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Tag der Juristischen Fakultät
29. November 2006

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Potsdam 2007

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Prof. Dr. Dorothea Assmann
Dekanin

Rück- und Ausblicke

Heute begehen wir bereits zum 9. Mal den Tag der Juristischen Fakultät. Dazu möchte ich Sie ganz herzlich willkommen heißen.

Der Tag der Fakultät ist zu einem festen Bestandteil im Leben der Juristischen Fakultät geworden. In diesem Jahr haben wir die besondere Ehre, den Titel eines Doktors der Rechte honoris causa zu verleihen. Diese Auszeichnung verleiht die Juristische Fakultät heute an Herrn Prof. Dr. David Kretzmer von der Hebräischen Universität Jerusalem in Würdigung seiner Verdienste um die Schaffung und Förderung einer Kultur der Menschenrechte, die Menschen ein Leben in Würde ermöglicht. Herr Kollege Klein wird in seiner laudatio noch genauer darauf eingehen. Ich möchte Herrn Prof. Kretzmer sehr herzlich danken, dass er unsere Einladung angenommen hat und zugleich den Festvortrag des heutigen Tages halten wird.

Wie in jedem Jahr nutzen wir diesen Festakt auch, um die Promotionsurkunden an die Promovendinnen und Promovenden unserer Fakultät zu übergeben, die ihr Promotionsverfahren erfolgreich beendet, d. h. ihre Dissertationsschrift bereits veröffentlicht haben. Seit dem letzten Festakt sind 24 Promotionsverfahren abgeschlossen worden. Hervorheben möchte ich, dass darunter erstmals auch ein so genanntes „Co-tutelle –Verfahren" ist, d. h. ein Promotionsverfahren, das gemeinsam von den Juristischen Fakultäten der Universität Potsdam und der Universität Paris X- Nanterre betreut wurde.

Auch in diesem Jahr findet wieder die Verleihung des Wolf-Rüdiger-Bub-Preises statt. Durch diesen Preis, der durch den Verein der Freunde und Förderer der Juristischen Fakultät der Universität Potsdam e. V. gestiftet und bereits seit 1996 vergeben wird, wird die Förderung des wissenschaftlichen Nachwuchses an unserer Fakultät in vorbildlicher Weise unterstützt.

Für das zurückliegende akademische Jahr werden mit diesem Preis heute 6 Promovendinnen und Promovenden, die beste Absolventin und der beste Absolvent der ersten juristischen Staatsprüfung sowie der beste französische Student aus dem deutsch-französischen Studiengang geehrt.

Im Rahmen des Akademischen Festaktes erfolgt außerdem die feierliche Verleihung des „Potsdamer Wilhelm von Humboldt Preises 2006". Dieser Preis wird heute bereits zum 4. Mal von der Potsdamer Wilhelm von Humboldt Vereini-

gung zur Förderung der Rechtsphilosophie e. V., die im Jahre 2003 von Professoren der Universität Potsdam, Rechtsanwälten und Richtern gegründet wurde, verliehen. Mit ihm sollen besondere Leistungen von Studierenden und Nachwuchswissenschaftlern auf dem Gebiet der Rechtsphilosophie prämiert werden.

Es wird mir heute auch eine besondere Ehre sein, im Auftrag des Rektors der Universität Potsdam die feierliche Überreichung der Urkunde zur Bestellung zum Honorarprofessor an Herrn Wolfgang Schael, Vorsitzender Richter am Brandenburgischen Oberlandesgericht, vorzunehmen. Die Bestellung selbst wurde durch den Rektor unserer Universität bereits im Juni dieses Jahres vollzogen. Die Fakultät möchte jedoch mit der feierlichen Überreichung der Urkunde unseren verehrten Fachkollegen, der bereits seit 1994 als Lehrbeauftragter an der Fakultät tätig ist, angemessen würdigen. Ich möchte an dieser Stelle Frau Kollegin Andrae nicht vorgreifen, die in ihrer laudatio auf die Verdienste von Herrn Schael eingehen wird.

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Es ist gute Tradition am Tag der Juristischen Fakultät, Rückschau auf die geleistete Arbeit zu halten und zugleich auf neue, vor der Fakultät liegende Aufgaben hinzuweisen.

Im Herbst dieses Jahres fand für die Studierenden, die bisher noch keine erste juristische Staatsprüfung abgelegt haben, zum letzten Mal die Prüfung nach altem Recht statt. Hierzu haben sich beim Gemeinsamen Prüfungsamt Berlin/ Brandenburg ca. 1500 Studierende angemeldet. Natürlich können die Wiederholungsprüfungen auch noch nach altem Recht abgelegt werden. Diejenigen, die nicht an dieser oder einer früheren Prüfungskampagne teilgenommen haben, müssen ihre Prüfung nach neuem Recht ablegen. Die erste juristische Prüfung besteht nun aus einer universitären Prüfung, der Schwerpunktbereichsprüfung, und einer staatlichen Prüfung. Im Sommersemester haben wir erstmals Schwerpunktbereichsprüfungen durchgeführt. Allerdings war dieser Durchgang wegen der geringen Anzahl von Prüflingen noch nicht aussagekräftig. Von 15 Studierenden haben 9 die Schwerpunktbereichsprüfung durch Anerkennung eines französischen Abschlusses im Schwerpunktbereich Französisches Recht abgelegt. Für dieses Semester haben sich 88 Studierende zur Schwerpunktbereichsprüfung angemeldet. Die Hausarbeiten sind bereits abgegeben, die Vorträge werden am Anfang des nächsten Jahres gehalten. Die Klausuren finden - wie immer - nach dem Vorlesungsende und die mündlichen Prüfungen am Ende des Semesters statt. Erst im Anschluss daran werden wir genauere Aussagen über die Schwerpunktbereichsprüfung machen können. Erstaunt hat uns, dass für das Sommersemester 2007 nur 31 Anmeldungen vorliegen.

Im Wintersemester bieten wir erstmals für Studierende anderer Fachbereiche vier Bachelor- Zweitfachstudiengänge an. Dabei handelt es sich um die Studiengänge: Zivilrecht, Strafrecht, Öffentliches Recht und Recht der Wirtschaft. Hierfür haben sich insgesamt 98 Studierende angemeldet. Allerdings gab es wegen der Vielzahl der Kombinationsmöglichkeiten große Schwierigkeiten bei der Koordination mit den Erstfachstudiengängen.

In diesem Jahr haben wir zweimal nach den jeweiligen Prüfungskampagnen im April und im Oktober unsere Absolventinnen und Absolventen feierlich verabschiedet. Es wurden die Urkunden durch Vertreter des GJPA überreicht. Da die Veranstaltungen sehr gelungen waren, wollen wir sie auch in Zukunft beibehalten und hoffen, dass möglichst viele Absolventinnen und Absolventen mit ihren Familien daran teilnehmen.

Mit der Zwischen- und vor allem der Schwerpunktbereichsprüfung sind viele neue Aufgaben auf uns zugekommen. Das Büro für Studien- und Prüfungsangelegenheiten der Fakultät unterstützt uns hierbei tatkräftig und hat sich in seiner neuen Besetzung gut bewährt.

Zu dem deutsch-französischen Studiengang gibt es zu berichten, dass er in diesem Jahr wieder durch die deutsch-französische Hochschule gefördert wird. In diesem Studiengang haben wir außerdem ein Novum. Die französischen Studierenden können im Rahmen ihrer französischen Masterausbildung in Potsdam ihre Masterarbeit schreiben. Diese zählt sowohl als Abschlussarbeit für das Masterstudium als auch als Magisterarbeit für das LL.M.-Studium im Potsdam. Das macht den deutsch-französischen Studiengang für die französischen Studierenden natürlich noch attraktiver als er schon ist.

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Im zurückliegenden akademischen Jahr hat es keine Veränderungen bei der personellen Besetzung der Professuren unserer Fakultät gegeben. Die Professur für Öffentliches Recht, insbesondere Verwaltungsrecht und Steuerrecht konnte bislang leider noch nicht besetzt werden. Wir hoffen aber, dass wir zum Sommersemester 2007 einen neuen Hochschullehrer für unsere Fakultät gewinnen können.

Erstmals wurde an der Fakultät ein gesetzlich vorgeschriebenes Bewertungsverfahren für einen Juniorprofessor durchgeführt. Nach Feststellung der Bewährung als Juniorprofessor im Juli dieses Jahres ist der Inhaber der Juniorprofessur für Öffentliches und Europäisches Wirtschaftsrecht und Wirtschaftsvölkerrecht,

Prof. Dr. Markus Krajewski, durch die Wissenschaftsministerin für weitere drei Jahre auf diese Professur berufen worden.

Eine besondere Ehre ist es, Ihnen mitteilen zu können, dass unsere Partneruniversität Paris X - Nanterre Herrn Professor Dr. Werner Merle den Titel eines Doktors honoris causa im Rahmen eines feierlichen Festaktes am 18. Oktober dieses Jahres verliehen hat. Herr Professor Merle war bis zu seinem Eintritt in den Ruhestand Professor für Bürgerliches Recht, Zivilprozess- und Insolvenzrecht an unserer Fakultät. Mit dieser Auszeichnung würdigt die Universität Paris X-Nanterre die herausragenden Verdienste, die sich Professor Merle auf dem Gebiet der deutsch-französischen Hochschulkooperation erworben hat, insbesondere bei der Etablierung und Betreuung des Deutsch-Französischen Studiengangs Rechtswissenschaften, der gemeinsam von den Universitäten Paris X - Nanterre und Potsdam durchgeführt wird.

Damit möchte ich meinen Rechenschaftsbericht beenden und mich an dieser Stelle bei allen bedanken, die an der Vorbereitung und Durchführung unserer heutigen Veranstaltung mitgewirkt haben. Mein besonderer Dank gilt den Mitarbeiterinnen des Dekanats, Frau Dr. Schwerdtfeger und Frau Hofmann.

Verleihung der Ehrendoktorwürde

Die Juristische Fakultät verleiht den Titel eines

Doktors der Rechte honoris causa
an

Herrn Prof. Dr. David Kretzmer
Hebrew University of Jerusalem, Faculty of Law

in Würdigung seiner Verdienste um die Schaffung und Förderung einer Kultur der Menschenrechte, die Menschen ein Leben in Würde ermöglicht.

Festvortrag

Prof. Dr. David Kretzmer
Hebrew University of Jerusalem, Faculty of Law

Israel as a Jewish and Democratic State – Constitutional Aspects

Introduction

Let me begin by thanking the Dean and members of the Faculty of Law of Potsdam University for bestowing this honour on me. I am not sure that I am worthy of the recognition and honour, but fortunately for me others made the decision, which I greatly appreciate. I am especially appreciative of the recognition given to my modest contribution to promotion of human rights in my country.

It is significant for me that this great honour is being bestowed upon me here in Germany, by a German university. The relationship between Jews of my generation and Germany cannot be simple. I was born in the middle of WWII, and growing up as a Jew in the shadow of the Holocaust necessarily meant that in my formative years Germany was a country that had negative associations. As I matured and became a lawyer and professor I was fortunate to meet Germans of my generation and younger who, being mindful of the past, worked tirelessly to create a new Germany, one committed to human dignity and equality between all human beings, regardless of race, religion or ethnic group; a country that has enshrined in the first article of its constitution the value of human dignity, that may never be violated. This contact changed my perspective, so that today I can be proud to receive this honour and award from a leading German university.

Being in Potsdam I would like to pay special tribute to my friend and close colleague, Professor Eckart Klein, director of the Human Rights Centre at Potsdam University. Professor Klein is, in my mind, the epitome of the new generation of Germans who have helped create the culture of constitutionalism, commitment to human dignity and democracy in your country. You are fortunate to have a person of Professor Klein's caliber and personality at this University. As you all probably know, Professor Klein was a member of the UN Human Rights Committee for 8 years. In the last 2 years of his tenure he served as Rapporteur. Professor Klein's contribution to the work of the Committee was enormous. I would describe him as a lawyer's lawyer. When lawyers are faced with easy questions – they solve them on their own. When they face difficult ones – they turn to people like Eckart Klein. In the Human Rights Committee Professor Klein's legal analysis was always accurate, perceptive and insightful, and members of the Committee looked to him for guidance on complicated issues of international law. Professor Klein has a humanistic approach, which he unfailingly manages to position within the political reality of complicated situations. It is a pleasure and a privilege having him as a friend and professional colleague.

Historical Background

By chance today – the 29th November - is a fateful date in the history of the State of Israel. For it was on this day in 1947, that the UN General Assembly, by a two-thirds majority, adopted Resolution 181, which provided for partition of Palestine into two states, a Jewish state and an Arab state. Thus international recognition was granted to the right to self-determination of the Jewish people, which would be realized by creating their own state in their historic homeland. There can be little doubt that the Holocaust was a major factor in persuading the international community that the Jewish people should be entitled to their own state, in which they would never again become a minority that could be threatened with annihilation.

While the notion of the Jewish state was welcomed by the vast majority of Jews in Palestine and elsewhere, it was totally rejected by Palestinian Arabs and the surrounding Arab countries. The Palestinian Arabs were of the view that as the majority of the inhabitants of Palestine they should be entitled to self-determination in the whole country. They claimed that they were being asked to pay the price for the conscience of the western world for the murder of 6 million European Jews in the Holocaust. The result was a violent conflict between the Jewish state, established following Resolution 181, and the Palestinian Arabs. Unfortunately this conflict continues to this day.

Declaring that the new state would be a Jewish state was easy. Deciding what this means was far more complicated. It was clear to all that the new state

would be democratic. In the Declaration of Independence of 14 May 1948 it was stated expressly that the State of Israel

> will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

The real question became how one reconciles the definition of Israel both as a Jewish state and a democratic state in which all citizens will enjoy equal rights, irrespective of race, religion or sex. One can divide the discussion of this question into two parts:

1. What is the status and place of non-Jews, and especially of Arabs, in a state that defines itself as Jewish. This is a crucial question, since no state can claim be democratic if it does not guarantee equal rights to all its citizens, irrespective of race, religion or sex.

2. What place does the Jewish religion play in the constitutional order of the state? Does it infringe on the rights to equality of non-religious persons, or of persons of other religious persuasions?

Jewish and Democratic State: Constitutional Manifestations

For a long time the constitutional ramifications of Israel as a Jewish state remained vague. While the Declaration of Independence is regarded as an important historical document that expresses the credo of the State of Israel, it is not regarded as part of Israel's formal constitution. Laws should be interpreted in the light of its principles, but even laws that are incompatible with the Declaration are regarded as valid. This situation was exacerbated by the fact that for a long time Israel had no formal constitution.

The first change came about in 1985. In this year the Basic Law: The *Knesset* was amended and section 7A was added.[1] This section provides that a party list will not be permitted to take part in elections for the *Knesset*, Israel's parliament, if in its aims or actions, it "negates the existence of the State of Israel as the state of the Jewish people", "negates the democratic nature of the state" or incites to racism. A few years later, in 1992, two basic laws were enacted which grant constitutional protection to fundamental rights, under the heading: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Vocation. These Basic Laws state:

> The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

This was the first formal constitutional reference to the term now generally used to describe Israel's constitutional and political nature: it is a Jewish and democratic state. Following these basic laws, section 7A of the Basic Law: The *Knesset*, was amended. It now provides that a party-list may not participate in the elections, and a person may not be a candidate for election, if they negate Israel's existence as a Jewish and democratic state, if they incite to racism or if they support the armed struggle of a terrorist organization or enemy state against the State of Israel.

This clear constitutional statement – that Israel is a Jewish and democratic state – and that a person or party who negates this principle may not run in the parliamentary elections, has become the focus of a deep political and constitutional debate. Israel has a large Palestinian Arab minority – which amounts today to 20% of its population. In recent years political leaders and intellectuals in that community have argued that there is a fundamental contradiction between the definition of the state as Jewish, and its definition as democratic. According to this view, supported by some Israeli Jews of the radical left, as long as Israel remains a Jewish state it cannot be regarded as truly democratic. It is true, proponents of this view argue, that in theory non-Jewish citizens have equal civil and political rights. However, they argue, defining the state as Jewish implies that preference is given to Jews; that the state is more their state than that of non-Jews (especially the Arab citizens). This necessarily means that there is no true equality and that the state cannot therefore be regarded as democratic. Furthermore, proponents of this view point to the Law of Return, which grants every Jew in the world the right to immigrate to Israel, and claim that this law entrenches the privileged place of Jews in the state, thereby undermining the very possibility of full equality between Jew and Arab.

It does not seem to me that the above analysis is a necessary conclusion from the constitutional definition of Israel as a Jewish and democratic state. In other words, the mere definition of Israel as a Jewish state does not of itself imply that the state cannot also be democratic. All depends, first and foremost, on the implications of the Jewish nature of the state, and their influence on its democratic nature.

As mentioned above, the Basic Law: the *Knesset* provides that a party list or an individual candidate may not run for election to the *Knesset*, if they negate the existence of Israel as a Jewish and democratic state. Seemingly, this is quite a drastic provision that could be regarded as incompatible with the equal right of

all to participation in the political process, one of the foundations of a democratic regime. On its face the provision applies even if the party or candidate is committed to seeking change of the constitutional definition of the state as Jewish by lawful means alone. Thus, even a Jewish political party which rejects Zionist philosophy and believes that the state should become "the state of all its citizens" should presumably be excluded from the parliamentary process.

The above constraint on the parliamentary process was strengthened in recent years by an amendment to the law granting immunity to members of the *Knessset*. According to the original law a member of the *Knesset* enjoys substantive immunity for any act, or expression of a view, in or outside of the *Knesset*, that was done in the course of his or her duties, or in order to fulfill his or her duties, as a member of the *Knesset*. The amendment states that an act, or expression of a view, that is not accidental, will not be regarded as being done in the course of a member's duties, or in order to fulfill those duties, if it involves negation of the State of Israel as the state of the Jewish people, negation of the democratic nature of the state, incitement to racism on the basis of colour or belonging to a race or being of national-ethnic origins, or support for the armed struggle of an enemy state, or terrorist acts against the State of Israel, or against Jews or Arabs for being Jews or Arabs, in Israel or outside of it.

The scope of the restriction on participation in the elections would appear to be pretty wide, and would seemingly allow for disqualification of any party list that rejected the Zionist ideology and supported changing the ideological and constitutional definition of the state so that it was merely defined as a democratic state of all its citizens. However, all disqualifications of lists of candidates for election are subject to appeal to the Supreme Court, and that Court has narrowed the restriction. The Court was obviously reluctant to adopt an interpretation that would in effect lead to disqualification of the main Arab political parties in Israel. In one major case, an attempt was made to disqualify an Arab political party on the grounds that its platform called for Israel to be defined as the 'state of all its citizens.' While this definition may seem pretty innocuous, in the context of Israel it is a clear code-word for rejection of Israel as a Jewish state. Nevertheless, the Supreme Court rejected the attempt to disqualify the party. The Court stated:

> Our view is that the statement that Israel is the state of all its citizens does not amount to negation of the State of Israel as a Jewish state. Could the argument be heard that Israel is not the state of all its citizens? Could it be argued that Israel is the state of only part of its citizens? One of the fundamental principles of a democracy is equality between the citizens.[2]

As can be seen, in narrowing down the interpretation of the provision for disqualification of party lists that negate Israel as a Jewish state, the Court placed

the emphasis on the democratic nature of the state. The clear notion was that any view of the State as a Jewish state, has to be compatible with its democratic nature. And it assumed, quite correctly, that equality between citizens is a fundamental principle of democracy. A state which denies equal rights between its citizens can hardly claim to be a democracy.

The Jewish State and Equality between Jew and Non-Jew
Equal rights in the constitutional order

The first and major question in examining the potential tension between Israel as a Jewish state and Israel as a democratic state must be to what extent the Jewishness of the state affects the right to equality of its non-Jewish citizens.

On the general constitutional level of principle the answer to this question is quite clear. It was the answer provided in the Declaration of Independence: the state guarantees equality of rights to all its citizens regardless of race, ethnic-national group or religion. This principle has been stressed by the Israel Supreme Court on numerous occasions. Thus in the *Ka'adan* case, to which I shall relate below, the Court declared:

> Equality is one of the fundamental values of the State of Israel. All authorities in Israel – and first and foremost the state itself, its organs and employees – are duty-bound to relate equally to the different individuals in the state...This is demanded by the character of the state as a Jewish and democratic state. This is also derived from the rule of law that pervades in the state.[3]

In another case the Court stressed the point further when it stated:

> Discrimination is one of the most serious violations there can be of a human being and of human rights. It is likely to lead to degradation and violation of human dignity...This is certainly the case when the discrimination is on the grounds of a person's race or religion.[4]

In the same case the Court referred specifically to discrimination between Jew and non-Jew and declared:

> The principle of equality applies to all spheres of government activity. At the same time, special importance attaches to this principle when it comes to the governmental duty to treat Jewish and non-Jewish citizens of the state equally. This duty – of equality between all the citizens of the State of Israel – Arabs and Jews alike – is one of the foundations of Israel as a Jewish and democratic state.[5]

The Court also related expressly to the argument that as a Jewish state, it was justified to grant certain privileges to Jews. In the *Ka'adan* case, which will be discussed below, it stated:

> We do not accept the notion that the values of the State of Israel as a Jewish state could justify discrimination by the State between citizens of the State...The values of the State of Israel as a Jewish and democratic state do not imply at all that the State will discriminate between its citizens. Jews and non-Jews are citizens with equal rights and duties in the State of Israel.[6]

While this constitutional principle has been accepted for a long time, until the last decade or so there was a wide disparity between the principle and the way the authorities discriminated in practice without judicial intervention. The main forms of discrimination were not based on statutory power, but took the form of discrimination in the allocation of resources, such as funding for religious institutions, education and municipal authorities. What characterizes these cases is that the discrimination does not relate to a particular individual, but is on a sectoral level. On the one hand, this makes it more wide-spread and therefore more serious; on the other hand, it may be more difficult to prove in a court of law. While courts are used to claims of individual discrimination they are not always equipped to deal with claims of discrimination in governmental allocation of resources, which by its very nature, must be based on numerous factors and policy considerations.

Despite the evidential problems, in recent years the Supreme Court has delivered a number of major judgments in which it has overruled government policy in allocation of resources on the grounds that it is discriminatory towards the Arab citizens of the country. In one case the Court ruled that discrimination in funding for maintenance of Jewish and Muslim cemeteries was unlawful and it ordered the authorities to grant equal funding;[7] in a second case it held that the government must act according to equal criteria in executing a project, named 'project renewal', renovation of poor neighbourhoods;[8] in yet another it held that exclusion of Arab villages from specially designated 'national priority areas' was unlawful.[9] In many cases, submission of a petition to the Supreme Court concerning discrimination in a certain field has moved the authorities to change their policy so as to equalize rights.[10] Thus, while there can be little doubt that discrimination still persists, the constitutional position has been made quite clear: discrimination against Arabs by state authorities is unlawful, and the courts will interfere to remedy the situation where such discrimination can be shown.[11]

Possibly more important than the statements and rulings supporting equality between Jew and Arab was a willingness to widen the concept of discrimination

accepted by the courts. Traditionally the judicial approach towards discrimination in Israel was process-oriented. In order to convince the court that a government action was discriminatory it had to be shown that improper considerations – such as a person's race, religion or sex – had influenced the action. Thus in an early case in which Arab citizens complained of discrimination in expropriation of their land, the Supreme Court rejected the claim since it had not been shown that the national/ethnic affiliations of the land-owners was the reason the particular land was chosen for expropriation.[12] In recent years the Court has been prepared to consider discriminatory consequences of a policy, even if there were no improper considerations in the decision-making process. Thus, in his opinion in one case, Chief Justice Barak stated:

> Forbidden discrimination may exist in the absence of a discriminatory intention or motive of those who create the discriminatory norm. In the case of discrimination it is sufficient that there is a discriminatory consequence. When realization of the norm created by the authority – which may have been forged without discriminatory intent – leads to a result that is unequal and discriminatory, the norm may be overruled because of the discrimination that is attached to it. Discrimination is not determined only by the thoughts and intention of those who created the discriminatory norm. It is determined by the effect which it has in actual practice.[13]

In the *Ka'adan* case the Court took this further than had been accepted in the past, and that was acceptable to many in the present. The struggle between Jew and Arab in Palestine had always related to two major issues: land sale and use, and immigration. When Zionist immigration to Palestine began in the second half of the 19th Century, very little land in the country was owned by Jews. The original Zionists had striven to change work patterns among Jews, who in many countries of the Diaspora, had been forbidden to own land. They saw it as essential that land be purchased for Jewish settlement and agriculture. Thus began the movement towards Jewish settlement on land. A special body of the World Zionist Organization, the Jewish National Fund (JNF), was created to purchase land for the settlement of Jews. The Jewish Agency, established under the terms of the Mandate over Palestine to further establishment of a home for the Jewish people in Palestine, also supported settlement of Jews on land purchased by the JNF.

After the State of Israel was created the special Jewish institutions, such as the JNF and the Jewish Agency, were not dissolved. An act of the *Knesset* was passed granting them special status, which is defined in agreements signed between those organizations and the Government of Israel.[14] One of the tasks of the Jewish Agency, under those agreements, is rural settlement. And this means rural settlement of Jews.

Existence of the Jewish Agency and JNF alongside the state authorities allowed room for circumventing the prohibition on discrimination by state authorities. While it was forbidden for the state authorities themselves to discriminate between Jews and Arabs, the Jewish institutions could do so with impunity. Thus it was for a long time that rural settlements were created by the Jewish Agency and housing in those settlements was restricted to Jews. In the *Ka'adan* case this system was challenged in court. The case involved land that belonged to the state, which had leased it to the Jewish Agency. The latter established a rural settlement and when an Arab family applied to buy land to build a house in the settlement their application was refused. In its judgment the Supreme Court made it clear that the State could not circumvent its legal duty to treat all citizens equally by leasing land to a third party, which discriminates. The Court declared that the authorities were bound to allow the Arab family to purchase land and to build a house in the settlement. Chief Justice Barak stated:

> The return of the Jewish people to its homeland is indeed derived from the values of the State of Israel as both a Jewish and democratic state....From these values of the State of Israel – on their own and joined together – a number of conclusions can be drawn: thus, for example, Hebrew is the main language in the state and its main holidays will reflect the national revival of the Jewish people; Jewish tradition will be a major component of its religious and cultural tradition, and further conclusions that we need not dwell on here. But from the values of the State of Israel as a Jewish and democratic state certainly one certainly cannot deduce that the state will discriminate between its citizens. Jews and non-Jews are citizens with equal rights and duties in the State of Israel....Furthermore, not only do the values of the State of Israel as a Jewish state not demand discrimination on the basis of religion or nationhood in the state; these very values prohibit discrimination and require equality between religions and peoples.[15]

All the above relates to discrimination in realization of individual rights, whether they be civil and political rights, or economic and social rights. The principle is quite clear: discrimination in allocation or realization of such rights is unconstitutional. The courts will grant a remedy to persons who are victims of the violation of such rights. They will also respond to petitions by human rights NGOs or other public organizations which seek a general remedy against such forms of discrimination that affect a large number of persons.

A more difficult question arises when it comes to group rights. This question has arisen in relation to language. Under British Mandatory law that is still in force in Israel, alongside Hebrew, the Arabic language is still regarded as one of the official languages of the state. In theory, at least, Arabs may correspond with state authorities in their own language, and may use that language in the courts or in the *Knesset*. Alongside the Hebrew language schools, there exists a sepa-

rate stream of Arabic language schools (although Arab parents may send their children to Hebrew-speaking schools, if they so wish). In practice, however, it is clear that Hebrew is the dominant language of the state, and is the real official language. As seen above, the status of Hebrew as the main language of the state was seen by CJ Barak as one of the manifestations of Israel as a Jewish state.

In a number of cases, attempts have been made to force the authorities to include the Arabic language in road-signs. There was no argument that when it comes to inter-urban roads that are used by all, the authorities are indeed bound to include Arab alongside the Hebrew and English. An agreement was reached in Court that the relevant state authority would add Arabic to all signs within a designated period of time. There was also no question that in places in which there is a significant number of Arab residents, Arabic should be included in all road-signs. However, in a petition to the Supreme Court it was argued that in towns in which there is a mixed population of Arabs and Jews, the municipalities are required to include the Arabic language in all signs and road-names, even in districts in which few if any Arabic-speaking persons live. As one of the judges noted in his opinion, the petition was not based on the argument that Arabic-speaking residents would not be able to read the signs if they were not written in Arabic, but on the notion that the Arabs in Israel are a national minority, which has groups rights, one of which is the right to demand that the state promote use of its language. The question was one of symbols, and not of practicalities.

By a majority of 2-1 the Supreme Court upheld the petition and ordered the municipalities to include Arabic in all road-signs. However, the majority did not base their ruling on the group rights of the Arab minority, but on the rights of individual Arabs to equality. On the other hand, the judge who wrote the dissenting, minority opinion, contended with the group rights argument head-on. He adamantly argued that Israeli law does not recognize group rights of the Arab minority, that recognition of such rights is a political issue which must be dealt with by the *Knesset*, and that it would highly inappropriate for the Court to grant judicial recognition to such rights.[16] In his view the status of Arabic as an official language does not imply that all local authorities are bound to use Arabic in their street-signs, in the absence of any proof that not including Arabic would actually cause harm to individuals.

Thus the question of the group rights of the Arabs in Israel and their legal recognition as a national minority remains an open question. Clearly, however, recognition of group rights of minority groups, national, ethnic, religious or linguistic, is not one of the conditions a state must fulfill in order to be regarded as a democracy. Nobody would challenge the characterization of France as a democracy, notwithstanding its principled position that there are no minority groups in the country, and that even article 27 of the International Covenant on Civil and Political Rights, which protects the rights of persons belonging to mi-

norities, rather than minorities themselves, is not[17] relevant in its constitutional regime

The Law of Return

While this law does not enjoy the formal status of a basic law, it is recognized as expressing one of the fundamental principles of the State of Israel: the right of every Jew to immigrate to Israel and settle there. This law itself does not grant Jewish immigrants Israeli citizenship, but the Nationality Law provides that every person who immigrates to Israel under the Law of Return automatically becomes an Israeli citizen from the day of immigration. When presenting the draft bill of the Law of Return to the *Knesset*, soon after the State was established, Israel's first prime minister, David Ben Gurion, argued that the law did not grant rights, but merely recognized the natural right of every Jew to settle in the Land of Israel.

In recent years there has been a spate of writing about the Law of Return and its justification.[18] Some have argued that the privilege granted to Jews (and their descendants) is a form of benign discrimination or affirmative action; others have justified the law as being an inevitable consequence of the right of the Jewish people to self-determination, a right recognized internationally, both by the League of Nations and the United Nations. Yet others have argued that many countries have laws that grant privileged status in immigration to persons who belong to the ethnic or national group of the majority, and that the Law of Return is no different from such laws. The prime example given of another country that allowed privileges in immigration on the basis of ethnic origins is Germany.

Many Palestinians regard the Law of Return as essentially incompatible with the notion of equality between Jews and Arabs in Israel. Their argument is that the law does not offer a parallel privilege to Palestinians who were forced to leave the country, or fled, during the 1948 Israel-Arab War. On the contrary, such persons do not have a right to return to Israel and Israeli policy has always been to refuse them permission to return. In 2001 the *Knesset* even enacted a law that Palestinian refugees would not be allowed to return to the territory of the State of Israel unless this was approved by a majority of *Knesset* members (the law does not apply to return of individual Palestinians on humanitarian grounds).

Within the frame-work of this lecture I do not intend discussing the pros and cons of the Law of Return. The question that interests me for the present purposes is whether existence of this law, clearly a function of the status of the State as a Jewish state, is incompatible with the democratic nature of the state. The Supreme Court has referred to this question. The view it has taken is that since the Law of Return only refers to the rights of non-citizens to enter and re-

side in the country, and has no influence on the rights of citizens inside the country, it cannot be regarded as a law that violates the principle of equality.[19] The counter-argument is that while on the formal legal level, the Law of Return does not affect equality between Jewish and non-Jewish citizens, it serves as a basis for inequality in questions of identity. Jewish citizens can feel that the state is their state, which is bound to further their interests and national identity. Arab citizens cannot feel the same. Furthermore, Jewish citizens are entitled to have their family members enter the country and reside there; Arab citizens do not have the same right vis-a-vis their family members.

The argument that the Law of Return implies inequality between Jewish and Arab citizens of the state was exacerbated recently by passage of an amendment to the Nationality Law, which relates to entry and acquiring of residence in Israel of Palestinian residents of the Occupied Territories. This amendment, which was passed as a provisional measure restricted in time, was enacted following terrorist attacks inside Israel that had involved Palestinians from the West Bank and Gaza, who had acquired residence permits in Israel after marrying Arab citizens of the state. The authorities claimed that for security reasons it was necessary to exclude Palestinian residents of the West Bank and Gaza, from acquiring residence status in Israel. The argument was that such persons were 'enemy aliens' and given the armed conflict between Israel and the Palestinians there was full justification in preventing them from living in the state, as long as the conflict continued. The constitutionality of the amendment was challenged before the Supreme Court. The vast majority of Palestinians who wish to acquire residence in Israel are family members of Arab citizens: husbands, wives or children. By denying such persons the right to live in Israel, the rights of citizens to family life in the state was denied.

By a majority of 6-5 the Supreme Court upheld the constitutionality of the above amendment. However, one of the judges in the majority stated expressly that he regarded the amendment as discriminatory, but was not voting to declare it unconstitutional only because it was a temporary provision. Soon after this decision of the Supreme Court the *Knesset* extended the amendment for a period of two years. At the same time, in an attempt to weaken the argument that the amendment discriminates against Palestinian residents of the Occupied Territories, the *Knesset* extended application of the amendment so that it would also include persons resident in enemy states.

The Law of Return does indeed give a privileged status to Jews (and to family members of Jews). One can certainly understand the feeling of the Arabs in Israel that this involves a deep form of inequality in the very nature of the state. This is the very essence of the definition of the state as a Jewish state, meant to provide a home for the Jewish people who have been persecuted and worse throughout the ages. Does this necessarily mean that the state is not democratic?

It is impossible to give an answer to that question that is divorced from the political reality of the present Israel-Palestinian conflict. As mentioned at the opening of this talk, UNGA Resolution 181 of 29 November, 1947, envisaged two states in Palestine – a Jewish state and an Arab state. This was a solution that was meant to allow for self-determination within the borders of Palestine for both national groups – the Jews and the Palestinian Arabs. Unfortunately, in 1947/8 the surrounding Arab states and the Arabs in Palestine rejected this solution and went to war to prevent it being implemented. After the war ended the Arab states did not allow creation of a separate Palestinian Arab state. Part of Palestine – the West Bank – was annexed by Jordan. Another part – Gaza – was occupied by Egypt. It was not until two more wars had been fought that the Arab states came around to the idea of two states in Palestine – an Arab state and a Jewish state. It was not until the late nineteen eighties that the PLO – recognized by the UN as the legitimate representative of the Palestinian people – also accepted this idea. The idea has yet to be realized. Despite the present difficulties, one must hope that it will eventually come about. At that stage it would be expected that the Palestinian state would adopt its own law of return, according to which all Palestinian Arabs would be granted the right to return to Palestine. This would be the counterpart of the Law of Return in Israel and would weaken the argument that this law undermines the equality between Jew and Arab in Israel.

The Status of the Jewish religion

The potential conflict between the Jewish and democratic nature of the state is not confined to the situation of non-Jews in the state. One must also consider the place of the Jewish religion within the constitutional frame-work of the state. The original concept of a Jewish state was based on the 19th Century national movements in Europe. The founders of the Zionist movement and of Israel itself made it clear that the idea of a Jewish state was not of a state based on the Jewish religion. On the contrary, they were ideologically committed to a secular liberal state based on modern legal codes and constitutions and not on religious law. The ideological attachment to secular values was so strong that the dominant political parties at the time the state was established, refused to agree to the demand of religious parties that God should be mentioned in the Declaration of Independence. Instead a compromise was reached in which there was reference to the 'rock of Israel', an oblique term that each person could interpret as he or she wished.

This rejection of direct import of religious law into the constitutional structure of the state continued after the state was established. The British Mandatory authorities had adopted the legal principle that lacunae (gaps) in the law would be filled by principles of English common law and equity. When the Israeli *Knesset* abolished this principle in 1980, it did not provide that instead gaps would be

filled by Jewish law. On the contrary it provided that such gaps should be filled firstly by analogy, and only if that failed should the lacuna be filled 'in the light of the principles of freedom, justice, equity and peace of Israel's heritage.'[20] This phrase was chosen intentionally to make it clear that the reference is not to Jewish religious law as such, but only to the named principles of Israel's heritage. The Supreme Court has time and again stressed the secular nature of the state and of the legal system, rejecting attempts by cabinet ministers or other governmental authorities to use their powers to further their religious values. In one case, the Minister of Education and Culture cancelled a permit for an archeological dig, after the chief rabbis had expressed their view that as there might have been an ancient Jewish burial ground on the site according to religious law it was forbidden to continue with the dig. The Court overruled his decision, making it clear that he could not base governmental decisions on his personal religious outlook.[21] In other cases, the courts have overruled local bye-laws for closing of theatres on the Sabbath,[22] and forbidding the sale of pork,[23] on the grounds that furtherance of religious observance was not a legitimate aim of municipal legislation. In one major case, the Supreme Court overruled a ministerial decision not to grant a license to a company which wished to import non-kosher meat (i.e. meat that does not conform to religious dietary laws).[24]

Despite the secular nature of the state and its constitutional framework there are some pockets of religious legislation. The main one is the legislation that retains the Ottoman *millet* system, under which jurisdiction in matters of marriage and divorce is in the hands of the various religious courts, and regulated by the personal religious law of each community. This means that under Israeli law there is no civil marriage (although the courts recognize civil marriage carried out abroad). While there is a lot of opposition to this arrangement, it has proven politically impossible to change it. The courts have softened some of its implications by extending the rights of legally married couples to couples who have living together arrangements, or may be regarded as common law spouses.

The absence of civil marriage is an unacceptable infringement on the right to freedom of conscience and religion. However, it does not reflect any special status of the Jewish religion in the constitutional framework. All religions – Jewish, Muslim, Druze and various Christian denominations - enjoy autonomy and jurisdiction in matters of marriage and divorce. The religious courts of the Jews, Muslims and Druze are all funded and supported by the state.

The Jewish religion does enjoy some symbolic status. Thus under law, two Chief Rabbis and a Chief Rabbinical Council are elected and funded by the state. However, outside questions of marriage and divorce for Jews, these bodies have no powers over those who choose not to accept their authority. In fact, the vast majority of ultra-orthodox Jews in the state do not accept their authority. Obviously non-religious Jews and non-Jews do not do so either.

Summary and Conclusions

Let me now summarize and try to present some conclusions:

1. There is potential tension between the two fundamental principles of Israel's constitutional order: Israel as a Jewish state and Israel as a democratic state. Whether this tension is realized and makes co-existence between the two principles impossible depends on the meaning ascribed, constitutionally and practically, to the first principle, that of the Jewish state.

2. Despite some legislation which could have increased the tension, the Supreme Court of Israel has adopted a view of the Jewish state that reduces the tension to a minimum. Its approach has been that any interpretation of the principle of the Jewish state must be compatible with the principle of a democratic state.
3. The Court has promoted equality between Jew and non-Jew and has emphasized the secular nature of the state and its institutions. This leaves the legal manifestations of the Jewish state on two levels: the cultural level, such as language, days of rest and public festivals, and the Law of Return.

4. Until such time as there is a Palestinian state which will allow all Palestinians to return to Palestine, the Law of Return will probably continue to be regarded as unfair and unequal by the Palestinian citizens of the state. Hopefully, this issue will be mitigated or resolved when a Palestinian state is created.

5. The recent provisional amendment to the Nationality Law, which prevents Palestinian residents of the Occupied Territories from gaining residency status in Israel, has exacerbated the problem of the distinction between Jews and Arabs in acquiring of residency and citizenship. However, this law is a provisional measure, upheld by the Supreme Court only because of security concerns related to terrorist attacks in Israel. It is doubtful if it would be upheld were it to become a permanent measure.

6. The last two points expose the inevitable connection between constitutional and political developments. The political prospects for a solution to the Israel-Palestine conflict do not look bright at the present time. But one must hope that times will change and bring with them new hope for a political solution that will bring in its wake a reduction of the present tension between two constitutional principles.

[1] In a resolution of Israel's parliament, the *Knesset*, adopted in the early nineteen-fifties, it was decided that Israel's formal constitution would be drawn up in a piece-meal fashion in a series of basic laws, Grundgerechten.

[2] See L.C.A. 2316/96, *Isaacson* v. *Registrar of Political Parties* (1996) 50 P.D. (2) 529. In a later case an Arab candidate for prime minister (during the short period that Israel has direct elections for prime minister) was quoted as saying that the Jews are not a people, but a religion, and that they therefore do not have the right to self-determination. An attempt to disqualify his candidature and that of his party list was rejected. See E.A. 2600/99, *Erlich* v. *Central Elections Committee* (1999) 53 P.D. (3) 38.

[3] HCJ 6698/95, *Ka'adan* v. *Israel Lands Administration*, 54 P.D. (1) 258, 273.

[4] HCJ 11163/03, *High Monitoring Committee* v. *Prime Minister*, 2006 Takdin-Elyon (1)

[5] Ibid.

[6] *Ka'adan* case, note 3 supra, 280-281.

[7] HCJ 1113/99. *Adalah* v. *Minister for Religious Affairs*, 2000 Takdin-Elyon (2) 413.

[8] HCJ 727/00, *Committee of Heads of Arab Local Authorities* v. *Minister of Housing and Construction*, 56 P.D. (20 79.

[9] HCJ 11163/03, note 4 *supra.*

[10] See, e.g., HCJ 2814/97, *High Monitoring Committee* v. *Ministry of Education and Culture*, 53 P.D. (3) 233

[11] The full nature of discrimination was recently described in the report of an official judicial commission of inquiry, established to examine the events of October, 2000, in which 13 Arab citizens of the state were killed in the course of violent clashes with the police. The Commission's report is available at http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm

[12] HCJ 30/62, *Committee for Defence of Lands* v. *Minister of Finance* (1955) 9 P.D.1261

[13] HCJ 11163/03, note 4 *supra*, para. 18.

[14] I have discussed the law and subsequent agreement elsewhere: David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder, Colorado: Westview Press, 2000), chapter 6.

[15] *Ka'adan* case, note 3 *supra*

[16] HCJ 41192 /99, *Adalah* v. *Tel-Aviv-Jaffo Municipality*, 56 P.D. (5) 39

[17] On ratification of the International Covenant on Civil and Political Rights France submitted a reservation that states: 'In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.' Available at http://www.ohchr.org/english/countries/ratification/4_1.htm.

[18] See, e.g., Asa Kasher, "Justice and Affirmative Action: Naturalization and the Law of Return" 15 *Israel Yearbook on Human Rights* 101 (1985); Haim Ganz, "The Law of Return and Affirmative Action" 19 *Iyunei Mishpat* 683 (1995); Na'ama Carmi, *Immigration and the Law of Return* (Tel Aviv University Press, 2003).

[19] See *Ka'adan* case, note 3 *supra*

[20] Basis of Law Act, 1980

[21] HCJ 512/81, *Archeology Institute of Hebrew University* v. *Minister of Education and Culture*, 35 P.D. (4) 533

[22] Cr.C. (J-m) 3471/87, *State of Israel* v. *Kaplan*, P.M. 5747 (2) 265

[23] HCJ 122/54, *Aksel* v. *Mayor of Netanya*, 8 P.D. 524

[24] HCJ 3872/93, *Meatrael* v. *Prime Minister*, 47 P.D. (5) 485 .

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