Court of Justice).

The Update Report emphasizes the independence of the Military Advocate General (MAG) Corps, which is responsible for the prosecution of soldiers for military offenses and for criminal offenses (under Israel's Penal Law), and states that whenever the evidence establishes the reasonable likelihood that a crime or legal violation has been committed, a military court will indict the wrongdoer or a disciplinary procedure would be initiated against him or her. In May 2007, the MAG established a specialized unit within the military prosecution, the Office of the Military Advocate for Operational Affairs, to oversee all investigations and conduct all relevant prosecutions with regard to violations of international humanitarian law (IHL).

The Military Police Criminal Investigation Division (MPCID) is conducting investigations of the crimes allegedly committed by IDF soldiers. It reports the conclusions of these investigations to the military prosecution authorities who then decide whether or not to initiate criminal or disciplinary proceedings. The military prosecutors' decisions are reviewed by the Attorney General and may be challenged before the High Court of Justice. Petitions to the High Court may also be submitted by Palestinian victims and

14 Such as Amnesty International, Human Rights Watch and the Arab League. See the discussions in previous issues of the *Terrorism and Democracy Newsletter*.

15 See a discussion of these investigations in the fifth issue of the *Terrorism and Democracy Newsletter*.

16 For a comprehensive discussion of the UN Human Rights Council Fact-Finding Report (hereinafter: "Fact-Finding Report"), see the tenth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/10th%20newsletter/Main.aspx

NGOs. The Update Report also elaborates on the structure of the military courts, the qualifications of military judges, and the possibility of appealing the military courts' decisions before the Military Court of Appeals (this option is available to both the defense and the prosecution) and the Israeli Supreme Court (sitting, on a discretionary basis, as a second instance Appeals Chamber).

The Investigation Process – The Update Report continues with an explanation of the process of investigation of alleged IHL violations. According to the Update Report, the process begins with a review by the MAG of complaints received from a variety of sources (including NGOs, UN bodies, victims, IDF soldiers, and media). When necessary, the MAG refers individual complaints to command investigation or to criminal investigation (when criminal behavior *per se* is alleged). Regarding the complaints referred to command investigation, the MAG reviews the records and findings of these investigations, along with any other relevant material available, to determine whether to recommend disciplinary proceedings, or to initiate a criminal investigation. Following a criminal investigation, the MAG reviews the entire evidentiary record to determine whether or not to file an indictment, or to recommend disciplinary proceedings.

The Update Report identifies two main types of complaints: the first type alleges criminal behavior *per se* (including maltreatment of detainees, use of civilians as human shields, intentional targeting of civilians, and looting), and is referred directly to the MPCID for criminal investigation. The second type alleges civilian casualties or property damage caused by the IDF during battle. These actions must be examined according to the prevailing circumstances, since IHL rules do not prohibit harm to civilians or civilian property *per se* (unless such harm was deliberate or clearly excessive).

Regarding the second type of allegation, the MAG must determine whether the available evidence raises suspicions of criminality prior to initiating a criminal investigation. Nevertheless, the Update Report emphasizes that this procedure does not necessarily delay the process; whenever complaints allege conduct that is clearly criminal in nature, the MAG immediately initiates criminal investigations.

In a comparison of the IDF's investigating methods with those employed by the British, American, Australian, and Canadian militaries, the Update Report finds that these investigative systems also include field reviews, in parallel with formal military investigations and prosecutions by court martial (or their equivalents). The Update Report claims that these military justice systems are accepted worldwide as adequate for the investigation of allegations of IHL violations.

According to the Update Report, the IDF has investigated, or is currently investigating, more than 150 separate incidents of alleged IHL violations during Operation Cast Lead. The length of some of the investigations can be attributed to the difficulties of accessing information and genuine forensic evidence from Gaza, and also reflects the investigators' thoroughness. Some of the investigations have already been concluded with prosecutions for disciplinary and criminal violations; in some cases, the MAG found no evidence of wrongdoing and closed the investigation.

Command Investigations – With regard to the five special command investigations initiated following Operation Cast Lead,¹⁷ the Update Report emphasizes that one of the purposes of these investigations is to review the orders and instructions issued by the IDF before and during the operation concerning the need to minimize harm to civilians. These investigations have revealed several instances in which IDF soldiers and officers violated the rules of engagement. In one case, a brigadier general and a colonel authorized the firing of explosive shells that landed in a populated area, which violates IDF orders limiting the use of artillery fire near populated areas. These officers were subject to disciplinary proceedings.

In its discussion of other developments, the Update Report states that on January 19, 2010 the MAG issued an opinion addressing each of the five investigations:

1. Investigations regarding seven incidents in which a large number of non-combatant civilians were harmed: There were no grounds to open a criminal inquiry in four of these incidents, and two command investigations are still under way. The last incident, regarding the alleged strike on the Al-Maquadme mosque, was remanded by the Chief of General Staff for a new special command investigation.
2. Claims regarding 13 incidents in which UN and international facilities were fired upon and damaged during the operation: The MAG did not find a basis to order criminal investigations in any of these 13 incidents. Regarding two of the incidents, the MAG approved the aforementioned decision to pursue disciplinary proceedings against IDF personnel. It is important to note that with regard to the alleged attacks against UN facilities, Israel fully cooperated with the UN Board of Inquiry,¹⁸ and on January 22, 2010 the Government of Israel paid \$10.5 million to the United Nations to cover losses sustained by the international body in these incidents.¹⁹
3. Ten incidents involving shootings at medical facilities, buildings, vehicles, and personnel: The MAG found no grounds to order criminal investigations in any of the ten incidents under review.
4. Destruction of private property and infrastructure by ground forces: This investigation did not deal with specific allegations. The Update Report emphasized that under IHL, it is prohibited to destroy private property, unless this can be justified by military necessity. The MAG concluded that the findings of the investigation were consistent with this obligation, and noted that the extent of destruction *per se* cannot serve to establish violations of IHL. Nevertheless, the Update Report mentions

17 For a comprehensive discussion of these investigations, see the fifth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/5th%20Newsletter/2/ReportoftheUNBoardofInquiryonOperationCastLead.aspx

18 For further discussion of the UN Board of Inquiry report, see the fifth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/5th%20Newsletter/2/ReportoftheUNBoardofInquiryonOperationCastLead.aspx

19 <http://downloads.unmultimedia.org/radio/en/real/2010/10012200-israel.rm>

that the IDF has adopted clearer regulations and orders, as well as a clearer combat policy regarding the demolition of structures and infrastructure.

5. The use of weaponry containing phosphorous: The MAG did not find any grounds to resort to disciplinary or criminal measure for the IDF's use of weapons containing phosphorous, concluding that IHL rules were not violated.

An additional special command inquiry was established by the Chief of General Staff as a result of the MAG recommendation to assess certain allegations discussed in the UN Fact-Finding Report. The investigation focused on three sets of allegations, which are being reexamined: the alleged targeting of the Al-Samouni residence, and the injury and death of several dozen civilians who were seeking shelter there; allegations of mistreatment of Palestinian detainees; and the alleged attack on the Al-Maquadme mosque. These investigations are still in progress.

In addition to the special command investigations, approximately 90 incidents were referred to command investigation in order to determine whether there are sufficient grounds to open criminal investigations. According to the Update Report, 45 of these investigations have been completed. Seven incidents were referred to criminal investigations; regarding the other 38, the MAG found that the investigations did not raise any reasonable suspicion of IHL violations.

Criminal Investigations – According to the Update Report, the MAG has already referred 36 incidents to criminal investigation. Special MPCID investigative teams were appointed solely for the purpose of investigating complaints related to Operation Cast Lead. Moreover, the MPCID is cooperating with NGOs to locate Palestinian complainants and witnesses.²⁰ Nineteen of the 36 incidents involved alleged shootings at civilians; 12 were directly referred to criminal investigation, and the other seven were referred to criminal investigation following command investigations. The remaining 17 incidents, which involve allegations of the use of civilians as human shields, mistreatment of detainees and civilians, looting and theft, were also referred directly to criminal investigation.

One of these criminal investigations has already led to the indictment and conviction of an IDF soldier who stole a credit card belonging to a Palestinian. The soldier confessed and was sentenced to seven-and-a-half months in prison.

Incidents Discussed in the UN Human Rights Council Fact-Finding Report – This Update Report makes special reference to the 34 incidents that appeared in the Human Rights Council Fact-Finding Report. The 34 incidents are included within the command investigations or criminal investigations mentioned above. It should be noted that 12 of the 34 incidents were brought to the attention of the IDF through the Fact-Finding Report (ten incidents involving damage to property, and two incidents of harm to civilians). Eleven of the 34 incidents are subject to ongoing criminal investigation by the MPCID (two of them were concluded with no suspicion of criminal conduct). Seven incidents were investigated as part of the special command investigations and with

²⁰ Testimonies from almost 100 Palestinians complainants and witnesses have already been taken, along with those of about 500 IDF soldiers and officers.

regard to two of them, the MAG requested further review. The remaining 16 incidents are subject to regular command investigations.

The Update Report presents four examples of investigations in which the MAG concluded that there were no grounds for criminal investigation:

1. **The Namar wells group**²¹ – The IDF learned about this incident from the Fact-Finding Report. According to the Update Report, the well is located within a closed Hamas military compound, which served as a regional command and control center, and was used for military training and weapons storage. The Update Report reveals that the IDF had compiled a list of sensitive sites inside Gaza, including 143 water wells. The Namar wells, however, did not appear on the list and, therefore, the IDF was unaware of the wells' location. The attack in question was not directed against the water facilities, but rather against the Hamas military compound in which it was located. Accordingly, the MAG found no basis to order a criminal investigation of this case.
2. **The Gaza wastewater treatment plant**²² – In this incident as well, the IDF learned of the allegation of a direct attack against the plant from the Fact-Finding Report. After reviewing the command investigation's findings and the information provided by the Fact-Finding Report and the Coastal Municipalities Water Utility Report,²³ the MAG could not rule out the possibility that the damage had been caused by Hamas, and not by the IDF. There was no physical evidence or eyewitness testimony to support claims alleging IDF activity in the area. Therefore, the MAG concluded that there are no grounds to order a criminal investigation regarding the case.
3. **The El-Bader flour mill**²⁴ – The IDF conducted an investigation, which entailed gathering evidence from numerous sources, including soldiers and commanders from both the ground and aerial forces, and collecting the testimony of the owner of the El-Bader flour mill. The investigation suggests that the area of the mill was "used by enemy forces as a defensive zone." Hamas had fortified the area with tunnels and booby-trapped houses. Despite identifying it as a "highly strategic point" in the area, the IDF decided not to preemptively attack the flour mill in order to avoid damage to civilian infrastructure as much as possible. Moreover, early warnings were issued to the residents in the area. During combat in the area, the IDF returned fire and the upper floor of the mill was hit by tank shells. This attack was not preceded by a specific warning as it was not preplanned. Later on, in response to enemy fire directed at IDF forces from the mill, a counterattack was ordered. After reviewing all the relevant material, the MAG concluded that the mill was struck by tank shells during combat, but there was no evidence that the mill had been attacked from the air as alleged in the Fact-Finding Report. Moreover, this last allegation was not

21 UN Human Rights Council Fact-Finding Report, p. 267, para. 972.

22 UN Human Rights Council Fact-Finding Report, p. 264, para. 959.

23 Damage Assessment Report: Water and Waste Water Infrastructure and Facilities, January 2009, http://www.ochaopt.org/gazacrisis/infopool/opt_wash_cmwu_Water_Wastewater_Infra_Damage_jan_2009.pdf

24 UN Human Rights Council Fact-Finding Report, p. 253, para. 909.

supported in the Fact-Finding Report or by the testimony of the mill owner (who had left the area prior to the attack in response to the early IDF warnings). The MAG also found that under the circumstances, the mill was a legitimate military target according to IHL provisions. Furthermore, the allegation that the attack against the mill was meant to deprive Gaza's civilian population of food was rejected. Accordingly, the MAG found no reason to order a criminal investigation into the case.

4. **The House of the Abu-Askar Family**²⁵ – The findings of the command investigation suggest that several parts of the house were used to store weapons and ammunition. Furthermore, the area in which the house was located was frequently used as a launch site for rockets aimed at Israeli towns. Prior to the strike, a telephone warning was made and the house was evacuated. Moreover, the attack was conducted at night in order to limit civilian casualties. The MAG concluded that the area was a legitimate military target, since it was used to store weapons and ammunition, and that the strike did not target the residents of the house, but rather was directed against the weapons stored inside it. Therefore, the MAG found no reason to order a criminal investigation.

The Update Report concludes with Israel's expressed desire to share its investigative procedures and to provide updates about the progress of the ongoing investigations.

Conclusions

The July, 2009, report was meant to serve as a temporary response by the State of Israel to the increasing number of allegations leveled against it concerning its conduct during Operation Cast Lead. Although not explicitly mentioned in the report, it may be assumed that the report was also meant to serve as an unofficial statement of defense for future purposes (such as universal jurisdiction proceedings in Britain²⁶ or Spain, proceedings before the International Criminal Court or even an International Court of Justice Advisory Opinion).

The direct responses in the Update Report to some of the specific allegations raised by the Goldstone Report demonstrate the difficulty of reaching harsh conclusions regarding allegations of war crimes and other violations of IHL, without having gathered all the relevant information and intelligence. When confronted with the Israeli version of events, some of the conclusions advanced by the various fact-finding bodies that reviewed Operation Cast Lead appear less compelling. Arguably, this suggests that had Israel cooperated with the Fact-Finding Mission and explained the military reasons for pursuing certain targets or using certain weapons, many of the allegations presented in the Fact-Finding Report may have been avoided from the start.

25 UN Human Rights Council Fact-Finding Report, p. 185, para. 651.

26 See the eighth issue of the *Terrorism and Democracy Newsletter*. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/8th%20Newsletter/8th_main.aspx

The analysis of IHL offered in the report appears to be generally accurate. Indeed, the permissibility of a specific attack must be reviewed in light of the *ex-ante* information and intelligence that the IDF commanders possessed at the time of the attack, and not only according to the actual harm caused, which is *ex-post* information. Still, both the report and its update do not adequately account for the large number of Palestinian casualties, which appears to be incongruent with the limited intensity of the actual fighting (as indicated, *inter alia*, by the limited number of military casualties on the Israeli side). The number of casualties and the use of controversial methods of warfare, such as white phosphorus shells, perhaps suggest a skewed balance between military needs and humanitarian considerations.

The information provided by the Update Report demonstrates that Israel's military justice system is investigating the numerous alleged violations of IHL during Operation Cast Lead. On one hand, the number of investigations is impressive and indicative of the thoroughness of the MAG office; on the other hand, the small number of criminal indictments and disciplinary proceedings more than a year after the operation ended, as well as the open status of so many investigations, suggest a certain unwillingness and/or inability to effectively prosecute violations. Moreover, some of the IDF's strategic decisions, such as the major target criteria, have not been investigated to date. It is unlikely that the office of the MAG, which rendered legal advice in real time on these issues, can conduct independent investigations of the major strategic decisions that were approved by Israel's top military and/or political leaders.

At a deeper level, the July report illustrates some of the dilemmas associated with the implementation of IHL in situations of asymmetric conflict, i.e., when one party to the conflict attempts to "play by the rules" while the other disavows the rules and, in fact, abuses them. Although Israel is correct in observing that under such circumstances, civilian casualties are not in themselves indicative of IHL violations, the conditions described in the report are hardly conducive to compliance with IHL. Most importantly, the "blame game" in which Israel and Hamas engage, may, in the eyes of the parties to the conflict, serve to relieve them of the moral, if not legal, responsibility for civilian harm.

IDI's monthly *Terrorism and Democracy Newsletter* aims to shed light on relatively unknown counterterrorist measures and policies adopted by Israel or related to the security situation in Israel. The newsletter is part of a broader IDI effort to foster professional debate on the proper balance between national security and democratic principles. It surveys recent developments in Israeli law and policy, which are intended to mitigate or prevent terrorist threats. The authors of the newsletter believe that Israel's experience in this area may be of value to other democratic societies; at the same time, they believe that Israel has much to learn from a comparative international perspective on the common dilemmas confronting the world's democracies in the struggle against terrorism.

To receive the *Terrorism and Democracy Newsletter* directly, please contact td_news@idi.org.il and include your e-mail address in the body of the message.

Administrative Detention in a Jewish and Democratic State – A Reexamination

Elad Gil

Supervised by Mordechai Kremnitzer

Abstract*

The Emergency Powers (Detentions) Law, 5739-1979 vests the Minister of Defense with the authority to order a person's detention without trial for reasons of protection of state security and public safety. The order may be given for a period of up to six months, and consecutive detention orders are liable to allow a person to be incarcerated for years on end without ever having been criminally convicted (in theory, the detention could continue indefinitely). This authority is universally referred to as "administrative detention."

This study seeks to examine the authority for administrative detention in Israeli law, inquiring into its purpose and whether that purpose is worthy of being realized. Above all, the study considers whether realizing that purpose justifies the high price paid by the State. The basic problem in administrative detention proceedings is that they establish the legal possibility of detaining a person based on evidence that cannot be disclosed to him by reason of a critical need, while failing to provide the detainee with any clear idea of the nature of the suspicions. In speaking of the "price," we are referring to the flawed division of power among the state authorities and the mortal infringement of the individual's undisputed fundamental right to liberty, dignity, and due process under Israeli law.

Since its establishment, Israel has confronted substantial security threats whose end is nowhere in sight. This reality is expressed in the balance that Israel strikes between ensuring individual rights, and the protection of security interests. In Israel, security is not a mere slogan – it is a real objective confronting the security establishment every day in its efforts to protect citizens' lives and enable them to maintain a normal daily life in a "tough neighborhood" such as the Middle East.

Criminal imprisonment is consequential; it is the result of an offense. The offender is imprisoned after and by reason of having violated the values that society seeks to protect with its criminal law. Imprisonment must be justified as constituting an appropriate response to a particular act. It must be necessary in terms of its deterrent effect upon the individual, and it must be of a nature that will deter others

* This abstract of Policy Paper 7E (Jerusalem: The Israel Democracy Institute, in press) was written in Hebrew by Amir Fuchs and was translated to English by Michael Prawer.

from considering the commission of similar offenses. At the same time, the **purpose of administrative detention is preventive** (hence, it is occasionally referred to as “**preventive detention**”). One thing must be stressed: Punishment is not the purpose of administrative detention. The detainee is denied liberty on the basis of a decision that anticipates the future and endeavors to prevent the performance of acts that potentially endanger public safety or state security. In other words, in deciding to hold a person in administrative detention, the authority must balance that person’s right to liberty against the danger that his liberty poses to society. The authority evaluates the likelihood of the danger being realized and decides whether the balance of considerations justifies detention in order to prevent the danger.

The Primary Characteristics of the Israeli Legal Regime

- **The authority.** The Minister of Defense is authorized to issue an administrative detention order. An exception is made for urgent cases: The Chief of General Staff has restricted authority to issue a detention order in his own name, but only if he believes that, under the circumstances, the Minister of Defense would also have decided to order detention.
- A detention order issued by the Chief of Staff is restricted to a maximum of 48 hours.
- **The grounds for detention.** A person may be detained when there are reasonable grounds for assuming that considerations of state security or public safety compel his detention.
- **The duration of the detention.** The order is restricted to six months. The order may be extended from time to time, provided that each extension does not exceed six months.
- **Judicial review.** The detention order is subject to close judicial review (the District Court reconsiders the entire decision from start to finish and does not just review the discretion of the authority, as is generally done in regular proceedings). The detainee must be brought before a judge **within 48 hours** of his arrest for approval of the detention order. The judge can also shorten the time period of the warrant. The judge is obligated to reexamine the grounds for detention at least once every three months. The detainee can **appeal to the Supreme Court** regarding every judicial decision made by the District Court.
- **Evidence.** The main reason for administrative detention (rather than criminal proceedings) is that the detention is based on evidence that cannot be presented in court, consisting primarily of privileged evidence (the publication of which may harm state security) and hearsay. The privileged evidence is submitted to the court *ex parte* without being given to the suspect or his defense attorney.
- **The Emergency Powers (Detentions) Law** operates on a routine basis because since its establishment in 1948, Israel has been in a constant, ongoing state of emergency.

This study surveys Israel’s existing law of administrative detention and pinpoints its problematic aspects. It also presents a comparative survey of the international law and of the positions of several Western democracies

Conclusions

First, the general and unequivocal conclusion is that the **Emergency Powers (Detentions) Law as implemented in Israel is unproportional and does not stand up to scrutiny:**

- When a person is held in detention and is unaware of the reason for his detention, the result is a grave and inexcusable violation of human dignity.
- There is a real possibility that people who are not dangerous may be detained.
- Judicial proceedings in which the suspect lacks any real possibility of defending himself will almost certainly be Kafkaesque.

Nevertheless, despite all the defects, the study's conclusion is that administrative detention **should not be totally abolished**. Although there are alternative measures that provide a better, more proportionate solution, ultimately those measures cannot ensure the same degree of protection of security. In some situations, the danger may be so grave as to preclude the possibility of assuming any risk at all or of tolerating any additional risk, placing a particularly heavy burden on the security forces. **Such situations leave no option for relying on more moderate measures, and hence no alternative to administrative detention.**

Recommendations

To reconcile the Detentions Law with the requirements of the principle of proportionality, reforms and changes must be introduced that will produce a proportionate, proper, and legal arrangement:

1. **The state of emergency should not be extended automatically.** Precise criteria should be established for declaring a state of emergency. The Knesset should be able to establish the existence of the required conditions before deciding to extend a declaration of a state of emergency.
2. **The law should provide measures that are less harmful than administrative detention.** The study surveys a variety of means that may achieve the preventative objectives of the Detentions Law (for example, surveillance, house arrest, partial restriction of freedom of movement and electronic handcuffing). The legislature has the tools (statutes), and these should be placed at the administrative authority's disposal so that it can discharge its duty to prevent the realization of threats to state security or public safety. Under such an arrangement, the administrative authority would first be obliged to consider its duty to suffice with more moderate measures.
3. **Changes should be made in the legal regime governing administrative detention itself:**
 - a. **The right to representation by special defense counsel should be established.** The study presents a detailed account of a serious problem caused by reliance on privileged evidence in the administrative detention proceeding. The arrangement currently prescribed by section 6 of the Law gravely infringes the detainee's rights and denies him the possibility of standing trial in a fair proceeding that can assess the legality of his detention. A central element of the infringement caused by section 6 is the fact that defense counsel is denied access to the evidence. We believe that a special defense counsel can bridge the gap between the detainee

and the evidence through interrogation and a thorough examination of the material. While it is inherently difficult for a judge – who is committed to neutrality by definition – to serve as the detainee’s spokesman, the special defense counsel will be concerned exclusively with the detainee’s best interests. In addition to his ability to provide the detainee with a more efficient defense, his exposure to the evidence will enable him to be present at the hearing of the State’s application in regard to privileged evidence. As such, a significant, determinative part of the detention proceedings will not be conducted *ex parte*.

- b. **There should be a statutory definition of the goal and purpose of administrative detention.** A provision should be added to the law that clarifies its dual purpose: protecting the security of the state and its citizens, while simultaneously guaranteeing the basic rights of the individual in Israel.
- c. **There should be a statutory definition of the detention period.** The authority to order detention for six months and the possibility of unlimited extension of a detention order (for six months each time) represents a disproportionate balance between security interests and individual rights. It also gives rise to the fear that the law might be used for punitive rather than preventative purposes. We recommend the establishment of a two-month ceiling for the first detention, with no possibility of extending the detention period for more than one year. Otherwise, the administrative authority is left with the power to order “life detention” based on an assessment of dangerousness that can never be verified with absolute certainty. The longer the detainee is kept in detention, the more acute the question of who should bear the security risk. It should be stressed that releasing a detainee from custody does not mean discontinuation of activities intended to gather information about his dangerousness or to prevent him from the furtherance of criminal and/or security-related conduct.
- d. **Changes should be introduced into the laws of evidence to reinforce the right to due process.** The need to protect sensitive evidence inevitably involves a certain violation of due process. Nevertheless, the law and the courts must ensure that the core of the right is preserved. To that end, we recommend changes in the law and in the process of judicial review. **These changes are consistent with trends in recent judicial rulings in several western states in the context of the fight against international terror.**
 - **Changes should be made in the language of the law.** The law should establish the duty of apprising the detainee of the suspicion underlying his detention, at a level of specificity that enables him to efficiently defend himself against the suspicion. Any other approach fails to ensure the basic minimum necessary for a fair proceeding and mortally violates human dignity. This principle should guide the authority when issuing the detention order and it should be anchored in the wording of the law.
 - **Changes should be made regarding judicial review.** The Detentions Law grants special authority to the court in implementing the Administrative Detention Law and special status in maintaining the balances prescribed by the law. In any judicial proceeding, the court has a special role in ensuring the proceeding’s fairness. It does not merely serve in a supervisory role intended to prevent any violation of a right by one of the authorities; it is also required to examine itself and the propriety of the proceedings it conducts. Today, in the writers’ opinion, greater judicial involvement in the supervision of the proceedings

for issuing an administrative detention order is not only desirable, but unequivocally required.

- i. The Detentions Law, and especially its evidentiary arrangements, creates a real danger of unfair proceedings that will ultimately culminate in denying an innocent person's liberty. As mentioned, the balance of interests compels a certain violation of the detainee's procedural rights. Even so, under no circumstances should this balance provide license for the denial of the right to due process that is the first defense of human rights, chief among them the right to liberty and the right to dignity. Due process means that a suspect must be able to state his case and attempt to refute the claims against him. **This right can be realized only if the suspect is presented with the grounds for his detention and the factual basis underpinning the order**, even if only partially. As such, it is incumbent upon the court to ensure strict compliance with these conditions in conducting proceedings to approve a detention order. This duty may arise at two separate stages of the proceedings, and at each of them the court is required to implement a distinct balancing formula:
 - **The court may confirm the state's application to prevent the disclosure of evidence only when there is a near certainty that its disclosure will substantially endanger state security or public safety, and that the harm to security is graver than the harm to the suspect.** The state bears the onus of persuasion regarding the privilege of evidence even if the detainee's defense counsel is permitted to be present at the hearing. The grave consequences of a decision on privilege and the governmental tendency to make exaggerated use of privilege preclude resort to the presumption of the legality or the presumption of regularity in favor of the state.
 - Meeting the near-certainty criterion is not the final step. **The judge must also examine whether the decision to conceal evidentiary material from the detainee satisfies the criterion of proportionality, primarily as it relates to the criterion of relativity** (the relationship between the benefit deriving from the detention and state security). In any event, when the state submits an application for privilege, the court must appoint a special defense counsel for the detainee and extend that appointment for the duration of the proceedings, if the application for the privilege is granted.
- ii. Apprising the detainee of the grounds for and the factual basis of his detention. Having decided whether or not to grant the privilege and having determined its scope, the court is required to review the nature of the suspicions to be presented to the detainee. The court cannot confirm a detention order in which the grounds specified are "an evaluation that indicates dangerousness." The reason for withholding certain particulars from the detainee must be the near certainty that the disclosure of the details will substantially harm state security or public safety. However, the court cannot permit anything that falls short of the basic minimum of details required to enable the detainee to meaningfully address the suspicions against him. The appropriate test for the court's adoption of the decision is whether the actual foundation is sufficient to allow the detainee

to argue against it. Can the detainee give an effective response to the suspicions grounding the administrative detention order that the court is asked to confirm? **A factual foundation supplying no information regarding the grounds for detention can never be refuted, not even by a person whose liberty poses no danger at all. Such a situation effectively precludes the right to due process.**

- e. **In the framework of confirming an administrative detention order, the requesting authority should be required to explain why it is impossible to suffice with more moderate measures and to refrain from resort to administrative detention under the Detentions Law.** Such a strict approach in the framework of the judicial review process is likely to reduce the number of administrative detention requests and ensure that the use of this tool will be limited only to cases in which there is really no other option.

The measures proposed here are likely to significantly reduce the ability of the authority to justify administrative detention. This is a minimum requirement in order to prevent a threat to state security that is of no less gravity than that posed by the detainees themselves – the danger posed by the deprivation of the fundamental rights of liberty and due process.

The principal conclusion of this study is that the balance that has been struck in the State of Israel (as of 2009) does not properly reflect the desired formula, because it violates basic rights of the individual and does not provide sufficient guarantees for the prevention of arbitrariness in the executive branch's exercise of the authority for administrative detention. This situation hinders the promotion of the rule of law in Israel; it is inconsistent with the democratic values of the State of Israel and does not actualize the state's Jewish values, which place human liberty at the forefront based on the tradition and the history of the Jewish people.

◀ The Legal Battle Against the Financing of Terrorism in Israel

Gilad Noam

Supervised by Yuval Shany

Abstract*

The diverse tactics of those who engage in terrorism to finance their activities and the increasing sophistication of terrorist organizations in obtaining funds pose both legal and practical difficulties to states confronting terrorism. In recent years, particularly in the wake of the events of 11 September 2001, there has been growing recognition that a key aspect of the war on terror requires focusing on the sources of the financing of terrorist activities and organizations. According to this approach, the fight against terrorism must not be limited to punitive measures or attempts to thwart terrorist attacks; wide-ranging and varied measures must also be taken to prevent terrorism from the outset.

The globalization of terrorism (as reflected in the cooperation between terrorist organizations around the world, in the existence of international terrorist organizations operating across borders, and in state support of terrorism) entails the increasing importance of the economic aspect of terrorism, and the expansion of the monetary infrastructure used to finance terrorism around the world. Numerous factors, such as the relative ease with which money can be transferred across state borders and the difficulty of distinguishing between funds intended for legitimate purposes and those designated for terrorism, make it harder to identify the monetary channels used to finance terrorism. Thus, effectively suppressing the financing of terrorism requires a high degree of international cooperation. Indeed, in recent years international forums have played a dominant role in developing a comprehensive legal foundation for the struggle against the financing of terrorism, and in coping with the difficulties and the complexity of this issue.

The legal foundations of the fight against terrorism, in general, and against the financing of terrorism, in particular, were established in Israel soon after it gained its independence. A major portion of this legal infrastructure is based on British Mandatory legislation that was automatically transformed into Israeli law. It was intended primarily for the fight against terrorism at the local level. The globalization of terrorism and Israel's ratification of the International Convention for the Suppression of the Financing of Terrorism (hereafter: the Financing Convention) necessitated a response from the Israeli

* Policy Paper 79 was originally published in Hebrew (Jerusalem: The Israel Democracy Institute, 2009). This abstract of this Policy Paper was translated to English by Karen Gold.

legislature, which took the form of the Prohibition of Terrorist Financing Law 5765-2005 (hereafter: the Financing Law).

The suppression of the financing of terrorism shares a common legal basis with other aspects of crime prevention and criminal law enforcement, in particular, the measures that are employed against money laundering. In many cases, terrorist organizations rely on resources acquired through criminal acts, especially drug dealing, smuggling, illegal arms trading, fraud, extortion, etc. To the extent that the financing of terrorism involves funds obtained from illegal sources, the measures against it can be based on the legal foundations of the fight against organized crime and money laundering at both the global and state levels. Indeed, state authorities that deal with money laundering are usually also responsible for the suppression of the financing of terrorism (in Israel – the Israel Money Laundering and Terrorist Financing Prohibition Authority, or IMPA). However, the battle against the financing of terrorism is unique in that it also requires dealing with cases in which no criminal activity has been carried out prior to the delivery of the funds to the terrorist organizations. The financing of terrorism relies extensively on legal sources of funding, such as funds raised by non-profit institutions, including charities. Ideological and religious movements that support terrorism use these charities and institutions as a natural link between the legitimate activity of civil society, on the one hand, and terrorist organizations, on the other. Identifying funds allocated to terrorist activities and evaluating their amount become difficult when the funds originate from a legal source. Besides charities and non-profit organizations, the financing of terrorism can also take place under the auspices of commercial enterprises, particularly businesses that engage in extensive trade across state borders. In such cases, financial institutions find it difficult to pinpoint suspicious transactions according to the usual criteria used to counter money laundering. This dictates the need for a unique legal foundation for the battle against the financing of terrorism that is based on the illegal destination of the funds, rather than on their source (as occurs in the fight against money laundering).

Waging an effective battle against the financing of terrorism through bodies that also (even primarily) engage in legal activity requires resorting to drastic inspection methods, which naturally raises the question of whether they disproportionately prejudice fundamental human rights and freedoms. The monitoring of the activities of charities and non-profit institutions, and the imposition of restrictions on them are liable to spark claims of infringement of fundamental freedoms, such as the freedom of association or the freedom of religion (in the case of religious institutions). Intervention in the activities of commercial enterprises and private businesses of various types can also generate claims of violation of such basic constitutional rights as freedom of occupation and the right to property.

There is obviously a conflict between the global and the local desire to effectively suppress terrorism and the duty to preserve democratic values and human rights – a duty that limits the ability of democracies to implement measures that cause severe and disproportionate harm to the rights and freedoms of individuals. At first glance, it seems that the fight against the financing of terrorism does not raise these critical questions to the fullest extent. Measures that focus on the sources of financing appear more “fair” as part of the war on terror in contrast to the methods employed against terrorist suspects, such as administrative detention, aggressive interrogation techniques, and so forth.

Moreover, the argument can be made that an effective battle against the financing of terrorism would significantly reduce incidents of terrorism and would, thus, diminish the need to employ more severe measures.

However, it is precisely the focus on the early planning stages of the financing of terrorism and the connection to broader and more remote circles of potential participants that raises concerns of a “silent” infringement of fundamental rights. The suppression of the financing of terrorism is liable to strike a grave blow to a range of rights, including the rights to property and to privacy, the freedom of occupation, the freedom from arrest or incarceration, and due process guarantees. Furthermore, since the fight against the financing of terrorism is an integral part of the global war on terror, which is firmly established in international conventions and UN Security Council resolutions, measures taken at the national level are presented as the implementation of international norms and, thus, enjoy an international “seal of approval,” granting them unofficial immunity from criticism regarding human rights violations. However, it should be noted that in recent years, there has been a growing realization among international bodies involved in the suppression of the financing of terrorism, including the UN Security Council, of the need to give proper weight to the protection of human rights in the fight against terrorism, in general, and against the financing of terrorism, in particular. This book suggests that the legal situation in Israel calls for a reevaluation of the balance that existing arrangements offer between the competing interests of safeguarding individual rights and of effectively dealing with the financing of terrorism.

The issues that are addressed in this book are especially important given their almost total absence in public discourse, and the paucity of academic writing and judicial rulings on this question. The debate on the tension between the war on terror and basic human rights focuses on the methods (referred to above) that are considered to be more severe, or more “newsworthy.” The lack of genuine legal and public discourse on the subject of the financing of terrorism also stems from the fact that the Financing Law is relatively new and has not yet been subject to in-depth interpretation, or to the evolution of related case law. After reviewing the international legal framework for the suppression of the financing of terrorism, this book highlights several problems related to the arrangements Israel has adopted to counter terrorism funding. The courts and law enforcement bodies in Israel are expected to confront these issues over the next few years.

One problem is the fact that the Financing Law reestablishes and reasserts the judicial instruments that preceded its adoption and that have been used, *inter alia*, to suppress the financing of terrorism. These judicial instruments include the Defense (Emergency) Regulations of 1945, which were enacted during the British Mandate, and the Prevention of Terrorism Ordinance 5708-1948. The arrangements, which were set by Mandatory and Israeli lawmakers over sixty years ago, grant the authorities far reaching powers in the fight against terrorism, in general, and against the financing of terrorism, in particular. These powers harshly and disproportionately prejudice the fundamental rights of those allegedly involved in terrorism and of third parties, without providing for appropriate judicial review. Not only were these arrangements not annulled or modified by the Financing Law of 2005, but they were reasserted and approved by this law. Furthermore, more than four years after the entry into force of the Financing Law, the

actual practices of the authorities in Israel with respect to the financing of terrorism reveal that the Defense Regulations and the Prevention of Terrorism Ordinance continue to serve as the primary instruments in dealing with the financing of terrorism, not only in the context of local terrorism, but also to fulfill Israel's international obligations. In light of the constitutional revolution in Israel following the adoption of the Basic Laws: Human Dignity and Liberty, and Freedom of Occupation in the early 1990s, and given Israel's international commitments related to the preservation of human rights, the Financing Law should have led to the adoption of updated and more proportional instruments that would prevail over the earlier arrangements.

The Financing Law includes three criminal offenses that apply to the financing of terrorism at both the local and international levels. Countering the financing of terrorism by resorting to criminal prohibitions is appropriate as it ensures legal proceedings and judicial guarantees, which are inherently preferable to the far reaching administrative powers provided by the legislation that preceded the Financing Law, particularly the Defense Regulations. Nevertheless, this book raises two key problems in this context: first, since previous statutes continue to apply and to grant extremely broad powers to administrative bodies with less judicial review, the state authorities currently have very limited incentive to instigate criminal proceedings under the Financing Law. Also, in the criminal context, violations of the Financing Law do not nullify criminal liability under the previous statutes. In fact, the few criminal cases that were filed for violations of the Financing Law in recent years also included charges of violations of the Defense Regulations and of the Prevention of Terrorism Ordinance.

The second problem is that the Financing Law criminalizes some behaviors that should not, in my opinion, be subject to criminal liability. The primary difficulty in this context concerns the offense of refraining from reporting suspicions of the financing of terrorism. It would appear that Israeli lawmakers went too far in setting the parameters of criminal activity under the Financing Law. This conclusion also emerges from an analysis of comparative and international law with respect to the suppression of the financing of terrorism.

The Financing Law includes provisions related to the freezing and seizure of terrorist assets. As a rule, these provisions offer due guarantees for the protection of fundamental rights of individuals, organizations, and third parties that are liable to be harmed by the freezing or seizure of such assets. The Law provides for administrative and judicial review mechanisms as part of the proceedings for the freezing or seizure of terrorist assets. The main problem is that the freezing and seizure procedures under the Financing Law apply only to terrorist organizations or individuals that have no connection to Israel (except in cases in which assets are frozen or seized as part of criminal proceedings under the Financing Law). In cases in which the terrorist organization or individual in question has a connection of some sort to Israel (and this extends to the vast majority of cases that are actually handled by the Israeli authorities), the broad administrative powers granted by the Defense Regulations regarding restrictions and seizure of assets will presumably continue to be employed. For example, in cases where a terrorist organization has a connection to Israel, steps can be taken to seize assets through a purely administrative proceeding under the Defense Regulations. By contrast, in cases in which there is no connection to Israel, judicial proceedings

(civil or criminal) must be conducted, and the administrative authority is restricted to a temporary freezing of assets, subject to limitations.

Apparently, the adoption of monitoring and review mechanisms that apply to decisions regarding acts of terrorism with no connection to Israel was not motivated by a concern for the human rights of potential injured parties, but rather by a fear of adopting measures at the domestic level solely on the basis of foreign demands and without subjecting them to independent domestic review. It is advisable to formulate a consistent overall approach to the fight against the financing of terrorism at both the state and the international levels, including comparable conditions for both with regard to the freezing or seizure of assets linked to terrorism. Such consistency is necessary primarily to maintain the balance between effective efforts to combat the financing of terrorism and the duty to preserve the human rights of suspects, defendants, and third parties. In this regard, there is no practical justification for distinguishing between acts of terrorism that have no connection to Israel and those that do. However, rather than adopting a comprehensive perspective, the Financing Law took a patchwork approach. Obviously, the legislative approach that has been adopted reaffirms the previous problematic arrangements regarding terrorist activities linked to Israel, while ignoring the importance of human rights, in general, and the constitutional status of the right to property in Israel, in particular.

To summarize, the very fact that the Financing Law was enacted is an expression of the current view that the suppression of the financing of terrorism has unique characteristics that justify separate treatment, although the linkage of the Financing Law to earlier statutes constitutes an obstacle to the consolidation of an independent approach to the suppression of the financing of terrorism. From the perspective of state authorities, broad use of the parallel powers granted by the Defense Regulations remains the easy path and, therefore, it is not surprising that the Financing Law has rarely been invoked to date, and that the primary channel for combating the financing of terrorism continues to be the Defense Regulations. Reasserting the legitimacy of relying upon the old arrangements at the present time is problematic from a human rights perspective (and possibly also from a constitutional point of view). In addition, Israel is a signatory to important human rights conventions, and its international obligations in the suppression of the financing of terrorism must be fulfilled by upholding the other international commitments that it has taken upon itself.

Finally, this book demonstrates that the Financing Law, notwithstanding its stated purpose, is far from being a perfect tool for meeting Israel's international obligations to suppress the financing of terrorism. The Law does not pave the way for a straightforward, direct implementation of these undertakings, and international bodies have given Israel only an average score on its compliance with international obligations in this area. In practice, the mechanism provided by the Financing Law to designate organizations or individuals unrelated to Israel as terrorists was utilized for the first time only in late 2008, almost four years after the Law had been adopted.

◀ An Israeli, Even Though He Has Sinned, Is Still an Israeli? Revoking Citizenship on Grounds of Disloyalty

Efrat Rahaf

Supervised by Mordechai Kremnitzer

Abstract*

Pursuant to section 11(b) of the Israeli Nationality Law, the Minister of Interior may revoke the citizenship of a person who “has committed an act that constitutes a breach of loyalty towards the State of Israel.” This power has been exercised only twice in Israel’s history – at the end of 2002, Interior Minister Eli Yishai revoked the citizenship of two Israeli Arabs suspected of involvement in terrorism. Nevertheless, a bill aimed at increasing the use of the power to revoke citizenship on grounds of disloyalty has already been proposed in the Knesset. This study will deal with several fundamental justifications for revoking citizenship on grounds of disloyalty, as well as with the benefits and risks entailed by this power.

First of all, one should clarify just what citizenship is and how the duty of allegiance derived therefrom is manifested. These are not simple questions. Throughout history the concept of citizenship has taken on two distinct meanings. On the one hand, citizenship represents a certain political ideal – a moral obligation that the individual be actively and significantly involved in the life of the political community. This ideal reflects the approach of Aristotle, who viewed the individual as a “political animal.” On the other hand, citizenship is a legal status that engenders the rights and duties of the individual vis-à-vis the state. There is some tension between these two meanings, since the legal meaning of citizenship nullifies the active emphasis of its political sense. Both meanings were developed in ancient times and have been integrated into modern political theories such as liberalism, which emphasizes rights, and republicanism, which espouses the realization of citizenship through political participation.

From a practical perspective, the dominant meaning of citizenship is as a source of rights and obligations. This reflects a type of exchange between the individual and the state: The rights express the needs of the individual and the obligations express the needs of the state. In the modern Western world, citizenship is mainly perceived in terms of rights. Even political participation, which was a duty in Athenian democracy, is currently viewed solely as a right in most countries (and it is of a more diluted content than in the past).

* Policy Paper 73 was originally published in Hebrew (Jerusalem: The Israel Democracy Institute, 2008). This abstract of this Policy Paper was translated to English by Neil Zwait.

This approach is termed “citizenship as rights,” and it conforms to the liberal tradition that has taken root in the West.

It is important to clarify which rights derive from the status of citizenship in order to understand the implications of revoking citizenship, as well as in order to examine practical alternatives to the use of this power. The currently accepted approach is that all persons are entitled to basic rights, irrespective of their affinity to the country in which they happen to be. Thus, for example, foreigners are also entitled to equality before the law and due process. The status of residency also engenders rights that vary in scope from country to country. Nevertheless, some rights are only granted to citizens: the right to vote and to be elected to national institutions of government; the ability to occupy senior public positions; the right to be issued a passport, which is a prerequisite for freedom of movement between countries; immunity against extradition (in Israel, this immunity was very broad in the past, but has now been restricted to immunity against serving a prison sentence in a foreign country); the right to enter the country of citizenship without the need for a visa; and, most important, immunity against deportation.

As far as obligations are concerned, the accepted view is that the main duty imposed on the citizen is that of allegiance to the state. Other duties, such as obedience to the law and the payment of taxes, are also imposed on non-citizen residents. In certain countries, like Israel, compulsory military service also applies to non-citizen residents. The civic duty to vote in elections or to serve on juries only exists in some countries (not in Israel). However, the duty of allegiance remains too abstract. Among other things, the question arises as to whether or not it is limited to “negative” duties (manifested in prohibitions) or includes “positive” duties (to take action) as well.

It seems that the duty of allegiance to the state is essentially a negative duty and does not require that the citizen identify with and show loyalty to the state. History provides enough examples of the anticipated danger to freedom of opinion, conscience, and expression following an overly broad definition of this duty. A minimal, passive duty of allegiance is necessary, *inter alia*, because the heterogeneity of the modern state makes it difficult to identify an experience of common history that produces a sense of identification among its citizens. The complicated reality characterizing the modern state, in general, and the nation-state, in particular, demands a clear distinction between citizenship and nationality. It also calls for a distinction between allegiance to the state, which creates legal obligations, and patriotism and civic virtue, which concern the sphere of morality. One of the advantages of limiting the duty of allegiance to its passive sense is that this reflects a simple dichotomy: a person can be either loyal or disloyal. This dichotomy suits the legal realm since the law demands that behavior be clearly categorized in order to determine its practical implications in view of the laws of the state. On the other hand, in the realm of morality, a person could be more or less patriotic and a better or worse citizen. In these matters there is no dichotomy. For these reasons, this study supports a narrow, passive concept of allegiance – at least in the legal realm – expressed primarily in the duty to refrain from committing offenses that harm national security. In Israel, these are the offenses of treason; however, it should be noted that these offenses have been formulated too broadly.

A survey of attitudes toward revoking citizenship in international law and the law of other countries, past and present, offers the necessary vantage point for examining the Israeli law. As a rule, international law does not interfere with the citizenship laws of individual states, with one exception – the revocation of citizenship that results in statelessness. While there is disagreement over whether dual citizenship is a desirable situation, it is agreed that statelessness is undesirable from the perspective of both international order and individual rights. Therefore, the Convention on the Reduction of Statelessness stipulates, *inter alia*, that a person may not be deprived of his nationality if this will render him stateless. This rule is subject to several exceptions that express recognition of the state's right to revoke a person's citizenship for having taken an oath of allegiance to another country or for a clear manifestation of disloyalty, provided that the citizen is given a fair hearing by a court of law or other independent body. In addition, it should be noted that the Convention absolutely prohibits the deprivation of nationality on racial, ethnic, religious, or political grounds. Israel signed this Convention, but has never ratified it, and, therefore, it does not have the status of law. Nevertheless, the act of signing is normatively binding.

Over the years, changes have occurred in the legal situation in other countries regarding this issue. In the past, a distinction prevailed between the revocation of naturalized citizenship and the revocation of birthright citizenship. In both cases, many states allowed citizenship to be revoked following acts reflecting disloyalty, especially during wartime. Naturalized citizens, in particular, have been suspected of disloyalty during periods of tension between their new country and their previous country of citizenship. In the United States, for example, during the first half of the twentieth century, the citizenship of many naturalized citizens, particularly those of German descent and including people who had been American citizens for many years, was revoked.

Furthermore, comparative law demonstrates that the attitude toward revoking citizenship is influenced by the nature of the regime. The distinction between naturalized citizens and birthright citizens, which has been eliminated in democratic nations over time, still prevails in undemocratic countries. Moreover, legislation in undemocratic nations allows citizenship to be revoked on broader grounds than those accepted in democratic countries, such as, for acts and expressions considered to be manifestations of subversion. Such legislation existed, for example, in the Soviet Union, Fascist Italy, and Nazi Germany, where it was vigorously enforced.

In the vast majority of democratic countries, a revocation of citizenship that leads to statelessness has been expressly prohibited, and in some cases this restriction has even been established in a constitution. Furthermore, it is rare to find democracies that allow citizenship to be revoked for acts of treason. Such acts are solely dealt with by the criminal law. The most common ground for revoking citizenship in democratic countries is the acceptance of foreign citizenship, and even this is less common than in the past since the current trend is to permit dual citizenship. An even less prevalent cause is foreign military service or public service on behalf of a foreign nation, and in some countries it must be proven that this has actually caused harm to the interests of the state. It should be noted that in Great Britain, the power to revoke citizenship is exceptionally broad (subject to the exception of statelessness) as a result of legislative amendments enacted to fight terrorism. In the United States, on the other hand, the legal

grounds for revoking citizenship were greatly expanded in law at the end of the first half of the twentieth century, but this legislation became a “dead letter” after the US Supreme Court held it unconstitutional to revoke a person’s citizenship against his will.

Given all of this, it is clear that the Israeli statute allowing the revocation of citizenship is inconsistent with principles of international law and the prevailing law of democratic nations for the following reasons: (1) the grounds of disloyalty are unacceptable as well as too vague; (2) the law does not establish an exception to a revocation of citizenship that results in statelessness; (3) the power is delegated to the Minister of Interior and not to the courts. It should be noted that another cause for revoking Israeli citizenship – unlawfully visiting an enemy state – has no parallel in any other democratic nation. These grounds were established in law in 1980, within the framework of an amendment that transferred the power to revoke citizenship from the courts to the Minister of Interior. It is no wonder that this amendment was passed without any real discussion in the Knesset. To complete the picture, it should be made clear that the acceptance of foreign citizenship is not grounds for revoking Israeli citizenship and that the problems stemming from dual loyalties are dealt with mostly through the criminal law. For example, it is a criminal offense for an Israeli citizen to serve voluntarily in the foreign army without previously acquiring permission under Israeli law or in the context of an international agreement.

It is important to note that the Israeli government has never exercised the power to revoke a person’s citizenship for having unlawfully visited an enemy state, and it has almost never exercised this power on grounds of disloyalty. Thus, for example, the Israeli Supreme Court dismissed a petition challenging the refusal of the Minister of Interior to revoke the citizenship of Yigal Amir, the assassin of Prime Minister Yitzhak Rabin. However, in 2002, during the Second Intifada, the citizenship of two Israeli Arabs who had spent extended periods abroad was revoked for suspicion of involvement in terrorism. Since then, there has been a continuous increase in calls to revoke the citizenship of those involved in terrorism, and a bill has been submitted that would transfer this power to the courts – a move designed to increase the legitimacy of its use.

The point of departure for the discussion is that, in principle, even if there is a moral justification for the duty of allegiance to the state, this itself does not mean that there is a moral justification for revoking citizenship on grounds of disloyalty. Rather, we should examine concrete arguments for and against revocation of citizenship on these grounds. One argument, for example, is that citizenship should not be revoked because it is a fundamental right in that it constitutes a prerequisite for receiving the most basic benefits and services, which, to a large degree, are a condition for decent human life. In this context, citizenship has been described in terms of “a right to have rights,” an expression rooted in Hannah Arendt’s spine-tingling description of the existential distress experienced by stateless refugees during the Second World War. On the other hand, it may be argued that the fact that status engenders rights does not turn status itself into a right; and that the expression “a right to have rights” even entails a conceptual contradiction, since a “right” – at least according to an accepted definition in rights theory – expresses a basic human need that cannot be derived from another need. Furthermore, it seems that citizenship is not currently as vital a need as it was in

the past, because of the fact that the lessons of the Second World War led enlightened nations to significantly fortify the protection of individual rights, regardless of the individual's legal relationship with the state. In response to these arguments, it is possible to limit the scope of the rights-based argument to the right to not be stateless or the right to be a citizen of a free nation. However, even if there is a justification for viewing these as "rights," the rights discourse does not provide an absolute barrier to revoking citizenship, since, according to the accepted approach, human rights are not absolute; they may retreat in the face of other values.

Another argument is that the state should be compared to the family, especially a nation-state like Israel, and, therefore, it is wrong to revoke citizenship for two reasons: (1) It severely harms the identity of the individual; (2) The state bears responsibility for the actions of its citizens, and it cannot alienate and expel them whenever it is convenient (in the words of one scholar, "the state can punish, but it cannot banish"). These arguments only advance the discussion to a limited degree since they are not valid in all situations. Moreover, the family metaphor requires us to think of membership in the state in terms of close relations. Perhaps this approach suited the Greek city-state of ancient times, but not the modern, alienated state.

A third type of argument relates to social contract theory. Some scholars support the revocation of citizenship on grounds of disloyalty by arguing that citizenship in a democratic country reflects the social contract between the individual and the government and, therefore, disloyalty represents a breach of the social contract. This argument has many flaws. For example, according to this logic, any violation of law, and certainly a severe violation of law, justifies the revocation of citizenship, since social contract theory serves as a moral justification for the duty to obey the law. Furthermore, the social contract, in its liberal formulation, does not require allegiance to the government. Some scholars even argue that the contract is not between the citizens and the government, but rather between the citizens themselves. US Chief Justice Earl Warren held that the government of a democratic regime has no power to sever the relationship that gives rise to its existence. Nevertheless, an act that reflects high treason by a citizen against the nation, and not just against the government itself, could be considered a breach of the social contract even in its liberal formulation. Therefore, the argument based on social contract theory indeed justifies severe restrictions on the revocation of citizenship, but it does not lead to an unequivocal abrogation of this power.

Indeed, we have not found an argument that totally rejects, in principle, the revocation of citizenship on grounds of disloyalty. However, given the balance of risks and benefits latent in the exercise of this power in the current reality, considerations of policy may render it illegitimate. This is a second-order type of argument, whereby it is better to avoid granting a certain power if it embodies a potential harm that outweighs its potential benefit.

It seems that the benefits of revoking citizenship are too trivial. The proper way to deal with serious cases of disloyalty – and there is no reason to even consider the revocation of citizenship except in serious cases – is through criminal proceedings. A criminal conviction – and certainly for an offense of treason – casts a social stigma on the offender, and for serious offenses entails a lengthy prison sentence. It is possible

to consider, as supplementary punishment, the temporary revocation of citizenship rights, such as the right to vote and to be elected. This measure is less harmful than the revocation of citizenship itself. The biggest fear is that the power to revoke citizenship will actually be exercised in cases in which the criminal law does not provide a solution due to the lack of sufficient evidence. The power is liable to be used to circumvent prosecution for treasonable offenses, which would not protect the rights of the individual any more – but perhaps even less – than would have been possible through the criminal justice system. In this context, it is important to remember that the heavy criminal burden of proof is not a technical matter, but rather a substantive principle designed to prevent the conviction of innocent persons. On the other hand, if it is impossible to apply criminal law, because the suspect permanently lives abroad, even if there is overwhelming evidence, we must still respect the principle whereby a person is not to be tried *in absentia*; and it is not clear why there is a need to revoke citizenship in such cases, apart from the symbolic aspect of condemnation. Only under certain circumstances may the Minister of Interior justifiably revoke, restrict, or refuse to renew the passport of a citizen who resides abroad.

Notwithstanding the minimal benefit embodied in the power to revoke citizenship on grounds of disloyalty, the risks entailed by this power, in general, and in the Israeli reality, in particular, are considerable. The most tangible risk in Israel is that legislation allowing citizenship to be revoked following manifestations of disloyalty is liable to be considered and even to be used as a weapon directed at the Arab minority, given patterns of discrimination that have existed since the establishment of the State and given the suspicious treatment of this populace as a “fifth column.” Indeed, the sole exercise of the power to revoke citizenship on grounds of disloyalty has been directed at Israeli Arabs, despite the fact that Jews have been convicted of serious acts of espionage and treason. The national preferences of the Jewish public in Israel expressed in the symbols of the State and its immigration policy (i.e., the Law of Return, which grants every Jew the right to immigrate to Israel) must be accompanied by extra concern for the principle of equality before the law.

Some scholars argue that revoking citizenship for the commission of security offenses, especially terrorist offenses, is justified by the principle known as “defensive democracy.” However, this principle should be interpreted very narrowly, since it embodies a tension between its declared objective – the preservation of democracy – and the measures that it is designed to justify. The security challenges constantly faced by the State of Israel do not detract from this necessity. Moreover, without understating the seriousness of the threat of terrorism, in general, and of its threat to the State of Israel, in particular, this matter should be examined from a historical perspective. The fight against communism in the twentieth century, especially in the United States, offers a good analogy to the fight against terrorism at the beginning of the twenty-first century. It is clear today that public alarm over communist subversion was exploited by the American government to justify an exaggerated curtailment of individual rights, which included revoking the citizenship of people who, during the naturalization process, had concealed information about their connections to the Communist Party (however trivial). Practical alternatives to revoking citizenship – use of the criminal process and the temporary revocation of citizenship rights as supplementary punishment in suitable cases – are also appropriate for involvement in terrorism. Even if we accept the position that views terrorism as a unique

phenomenon justifying unique measures (and there is disagreement on this subject), the danger that the fight against terrorism will be exploited for political needs demands that we find means for combating terrorism that cause minimal harm to democratic-liberal values. Israel employs a variety of measures against terrorism, from military combat to legislation allowing the disqualification of candidates to the Knesset who support the armed struggle of a terrorist entity. Furthermore, the courts hand down harsh sentences to Israeli citizens convicted of providing assistance to terrorists.

In conclusion, the argument that putting the power to revoke citizenship in the hands of the courts would prevent the abuse of this power should be addressed. Undoubtedly, the court is better suited to exercise this power than a minister; however, transferring the power to the court does not dispel the fear that it will be abused or exercised in inappropriate cases. The courts in democratic nations have been known to render mistaken decisions, especially during a national-security crisis, when public pressure demands that “traitors” be brought to justice. From a practical perspective, judicial discretion even tends to be less independent when it comes to security matters. When the status of citizenship hangs in the balance, it is best not to rely on judicial sensitivity.

Accordingly, given the concrete danger of abuse, it is essential to make sure that the power to revoke citizenship on grounds of disloyalty be exercised only in suitable cases; but since this cannot be guaranteed, it is best to avoid granting this power altogether. Therefore, it is hereby proposed to repeal the statutory provision authorizing the Minister of Interior to revoke citizenship on grounds of disloyalty, as well as the provision that allows citizenship to be revoked for unlawfully visiting an enemy state. Nevertheless, a final conviction for a “hardcore” offense of treason could justify the revocation of citizenship rights for a fixed period, as supplementary punishment to the primary punishment imposed for the crime. If the legislators do not accept this proposal, then, at the very least, the grounds of unlawfully visiting an enemy state should be repealed altogether and the grounds of disloyalty should be replaced with a limited and well-defined provision, accompanied by an exception for a revocation of citizenship that leads to statelessness.

Collateral Damage: The Harming of Innocents in the War Against Terror

David Enoch, Iddo Porat, Re'em Segev, Mordechai Kremnitzer

The Israel Democracy Institute

2007

Abstract*

An armed band of Palestinian terrorists is heading toward Israel from the Gaza Strip to carry out an attack. While still in Gaza, it enters a multi-story residential building. Is it permissible to attack the building in order to strike the group, thereby also harming the occupants of the building who are not involved in terrorism?

International law does not categorically prohibit the harming of civilians under such circumstances (often referred to as “incidental harm”), but it does forbid harming civilians to a degree that is disproportionate to the military advantage underlying the action. Even so, there is an absolute prohibition against the intentional harming of civilian non-combatants; hence the (almost) universal condemnation of acts of terrorism that target civilians.

What is the position of the law regarding harm caused to civilians as part of a strike against a military objective that is a permissible target if the action is carried out, not with the intent to harm civilians, but with the awareness that such an outcome is possible, even highly probable? This question is explored from an ethical perspective by three legal theoreticians: Prof. David Enoch and Dr. Re'em Segev, of The Hebrew University of Jerusalem, and Dr. Iddo Porat, of Ramat Gan Law School. Prof. Enoch addresses the issue of awareness from a more general standpoint, while Segev and Porat focus on situations in which it is known that there is a high probability that a certain incident will take place.

David Enoch's article analyzes the question of whether there is a moral and ethical difference between Palestinian terrorist attacks and the preventive assassinations (known as “targeted killings”) carried out by Israel. After eliminating extraneous considerations, he examines whether there is a moral distinction between actions with “intended consequences... and... consequences that, even if foreseeable, are unintended.” More precisely, he states: “For the terrorist, the harming of innocent victims is a means to an end, whereas, for the person carrying out the targeted killing, the harming of innocent victims falls under the heading of a predictable incidental result.” Enoch demonstrates that this distinction is central to common-sense moral thinking, in that it allows us to differentiate between two cases: the runaway train car scenario and the

* This book was originally published in Hebrew. This abstract was translated to English by Karen Gold.

organ transplant scenario. In the first case, we consider the rerouting of a train car that is about to kill five people onto a track where it is likely to kill one person to be a morally justified act, in that the killing of one man is neither a goal nor a means to an end, but merely an expected, or predictable, incidental result. In the second case, we consider the killing of one patient by a doctor in order to transplant his organs into several patients that he wishes to save to be an unjustified action, since putting the patient to death, from the doctor's perspective, is a goal in itself, or at least a means to an end.

Enoch, however, offers numerous substantive criticisms of this distinction. The discussion of these criticisms can ultimately be reduced to the following complex position: On the one hand, the inability to defend the distinction mentioned above, and on the other, the statement that "the profound ethical revolution that would be engendered by the collapse of the above distinction causes me to avoid hastening to conclude that the distinction cannot be defended against the difficulties enumerated above (even if I do not know how to defend it)."

Enoch shifts at this point to discussing the special case of Israel's actions. His conclusion is that even if we assume the existence of a distinction between intended consequences and expected consequences, there is reason to reject such a distinction when the case involves the actions of a state. Ostensibly, such a position would hold the state to a stricter standard; but surprisingly enough, it lends itself to a more lenient approach vis-à-vis the state: in the case of the state, the balance is weighted in favor of considerations of actual outcome, whereas with regard to a terrorist, the preceding distinction still applies. It is not entirely eliminated, and serves as a moral barrier to acts of terrorism intended to kill civilians. To avoid this asymmetry, Enoch raises the possibility of denying the moral relevance of the distinction between intended and expected consequences in the case of individuals as well.

Iddo Porat's article is a response to Enoch's remarks. Porat posits five major arguments: (a) The case of the terrorist as discussed by Enoch does not reflect the typical case of the Palestinian terrorist in terms of its severity. (b) There is reason to address only those cases in which it is understood that there is a high degree of probability that civilians will be killed, and not every case in which there is an awareness of such a possibility. (c) There is room to distinguish between responsibility for an action, which Enoch addresses, and justification for an action, which is the category of the actions of a state that should be judged. (d) It is possible to preserve the distinction between the case of the railway car and that of the transplant by differentiating between creating an unjustified risk and deflecting an existing risk from its original course, which can be justified. (e) The distinction between intent and expectation can be maintained if it is based on Kant's reasoning, as follows: If we wish to act in accordance with the first formulation of Kant's categorical imperative, we would be expected to agree to a universal practice that permits causing expected (but not intended) harm in order to achieve positive results; but we would not agree to a general practice that allows causing intended harm for the purpose of achieving positive results.

In his response to Porat, Enoch offers a dissenting view concerning the moral relevance of the distinction between creating a new risk and deflecting an existing one. He shows that even if we were to accept this distinction, it would not offer us an ethical distinction between a state-sponsored act of killing and a terrorist action. Enoch also takes issue

with Porat's "Kantian argument." He demonstrates, *inter alia*, that Porat's argument is based on an outcome-oriented calculation that can be contradicted, and that such a calculation cannot serve as the basis for an argument concerning the intrinsic importance of the distinction between intent and expectation. In addition, he argues that it is unjustified to limit the comparison between intent and expected outcome to cases in which the outcome is almost certain. He notes that Porat's discussion applies also to consequences that are totally unexpected, which are clearly outside the parameters of the present debate. Enoch demonstrates further that Porat's position on mental states is different and narrower than his, and that Porat's treatment of causal structures likewise differs from his own. That is, Enoch believes that Porat's approach embraces the notion of causal structure as well.

Re'em Segev focuses on a situation in which the harming of civilians is a certain, or highly probable, outcome. He takes a two-pronged approach: analyzing the issue in terms of outcome, and then examining whether there is room for a deontological (that is, non-outcome-oriented) limitation of such harm. After a thorough discussion of the issue, he concludes that "such actions would be justified only in cases in which the estimated number of casualties from a terrorist attack is much greater than the estimated number of casualties from an action taken to prevent it, or where there is a very high likelihood of preventing an attack."

In other words, Segev concludes that such actions would be justified only if the chance of saving innocent victims would be greater than the risk of harming innocent victims. He demonstrates that such a condition is not fulfilled except in outstanding cases, particularly since, in general, it is not certain (as opposed to merely suspected) that an act of terrorism is likely to be committed; there is no guarantee that the preventive action will succeed; and there is a chance to prevent the harming of innocent victims by implementing a different measure. By contrast, the risk of harming innocent victims in the scenario in question is certain, or almost certain. Segev shows that calculations based on outcome are liable to be weighed against innocent victims on the other side. Accordingly, his conclusion is that there are two possibilities, utterly rejecting such actions or permitting them only in the rare cases in which "there is reliable evidence on which to base a reasonable assumption that if preventive action is not taken, an actual terrorist attack will be imminent."

In the second part of the article, Segev analyzes the possibility of adopting a deontological limitation on preventive action, and offers arguments for his conclusion that such an option should be rejected. In addition, he addresses the relationship between intended outcome and expected outcome, concluding that the distinction between the two should be eliminated and they should be seen as normatively equal.

The present abstract is part of an introduction written by Prof. Mordechai Kremnitzer of The Israel Democracy Institute and The Hebrew University of Jerusalem. The introduction also offers a legal perspective on the issue in question. Kremnitzer concludes that the most enlightened alternative would be to limit attacks on military targets in situations in which there is a high probability that innocent victims will be killed in the course of the attacks to cases of concrete danger in which there is a solid basis for believing that if preventive action is not taken, an actual terrorist attack will be imminent. He further concludes that this approach should be expressed in the form of a clearly defined principle.

Appendix



The 2009 Israeli Democracy Index: Auditing Israeli Democracy – Twenty Years of Immigration from the Soviet Union

Asher Arian, Michael Philippov, Anna Knafelman

The Israel Democracy Institute

2009

The Democracy Survey 2009: A Summary of the Salient Findings*

The Israeli public continue to show high interest in politics in comparison with other democratic countries. Two thirds of the public are interested in politics to a large extent or to some extent. And yet, only half of young Israelis are interested in politics to a similar extent. The public perceptions of Israeli democracy present a problematic picture: about one third of Israelis – and of them, more than half of the Arab respondents and of FSU immigrants – maintain that Israel is not democratic enough.

Israelis believe in the effectiveness of a regime headed by a strong leader (and Israel differs in this regard from most democratic countries in the world), but they tend not to grant additional powers to the prime minister at the expense of the legislative branch. Among all the alternatives to a democratic regime, the Israeli public choose a government of experts who make decisions on the basis of their personal and professional views, and without taking the public's attitudes into account. Fifty-eight percent of the respondents agree that a regime of this type is suitable for Israel; among the immigrants, the rate is 72%.

In 2009, Israelis feel their country is deeply corrupt; 37% maintain that corruption in Israel is greater than in other democracies. Interestingly, views among the Arab public are more positive – only a minority think that politicians in Israel are corrupt. Another finding that indicates dissatisfaction with the functioning of the democracy is that about half of the public feel they lack any ability to influence government policy; 61% of FSU immigrants support this view. With regard to the ability to influence local and communal politics, public opinion is more positive, although not among FSU immigrants: more than 40% say they have no way of influencing what happens in the residential community, in the educational institution, and not even at the workplace.

The political integration of the immigrants discussed at length in the Democracy Index 2009 enables us to determine that the political culture of FSU immigrants as of 2009 differs from that of most groups in the country. In general, the immigrants' attitudes are

* This book was translated to English by Batya Stein.

less liberal and less tolerant in almost every realm and concerning every topic examined. Thus, for instance, despite their education and their secularism, they have traditional attitudes as far as family values are concerned.

Furthermore, despite the widespread view that “Russian politics” has been assimilated in Israel, the immigrants do not feel they fully share in the events taking place around them. On the twentieth anniversary of the beginning of immigration from the FSU, many immigrants express views that bring to mind the patterns of political behavior in the Soviet regime. This attests to very weak political integration into Israeli democracy. In an analysis over the years, we found no changes – the immigrants’ attitudes appear more stable and more consistent than those of the Jewish old-timers. As of 2009, the political integration of the immigrants is only partial and confined to systematic participation in elections. They do not feel they can influence their surroundings, and their civic perception is extremely passive. Such feelings may preserve the social-economic problems discussed in the pertinent sections of the Democracy Index 2009. FSU immigrants prefer strong leaders or a government of experts who do not depend on democratic mechanisms. Many of them are dissatisfied with Israeli democracy, and find these two forms of government appealing, and good alternatives to the current Israeli regime. The Index indicates that the mood among the immigrants is worse than the mood among Jewish old-timers, that the problems they suffer from are more serious, and that their reactions are more extreme. Immigrants are more worried about security problems, less sure of their desire to live in Israel, and not sure about their desire to raise children in Israel.

Figure 1

Support for Strong Leaders in Israel

“A few strong leaders can be more useful to the country than all the discussions and the laws”

Agree and definitely agree (according to sectors; percentages)

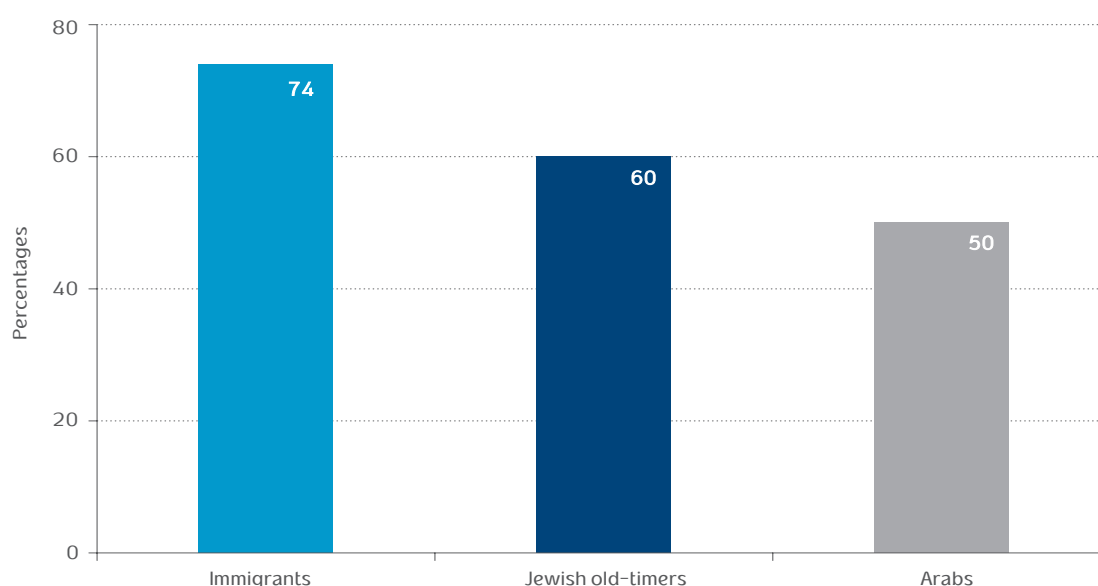
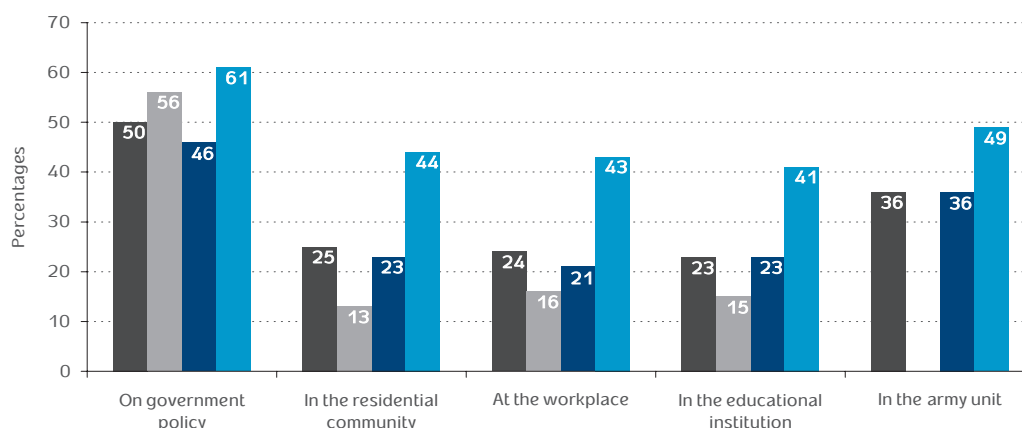


Figure 2

Perception of the Implementation of Democracy: The Institutional Aspect*
 “I and citizens like me have no influence on government policy
 or in the following contexts” (according to sectors; percentages)



* The question about the ability to exert influence in the military context was not presented to the Arab sample, since most Arab citizens do not serve in the IDF.

Figure 3

Democratic Attitudes: The Rights Aspect – Equality for Minorities
 “Israeli Arabs should be denied the right to vote and to be elected to the Knesset”
 “The government should encourage Arab emigration”
 Agree and definitely agree (Jewish sample only; by sectors; percentages)

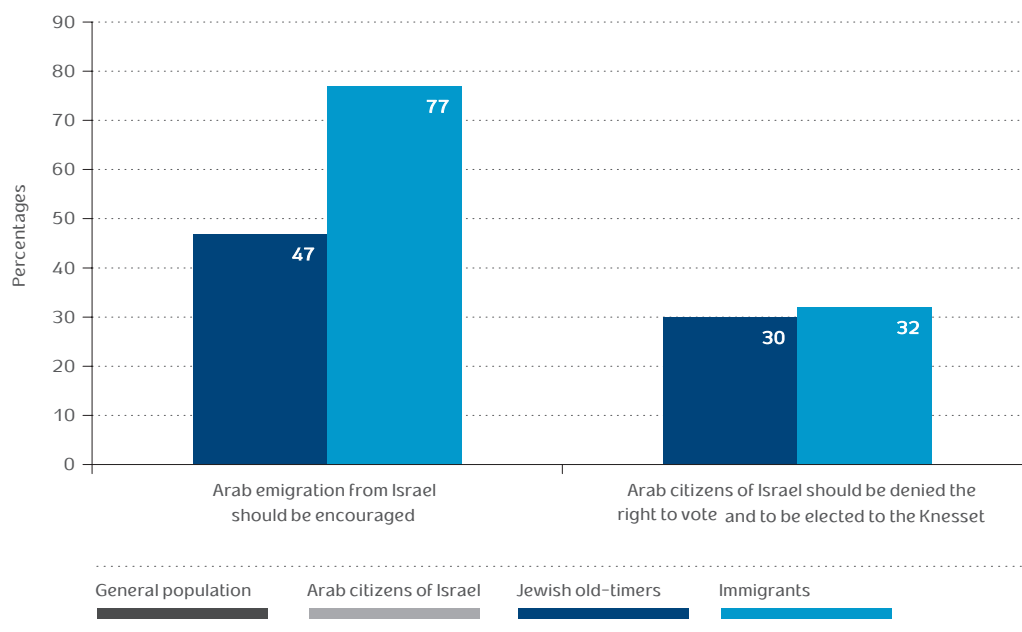
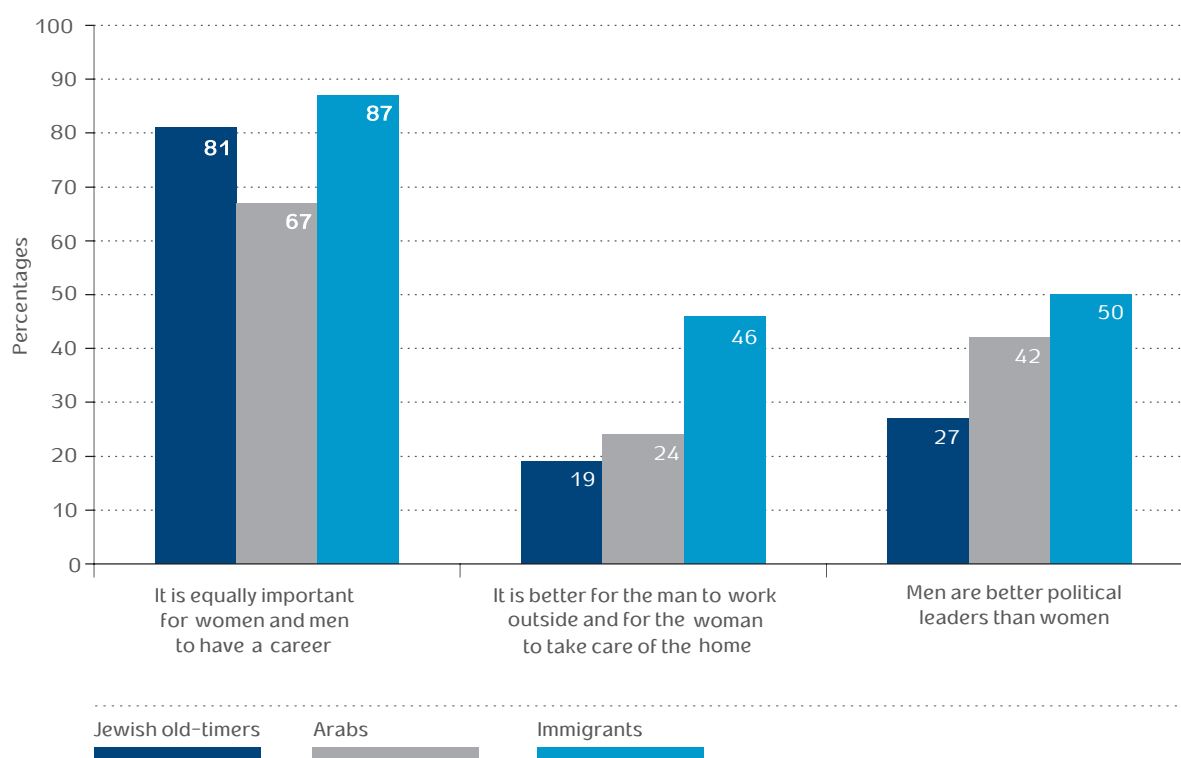


Figure 4

Democratic Attitudes: The Rights Aspect – Gender Equality in Politics,
Family, and Career

“It is equally important for women and men to have a career”
“It is better for the man to work outside and for the woman to take care of the home”
“Men are better political leaders than women”
Agree and definitely agree (according to sectors; percentages)



Contributors

Prof. Asher Arian	Senior Fellow, The Israel Democracy Institute; Department of Political Science, The City University of New York
Nir Atmor	Research Fellow, The Israel Democracy Institute; Department of Political Science, The Hebrew University of Jerusalem
Prof. Avi Ben-Bassat	Senior Fellow, The Israel Democracy Institute; Department of Economics, The Hebrew University of Jerusalem
Dr. Arye Carmon	President, The Israel Democracy Institute
Dr. Momi Dahan	Project Director, The Israel Democracy Institute; The Federmann School of Public Policy and Government, The Hebrew University of Jerusalem
Prof. David Enoch	Department of Philosophy and Faculty of Law, The Hebrew University of Jerusalem
Elad Gil	Research Assistant, The Israel Democracy Institute; Graduate student, The Jerusalem School of Business Administration, The Hebrew University of Jerusalem; law intern
Prof. Tamar Hermann	Senior Fellow, The Israel Democracy Institute; Department of Sociology, Political Science and Communication, The Open University of Israel
Dr. Ofer Kenig	Researcher and Knowledge Manager, The Israel Democracy Institute
Anna Knafelman	Research Fellow, The Israel Democracy Institute; Department of Political Science, The Hebrew University of Jerusalem
Prof. Mordechai Kremnitzer	Vice President, The Israel Democracy Institute; Faculty of Law, The Hebrew University of Jerusalem
Adv. Gilad Noam	Former Research Fellow, The Israel Democracy Institute; Faculties of Law: The Hebrew University of Jerusalem, University of Haifa and Sha'arei Mishpat College

Michael Philippov	Research Fellow, The Israel Democracy Institute; Department of Political Science, The Hebrew University of Jerusalem
Dr. Iddo Porat	Academic Center of Law and Business, Ramat Gan
Adv. Efrat Rahaf	Former Research Fellow, The Israel Democracy Institute
Dr. Gideon Rahat	Senior Researcher, The Israel Democracy Institute; Department of Political Science, The Hebrew University of Jerusalem
Adv. Ido Rosenzweig	Research Fellow, The Israel Democracy Institute; Interdisciplinary Center Herzliya
Dr. Re'em Segev	Former Senior Researcher, The Israel Democracy Institute; Faculty of Law, The Hebrew University of Jerusalem
Prof. Yuval Shany	Senior Fellow, The Israel Democracy Institute; Faculty of Law, The Hebrew University of Jerusalem
Prof. Yedidia Z. Stern	Vice President, The Israel Democracy Institute; Faculty of Law, Bar-Ilan University