ETHNIC DEMOCRACY AND THE LEGAL CONSTRUCTION OF CITIZENSHIP: ARAB CITIZENS OF THE JEWISH STATE

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The citizenship status of its Arab citizens is the key to Israel's ability to function as an ethnic democracy, *that is, a political system combining democratic institutions with the dominance of one ethnic group. The confluence of republicanism and ethnonationalism with liberalism, as principles of legitimation, has resulted in two types of citizenship: republican for Jews and liberal for Arabs. Thus, Arab citizens enjoy civil and political rights but are barred from attending to the common good.*

The Arab citizenship status, while much more restricted than the Jewish, has both induced and enabled Arabs to conduct their political struggles within the framework of the law, in sharp contrast to the noncitizen Arabs of the occupied territories. It may thus serve as a model for other dominant ethnic groups seeking to maintain both their dominance and a democratic system of government.

The problem of maintaining viable democratic regimes in ethnically divided societies promises to be one of the more salient political issues of the new world order. Contrary to the expectations of modernization theorists in the 1950s and 1960s, "nation building" has not only failed in the Third World but is crumbling in the Second and is showing growing signs of strain even in the First. As Western liberal democracies are increasingly confronted with the reality of ethnic diversity and as multiethnic societies in Eastern Europe and elsewhere are struggling with the process of democratization, the efforts to reconcile competing ethnic claims with democratic values and institutions are bound to be more and more difficult to sustain.

One successful example of a democratic yet deeply divided society is Israel. A Jewish state by self-definition, Israel has a Palestinian Arab minority of about 15%, and its Jewish population is divided almost equally between Jews of European and Asian–African origin. Still, since its establishment in 1948, the country has maintained a stable democratic regime that has withstood five major wars, 12 national elections, massive immigration waves, and at least one serious economic depression. Moreover, the political stability within Israel itself has been highlighted, since December 1987, by the national uprising of the Palestinian Arabs in the territories occupied by Israel since 1967 (Lustick 1980; Smooha 1978, 1990).

An important reason behind Israel's ability to manage ethnic conflicts within the framework of the law is the particular character of its political system. This has recently been described as an *ethnic democracy* as distinguished from a majoritarian, consociational, or *Herrenvolk* democracy. An ethnic democracy is a polity combining "the extension of political and civil rights to individuals and certain collective rights to minorities with institutionalized dominance over the state by one of the ethnic groups" (Smooha 1990, 391).

Israeli ethnic democracy has been constituted, according to Smooha, by the tension between two political commitments: one to the Jewish character of the state and the other to a democratic form of government (Smooha 1990, 391–95). Other social scientists have discussed this tension in terms of particularism versus universalism, collectivism versus liberalism, primordialism versus civic culture. Whatever the designation, the current scholarly consensus is that the ethnic Jewish element in Israel's political culture has been on the ascendance since 1967 and that the universal, democratic element has been on the retreat (E. Cohen 1983, 1989a; Kimmerling 1985; Medding 1990, 233; Weissbrod 1983).

I shall argue that the portrayal of Israel's political culture as constituted by these two conflicting principles cannot adequately explain one of the key features of Israeli democracy, namely, the citizenship status of its Arab citizens. In particular, I will argue, this dichotomous view would render a contradictory account of the way in which Arab citizenship has been codified and made explicit by a series of legislative and judicial acts during the 1980s.

To account for these developments, it would be more useful to understand Israeli political culture as comprised not of two constitutional principles—liberalism and ethno-nationalism—but of three—republicanism, liberalism and ethnicity (see Smith 1988). Of the three, the republican principle has been easily dominant; but it has increasingly been challenged in recent years in the name of the other two.

The confluence of these three principles of legitimation has resulted, I will show, in two types of citizenship: republican for Jews and liberal for Arabs. Thus, while Jews and Arabs formally enjoy equal citizenship rights, only Jews can exercise their citizenship as practice, by attending to the common good. Nevertheless, the citizenship rights enjoyed by Israeli Arabs are not inconsequential. Since they were first laid down in 1948, these rights have become the foundation of a civic status that both induces and

enables Israel's Arab citizens to confine their political struggles within the boundaries of the law.

My aim here, however, is not only to analyze a set of constitutional arrangements that have enabled a stable democratic regime to be sustained in a deeply divided society. I also hope to contribute to the extension of the current discussion of citizenship into the sphere of ethnic relations. The need to incorporate the problematic of ethnicity into the analysis of citizenship has frequently been pointed out. Thus, Turner has argued that "any further development of the theory of citizenship will have to deal more fundamentally with . . . the conditions under which citizenship can be formed in societies which are, as it were, constituted by the problems of ethnic complexity" (Turner 1990, 212–13). So far, however, with the exception of the issues of immigration and civil rights—which have mainly to do with admission to, rather than the definition of, citizenship (Brubaker 1989; Gibney 1988; Shklar 1991)—the field of ethnic relations has remained largely untouched by the citizenship debate. This in sharp contrast to the important ways in which the conventional views of citizenship, both liberal and republican, have been challenged by, for example, feminist writers (Jones 1990).

THE CONCEPTUAL BACKGROUND: LIBERAL VERSUS REPUBLICAN CITIZENSHIP

In the *liberal* tradition citizenship has been understood as "a set of normative expectations specifying the relationship between the nation–state and its *individual* members which procedurally establish the rights and obligations of members and a set of practices by which these expectations are realized" (Waters 1989, 160; emphasis mine).

The essence of the liberal conception of citizenship lies in its individual, universal, and equal character. As formulated by Roche, a community of citizens must possess at least three characteristics:

> Firstly, . . . all [members] have a presumptively equal status, equal rights and duties, etc. Principles of inequality deriving from gender, ethnic, class or other contexts are not supposed to be of relevance to the status of citizenship as such. Secondly, citizens accept that in principle and in fact they are and will remain strangers to each other. . . . They are not complete strangers, however. . . . They have impersonal but fairly complex and occasionally modifiable sets of assumptions and expectations about each other. . . . Thirdly, the presumptive equality between these fellow strangers is assumed to normatively govern, and to be enforceable in, their interactions with each other. (1987, 376–77)

The abstraction of the self from all particularity as a condition of citizenship in liberal democratic theory has been criticized by the proponents of republicanism. This "unencumbered self," whose sole characteristics are its subjectivity and its possession of natural rights, is denied, according to Sandel (1984), the possibility of membership in a moral community; for a moral community presupposes a notion of the common good antecedent to the individual citizen's choice. This contradicts the most basic liberal tenet of the priority of right over good (pp. 85–91).

To be able to participate in a moral community, Sandel has argued, one needs "character"—which the abstract, a-historical, unencumbered, liberal self does not possess. Having character means knowing "that I move in a history I neither summon nor command, which carries consequences nonetheless for my choices and conduct. It draws me closer to some and more distant from others; it makes some aims more appropriate, other less so" (Sandel 1984, 90–91). A shared moral purpose, from which originate both a notion of civic virtue and criteria for membership in the community, is thus at the heart of the republican ideal of citizenship (Geise 1984, 27).

Unlike the liberal citizen, who is the passive bearer of *status* (a mere bundle of rights), the republican citizen experiences citizenship as *practice* (active participation in the determination, protection, and promotion of the common good). The will and capacity to participate constitute one's civic virtue and are not only an expression, but also a condition, of citizenship (Oldfield 1990, 1–11). This raises the question how the republican community is constituted and what qualities are required for active participation in it.

Historically, the question of membership in the republican community was unproblematic, since membership was determined largely by birth. In the current revival of republicanism in the United States, however, two distinct notions of community may be discerned: a *weak* community, constituted by deliberation, membership in which is essentially voluntary and a *strong*, historical community that is discovered, not formed by its members (Friedman 1989, 283–84; Sandel 1982, 150; Sunstein 1988, 1541–42, 1571; Taylor 1989, 170).

The civic virtue appropriate to the weak community is no more than the willingness to be public-spirited—to place the general interest ahead of one's own in deliberating the common good (Geise 1984, 27). In the strong community, however, the possession of civic virtue requires much more than that. Since it is a historically constituted entity, members of this community must be committed to its ongoing existence as an important value in and of itself. As Sandel has put it, "[To] family or community or nation or people . . . I owe more than justice requires *or even permits*, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am" (1982, 179; emphasis mine; see also Taylor 1989, 182).

While the weak community is inclusive and open (at least in principle), people who are formally members can still exclude themselves from full citizenship practice by shying away from active participation in politics (Oldfield 1990, 160–61). In the strong community the problem is much more severe; for this type of

community is necessarily exclusive (as many critics have charged: I. Shapiro 1990, 198–99; Smith 1988; Sunstein 1988, 1539–40). Moreover, the basis for exclusion from the strong community is at least partly ascriptive, since membership in Sandel's "enduring attachments" cannot be entirely a matter of choice. Since republican communities could not exist as islands unto themselves even in antiquity—much less today—the question arises, What of members of society who cannot or would not become full members of the community?

While millions of people officially defined as guest workers, undocumented aliens, and so on, live as noncitizens on the margins of many democratic societies, a permanent status equivalent to the metics of the ancient polis is no longer acceptable to modern democratic theory (Dahl 1989, 119–31; Walzer 1983, 53–61). The only solution, therefore, for people who cannot acquire full republican citizenship is to grant them a residual, truncated status, similar to the liberal notion of citizenship as a bundle of rights. Bearers of this citizenship as status do not share in attending to the common good but are secure in their possession of what we consider essential human and civil rights (Oldfield 1990, 160–61). Precisely this type of citizenship is possessed by Israel's Arab citizens.

ISRAEL'S POLITICAL CULTURE

Israel's political culture and its constitutional arrangements are rooted in the experiences of the Yishuv, the Jewish community in Palestine under the British Mandate (1922–48). Jewish settlement in Palestine, which began in the 1880s, was conducted through most of its prestatehood period under the ideological banner of Labor Zionism. The leading ethos of that period was *chalutziyut* (pioneering)—the mutual redemption of the Jewish people and their land through physical labor, agricultural settlement, and military defense.

As a political community the Yishuv was semivoluntary in nature under the aegis of the British Mandate. *Chalutziyut* served as its civic virtue, the criterion by which (in theory at least) civic recognition was accorded to individuals and social groups. Thus, a distinction was made not only between Jews and Arabs but also between the (mostly European) Jews who came to Palestine to "build and be built" there and the (mostly non-European) Jews who were regarded simply as immigrants (E. Cohen 1983, 115–16; idem 1989a, 150; Eisenstadt 1948; idem 1950, 200–203; idem 1985, 102–24, 297–300; Horowitz and Lissak 1978, 120–56; Shafir 1989, 91–122; Y. Shapiro 1977; idem 1984).

As the "civil religion" of the Yishuv (Liebman and Don-Yehiya 1983, chap. 2), *chalutziyut* had a distinctly strong republican character. Like most nationalist ideologies, it embodied a collective sense of mission for an ethnically defined community and expressed it in a powerful founding myth. Israel's Declaration of Independence, which concluded the Yishuv period, proclaimed:

> The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and national identity was formed. Here they achieved independence and created a culture of national and universal significance. Here they wrote and gave the Bible to the world. . . . Impelled by this historic association, Jews . . . in recent decades . . . returned in their masses. They reclaimed the wilderness, revived their language, built cities and villages, and established a vigorous and ever-growing community. (quoted in Medding 1990, 237; see also Y. Shapiro 1977, 10)

Two other strong republican elements in the Yishuv's political culture were a powerful connection between military and civic virtue and a collectivist economic philosophy that assigned great, if not overwhelming, significance to the achievement of national economic goals through the public sector. While individual rights and the procedural rules of democracy were widely respected, they were clearly seen, in line with republican thinking, as secondary in value to the collective Zionist mission. Thus, the liberal notion of the priority of right over good had a very weak grounding in Israeli political culture (Aharoni 1991; Y. Shapiro 1976, 2–4; idem 1977, 19, 29–30, 37, 41; Sternhel 1991; see also Kerber 1988, 1665; Sunstein 1988, 1551, 1564–65).[1]

The ethos designed to legitimate the transition to statehood in 1948 was termed *mamlachtiyut*.[2] It emphasized the shift from sectoral interests to the general interest, from semivoluntarism to binding obligation, from foreign rule to political sovereignty. Equal application of the law was of paramount importance if the state was to assert its authority over the various Jewish social sectors, which had enjoyed a large degree of autonomy in the Yishuv. These sectors (identified by their brand of Zionism—Labor, bourgeois, or religious) had maintained their own educational networks, health care systems, labor exchanges, and even military forces. They all had to be brought now under the jurisdiction of the state.

Israel's first premier, David Ben Gurion, was the great preacher of *mamlachtiyut* and its key element, the uniform rule of law:

> Only in a state in which everyone—citizen, soldier, official, minister, legislator, judge and policeman—is subject to the law and acts according to the law; only in a state in which there is no arbitrariness, neither of ministers or rulers, nor of representatives of the people, and also not of individuals and political leaders—only in a state such as this is freedom guaranteed to the individual and to the many, to the person and to the people. (quoted in Medding 1990, 138)

The state envisioned by Ben Gurion was not, however, a neutral,[3] nightwatchman, liberal state. It was to continue to be committed to the values of *chalutziyut* and to demand such commitment from its citizens:

> Even if in their private lives they act as *chalutzim*, both the individual, and the organizations of individuals, will fail if they do not put their *chalutzic* activity in the service

of the state, and if the state's financial, organizational and legislative power is not committed to the *chalutzic* tasks that are thrust upon us." (quoted in Medding 1990, 136)

Mamlachtiyut, then, was not meant to displace *chalutziyut* as the legitimating ethos (or "civil religion") of society but, rather, to subsume it within the organizational framework of the state. And individuals and social groups were to continue to be evaluated on the basis of their contributions to the common good as defined by the Zionist project (M. Cohen 1987, 201–59; Horowitz and Lissak 1978, 189–95; Kimmerling 1985, 272; Liebman and Don-Yehiya 1983, chap. 4; Medding 1990, 134–77).

The most important statutory manifestation of Israel's commitment to its Jewish moral purpose is the Law of Return. Enacted in 1950, this law guarantees immediate right of entry to every Jew who comes to Israel and expresses a wish to settle there (with the exception of those who might pose a danger to public health or security). The Nationality Law grants every person admitted under the Law of Return Israeli citizenship from the day of arrival in the country (Kraines 1976, 95–99; Kretzmer 1990, 18, 31n., 36–40).

When Ben Gurion submitted the Law of Return to the Knesset for its approval, he argued that the preferential treatment accorded to Jews in the proposed statute did not affect the equal citizenship status of Jews and non-Jews, because the rights granted to Jews—and only to Jews—in the Law of Return were not *given* to them by the state. These rights predated the state, and Jews had possessed them by virtue of being Jews. Moreover, the State of Israel itself came into being through the right Jews had always had to the Land of Israel and in order to enable them to fulfill that right. Therefore, Israel could neither grant nor deny Diaspora Jews the right to settle in the country. In its positive acts, Ben Gurion vouched, the state would always maintain strict equality between its Jewish and non-Jewish citizens (Israel, Knesset 1950, 2035–37).

Ben Gurion's argument that the state was committed to the fulfillment of a primordial Jewish right to the land—a right from which the state derived its very purpose—was a clear affirmation of republican, as opposed to liberal, principles. Liberals have recognized the right of "communal self-determination," that is, the right of a community to shape its own cultural character or provide refuge to its ethnic kith and kin (Walzer 1983, 35–51). Otherwise, few immigration laws would be legitimate from a liberal point of view. However, Ben Gurion's claim that the state was morally bound to promote some good that was antecedent to it and that, moreover, this justified making distinctions between the rights of different groups of citizens (or potential citizens) on the basis of ethnic affiliation is anathema to liberal political theory. It is perfectly acceptable, however, from a strong republican point of view (see Smith 1988).[4]

To sum up, then, the dominant strain in Israel's political culture may be termed *ethnorepublicanism*. Jewish ethnicity is a necessary condition for membership in the political community, while the contribution to the process of Jewish national redemption is a measure of one's civic virtue. This conception necessarily excludes the Arabs. As non-Jews, they cannot belong to the ethnically defined community; as those from whom the land is to be redeemed they cannot partake of Zionist civic virtue. I shall now show how, starting with this a priori exclusion, a liberal citizenship status has been constructed for Israel's Arab citizens.[5]

THE FOUNDATIONS OF ARAB CITIZENSHIP

At the conclusion of the 1947–49 Arab–Israeli war, 63,000 of the 160,000 Arabs who had remained in the territory of the State of Israel were granted immediate Israeli citizenship. The others could apply for citizenship under the Nationality Law promulgated in 1950 (Moshe Shapira in Israel, Knesset 1950, 2134–35).[6]

This granting of Israeli citizenship to the country's Arab residents constituted a renunciation of the ethnonational principle, which would have mandated the institution of a South Africa–style *Herrenvolk* democracy for Jews only. That the *Herrenvolk* democracy option was not even raised by any serious political force in the Yishuv attests to the weakness of ethnonationalism as a legitimating ideology among Jews in Palestine at the time. Similarly, ethnically blind liberal citizenship could not have become the norm, either; for this would have meant forfeiting the most essential goals of Zionism. Ethnorepublicanism, on the other hand, was not only a natural continuation of the tradition of the Yishuv but also the most attractive option available to Israel's founders; for ethnorepublican citizenship could reconcile the uniform rule of law with the assignment to Jews of "more than justice permits."

The extension of citizenship rights to Arabs did not stem, however, solely from Israel's commitment to equality before the law. Attenuating circumstances made that decision both easier and more necessary than it might have been. The Arab population of Israel had been reduced by the war from a 2:1 majority (in the area of Mandatory Palestine) to a small minority of about 12.5% of the population of the State of Israel (Lustick 1980, 48–49; Morris 1987; Kamen 1987–88). Moreover, the Jewish leadership believed "that the minority problem had been all but eliminated by the mass Arab exodus—that the number of Arabs left in the state was insignificant" (Lustick 1980, 53). This made it easier to include the remaining Arabs in the body politic of the state.

In addition, the international situation had to be considered, as well. In the deliberations leading to the partition of Palestine in 1947, the Zionist representatives had emphasized that "when we speak of a Jewish State we do not have in mind any racial state or any theocratic state, but one which will be based upon full equality and rights for all inhabitants with-

out distinction of religion or race, and without domination or subjugation" (Robinson 1947, 208). The UN Partition Resolution itself, which had legitimated Israel's founding in international law, required that elections to the legislative organ of the state be conducted on the basis of "universal suffrage" and that the state guarantee "all persons equal and nondiscriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association" (quoted in Medding 1990, 11–12).

Arab delegations at the United Nations complained about the treatment of the Arabs in Israel, and Israel's first application for membership in that body was refused in December 1948 (Lustick 1980, 61). Furthermore, the government sought to avoid the possibility that the remaining Arabs, who were concentrated in clearly demarcated geographical areas, would demand secession from Israel on the basis of their right of national self-determination—as has, indeed, happened in the territories occupied in 1967, whose residents have not been granted Israeli citizenship (ibid., 61–63).

After some debate in Ben Gurion's inner circle, Arab citizens were allowed to participate in the first general elections held in January 1949—at a time when the war had barely ended and prior to Israel's second, and successful, application for membership in the United Nations. Ben Gurion's reason for allowing the Arabs to vote was instructive: "We must not begin with national discrimination" (quoted in Medding 1990, 26). Significantly, however, over 60% of the Arab voters supported Ben Gurion's ruling party, Mapai, or its Arab affiliates, in these first general elections. This electoral pattern was maintained until 1965 (Rouhana 1986, 136).

The gap between the Arabs' formal citizenship status and their actual treatment (in this early period) as occupied enemy population was bridged by emergency decrees and administrative regulations. Most conspicuous of these was the military administration instituted in the areas of Arab concentration, "which imposed severe restrictions on their freedom of movement and economic opportunities, and placed them under surveillance and military law" (Medding 1990, 25; see also Dowty 1988; Jiryis 1976, 15–55; Kretzmer 1990; Lustick 1980).

Several Jewish political parties opposed the military administration, either because it violated the Arabs' citizenship rights or because it was seen as an instrument in the hands of the ruling party to secure for itself the lion's share of the Arab vote. In response to this pressure, many of the restrictive regulations against the Arabs had been gradually relaxed, beginning in the early 1960s. The final abolition of the military administration came, however, only in December 1966, following Ben Gurion's resignation from the government and the development of shortages in the (Jewish) labor market (Jiryis 1976, 31–55; Shalev 1989, 108; Smooha 1989, 15, 207).

One important *obligation* still denied to most Israeli Arabs is military service, which is mandatory for most Jewish citizens. This exemption is not a matter of law but of administrative practice and is probably unavoidable as long as the primary task of the Israeli military is to fight Arabs. Still, many social rights in Israel have been tied to the performance of military service, so that most Arab citizens either do not enjoy them or are entitled to smaller benefits (Kretzmer 1990, 98–107).

Moreover, the possibility of instituting some form of alternative national service for Arabs (which has been done in the case of religious Jewish women) has not been seriously considered by either the state or the Arabs themselves. Since any notion of citizenship entails the equality of rights and obligations—and especially in view of the extraordinary importance accorded national service in the republican view of citizenship (Oldfield 1990, 166–67)—this omission is highly symbolic of the Arabs' exclusion from attending to the common good. It has also become a major issue in the debate over the rights of Arab citizens. Thus, in the general elections of 1988 three right-wing Jewish political parties demanded that national service for Arab citizens become a condition for their enjoyment of full citizenship rights (Horowitz and Lissak 1989, 39–40; Nakdimon et al. 1988, 75, 133, 142; Smooha 1989, 96, 224).[7]

THE CODIFICATION OF ARAB CITIZENSHIP

The Challenge of al-Ard

The first major constitutional challenge to the citizenship status of Israeli Arabs came in 1965, an election year. Israel's electoral system is a proportional system, in which candidate lists submitted by political parties compete in a single national constituency for a share of the Knesset's 120 seats. These candidate lists have to be ratified beforehand by the Central Elections Commission (CEC), a semijudicial body made up of representatives of all parties currently in the Knesset and presided over by a Supreme Court justice.

Until 1965, the only Arab parties that participated in national elections were those affiliated with Zionist Jewish parties (except for the Israeli Communist party, which had been taking on more and more the character of an Arab party). In 1965, however, one of the lists of candidates submitted to the commission was the Socialist list organized by al-Ard (the Land), a small group of nationalist Arab intellectuals that had been previously declared an unlawful association by the minister of defense (Jiryis 1976, 187–96). The commission decided to disqualify the Socialist list on the grounds that it was "an unlawful association, because its promoters deny the [territorial] integrity of the state of Israel and its very existence" (Kretzmer 1990, 24). The commission's decision was appealed to the Supreme Court, which had to face the full force of

the contradiction between the different constitutional principles governing the citizenship status of Jewish and Arab citizens.[8]

By the legal situation that existed in 1965, the Central Elections Commission did not have the authority to turn down a list of candidates if that list had met all the technical criteria stipulated in the Elections Law (such as a certain number of signatories and candidates' ages, citizenship status, etc.). In other words, the commission had no statutory authority to pass judgment on the list's political goals or those of its members. Strict adherence to the existing law would have mandated the Court to uphold the appeal of the Socialist list—as was, indeed, recommended by one of the three justices. The other two justices, one of whom was the president of the Supreme Court, decided to deny the appeal on the grounds that the gravity of the issue placed before the commission justified its departure from the strict letter of the law (Gavison 1986; Kretzmer 1990, 22–26; *Yardor* v. *CEC* 1965; see also Smith 1988, 243–44).

There was some unclarity in the Court's written decision, however, as to what precisely was the issue before the commission: Was it that the al-Ard group objected to the Jewish character of the state or to its very existence? But if the main opinion for the majority, written by President Agranat, is read in its entirety, it becomes quite clear that the two issues were one and the same in his mind (*Yardor* v. *CEC* 1965, 384–89; see also Gavison 1986, 179, 181). Thus, Gavison has interpreted Agranat's opinion to mean that

> Israel's being a Jewish state established as the fulfillment of the Jewish people's dream of self-determination justifies, as a necessary condition, the disqualification of a list which does not accept the Jewish people's right to a state of its own (as distinguished from a list which accepts this right but objects to some of its political and legal manifestations or questions the conditions under which a Jewish state should continue to be maintained in Israel). (1986, 159)

Evidently, the Socialist list was judged to deny the Jewish people's right to a state of its own.[9]

Between 1965 and 1984 no Arab party had attempted to field a list of candidates in Knesset elections. (In 1980 a public meeting called by Arab organizations to discuss the possibility of forming an all-Arab political party was banned by the government.) Instead, Arab voters had been shifting their votes from Mapai and its successor, the Labor party, to the Israeli Communist party, whose following has become overwhelmingly Arab. Thus, the communists gained 51% of the Arab vote in 1977 and have been receiving about a third of the Arab vote since then (Rouhana 1986).

During the 1970s, following the abolition of the military administration in 1966 and the Six Day War of 1967, Israeli Arabs were becoming increasingly assertive of their rights and had shown growing willingness to use the political system for promoting those rights. A number of countrywide representative organizations had emerged in that period, such as the Committee of Heads of Arab Local Councils and the Committee to Defend the Lands (established to fight the expropriation of Arab-owned land by the state). These organizations have gained the grudging de facto, if not de jure, recognition of state authorities (al-Haj and Rosenfeld 1989, 1990; Lustick 1980, 246–49; Smooha 1989, 211–12).

1984

The ethnorepublican principle governing the status of Israel's Arab citizens was next seriously challenged before the general elections of 1984. This time ethnorepublicanism was contested by two political parties: a joint Arab–Jewish party, the Progressive List for Peace (PLP), headed by a former member of al-Ard and Rabbi Meir Kahane's ultranationalist Jewish party, Kach. The two parties couched their arguments in the language of liberalism and Jewish ethnonationalism, respectively (on the PLP see Lustick 1990; Rouhana 1986; Smooha 1990; on Kach see Peled 1990a, 1990b; Shafir and Peled 1986; Sprinzak 1986).

The joint premise shared by the PLP and Kach was that because Israel had a sizable Arab minority, the claim that it could be both Jewish and democratic at the same time was a charade. A state defined as Jewish could not treat its non-Jewish citizens as equals. A democratic state (by any acceptable sense of the term) could not give preference to any particular group. While agreeing on the need to choose between these two constitutional principles, the two parties differed diametrically in the choices they recommended. The PLP advanced the liberal argument that all discriminatory laws and practices favoring Jews should cease to exist and that the territories occupied by Israel since 1967 should be turned over to their Palestinian inhabitants. Kahane's party argued, in the name of Jewish ethnonationalism, that all Arabs, citizens and noncitizens alike, must be expelled from Israel and the occupied territories, and that the territories should be incorporated into Israel.

The Central Elections Commission decided to disqualify the PLP list because "this list believes in principles that endanger the [territorial] integrity and existence of the State of Israel, and [the] preservation of its distinctiveness as a Jewish state in accordance with the foundations of the state as expressed in the Declaration of Independence and the Law of Return" (Kretzmer 1990, 27; *Neiman* v. *Chairman of the CEC* 1985, 238). The Kach list was disqualified, as well, because the party was found to

> uphold racist and anti-democratic principles which contradict the Declaration of Independence of the State of Israel, openly supports acts of terror, tries to incite hatred and hostility between different sectors of the population in Israel, aims at offending the religious feelings and values of some of the citizens of the state and negates in its goals the foundations of democratic government in Israel (*Neiman* v. *Chairman of the CEC* 1985, 238).

Both parties appealed the commission's decisions to the Supreme Court and were reinstated into the

race. The Court ruled, on the basis of the 1965 al-Ard precedent, that in the absence of specific legislation empowering it to do so, the commission could not disqualify the Kach list for the racist and anti-democratic nature of its political platform. In the case of the PLP, the court decided that the commission acted within its authority in disqualifying the list for seeking to negate the existence of the state but that sufficient evidence had not been presented to the commission to merit such a determination. A number of the justices called upon the Knesset to enact legislation that would broaden the authority of the commission to disqualify candidate lists (Gavison 1986, 184–95; Kretzmer 1990, 27; *Neiman* v. *Chairman of the CEC* 1985, 226–33).

While in the case of Kach the implication of the Court's decision was quite clear, namely, that there was no legal way to bar from the electoral process a party seeking to expel the Arab citizens from the country, the implications of the PLP decision depended on an interpretation of the 1965 al-Ard case. If the Court is understood, in the earlier case, to have equated negating the Jewish nature of the state with a negation of its very existence, then one would have to conclude that the 1984 PLP decision meant that "a list cannot be permitted to stand for election if it denies the Jewish character of the state" (Klein 1985, 414; see also Gavison 1986, 159, 179, 181).

If a more restrictive interpretation of the 1965 decision is adopted, however—as was evidently done by the Court in 1984 (Justice Moshe Beiski and Justice Menachem Elon in *Ben-Shalom* v. *CEC* 1988, 242, 257; Gavison 1986, 180–81, 184–85), then the existence of the state and the preservation of its Jewish character must be seen as two separate issues. In that case the al-Ard precedent would apply only to candidate lists that seek to negate the very existence of the state. As Kretzmer has put it, "What of a list that explicitly wishes to repeal the Law of Return, but is sincerely committed to achieving this by the legislative process alone? The statement of the judges in the *Neiman I* [v. *Chairman of the CEC* 1985] case would seem to imply that such a list, which is not committed to physical destruction of the State, may not be disqualified under the *Yardor* [al-Ard] precedent" (1990, 27). This question, which bears directly on the ability of Israel's Arab citizens to have their own vision of the common good represented in the political process, was to be substantially clarified (and, in the case of Kach, completely transformed) by a series of actions that followed the 1984 elections.

1988

Both Kach and the PLP succeeded in electing representatives to the Knesset in 1984, with Kach winning one seat (for Rabbi Kahane himself) and the PLP two. This outcome—especially the election of Kahane, a vociferous racist demagogue—prompted the government to introduce legislation that would bar such parties from contesting future elections. The statute, an amendment to Basic Law—the Knesset adopted on July 31, 1985, reads:

> A list of candidates shall not participate in elections to the Knesset if its goals, explicitly or implicitly, or its actions include one of the following:
> (1) Negation of the existence of the State of Israel as the state of the Jewish people;
> (2) Negation of the democratic character of the State;
> (3) Incitement of racism. (Israel, Knesset 1985, 3951).

It should be noted that this amendment states the particularistic norm of Israel's being the state of the Jewish people explicitly, while the universal norm of equality before the law appears only implicitly, under the more general term *democratic*. During the debate, two changes proposed by members of Knesset belonging to the Israeli Communist party and the PLP (both predominantly Arab parties) were voted down. Their proposals would have removed or mitigated the particularistic content of article 1 by having it close with either "the State of Israel" or "the State of Israel as the state of the Jewish people and its Arab citizens" (Gavison 1986, 198; Kretzmer 1990, 29).

In 1988, prior to the next Knesset elections, the Central Elections Commission was presented with petitions to disqualify, on the basis of the amended Basic Law, the candidate lists of both Kach and the PLP, as well as almost every other party planning to participate in the elections. Kach, for example, requested that all other parties then represented in the Knesset be disqualified, since they all violated either article 1 or article 2 of the amendment. This, of course, was in line with its position that the Jewishness of Israel and its democratic system of government were mutually exclusive.

The commission deliberated seriously the cases of only three parties: the PLP, Kach and Moledet (Homeland), a new, extreme, right-wing party, which, like Kach called for the "transfer" of Arabs from the Israeli "control system" (Kimmerling 1989) but, unlike Kach, limited its demand to the noncitizen Arabs of the occupied territories (Nakdimon et al. 1988, 142). The commission approved the request to disqualify Kach, rejected the request to disqualify Moledet, and was tied (along strict party lines) in its vote on the PLP. The tie was broken by the commission chair, a Supreme Court justice, who decided that the PLP would be allowed to run (Israel, CEC 1988a–d).

Two of the commission's decisions (those relating to Kach and the PLP) were appealed to the Supreme Court. The Court rejected both appeals—Kach unanimously and the PLP by a 3:2 majority (*Ben-Shalom* v. *CEC* 1988; *Neiman* v. *Chairman of the CEC* 1988; Kretzmer 1990, 29). The appeals provided an opportunity for the constitutional implications of the amended Basic Law to be examined by the country's highest judicial authority. While the Court's decisions—against Kach and in favor of the PLP—seemed to uphold the liberal, as against the ethnonational, principle in the constitutional makeup of the state, a closer reading of the decisions reveals a much more complicated picture.

The fundamental constitutional, philosophical, and ideological issues involved in the decision to reject the appeal against the PLP were discussed thoroughly only in the opinions of the two justices who were in favor of upholding it. The three majority justices, including the president of the Supreme Court, rejected the appeal, like the Court did in 1984, for lack of sufficient evidence against the PLP. President Shamgar referred approvingly to the opinions of the two dissenting justices (*Ben-Shalom* v. *CEC* 1988, 246), who also concurred with each other (pp. 232, 257). The two other majority justices did not even refer to the opinions of their dissenting colleagues.

The opinions of the dissenting justices, buttressed by lengthy and profound analyses of the problem, were unequivocal. In the words of Deputy President Elon:

> The principle that the State of Israel is the state of the Jewish people is Israel's foundation and mission [*yessoda vi-weyda*] and the principle of the equality of rights and
>
> resident abroad. Even if the Arabs have equal rights on all other levels the implication is abundantly clear: Israel is not *their* state." (Kretzmer 1990, 31; emphasis original)

This view is shared by Smooha as well: "From the Israeli–Arabs' viewpoint, the provision that Israel is the land of Jews all over the world, but not necessarily of its citizens, degrades them to a status of invisible outsiders, as if Israel were not their own state" (Smooha 1990, 402).

In the opinion of these two Israeli scholars, then, the 1988 PLP decision explicitly excluded Israel's Arab citizens from full membership in the community. Thus, the Court seemed to uphold the ethnonational principle of legitimation over the liberal–democratic one. However, to appreciate the full import of the PLP decision, it must be seen in the context of two other acts connected with the 1988 elections: the exclusion of Kach and inclusion of Moledet.

In the deliberations of the Central Elections Com-

in the rule of law. Thus, the concept borders on Rousseau's *general will*.

3. Medding describes the Israeli state structures as "neutral," in the sense of being free of "partisan criteria" (1990, 9, 11). He also emphasizes that he does not mean to suggest that they are neutral in the class struggle (p. 28, n. 3). However, it would be exceedingly difficult to sustain the argument that the Israeli state is neutral as between Jews and Arabs (Smooha 1990, 393) or in the liberal sense of lacking a moral purpose.

4. Israeli jurists have tended to use liberal arguments in defense of the Law of Return. They have argued, for example, that as a law of immigration and naturalization and as a law that does not discriminate *against* any particular national or ethnic group, it does not violate the norms of international law (Smooha 1978, 399, n. 24). Ben Gurion, however, explicitly stated that the Law of Return was *not* an immigration law (Israel, Knesset 1950, 2037). Ironically, the fact that a similar law exists in the Federal Republic of Germany has also been adduced in support of the Law of Return (Kretzmer 1990, 45, n. 6). The Arab view of the Law of Return is that it gives the right to "return" to Jews who have never set foot in the country, while hundreds of thousands of Palestinian refugees are denied that right (see Smooha 1978, 197; idem 1990, 396). Another important, though largely symbolic, manifestation of Israel's moral purpose is the Nazi and Nazi Collaborators (Punishment) Law of 1950. In this law, Israel undertook to punish Nazi criminals for crimes committed before the state existed, outside of its territory, and in which neither the victims nor the perpetrators were its own citizens. The most celebrated case adjudicated under this law was that of Adolph Eichmann (Papadatos 1964, 32).

5. This sketchy description of Israeli political culture does not take account of much of its complexity or of changes that have occurred in it over time. The most comprehensive—though still very partial—account is Liebman and Don-Yehiya 1983.

6. The connection between the Law of Return and the Nationality Law had the effect, initially, of denying Israeli citizenship to many of the hundred thousand Arab residents not covered by the original grant of citizenship. This problem has been rectified, however, by a 1980 amendment to the Nationality Law (Kretzmer 1990, 37–39).

7. I do not provide a complete account of the status of Israel's Arab citizens, only review some of their civil and political rights. Of the authors cited, Smooha and Lustick provide the most comprehensive accounts of the situation of Israeli Arabs, while Kretzmer focuses specifically on their legal status.

8. In the absence of a formal written constitution and a bill of rights, the courts (especially the Supreme Court) have become the foremost guardians of civil rights and liberties in Israel (Arian 1989, 200–201; Lahav 1990). The Supreme Court has been playing that role primarily in its capacity as the High Court of Justice, entrusted by law with the authority to "issue orders against any body which performs a public duty under law" (Kretzmer 1988, 122). Although judicial review of legislation does not exist in the Israeli system, in recent years the Court has adopted an increasingly activist attitude vis-à-vis the Knesset, agreeing to pass judgment on all types of Knesset decisions, except primary legislation (Kretzmer 1988). The main reason for this development has been the inability of the other branches of government to make politically difficult decisions and their growing disregard for civil rights (Rubinstein 1991, 28). In what follows, I shall rely heavily on Supreme Court decisions in election appeals as indicative of changes in Israel's political culture.

9. It should be noted that the threat posed by the Socialist list was purely ideological. In the words of Justice Cohn, "In the material which was in front of the Central Elections Commission, and which was presented to us too, there was nothing to justify, let alone mandate, the finding that there is a [real or clear or present] danger" posed to the state or to any of its institutions by the activities of the list. This factual statement was not disputed by either of the other justices (*Yardor* v. *CEC* 1965, 381; see also Gavison 1986, 154). Gavison herself also believes that "principled commitment to the idea of Israel as the state of the Jewish people *does not* follow from, and is not mandated by, any conception of democracy. Therefore, if making such a commitment is allowed [under the law], then it may be justified to place certain limits on formal democracy in order to protect" that commitment (Gavison 1986, 160; emphasis original). This, in Sandel's (1984, 85–91) terms, is a perfect example of republican placing of good before right.

10. The PLP does not demand that the Law of Return be abrogated but, rather, that the right to return be extended to the Palestinian refugees, as well (D. Levin in *Ben-Shalom* v. *CEC* 1988, 241; Nakdimon et al. 1988, 118).

11. Justice Dov Levin objected specifically to, among other things, the preamble to the PLP platform, which is formulated in classic liberal terms: "In all of its struggles the List is guided by a paramount principle: Man is everything and the state is a tool in his hands. In this spirit the List shall struggle for another Israel—a state of all of its citizens" (*Ben-Shalom* v. *CEC* 1988, 240).

12. The distinction between expelling citizen and noncitizen Arabs is very much in the mind of the general Israeli public, as well. In an attitude survey conducted by Asher Arian in March of 1991, 39% of the respondents supported the idea of "transfer" when its intended victims were not specified; 34% supported it for noncitizen Arabs, and only 22% supported it for citizen Arabs (personal communication; see Peled 1990b, 356–57).

13. It has recently been suggested that the growing political polarization among Jews in Israel over the future of the occupied territories, coupled with the Arabs' rising numerical importance in the electorate, could result in Arab parties being included in the governing coalition in the not-too-distant future (Lustick 1989, 1990). But even disregarding the current massive immigration of Jews from the former Soviet Union, which has already diminished the Arabs' electoral weight (and which could not have been foreseen by Lustick), Arabs are not very likely to be allowed into the inner sanctum of political power in Israel in the foreseeable future. Even if the problem of national security could be overcome by having Arab parties support the government from "outside" (i.e., without sharing ministerial responsibility), the notion of a government dependent on Arab support runs against the grain of Israeli ethnorepublicanism (see Benvenisti 1991; Rabinowitz 1991).

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