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IMMIGRATION POLICY OF ISRAEL: THE UNIQUE PERSPECTIVE OF A JEWISH STATE

*Yehiel S. Kaplan**

I. IMMIGRATION POLICY OF ISRAEL

Israel was established in an attempt to create a shelter for Jews in the Diaspora. The Law of Return was enacted several years after the end of the Second World War. The Israeli legislature assumed that since Jews have suffered harsh persecutions and anti-Semitism throughout history, as a minority group, it is legitimate to discriminate in favor of those Jews who wish to immigrate to Israel.¹ Jewish history—including the persecution of Jews in parts of the world in the twentieth century and especially the holocaust of Jews in Europe during the Second World War, when Jews did not have their own independent state—was taken into consideration when Israel formulated the immigration policy of the Jewish state. In addition, as the nations of the world are granted the right of self-determination, Israel, the state of the Jewish nation, enacted this law in an attempt to maintain the Jewish majority in a Jewish and democratic state.

In the Law of Return, Israel granted Jews and those related to Jews and married to them the right to immigrate to the Jewish state. Section 1 of this law states that every Jew has a right to immigrate to Israel: “Every Jew has the right to come to this country as an *oleh*.”² In the year 5730-1970 section 4A(a) in Law of Return (Amendment No. 2) was added. It states:

The rights of a Jew under this law and the rights of an *oleh* under the Nationality Law, 5712-1952, as well as

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¹ Law of Return, 5710-1950, 4 LSI 114 (1950). The bill was published with an explanatory note in *Hatza'ot Chok* No. 48 of 12th Tammuz, 5710-1950, at 189.

² Law of Return, *supra* note 1, § 1.

the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.³

In the amendment to this law the right to immigrate to Israel was thus granted to individuals who are non-Jews according to the religious definition of a Jew in Orthodox Judaism: a non-Jewish child and grandchild of a Jew, a spouse of a Jew, a spouse of a child of a Jew, and a spouse of a grandchild of a Jew. The Israeli legislature also stated that it “shall be immaterial whether or not a Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.”⁴

One of the major purposes of this legislation was:

[t]o enable Jews that were married in mixed-marriage to immigrate to Israel together with their non-Jew family members, for otherwise those Jews would have not immigrated at all. Mixed-marriage is a very widespread phenomenon among Jews in the Diaspora and there is a fear that deprivation of rights from the non-Jew family member of a Jew will result in the decision of Jews not to immigrate to Israel.⁵

The aim of section 4A of the Law of Return is “to create an easier reality for mixed families who wish to immigrate to Israel as a whole family unit,”⁶ and this is done:

in an attempt not to split [the family] and in a desire to encourage its immigration to Israel, . . . to provide assistance to those who wish to fulfill the [two] main purpose[s] of the Law of Return: . . . that every Jew is entitled to immigrate to Israel, and that indeed Jews will immigrate to Israel. [The purpose of this law is] to encourage Jews that live outside the boundaries of

³ Law of Return (Amendment No. 2), 24 LSI 28, § 4A(a) (1969–70).

⁴ *Id.* § 4A(b).

⁵ HCJ 3648/97 Stamka v. The Minister of Interior [1997] IsrSC 53(2) 728, 755; *see also* HCJ 8030/03 Smoilov v. The Minister of Interior [2004] IsrSC 58(6) 115, 120.

⁶ HCJ 265/87 Beresford v. The Minister of Interior [1987] IsrSC 43(4) 793, 834.

Israel to immigrate to this state and to enable them as much as possible to immigrate to Israel.⁷

Immigrants to Israel in light of a right granted to them in the Law of Return are also granted the right to be citizens of this state in the Nationality Law. Section 2 of this law, in particular, grants a person who immigrated to Israel as a result of a right granted to him or her in the Law of Return an automatic right to obtain Israeli citizenship.⁸

In contrast to the easy path of this individual to Israeli citizenship, the path of those who did not immigrate to Israel as a result of a right granted to them in the Law of Return, and wish to acquire Israeli citizenship by naturalization, is difficult, due to the Minister of Interior's discretion regarding the naturalization process.⁹

A new immigration policy has been in effect in Israel as a result of the outbreak of violence between Palestinians and Jews in September 1948-2000. At that time, the issuing of residency permits to Palestinian spouses of Israeli citizens was effectively frozen. This *de facto* suspension policy was ratified by the Israeli cabinet in May 2002. The policy of a ban on family unification for Israeli-Palestinian couples was introduced by an administrative decision of the Ministry of Interior in 1962-2002, and enacted into law in 1963-2003 by the Israeli House of Representatives (the *Knesset*) as a result of concerns about the security of the State of Israel and its citizens stemming from terrorist attacks of Palestinians residing in the occupied territories—the West Bank and Gaza—against Israeli citizens.¹⁰ The Citizenship and Entry Into Israel Law imposed significant restrictions upon Palestinians from these territories who sought to obtain Israeli citizenship and the right to be residents of Israel. It barred family reunification of non-Israeli Palestinians who were married to

⁷ *Stamka*, IsrSC 53(2) at 755.

⁸ See Nationality Law, 5712-1952, 6 LSI 50, § 2(a) (1951-52).

⁹ See Albert K. Wan, Note, *Israel's Conflicted Existence as a Jewish Democratic State: Striking the Proper Balance Under the Citizenship and Entry Into Israel Law*, 29 BROOK. J. INT'L L. 1345, 1351-52 (2004). The gradual process of obtaining Israeli citizenship by naturalization designed for spouses of Israeli citizens and residents was defined as a result of the ruling of the High Court of Justice in the *Stamka* case, and first detailed in the 1996 policy of the State of Israel's response in HCJ 338/99 *Issa v. The Minister of Interior* [IsrSC -10 march 1999] (unpublished decision). Eventually, as a result of this ruling, the guidelines of the Ministry of Interior in 1999 became more flexible. They were evaluated in the subsequent case of the Supreme Court of Israel, HCJ 7139/02 *Abas-Batzah v. The Minister of Interior* [2003] IsrSC 57 (3), 481-94.

¹⁰ Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. L. 184, 185 (2008).

Israeli citizens, especially of Palestinian origin, living in Israel.¹¹

II. JUSTIFICATION OF THE IMMIGRATION POLICY OF ISRAEL

Israel was defined in its Basic Laws as a “Jewish and democratic state.”¹² It is not easy to reconcile the concepts “Jewish” and “democratic” when we analyze the immigration policy of Israel. On the one hand, Israel was established in order to gather all the Jews from the exile to the Jewish state. On the other hand, Israel, as a democratic state, declared in its proclamation of independence that it is obliged to maintain equal human rights without distinction between individuals based upon their race, color, or national origin.¹³ Is the immigration policy of Israel justified in a “Jewish and democratic state”?

The immigration policy of Israel is sometimes criticized as being racist, discriminatory, or undemocratic.¹⁴ Sometimes Palestinians claim they should be granted the right to immigrate to Israel, their “homeland,” as a result of a right granted to them in the International Covenant on Civil and Political Rights.¹⁵ This is a United Nations treaty entered into force on March 23, 1976. The International Covenant on Civil and Political Rights currently has 162 states parties, including Israel.¹⁶ This Covenant grants individuals protection against discrimination. Article 12(4) states: “No one shall be arbitrarily deprived of the right to enter his own country.” Article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” These articles could be a basis for the claim by some Palestinians that Israel, in the Law of Return, arbitrarily deprives them of their right to enter their “own coun-

¹¹ Citizenship and Entry Into Israel (Temporary Order) Law, 5763-2003, available at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (unofficial translation).

¹² See, e.g., Basic Law: Freedom of Occupation, 5754-1994, S.H. 90, § 2.

¹³ Wan, *supra* note 9, at 1345-46; see also DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948).

¹⁴ See Raef Zreik, *Notes on the Value of Theory: Readings in the Law of Return—A Polemic*, 2 LAW & ETHICS HUM. RTS. 1, 34-42 (2008) (considering whether “[p]olitics means that there is [a] group of people which has some common characteristic, be it national, ethnic, religious, or any other, and which is willing to defend its way of life as a group and even ready to go to war for that reason”).

¹⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

¹⁶ Office of the United Nations High Comm’r, Status of Ratifications of the Principal International Human Rights Treaties 6 (July 14, 2006), available at <http://www2.ohchr.org/english/bodies/docs/status.pdf>

try” and discriminates against them.

Sometimes the claim of Palestinians who wish to immigrate to Israel is based upon the right to family life.¹⁷ This right has been recognized in international law and is mentioned in important international treaties, such as the Covenant on Civil and Political Rights¹⁸ and the Covenant on Economic, Social and Cultural Rights.¹⁹ Article 10(1) of the second Covenant states: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.”²⁰ In addition, other international treaties recognize the essential and central role of the family in human society.²¹ International law protects the family in special circumstances such as by granting immigration rights to family members.²² A foreign spouse, married to a citizen or permanent resident in Israel, can claim he or she should be granted the right to immigrate to Israel in light of the principles of international law.

However, the foundation of the immigration policy of Israel is not “arbitrary” discrimination. It could be justified in light of the unique circumstances of Jewish self-determination in a Jewish state. The proponents of the current immigration policy in Israel provide several justifications for this policy.

The scholar Ruth Gavison rejects the claim that the Law of Return is a clear case of racism against Arab citizens in Israel.²³ She explains that all nations have the right to self-determination in their own country. The principle of return of an ethnic group as a means of enhancing the self-determination of that group is a common practice in many states. Since the Law of Return enables the Jewish people to realize their right of self-determination, it can be justified. Gavison also notes that the existence of the Jewish state—established as a solution to the persecution and distress of Jews as defenseless foreigners in the Diaspora—is very significant in the lives of Jews in

¹⁷ HCJ 7052/03 Adalah v. Minister of Interior [2006] 2 TakEI 1754.

¹⁸ ICCPR, *supra* note 15, art. 23(1) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

¹⁹ International Covenant on Economic, Social and Cultural Rights art. 10(1), G.A. Res. 2200A (XXI), at 49, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, *opened for signature* Dec. 16 1966, 993 U.N.T.S. 3. [hereinafter ICESCR].

²⁰ *Id.*

²¹ See Yuval Merin, *The Right of Family Life and Civil Marriage Under International Law and its Implementation in the State of Israel*, 28 B.C. INT’L & COMP. L. REV. 79, 80 n.2 (2005).

²² *Id.* at 80.

²³ Ruth Gavison, *The Jews’ Right to Statehood: A Defense*, 15 AZURE 70, 95–96 (2003).

Israel and outside its boundaries.²⁴ From the point of view of many Jews, the loss of the Jewish state means an end to all the great advantages they derive from its presence. Because there is no realistic alternative to the current and unique Jewish state, the advantages resulting from the existence of this state cannot be replaced by similar advantages in another state. Therefore, Israel has the right to preserve and to nurture its Jewish identity through, inter alia, its immigration policy.

The scholar Asa Kasher believes that if a national group has been deprived in the past of the conditions that would have enabled it to realize its right of self-determination, it ought to now be permitted to become a majority in a given territory, thus attaining the conditions necessary for its self-determination. Kasher believes that because Jews have suffered throughout history from harsh persecutions and prejudice as a minority group, it is legitimate to establish an immigration policy that discriminates in favor of Jews in Israel. This state is their homeland, and an immigration policy of positive discrimination in favor of Jews in Israel maintains their current status as a majority group in the Jewish state. He justifies this policy of Israel in light of the unique circumstances of Jewish history and survival calling for a special policy of affirmative action.²⁵ Some take into consideration the outlook of this scholar as one of the justifications of the immigration policy of Israel.²⁶

In addition, a justification for the immigration policy of Israel stems from the right to benefit from the advantages of a unique culture. As scholars Avishai Margalit and Moshe Halbertal explained, the right to culture “stems from the fact that every person has an overriding interest in his personality identity—that is, in preserving his way of life and the traits that are central identity components for him and the other members of his cultural group.”²⁷ From a liberal point of view, the right to culture is important since it facilitates autonomy. When the right of culture is granted to an individual, more

²⁴ *Id.* at 76–77.

²⁵ See generally Asa Kasher, *Justice and Affirmative Action: Naturalization and the Law of Return*, 15 ISR. Y.B. HUMAN RIGHTS 101 (1985); see also CHAIM GANS, *THE LIMITS OF NATIONALISM* 126–27 (2003); Aviad Bakshi, *Does a State Have a Primary Obligation to Accept Immigrants?*, 10 MISHPAT UMIMSHAL 387 (2006).

²⁶ See NA’AMA CARMI, *THE LAW OF RETURN: IMMIGRATION RIGHTS AND THEIR LIMITS* 35–55 (2003).

²⁷ Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491, 505 (1994).

options are available:

Only through being socialized in a culture can one tap the options which give life a meaning. By and large one's cultural membership determines the horizon of one's opportunities, of what one may become, or (if one is older) what one might have been. Little surprise that it is in the interest of every person to be fully integrated in a cultural group. Equally plain is the importance to its members of the prosperity, cultural and material, of their cultural group. Its prosperity contributes to the richness and variety of the opportunities the culture provides access to.²⁸

Many countries develop the values, tradition, and language of a dominant culture. It is not easy, and sometimes impossible, for countries whose populations speak different languages and belong to different cultures to implement a policy of equality and neutrality concerning culture—and it is not clear that from a liberal point of view these countries should attempt to realize this agenda.²⁹ It is difficult for states with special populations, like the State of Israel, to be culturally neutral, and this fact might indicate that the achievement of the ideal of cultural equality is not a realistic goal in certain states, especially states such as Israel that wish to preserve and develop the unique culture of the dominant group in the population. Therefore, Jewish culture is and should be the dominant culture in Israel.

Chaim Gans held that the Law of Return—or at least a weakened version of it which grants some priority to Jews in immigration to Israel in order to preserve the Jewish character of the state—is a legitimate means for cultural preservation.³⁰ The justification of nationality-based priorities in immigration to states such as the State of Israel derives from interests that individual human beings, such as the Jews in Israel, have in their own existence and self-determination.³¹

²⁸ JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 170, 177 (rev. ed. 1995).

²⁹ Will Kymlicka, *Western Political Theory and Ethnic Relations in Eastern Europe*, in *CAN LIBERAL PLURALISM BE EXPORTED?: WESTERN POLITICAL THEORY AND ETHNIC RELATIONS IN EASTERN EUROPE* 13, 16–21 (Will Kymlicka & Magda Opalski eds., 2001).

³⁰ Chaim Gans, *Individuals' Interest in the Preservation of Their Culture: Its Meaning, Justifications, and Implications*, 1 *LAW & ETHICS HUM. RTS.* 6-16 (2007).

³¹ Chaim Gans, *Nationalist Priorities and Restrictions in Immigration: The Case of Israel*, 2 *LAW & ETHICS HUM. RTS.* Vol. 2, Iss. 1, Art. 12, 1, 5-6 (2008); CHAIM GANS, FROM RICHARD WAGNER TO THE PALESTINIAN RIGHT OF RETURN: PHILOSOPHICAL ANALYSIS OF ISRAELI

The preservation of the right to culture could be the foundation, from a liberal perspective, of the current immigration policy of the homeland of the Jews. Muslims, Christians, and other believers could survive and flourish in many states that preserve their values, culture, and religion; Jews do not have an alternative to the Jewish state.

The scholar Na'ama Carmi also believes that the preservation of the Jewish majority's culture could be an appropriate basis for the immigration policy of Israel. Although she is aware of the fact that "demographic considerations" could be associated with racism, she believes that it is not clear they are always illegitimate since sometimes they "have a strong and relative connection to the legitimate interest in preserving culture."³²

In addition, the immigration to Israel of many individuals that do not share the values and religion of the Jewish majority could be counterproductive. Solidarity is important in all societies—including the society of a Jewish and democratic state.³³ According to this argument, an essential foundation of a stable society is a strong mutual goal embodied in a social contract of its members. When there is a mutual goal, there is also a sense of solidarity among members of the society. This foundation produces the willingness of many members of the society to act for the common good. When there is less harmony and unity in a society, it is less likely this society will remain a unified group for many years. The mutual foundation of the social contract in a Jewish state is the preservation of the principles, lifestyle, and outlook of Judaism. Consequently, a Jewish and democratic state could impose limits upon immigration and establish an immigration policy that encourages immigration of Jews and their relatives to Israel, since this act will enhance solidarity in the society in Israel.

It is not so easy to justify the immigration policy in the Citizenship and Entry Into Israel Law. This law goes one step beyond the previously existing rules of immigration in Israel. In the past, the immigration policy of Israel was based upon granting *preference* to

PUBLIC AFFAIRS 205-10 (Am Oved, Tel Aviv, 2006).

³² Na'ama Carmi, *Immigration Policy: Between Demographic Considerations and Preservation of Culture*, 2 LAW & ETHICS HUM. RTS. 1, 29 (2008). See also CARMİ, *supra* note 26, at 48. While Carmi believes that each person has a universal right to immigrate to other countries and the state should provide strong arguments in order to prevent the immigration of individuals across its boundaries, she is sympathetic to the argument favoring Israel's immigration policy based upon preservation and development of the culture of the majority in Israel at present.

³³ CARMİ, *supra* note 26, at 58.

Jewish immigrants and their relatives and spouses over immigrants from all other groups. The new law specifically singles out a group of Palestinians for exclusion.

Israeli authorities have sought to justify the immigration policy in the Citizenship and Entry Into Israel Law on security grounds. The security consideration was raised in the explanatory text accompanying this law when it was first proposed. The State claimed that Palestinians from the occupied territories have been involved in security-related offenses; therefore, the enactment of this new law is required as a means to prevent terrorist attacks. According to then-Israeli government minister Gideon Ezra, there have been many lethal attacks in the last few years involving Palestinians who entered Israel from the occupied territories.³⁴

However, some claim that this law was enacted in an attempt to reduce the percentage of Israeli Arabs among the population of Israel. The rules of this law were analyzed in the *Adalah* case.³⁵ *Adalah* is a legal organization for the enhancement of Arab minority rights in Israel. It challenged the constitutionality of this new Israeli law in a petition to the High Court of Justice and sought to revoke it as unconstitutional. It claimed that security considerations were not the main motivation of the enactors of this law, but that the primary motivation of those who enacted this law was demographic.

In his response to the petition of the *Adalah* organization, the Attorney General of Israel claimed that since the beginning of security problems, in a period known as the “second intifada,” until the enactment of this law in 2003, Palestinians from the occupied territories who received the status of legitimate residents in Israel as a result of family unification were sometimes involved in facilitating terror attacks. The State of Israel claimed that there is a security imperative to prevent the entry of residents of the occupied territories into Israel, since their entry into Israel and their free movement within the state’s borders after receiving Israeli documentation are liable to endanger the peace and security of the citizens and residents of the state.³⁶

The Supreme Court of Israel, by a vote of six to five, reached the conclusion that this law is valid. One of the six Justices who

³⁴ Joanne Mariner, *Israel’s New Citizenship Law: A Separation Wall Through the Heart*, FINDLAW’S WRIT (Aug. 11, 2003), <http://writ.news.findlaw.com/mariner/20030811.html>.

³⁵ See HCJ 7052/03 *Adalah v. Minister of Interior* [2006] 2 TakeI 1754 (unpublished) (14.5.2006).

³⁶ See *Adalah*, 2 TakeI 1754 (Feb. 2, 2006), Cheshin, D.C.J., ¶ 110.

found the law was constitutional, Deputy Chief Justice Cheshin, explained that the Palestinians who are residents of the occupied territories constitute a risk group for the citizens and residents of Israel.³⁷ Although this law was upheld, the gap between the majority and minority Justices in this decision was not wide, and some of the Justices in the majority granted weight to the fact that this law was not a permanent enactment.

III. WHO IS A JEW IN LEGISLATION ENCOURAGING IMMIGRATION TO ISRAEL?

There is a constant clash between two groups among the Jewish population in Israel, secular and religious Jews, in regard to the appropriate interpretation of the concept “Jew” in the legislation that grants these individuals the right to immigrate to Israel and receive citizenship of this state. This is part of a broader dispute about the Jewish character of the State of Israel. The Court is granted a right to interpret the law of the Jewish state in legal decisions. However, this interpretation engenders debate among the Judiciary and is an echo of the secular-religious divide across the Jewish population in Israel. It is hard to find an appropriate definition of a “Jew” in Israeli legislation since there is a significant gap in Israel between the perspectives of religious Orthodox Jews and non-Orthodox Jews. Probably a dialogue between moderate Jewish spiritual leaders and the leaders of secular Jews in Israel could bear good fruit. The Israeli courts have been struggling with the definition of a Jew especially in the Law of Return, since the establishment of the Jewish state imposed its own agenda. The courts chose their own formula of balancing between the outlook and feelings of the religious and secular segments of the Jewish society in Israel, which was not based upon popular consensus or dialogue.

A secular definition of a “Jew”—mentioned in the Law of Return—was adopted by the Supreme Court of Israel in the *Rufeisen* case³⁸ and developed further in the *Shalit* case.³⁹ The specific issue in *Shalit* was whether the minor children of a Jewish father and an agnostic mother of non-Jewish parentage could be registered in Israel’s

³⁷ See *id.* ¶¶ 109-10.

³⁸ HCJ 72/62 *Rufeisen v. The Minister of Interior* [1962] IsrSC 16(4) 2428; see also Ralph Slovenco, *Brother Daniel and Jewish Identity*, 9 ST. LOUIS U. L.J. 1 (1964).

³⁹ HCJ 58/68 *Shalit v. The Minister of Interior* [1969] IsrSC 23(2) 477.

population register as of Jewish nationality, in its secular/ethnic connotation, if the parents so desire. The father, the petitioner in this case, demanded that his children be registered in the population register of Israel as Jewish although they are not defined as Jews under the principles of Orthodox Judaism. He contested the refusal of the registration officer to register his children as being ethnically of Jewish affiliation. A few of the Justices tried to avoid controversy by confining the focus in their decision to a narrow point: does the registrar have the power to examine the correctness of the parents' declaration that a child is Jewish, and is he granted the right to refuse registration if his examination of this matter leads him to doubt its correctness? According to the outlook of these Justices, registration of an individual as a Jew is an act in the sphere of statistics and registration; therefore, a *bona fide* declaration by an individual that he or she, or his or her children are Jewish is usually sufficient.⁴⁰ The declaration establishes his or her identity as a "Jew." However, this Court policy is problematic, for if a person is actually not a Jew according to a "correct" definition, then the declaration that he is a Jew might not be in good faith.⁴¹

The traditional religious definition of a Jew was not adopted when laws concerning the return of Jews to Israel and citizenship in this state were interpreted. This religious perspective, the traditional criteria of Orthodox Judaism, is valid only when Rabbinical Courts in Israel determine who is a Jew who is subjected to their jurisdiction. The desire of the father in the *Shalit* case—that in Israel Jewish nationality need no longer be regarded as identical with religious affiliation—was fulfilled.⁴² Since the father of the children in this case was Jewish and the mother born as Christian but not professing any religion, the entire family living in Israel and closely involved in the Jewish society in this state, and the two parents, the guardians of these children, desiring that they maintain this special bond with this society, the Justices held that the children of the Shalit family should be registered as Jews by nationality although their mother was not Jewish and they did not convert to Judaism and therefore were not Jews according to the Orthodox definition. The traditional criteria of

⁴⁰ The foundation of the policy of the Supreme Court of Israel in this sphere is the decision of the Court, in a different context, in H CJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1963] IsrSC 17(1) 225.

⁴¹ Cf. Benjamin Akzin, *Who Is A Jew?: A Hard Case*, 5 ISR. L. REV. 259, 259 (1970).

⁴² *Id.* at 262.

Orthodox Judaism are valid only when Rabbinical courts in Israel determine who is a Jew in an attempt to define who are or are not Jews subjected to their jurisdiction.⁴³

After this decision, the Israeli legislature responded to the opposition of the religious segment of society to such a secular definition of a Jew and adopted a new definition of the concept “Jew” in Amendment No. 2 to the Law of Return. This definition was the result of dialogue and compromise.⁴⁴ According to section 4B of the Law of Return as amended, Israeli citizenship is granted to any “Jew” defined as an individual born to a Jewish mother, or a convert to the Jewish faith, provided that this person is not affiliated with “another religion.”⁴⁵

This definition of a “Jew” is a compromise between two opposite outlooks.⁴⁶ It is closer to the traditional Orthodox definition of a Jew. However, the definition of the legislature is not identical to the religious definition of a Jew. In current Orthodox Jewish law, a Jew is a son or daughter of a Jewish mother. In addition, the conversion of a Jew to another religion is not valid.⁴⁷ According to the principles of Jewish law, when a Jew converts to another religion he or she is violating the commandments of Jewish law but does not become a member of another religion as a result of this act. However, the Israeli legislature stated that a “Jew” in the Law of Return is not “a member of another religion.”⁴⁸ Another possible deviation from the clear-cut Orthodox perspective is in the sphere of conversion to Judaism. The legislature used the words “has become converted to Judaism,”⁴⁹ but did not mention the requirements concerning conversion. This was a decision not to decide about the standard of conversion. The desire of those who were insisting that the legislature state explicitly that only the strict standard of conversion of Orthodox Judaism should be legitimate was not fulfilled. The option of a different standard of conversion to Judaism—performed by the Conservative or Reform movements—was not rejected.

⁴³ See Shalev Ginossar, *Who Is A Jew: A Better Law?*, 5 ISR. L. REV. 264, 264–65 (1970).

⁴⁴ *Id.* at 264.

⁴⁵ Law of Return (Amendment No. 2), *supra* note 3, § 4B.

⁴⁶ Ginossar, *supra* note 43, at 264–67.

⁴⁷ See generally H CJ 72/62 Rufeisen v. The Minister of Interior [1962] IsrSC 16(4) 2428.

⁴⁸ Law of Return (Amendment No. 2), *supra* note 3, § 4B.

⁴⁹ *Id.*

In *Association of Torah Observant Sefardim-Tenuat Shas*,⁵⁰ the opinion of the majority of Justices of the Supreme Court was that the requirements of Population Registry Law⁵¹ were fulfilled, for the purpose of establishing conversion to Judaism of individuals in Jewish communities outside the boundaries of Israel, when the convert made a statement that he or she was converted to the Jewish faith in a Jewish community outside the territory of Israel. Since it is a matter of registration, this statement and a document produced by the convert attesting that he or she was converted to Judaism are sufficient. There is no distinction for the purpose of registering this conversion among the conversions of the Orthodox, Conservative, or Reform Movements in the Diaspora; the Orthodox standard of conversion is not relevant when the policy of registration is determined. Only when there is a solid factual basis leading to the suspicion of fraud on the part of the individual who claims to have been converted can the State refuse to register this individual in the population registry as a Jew.⁵²

However, in the *Beresford* case, a religious Justice of the Supreme Court, Menachem Elon, adopted a religious interpretation of the definition of a “Jew” in section 3A(2) of the amended Population Registry Law, which is the same as the definition of a “Jew” in section 4B of the Law of Return—i.e., a person “who was born of a Jewish mother, or has become converted to Judaism and who is not a member of another religion.” His criteria for defining a “Jew” constituted a departure from the secular approach applied by the Court in the *Rufeisen* and *Shalit* cases. According to his outlook, the definition of a “Jew” in the secular legislation of Israel is objective-normative. He stated that the acceptance of this objective-normative definition of a Jew in the legal system of the Jewish state, including adherence to the Orthodox pattern of conversion in Jewish law, could ensure the unity of the Jewish nation with an agreed standard of Jewish identity.⁵³ However, the majority of the Justices in *Beresford* did not share this point of view. Justice Aharon Barak stated he could not accept the criteria used by Justice Elon for defining Jewish identi-

⁵⁰ HCJ 264/87 Ass’n of Torah Observant Sefardim-Tenuat Shas v. Dir. of Population Registry [1989] IsrSC 33(2) 723.

⁵¹ Population Registry Law, 5725-1965, 19 LSI 288 (1964–65).

⁵² The foundation of this policy, in addition to the abovementioned *Funk-Schlesinger* case, HCJ 143/62 *Funk-Schlesinger v. Minister of Interior* [1963] IsrSC 17(1) 225, is the *Miller* case. See HCJ 230/86 *Miller v. Minister of Interior* [1986] IsrSC 40(4) 436.

⁵³ HCJ 265/87 *Beresford v. Minister of Interior* [1989] IsrSC 43(4) 793, 812.

ty for secular legal purposes, such as those related to the Law of Return. He held that the traditional criteria were static and would not admit any change in the future; Barak preferred the secular approach adopted in the *Rufeisen* case since according to his point of view it had a more dynamic nature and was capable of undergoing changes in the course of time.⁵⁴ This secular definition relies on the fact that an individual, defined as a “Jew,” identifies with the culture of the Jewish majority in Israel.

IV. CONVERSION OF IMMIGRANTS: THE POLICY OF THE STATE

The conversion of individuals who identify with the Jewish majority is a final stage in the process of increasing that majority in Israel, also in the religious sphere, in an era of military conflict between Israel and enemies from the surrounding population. It is the mission of the Jewish state to add more members to the Jewish majority in Israel in an attempt to enhance solidarity within the state. In addition, having a distinct majority of Jews in Israel is essential in order for the state to maintain and strengthen solidarity with the Jews in the Diaspora.⁵⁵ This solidarity is important for Israel since the Jews in the Diaspora make a significant contribution to Israel in the political and financial spheres.

The scholar Asher Cohen wrote that in the year 5768-2008, approximately 320,000 individuals reside in Israel who are not considered Jews under religious law, and 5,000 more join this group each year.⁵⁶ Most of the members of this group came to Israel in mass migration from the former Socialist Republics of the Soviet Union, as a result of a right granted to them in the Law of Return. Many are descendants of Jews. They have a Jewish father and a non-Jewish mother, or are grandchildren of a Jewish grandfather. Some are spouses of Jews.

In spite of the fact that this is a large group of individuals who

⁵⁴ *Id.* at 825–28.

⁵⁵ See Israel Inst. for Democracy, *Israel Towards a Constitutional Democracy: The Relationship Between State and Religion*, http://www.idi.org.il/ResearchAndPrograms/Public_Council/Pages/Public_council_1_i.aspx.

⁵⁶ Asher Cohen, *The Conversion Challenge*, 313 NEKUDAH 31, 32 (2008). The special courts for conversion in Israel provide conversion services only to immigrants who immigrated to Israel legally. They do not convert illegal immigrants. See HCJ 552/04 Guzman v. The Minister of Interior [IsrSC July 3, 2005] (unpublished decision); HCJ 8811/07 Kintart v. The Minister of Interior [IsrSC Mar. 24, 2008] (unpublished decision); HCJ 4278/08 Yurko v. The Minister of Interior [IsrSC Feb. 2, 2009] (unpublished decision).

at present identify with the Jewish nation, there are fewer than 2,000 conversions to Judaism in Israel each year.⁵⁷ According to Cohen, many of the non-Jews who live in Israel and belong to this group identify with the political goals of the Jewish state, and are assimilating into the secular Israeli society in the social sphere. Cohen believes this is a social conversion to Judaism without the religious component of accepting the doctrine of the religious principles of the Jewish faith.⁵⁸ During the process of social conversion, the members of this group become members of the Jewish society in Israel, learn the Hebrew language, are educated in the Israeli educational system, serve in the Israeli Defense Forces, and adopt the behavioral and cultural patterns of the secular Jewish society in Israel without a religious act of conversion. Cohen argues that this reality—of a social conversion without a religious conversion—is not desirable. A significant group of immigrants in Israeli society live in a vaguely problematic situation. Sociologically they belong to the Jewish group, but Jewish law and the religious establishment in Israel define the members of this group as non-Jews. In addition, this reality does not enhance solidarity among members of the Jewish community in Israel.

Cohen argues that the State of Israel should intervene in an attempt to assist members of this group who wish to join the Jewish faith. The State of Israel and the Israeli society should help this group of immigrants and their relatives, children, and spouses to assimilate in Israeli Jewish society by encouraging a more lenient conversion process. Cohen sees the conversion of members of this group as a national challenge and not simply a personal matter for those who wish to convert in a Rabbinical court. He explains that the adoption of the strict approach to conversions in Rabbinical courts in Israel will be an obstacle for those who wish to realize the Zionist dream of joining and maintaining the Jewish majority in Israel. It will cause the rejection of more and more applications of non-Jewish immigrants who wish to convert and also join the Jewish society in the religious sphere. By encouraging the Rabbis and Rabbinical courts in Israel to adopt a more lenient approach towards conversion, the State of Israel can fulfill the purpose of its establishment—to implement the Zionist outlook in reality.⁵⁹

⁵⁷ Cohen, *supra* note 56, at 32.

⁵⁸ *Id.* at 33.

⁵⁹ Asher Cohen, *Israeli Assimilation: Between Proselytizing by Halakha, "Social Conversion" and "Secular" Conversion*, 14 TZOHAR 117, 121 (2003).

The State of Israel encouraged the establishment of special Rabbinical Courts for conversion that assist candidates for conversion and fund their activity. Most of these candidates are immigrants to Israel and their children who are citizens of the state and wish to convert and as a result be part of the Jewish majority in the religious sphere. Many in this group of non-Jewish immigrants already identify with the national and political agenda of the Jewish majority in Israel. When they convert to Judaism, they also accept the ideology of the Jewish religion. The new religious identity of the converts grants them more autonomy and an elevated social status. Without conversion, when these individuals are part of a minority culture in Israel, “the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful.”⁶⁰

A lenient policy regarding the conversion of these immigrants and their descendants also promotes their rights in the spheres of human dignity and liberty, rights whose normative status in Israel was elevated with the enactment of the Basic Law: Human Dignity and Liberty.⁶¹ The immigrants who wish to convert to Judaism believe that conversion will help them realize their dream to be part of the Jewish majority in Israel. After their conversion, they will be fully integrated into Jewish society. They will be treated by members of the Jewish majority as fellow Jews, and their new status could enable them and their descendants to marry Jews in Israel. Some of them feel they are part of the Jewish nation since their ancestors were Jewish, and some believe in the ideology of the Jewish religion and wish to observe the commandments of Jewish law. According to their perspective, conversion to Judaism is a contribution to their human dignity. For them and others in Israel, the special significance of the constitutional right to human dignity is, among other things, “the ability of a human being . . . to express his desires and choose paths for their fulfillment . . . to receive fair treatment by each authority and by each individual.”⁶²

Rabbinical courts *should* find out if a candidate for conversion is sincere. However, a lenient approach when a candidate for conversion comes before the Rabbinical courts is preferable because it enhances the liberty of the convert. The meaning of the right to

⁶⁰ JOSEPH RAZ, *National Self-Determination*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 28, at 125, 134 (with Avishai Margalit).

⁶¹ Basic Law: Human Dignity and Liberty, 5752-1992, 45 LSI 150 (1992).

⁶² Meir Shamgar, *Human Dignity and Violence*, 3 MISHPAT UMIMSHAL 33, 40–41 (1995).

liberty in this basic law is “the free will of the individual. The right to human dignity is the right of free choice granted to an individual that enables him or her to develop his or her personality and to make decisions that shape his or her destiny.”⁶³ As the Court held in *Nachmani v. Nachmani*, “Liberty in its full sense is not only the freedom from external intervention of the authorities or others. It includes the ability of an individual to choose the direction of his own course of life, to fulfill his basic desires and to use discretion that enables him or her to make a choice from a range of possible choices.”⁶⁴ Isaiah Berlin explained that the “positive” meaning of the word liberty stems from the desire of an individual to be the master of his own fate. He or she desires to be able to execute his or her own voluntary actions and not be subjected to the will of other individuals. The individual wants to be a subject, not an object.⁶⁵

When an individual converts, he or she decides voluntarily to become dependent. Conversion is a free choice to be subjected to the commandments of Jewish law:

The American notion of freedom requires *independence*. . . . The right of independence—for individual as well as nation—is essentially alien to the Jewish perspective. . . . Freedom to an American denotes a *right*. Freedom to a Jew refers mainly to a *power*. . . . Judaism’s denigration of rights in the characterization of its conception of freedom is a direct consequence of its over-arching concern with *duties* or *obligations*. . . . Judaism’s paramount concern is with imposition of obligations, i.e., *mitzvot*. Their commanding authority derives either from the rightness of the act prescribed by the imperative (which should be construed in religious terms as the expression of the Divine will) or from the rightness of the act together with the fact of commitment.⁶⁶

Converts are “adults, exercising free will, who will immediately as-

⁶³ AHARON BARAK, 3 INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION 426 (1994).

⁶⁴ CA 2401/95 *Nachmani v. Nachmani* [1996] IsrSC 50(4) 661, 682–83.

⁶⁵ ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166, 178 (Henry Hardy ed., Oxford Univ. Press 2002).

⁶⁶ Sol Roth, *Two Concepts of Freedom*, 13 TRADITION 59, 61–64 (1972–73).

sume their role as Jews.”⁶⁷

Indeed, the establishment of courts for conversion funded by the State of Israel is certainly not in the spirit of the idea of separation of church and state. This separation stems from a viewpoint that a religious conviction is a personal matter which should be left free from state interference. However, in the unique legal system of Israel, a Jewish state, there is no separation between state and religion. Ruth Gavison justifies the current interaction between law and religion in the Jewish state by first noting that religion is important in the history of many nations. Those who regard religion as a private matter ignore this fact, which is evident after a deep analysis of history. Moreover, the role of religion and the perspective of the religious population are very important in Israeli politics. Israel is defined in its declaration of independence as a *Jewish* state and, as a result of this definition, the adoption of a policy of separation between the Jewish religion and the state in Israel is problematic.⁶⁸ In Israel, a Jewish state, we should take into consideration the perspective of Judaism. The Jewish religion is a collective-communal religion, and the religious and national identities of Jews are identical. The definition of the Jewish collective in religious law is identical to the national identity of this collective. A separation between the state and religion in Israel is also contrary to the vision of the Zionist movement that the State of Israel, as the homeland of the Jews, will solve the problems the Jews encounter when they are a minority in the Diaspora.

V. CONVERSION OF IMMIGRANTS: THE POLICY OF THE RABBINICAL COURTS

The Rabbinical courts for conversion in Israel have adopted a lenient approach in Jewish law. This policy, in favor of conversion, is an attempt to assist, as much as possible, candidates for conversion, who are usually immigrants to Israel or their children. The special courts' more lenient approach to conversion enables immigrants and their children to more easily join a desirable religion. Nevertheless, conservative elements in the Rabbinate and a group of Jewish judges

⁶⁷ Jerry Hochbaum, *Who is a Jew: A Sociological Perspective*, 13 TRADITION 35, 39 (1972–73).

⁶⁸ Ruth Gavison, *Religion and State: Separation and Privatization*, 2 MISHPAT UMIMSHAL 55, 56–57 (1994).

in the regular Rabbinical courts in Israel oppose this lenient policy.

The debate between the lenient and strict Rabbis concerning the conversion policy in Jewish law is ancient. All agree that Jewish law encourages Jews to love sincere and pious converts. An important commandment in the Bible—“And you shall love the foreigner”⁶⁹—imposes an obligation upon Jews to treat friends and foreigners in the same manner. Foreigners, including converts to Judaism, should feel that the foundation of their relationship with Jews is the love of Jews for them. The Bible stresses, many times,⁷⁰ that Jews should love foreigners. In addition to the positive commandment to love the foreigner, there is a negative commandment not to insult or shame the foreigner.⁷¹ Ancient Jewish scholars have emphasized that many times—thirty-six times according to one opinion and forty-six times according to another—Biblical law prohibited acts that offend or shame foreigners.⁷² This is part of a general perspective that love among all human beings is a basic foundation of Jewish law.⁷³

In the medieval period, Maimonides, an important medieval Jewish scholar, in his codification of Jewish law *Mishneh Torah*, places the directive that Jews should love foreigners who converted to Judaism between two principles of Jewish law:⁷⁴ one, that a person should love other individuals as he loves himself,⁷⁵ and the other: “Do not hate your brother in your heart.”⁷⁶ He explains, “Loving the foreigner who enters the wings of the Divine Presence comprises two good acts: one, since he is actually a friend, and the other, since he is a foreigner, and the *Torah* states that ‘you shall love the foreigner.’”⁷⁷ He adds that the two commandments coincide. One commandment is the directive: “And you shall love your G-od.”⁷⁸ But Jews should also love foreigners since G-od Almighty loves them, as stated in the holy ancient text.⁷⁹

⁶⁹ *Deuteronomy* 10:19.

⁷⁰ See BABYLONIAN TALMUD, *Bava Metzia* 59B.

⁷¹ *Exodus* 22:20.

⁷² See BABYLONIAN TALMUD, *Bava Metzia* 59B.

⁷³ See *Leviticus* 19:17.

⁷⁴ See MISHNEH TORAH, *Deot* 6:4–6.

⁷⁵ *Leviticus* 19:18.

⁷⁶ *Id.* 19:17.

⁷⁷ MISHNEH TORAH, *Deot* 6:4 (quoting *Deuteronomy* 10:19).

⁷⁸ See *Deuteronomy* 6:5; 11:1.

⁷⁹ See *id.* 10:18.

For Maimonides, this was practice and not mere theory. In his responsa he adopted a generous approach to a foreigner who joined the Jewish nation and accepted the commandments of the Jewish faith, the convert Ovadia.⁸⁰ Maimonides emphasized that there is a special duty to love this foreigner—“who left his father, his homeland and the powerful kingdom of his nation, and understood . . . that their religion [of the Jews] is a religion of truth and justice . . . and entered the wings of the Divine Presence and accepted the principles of [the law of] Moses, the leader of all the prophets, and his desire was to follow his commandments.”⁸¹ He addressed indirectly the problem of the contradiction between two approaches in ancient Jewish texts in regard to the prayer of the convert that could cause shame,⁸² and preferred the outlook in these texts that prevents possible unpleasantness and shame to foreigners who joined the Jewish faith. In his responsa to Ovadia the convert, Maimonides wrote that this convert could use the regular language in the prayer of all Jews: “the G-d of our ancestors.” This sensitive policy will prevent possible shame to him. A different prayer for this convert, if he should recite it in the presence of his fellow Jews, could reveal that he converted to Judaism and is not a descendant of the Jewish nation’s ancestors. Maimonides explained his preference as justified since:

Abraham taught all people . . . the religion of truth and about the uniqueness of G-d, and fought against idolatry and . . . commanded his sons and the members of his family to observe [the commandments to those who follow] G-d’s path. . . . [T]herefore, whoever converts to Judaism until the last generation and believes that G-d [of the Jews], mentioned in the Bible, is the only [true G-d] is a follower of Abraham, may he rest in peace, and one of the members of his family. . . . As he [Abraham] reformed the individuals of his

⁸⁰ Regarding the identity of the convert, see MENACHEM FINKELSTEIN, PROSELYTISM: HALAKHAH AND PRACTICE 15 n.8 (1994).

⁸¹ *Responsa Maimonides* 2:448; see also *id.* 2:293.

⁸² In ancient sources, from the Tanaitic period, it is written explicitly that a foreigner cannot say a prayer which includes the words “our ancestors.” MISHNAH, *Bikurim* 1:4; TOSEFTA, *Bikurim* 1:2. However, the subsequent Amoraic literature mentions the opinion of Rabbi Judah, according to which a foreigner can say a prayer which includes these words, since Abraham was a father of many gentiles. JERUSALEM TALMUD, *Bikurim* 1:4. The interpretation of Maimonides in this case is an adoption of the opinion in the Jerusalem Talmud and rejection of the principle in Tanaitic literature.

generation through his teaching . . . [he] is the father of his descendants, which follow him, and the father of all of his followers and whoever converts to Judaism. Therefore, you can say: “Our G-od and the G-od of our ancestors,” for Abraham, may he rest in peace, is your father.⁸³

Although Maimonides mentioned other requirements for a valid conversion including circumcision and immersion,⁸⁴ it is evident that one of the *basic* elements of conversion is the acceptance of the religious tenets of Judaism and the principles of Jewish law. According to Maimonides, conversion is an outcome of a sincere spiritual revolution in the soul of the convert, who pursued “G-od” and “entered the wings of the Divine Presence” and accepted the directive of “Moses, the Rabbi of all the prophets.”⁸⁵ In order to accomplish the spiritual conversion in the foreigner’s soul, the Rabbinical court should first tell the candidate what are the “basic [foundations] of the [Jewish] religion, which are monotheism and the prohibition of idolatry[,] and it should prolong the focus upon this matter.”⁸⁶

The convert should adopt a new religious ideology and also join the Jewish nation. The convert cannot perform only the religious act; the conversion is also not valid when the convert only joins the Jewish nation but does not accept the obligation to observe the Jewish commandments.⁸⁷ Both the spiritual and national requirements should be fulfilled when a foreigner desires to convert to Judaism.⁸⁸

⁸³ *Responsa Maimonides* 2:293.

⁸⁴ MISHNEH TORAH, *Issurei Bi’ah* 13:4 (“[W]hen the gentile wants to join the alliance [of Jews], to enter the wings of the Divine Presence and to take upon himself the burden of the *Torah*, he has to perform the acts of circumcision [and] immersion.”).

⁸⁵ *Responsa Maimonides* 2:293.

⁸⁶ MISHNEH TORAH, *Issurei Bi’ah* 14:2.

⁸⁷ ISAAC HALEVY HERZOG, *The Rights of Minorities According to the Halakhah*, in 2 TECHUMIN 169, 170 n.1 (1971), A CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH 12, 13 n.1 (1989) (“Acceptance of the Jewish national outlook which includes the faith that the people of Israel will return to their homeland and will reestablish Jewish sovereignty there is part of the Jewish belief, and the convert should adopt all the elements of this spiritual outlook. . . . [A] foreigner who adopts the religious aspects of Judaism but has reservations about the acceptance of the national aspect of Judaism, which is a belief that the Jewish nation will return to Zion and reestablish in this land the Jewish kingdom, cannot be accepted as a convert to Judaism since the belief in these principles is a fundamental element in a Jewish outlook.”).

⁸⁸ *See id.* 2 TECHUMIN 170 n.1, A CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH 13 n.1 (“When an individual did not accept the principles of the Jewish religion in a manner required in the rules pertaining to conversion—although he decided to be devoted with all of

Another concern of scholars of Jewish law, especially in recent generations, is whether the qualifications of the *Dayanim* in the Rabbinical court are adequate. One of the major flaws of a conversion occurs when the court does not have the required qualifications.⁸⁹ Orthodox Jewish law scholars frequently claim that conversions performed by courts of the Conservative and Reform movements are not valid. The outlook of the spiritual leaders of these movements concerning theological matters and their perspective in regard to the minimal standard of obligation to observe the Jewish commandments are not considered adequate.⁹⁰

Especially in recent generations the question of a convert's ulterior motive has been scrutinized. The main problem in this context is marriage-motivated conversions. Scholars have questioned the validity of these conversions when the observance of the commandments of Jewish law is not the goal of the convert. What is a desirable policy for the Jewish court when it is evident that the candidate for conversion will not observe the commandments of Jewish law or will do so only partially? Sometimes when a Jewish spouse is cohabiting with a non-Jew, or might cohabit with him or her in the future, regardless of the prohibition of this behavior in Jewish law, a Rabbinical court may adopt a more lenient policy towards the conversion of the spouse in an attempt to avoid this serious transgression of the principles of Jewish law.⁹¹ When the convert accepts an obligation to observe all the Jewish commandments in an Orthodox court, although it was a conversion motivated by desire to marry a Jewish spouse, it is a valid conversion and all the rules pertaining to converts, including those that prohibit a Jew from shaming him or her, still apply.

Should this policy prevail when Jewish scholars or another

his spirit and soul to the Jewish nation and to fulfill all the civil duties of members of this nation—he or she remains in the status of a gentile according to the principles of Jewish law, and cannot marry a Jewish spouse.”).

⁸⁹ A private conversion is not valid. The act of conversion should be performed in the presence of three Jewish judges (*Dayanim*) in a Jewish court. BABYLONIAN TALMUD, *Yebamot* 47A. The *Tosaphists* explained that these judges should be present when the convert accepts the burden of the commandments of Jewish law. It is preferable that the ritual immersion also be performed in the presence of these judges. However, if they are not present, this act is *de facto* valid. *Id.*; see also the view of Rabbi Meir Posner in *Responsa Beit Meir* 65.

⁹⁰ *Responsa Achiezer* 3:26; *RESPONSA IGROT MOSHEH, Yoreh Deah* 1:160; *Yoreh Deah* 2:123; 125.

⁹¹ *RESPONSA IGROT MOSHEH, Yoreh Deah* 2:124; see also Shmuel Shilo, *Halakhic Leniency in Modern Responsa Regarding Conversion*, 22 *ISR. L. REV.* 353 (1987–88).

court find out, after the conversion, that the behavior of the convert is not the behavior of an observant Jew? This issue was addressed in two significant decisions of the High Rabbinical Court in Israel in the last decade. These decisions determine the fate of many past conversions of immigrants to Israel. In these decisions the Judges in Rabbinical courts (*Dayanim*) analyzed the significance of the converts' religious outlook and behavior in the period after their conversion and focused especially upon the issue of partial observance of the principles of Jewish law after the conversion. Could a regular Rabbinical court decide, in light of the behavior of the convert after his or her conversion, to invalidate the conversion by the previous court? In both cases, it was not clear that the immigrant, who took upon himself or herself an obligation to observe the commandments of Jewish law before the court, actually adopted a religious outlook and observed the positive and negative commandments of Judaism after the conversion. Many immigrants who converted to Judaism are not married to observant spouses and consequently it is not easy for them to observe all the commandments of Jewish law after their conversion.

Sensitivity and empathy to the converts and immigrants to Israel, and an attempt to avoid the undesirable consequences of a strict religious approach, are evident in the first decision, handed down in 5761-2001.⁹² The decision of the majority in this case was written by the Jewish judge (*Dayan*) Rabbi Shlomo Daikhovsky, who was joined by the Jewish judge Rabbi Ezra Bar Shalom. This case was an appeal on the judgment of the *Dayan* Izirer of the regional Rabbinical Court in Rechovot concerning the validity of a woman's conversion in a Rabbinical court. The *Dayan* Izirer emphasized that according to her declaration in his court, at the time of her conversion to Judaism she knew that she could not observe all the commandments of Jewish law, and her commitment before the court to observe the principles of Jewish law was actually limited. Izirer found that at the time of her declaration, the woman believed that after her conversion she would be able to observe certain important commandments—the laws of family purity and the laws pertaining to the Sabbath and kosher food—and she explained that she also hoped to be able to observe more commandments in the future. Therefore *Dayan* Izirer conclud-

⁹² See the judgment of the High Rabbinical Court in case 1-12-9363, issued on Aug. 3, 2001.

ed that at the time of her conversion her acceptance of the commandments was partial and, consequently, not sufficient. He ruled that her conversion was not valid, since a fundamental element in a valid conversion to Judaism—acceptance of the burden of the commandments of Jewish law—was missing.

Rabbi Daikhovsky of the High Rabbinical Court did not share the point of view of Rabbi Izirer and adopted instead a lenient approach. He considered it important that in this case the convert was accepted to the Jewish faith and nation by a qualified Orthodox Jewish court. Although we know that the motivation of a candidate for conversion is not appropriate—such as conversion for the sake of marriage or a financial or other benefit to him or her—and although we find out, after the conversion, that the convert violates the principles of Jewish law, since the act of conversion was performed in the past and the candidate for conversion was accepted into the Jewish community, the conversion is valid. After the conversion, this convert is a Jew. If he or she does not observe some of the commandments of Jewish law, they are Jews that act in an improper manner. In addition, since the convert was granted the status of a Jew, his or her marriage to a Jewish spouse is valid. Rabbi Daikhovsky quoted from the writings of Maimonides, who noted that the wives of famous Jewish leaders in the Bible, like Samson and Solomon, remained with their spouses although their husbands found out, after their conversions, that they were idol worshippers.⁹³ Rabbi Daikhovsky granted due weight to the emphasis of Maimonides—that we should not think, incorrectly, that “Samson, who saved the Jewish nation, and Solomon, the king of Israel, who is defined in the Bible as ‘the beloved of the Lord,’ married gentile women.”⁹⁴ Although these wives were sinners, and violated the prohibition of idolatry after their conversion to Judaism, they were considered Jewish, and their Jewish husbands could live with them. Their sins after their conversion did not invalidate their conversions.

Rabbi Daikhovsky acknowledged that it is a different question before the candidate for conversion is granted the status of a Jew for the court that decides to convert him or her than what the legal policy should be in regard to the status of the convert post factum, after being accepted as a Jew. He analyzes the text of Maimonides:

⁹³ MISHNEH TORAH, *Issurei Bi'ah* 13:17.

⁹⁴ See his decision, *supra* note 92.

The wives of Samson and Solomon performed the sin of idolatry. This is what is written in the Bible. Their conversion was problematic at the beginning of the process, since Maimonides wrote that “it was known [at the beginning of the conversion process] that they converted in an attempt to receive a benefit [i.e., marriage to these Jewish leaders].” In addition, “their acts at the end, after their conversion, proved that they [violated the commandments of Jewish law and] performed [sins such as] idolatry at the beginning [immediately after their conversion]” and moreover, “they were not converted by a [Jewish] court.” There are three major problems [concerning the validity of this conversion]. I have no doubt that if this kind of a candidate for conversion would present a request to be accepted as a convert to the Rabbinical Court in Rechovot [the court of Rabbi Izirer] this court would rule she should not be accepted as a convert. It is possible that I would also have joined this opinion in these circumstances. Nevertheless, [after they are accepted as converts] Maimonides regards them as Jews. . . . [T]he status of a convert post factum, after the conversion, is not identical to his or her status before the conversion. After the conversion has been performed the conversion is valid and is not disqualified [in a later stage].⁹⁵

In addition, according to the perspective of Rabbi Daikhovsky, the convert in this case was a sincere convert. He and *Dayan* Bar Shalom were impressed by the honest and reliable declaration of the convert that she is observing the commandments of Judaism. She observed all the commandments of Judaism at the time of their decision in the court of appeal, and they believed she had sincerely intended to observe these commandments at the first stage, when she was accepted as a convert. They explained that she was sincere when she declared in the court of appeal that she intended to observe all the commandments of Jewish law eventually. However, since she knew it is difficult to observe all these commandments immediately, she decided it was more practical to begin by observing the main com-

⁹⁵ Judgment of the High Rabbinical Court in case 1-12-9363, issued on Aug. 3, 2001.

mandments of Judaism, such as the rules pertaining to Kosher food, keeping the Sabbath, and the rules of family purity.

These Jewish judges based their decision in this context upon the precedent of the ruling of a prominent Rabbi in the twentieth century, Rabbi Chaim Ozer Grodjinsky. He decided that when a foreigner accepts the burden of the Jewish commandments in a partial manner, such as the manner of commitment in this case, the acceptance of these commandments is sufficient and the conversion is valid.⁹⁶ When a foreigner declares that he will observe the Jewish commandments, but assumes that in the beginning it will be practical to observe only certain basic and important commandments, such as those mentioned in the decision of Rabbi Daikhovsky, the conversion is valid. Rabbi Daikhovsky stressed that Rabbi Grodjinsky wrote that this could be the policy of a Rabbinical court concerning the acceptance of the commandments at the first stage—before the convert is accepted as a Jew. The *Dayanim* Daikhovsky and Bar Shalom emphasized that this certainly should be the policy of this court post factum, after the conversion.

Although it is important to assist immigrants who wish to convert to Judaism, we must admit that the perspective of Rabbi Daikhovsky could be challenged. The convert in this case lived with her children and husband whom she married in a civil, not a religious, marriage ceremony. Rabbi Daikhovsky explained that indeed a religious Jew should not violate the prohibition on cohabiting with another Jew when they did not marry in a valid Jewish wedding ceremony. However, since the woman had established a family with her spouse and was living with him and his children, Rabbi Daikhovsky could understand why it was difficult for her not to violate this prohibition. He believed the focus should be upon the fact that, although on the one hand she cohabited with this individual, on the other hand she kept in a strict manner all the rules of family purity pertaining to her relationship with him.

The minority point of view in this judgment, of Rabbi Abraham Sherman, was based upon the assumption that if the observance of the commandments of Jewish law by the convert was partial, the conversion was not valid. He shared the outlook of the Rabbinical court in Rechovot in this case that when this observance was partial, or even not perfect, the conversion is not valid. Since the court knew

⁹⁶ *Responsa Achiezer* 3:26.

that after her conversion this convert did not observe all the rules of Jewish law pertaining to the Sabbath, and he believed her statement concerning her religious outlook did not fit with the ideology of Orthodox Judaism, Rabbi Sherman argued that the court should not accept her conversion as valid. In addition, he explained that there was another factor which strengthened the doubts of this court about the validity of the conversion in this case: her cohabitation with a person she did not marry in an Orthodox Jewish marriage ceremony. According to Rabbi Sherman, when in subsequent proceedings in another Rabbinical court facts are revealed to the judges that cast doubt upon a candidate's sincerity before the court that accepted her to the Jewish nation, the court should investigate, on its own initiative, whether the conversion performed by the Rabbinical court was valid. Among other reasons, this investigation is necessary because when a past conversion is not valid, the Rabbinical court cannot approve a request that a Jewish marriage ceremony be performed between the convert and a Jewish spouse, as a Jew cannot marry a non-Jew under Jewish religious law.

The point of view of Rabbi Sherman was presented in a more extreme and clear-cut manner in a subsequent decision of the Rabbinical court of appeals. In this case, Rabbi Sherman, Rabbi Izirer, and Rabbi Sheinfeld shared the same strict point of view.⁹⁷ Their decision was in an appeal on the challenge of Rabbi Atia, in the Rabbinical court in Ashdod, to the lenient policy of the Rabbinical courts for conversion in Israel. He attacked, in particular, the policy of Rabbi Drukman, who had accepted the request of the convert in this case to join the Jewish nation. Rabbi Atia refused to give a woman who was converted in the court of Rabbi Drukman a divorce certificate because he claimed her conversion was not valid; since he stated the woman is not Jewish, her religious marriage to her Jewish husband was not valid and therefore an act of divorce would not be necessary.

Between the lines of these arguments we can find two distinct attitudes towards the interpretation of the religion principles pertaining to conversion: the flexible attitude and the strict attitude, disguised as an attempt to achieve religious "truth." The strict and suspicious attitude pertaining to conversion of immigrants in Israel and the placing of significant and problematic obstacles that do not enable the conversion of many immigrants, their relatives, and spouses is

⁹⁷ See Judgment of the High Rabbinical Court in case 5489-64-1, issued on Oct. 2, 2008.

presented as an attempt to achieve religious pureness and holiness. But these candidates for conversion often have to pay a very high price as a result of this policy. The main group that will suffer from a strict policy is the society of immigrants, with their relatives and spouses, who came to Israel as a result of a right granted to them in the Law of Return. In his decision in the prior case, Rabbi Daikhovsky presented the suffering and humiliation of candidates for conversion in Israel, especially from weak segments of society, in a persuasive manner. He explained that when a proselyte has converted to Judaism in an ordinary Rabbinical court or in a special court for conversion, and he approaches a regular Rabbinical court in subsequent litigation, such as to request the division of an estate between the inheritors or property between the spouses or a divorce suit:

[C]an each [Rabbinical] court be free to investigate [what is the legal status of the convert] . . . and determine he is not a Jew? And what if his children or grandchildren need [the services of the] Rabbinical courts, could all courts examine their legal status [as Jews] until 1000 generations? Can we torture the convert anytime he or his descendants need [the services of] a Rabbinical court for any purpose? . . . I think that repeated investigation of such a sensitive matter and the continuation of this investigation in future generations . . . could result in a problematic situation of torture and abuse [of converts and their children].⁹⁸

Rabbinical courts for conversion can investigate, on their own initiative, whether a candidate for conversion is sincere. But after they decide they are accepting a candidate and they state he is a Jew, further investigation of the convert's behavior is unnecessary and humiliating. Such a lenient policy is in the spirit of the sensitivity of Jewish law and the concern in Judaism over the appropriate relationship between one individual and another. Recognizing this, the Supreme Court of Israel has sometimes sided with Jewish immigrant groups who were adversely affected by the policy of the Rabbinate or the Rabbinical courts regarding their conversion.⁹⁹

⁹⁸ Judgment of the High Rabbinical Court in case 1-12-9363, issued on Aug. 3, 2001.

⁹⁹ See HCJ 230/86 Shoshanah (Susan) Miller v. The Minister of Interior [1986] IsrSC 40(4) 436, 447-48.

The outcome of an investigation into the real intentions of a candidate for conversion can be cruel to the candidate and his or her children. Truth is a value in Jewish law. However, there are also other important values in Judaism. A verse in the Book of Proverbs says about the ways of the *Torah* (Biblical Jewish Law) that “[i]ts ways are ways of pleasantness, and all its paths are paths of peace.”¹⁰⁰ In light of this verse, the Babylonian Talmud concluded that “the [goal of the] whole *Torah* [also its purpose] is to promote peace.”¹⁰¹ From this point of view, peace is one of the most important principles of Judaism and it constitutes an ideological foundation for all the commandments of the *Torah*. Other verses in the *Torah* praise an individual who walks in the paths of peace.¹⁰² The competing values of truth and peace should be balanced in Jewish law in an appropriate manner. An important Jewish text states “truth, and judgment of peace you shall judge in your cities.”¹⁰³ Rabbi Kook emphasized that in a deep sense, truth and peace coincide in Judaism: “[I]t is all one *Torah*. The peace aims to [achieve] the [deeper] truth. [Peace] is not [a] concession about the [definition of the] truth but [a] precision on it [in a deeper understanding of truth] and justice derives from the peace.”¹⁰⁴

Hillel, an important Rabbi in the ancient period, attributed significance to peace: “Hillel would say: Be a disciple of Aaron—a lover of peace, a pursuer of peace, one who loves human beings and draws them close to the *Torah*.”¹⁰⁵ An ancient Jewish text states that scholars of Jewish law, including the *Dayanim* in Rabbinical courts,

¹⁰⁰ *Proverbs* 3:17.

¹⁰¹ BABYLONIAN TALMUD, *Gitin* 59:72.

¹⁰² E.g., *Psalms* 37:37 (“Observe the innocent and see the upright, for there is a future for the man of peace.”); *Proverbs* 12:20 (“There is deceit in the heart of those who plot evil, but for the counselors of peace there is joy.”); 1 *Chronicles* 22:7–10 (“And David said to Solomon, ‘My son, as for me, it was in my heart to build a House in the name of the Lord my God. But the word of the Lord was upon me, saying: ‘You have shed much blood, and you have waged great wars; you shall not build a House in My Name because you have shed much blood to the ground before Me. Behold a son will be born to you; he will be a man of peace, and I shall give him peace from all his enemies around about, for Solomon will be his name, and I shall give peace and quiet to Israel in his days. He shall build a House in My Name, and he shall be to Me as a son, and I to him as a Father, and I shall prepare the throne of his kingdom forever.’”).

¹⁰³ *Zechariah* 8:16.

¹⁰⁴ 2 IGROT HARAYAH 294 (1985); see also 1 IGROT HARAYAH 174 (1985) (“The truth cannot be partial; the truth has to be comprehensive.”).

¹⁰⁵ MISHNA, *Ethics of the Fathers* 1:12.

should enhance peace in the world.¹⁰⁶

The path of Hillel, preferring peace over the strict and uncompromising “truth,” conflicted with the strict and rigid path of another scholar named Shammai. Among other things, these two scholars disagreed regarding the policy of accepting converts to the Jewish nation:

Our Rabbis taught: A certain heathen [the candidate for conversion] once came before Shammai and asked him, “How many *Torahs* have you?” “Two,” he replied, “the Written Torah and the Oral Torah.” “I believe you with respect to the Written, but not with respect to the Oral Torah; make me a convert on condition that you teach me the Written Torah [only].” [But Shammai] scolded and repulsed him in anger. When [the candidate for conversion] went before Hillel, he accepted him as a convert. On the first day, he taught him, Alef, beth, gimme, daleth [the first four letters of the Hebrew alphabet]; the following day [Hillel] reversed [them] to him. “But yesterday you did not teach them to me thus,” he protested. “Must you then not rely upon me [Hillel]? Then rely upon me with respect to the Oral [*Torah*] too.”

On another occasion it happened that a certain heathen [the candidate for conversion] came before Shammai and said to him, “Make me a convert, on condition that you teach me the whole *Torah* while I stand on one foot.” Thereupon [Shammai] repulsed him with the builder’s cubit which was in his hand. When he went before Hillel, he said to him, “‘What is hateful to you, do not do to your neighbor;’ that is the whole *Torah*, while the rest is the commentary thereof; go and learn it.”

On another occasion it happened that a certain heathen [the candidate for conversion] was passing behind the Beth Hamidrash [a Jewish academy of learning], when he heard the voice of a teacher reciting, “and these are the garments which they shall

¹⁰⁶ *Bamidbar Rabbah* 11:18.

make; a breastplate and an ephod.” Said he, “For whom are these?” “For the High Priest,” he was told. Then said that heathen to himself, “I will go and become a convert, that I may be appointed to a High Priest.” So he went before Shammai and said to him, “Make me a convert on condition that you appoint me as a High Priest” [an ulterior motive]. But he repulsed him with the builder’s cubit which was in his hand. [The candidate for conversion] then went before Hillel, who accepted him as a convert. Said he to him, “Can any man be made a king but he who knows the arts of government? Do you go and study the arts of government!” He went and read. When he came to “and the stranger that cometh nigh shall be put to death,” he asked him, “To whom does this verse apply?” “Even to David King of Israel” was the answer. Thereupon the convert reasoned within himself a fortiori: if Israel, who are called sons of the Omnipresent, and who in his love for them He designated them, “Israel is My son, My firstborn,” yet it is written of them, “and the stranger that cometh nigh shall be put to death,” how much more so a mere convert, who comes with his staff and wallet! . . . He went before Hillel and said to him, “O gentle Hillel, blessings rest on thy head for bringing me under the wings of the *Shekhinah* [Divine Presence]!” Some time later the three [converts] met in one place; said they, “Shammai’s impatience sought to drive us from the world, but Hillel’s gentleness brought us under the wings of the *Shekhinah*.”¹⁰⁷

In three cases Shammai does not want to convert the candidate since this candidate is not willing to accept the whole burden of the Jewish commandments. Among other things, in his opinion, it is forbidden to convert a person who only wants to learn the Written Torah and not the Oral Torah, or a person who wants to learn the whole Torah while standing on one foot. In these cases Hillel is ready to convert the candidate even though his conversion is not complete at the first stage. In one case, when the convert stood on

¹⁰⁷ BABYLONIAN TALMUD, *Sabbath* 31:2.

one foot, Hillel told him that “What is hateful to you, do not do to your neighbor” is a principle that summarizes the whole *Torah* and that the rest of the commandments are an interpretation of this principle. He trusted the convert and saw the good potential in him and believed that in the future he would investigate the deep meaning of the principle he taught him and observe all the commandments as a result of his learning what he is commanded and not commanded to do.

The path of peace—the path of Hillel—is preferable. This perspective of Jewish law and the perspective of enhancing autonomy, human liberty, and freedom coincide, leading to the same conclusion: the lenient approach is preferable in the sphere of conversion of immigrants and other members of weaker segments in Israeli society.

VI. THE PERSPECTIVE OF GENDER

Most of the converts to Judaism in Israel are women. This could be the result of many factors, including the rule in Jewish law that the religious identity of a Jew is determined by his or her mother. A son or daughter of a Jewish mother is a Jew. Most of those who could benefit from the moderate approach concerning requirements for conversion are therefore women. A more lenient interpretation of the Jewish law of conversion can assist especially these female immigrants and their daughters.

Interpretation of Jewish law in an attempt to assist women was the policy of the Supreme Court Justice Menachem Elon in the *Shakdiel* case.¹⁰⁸ Local religious councils in Israel provide Jewish religious services to the local residents. The members of the religious councils are nominated by the Minister of Religious Affairs, the local Chief Rabbis, and the existing council members. In this case, the local Chief Rabbi opposed the nomination of Leah Shakdiel, a woman, to the religious council of her town. He claimed Jewish law forbids a woman from holding a post as a member of a religious council. The two Chief Rabbis of Israel and the Chief Rabbinate of Israel supported this point of view. In this case, the Supreme Court believed that the exclusion of a woman from membership in a religious council is gender discrimination. Justice Elon adopted an internal solution, within the boundaries of Jewish law. He did not state that the exter-

¹⁰⁸ HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [1988] IsrSC 42(2) 221.

nal principle of gender equality overrides the religious view that women cannot be members of religious councils. Instead, he focused upon two possible interpretations to the question: Does Jewish law enable women to be members of religious councils? Although the Chief Rabbinate of Israel was not in favor of the nomination of women as members in religious councils, Justice Elon weighed the evidence and concluded, “There is strong support within halakhic [Jewish law] framework itself, for the view that the petitioner, as a woman, should not be barred from membership of a religious council.”¹⁰⁹

A similar approach can assist females who are candidates for conversion in Israel. The adoption of the lenient approach within Jewish law—the approach of Rabbi Daikhovsky—can enable more candidates to fulfill their dream to be Jews.

VII. FEMINISM AND MULTICULTURALISM

Multiculturalism is common in many liberal democratic societies today. Presently residing in these societies, side by side, are individuals from different ethnic, racial, and religious groups. The ideology, outlook, values, and religion of members of different groups are not identical. While the state or the courts must balance these groups’ contrasting interests and values, those who grant due respect to multiculturalism wish to secure recognition and representation of the variety of interests and values of *all* ethnic, racial, and religious groups in society.¹¹⁰

Society should protect minority groups, especially when they have special cultural or religious values. The majority should not silence the voice of the minority. But should controversial values be safeguarded? If we take multiculturalism seriously, they should be safeguarded in order to accomplish the basic goal of the liberal democratic society: equal recognition and representation for all members

¹⁰⁹ *Id.* at 247–71.

¹¹⁰ See Amy Gutman, *Introduction* to *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* 3 (Amy Gutman ed., 1992); Isaak Dore & Michael T. Carper, *Multiculturalism, Pluralism, and Pragmatism: Political Gridlock or Theoretical Impasse?*, 10 WILLAMETTE J. INT’L L. & DISP. RESOL. 71, 73 (2002). Regarding the value of preserving the culture of different groups, see also Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 251 (Dan Danielsen & Karen Engle eds., 1994); Martha Minow & Elizabeth V. Spelman, *In Context*, in *PRAGMATISM IN LAW AND SOCIETY* 247 (Michael Brint & William Weaver eds., 1991).

of society. Presently, this mission has not been fully accomplished, since in many liberal democratic societies there are some groups with special values. They are not the mainstream in these societies and suffer from lack of representation or misrepresentation. The goal of proponents of liberal democratic societies should be the elimination of all forms of inequality. We can achieve this goal by recognizing the unique values and ideology of all groups.¹¹¹ The liberal point of view requires that all cultural groups in society will be granted equal legitimacy and should all be treated with due respect and tolerance.¹¹² We should grant each cultural group in society an equal opportunity to determine its own aspirations, customs, and values, which are the basic outcomes of its ideology. A group should be able to express itself without unnecessary constraints or deprivation.¹¹³

The difficulty in implementing multiculturalism arises whenever the cultural claims and cultural values of different groups contradict one another. Sometimes, as the result of liberal humanistic outlook, society wishes to protect the values and ideology of a conservative group although its values and ideology are contradictory to

¹¹¹ Dore & Carper, *supra* note 110, at 78. Some scholars reject the opinion discussed earlier regarding tolerance and respect for the values of different cultures. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 313 (1997). Bork questions the status granted to multiculturalism in society and law in the United States. In his opinion, this status might cause a split within American society. In addition, it could result in the devaluation of the central cultural values of American society. He also expressed concern that American culture could devolve towards the undesirable characteristics of the barbarian society.

¹¹² See STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 60–63 (1999). Fish makes a distinction between two forms of multiculturalism: boutique multiculturalism and strong multiculturalism. The first form is characterized by a sympathetic yet superficial approach towards the culture of others. This is the multiculturalism of “boutiques,” which welcomes ethnic food of different groups in the population. On the superficial level, it declares that it accepts the culture of others. However, when the values or conduct of others contradict the values of the individual who claims he adheres to this form of multiculturalism, he rejects them. Boutique multiculturalism is based upon the assumption that the cultural values of others should not be accepted when such acceptance conflicts with the values of the cultural group of those adhering to this form of multiculturalism. In these circumstances, the beliefs and convictions of those adhering to boutique multiculturalism are superior.

The other form of multiculturalism is based upon a commitment to promote special characteristics of the cultural values and customs of others, in an attempt to prevent discrimination among cultures. However, Fish stresses that this form of multiculturalism is also not absolute, as respect and tolerance towards the values of an intolerant culture becomes problematic. The adherent to this form of multiculturalism could probably choose to be intolerant to the values of the intolerant culture (such as fundamental Islam) on behalf of a common consensus on the values of his dominant culture. However, when he desires to act in this manner, his policy is actually not strong multiculturalism but boutique multiculturalism.

¹¹³ Dore & Carper, *supra* note 110, at 78.

those of the liberal Western society.¹¹⁴ Here, there may be a significant tension between the desire to enhance tolerance and equal treatment of women, and multiculturalism, which respects and tolerates the practices and ideology of all groups in society—including more traditional and religious groups that may adhere to traditional patterns of control and authority over women.¹¹⁵

What is the optimal approach for those who strive to promote the values of feminism in a multicultural society? What should be the policy of a liberal democratic society when ethnic groups or religious groups, or some other segments of society, preserve or promote patriarchal power structures? Proponents of multiculturalism have suggested several formulas for balancing between multiculturalism and feminism. Some have held that there should be more emphasis on multiculturalism. Their commitment to multiculturalism led to their conclusion that some aspirations of the feminist movement are impossible in a situation where feminism and multiculturalism clash.¹¹⁶

A second solution to this dilemma is based upon the assumption that protection should at times be granted to cultures that treat men and women unequally, including those that preserve biased legal arrangements regarding the relationships between men and women. However, this protection should be granted to these cultures only when they are at risk of extinction.¹¹⁷

A third approach suggests it is possible and appropriate to promote both multiculturalism and feminism at the same time. The

¹¹⁴ Ruth Halperin-Kaddari, *Women, Religion, and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 340–41 (2000).

¹¹⁵ MICHAEL WALZER, ON TOLERATION 65 (1999); Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism?: Civil Marriage in Lebanon*, 14 YALE J.L. & FEMINISM 177, 199 (2002).

¹¹⁶ See, e.g., Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 69 (Ian Shapiro & Will Kymlicka eds., 2000); Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 127 (1992); Chandran Kukathas, *Is Feminism Bad for Multiculturalism?*, 15 PUB. AFF. 83 (2001). Kukathas held that the state should demonstrate tolerance towards a variety of cultures, despite the fact that an outcome of this policy could be tolerance towards patriarchal patterns of behavior.

¹¹⁷ See generally Margalit & Halbertal, *supra* note 27. The authors' position in this matter is opposed to that of scholars who believe that cultures denying gender equality should be replaced by egalitarian societies. Nevertheless, some of these scholars were realistic, softened their position, and supported a more moderate approach—acting on the inside—that would achieve the desirable change in the field of gender equality without replacing the ancient society. See Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 9 (Joshua Cohen et al. eds., 1999).

desired outcome is to strike a reasonable balance between multiculturalism and feminism on a case-by-case basis.¹¹⁸

The past solutions to the dilemma of finding a desirable balance between multiculturalism and feminism were a sincere attempt to grant due weight to both philosophies. However, this goal can be reached today by taking an alternate approach that could enhance and promote a desirable balance between multiculturalism and feminism. Scholars and policymakers can focus upon a dynamic internal solution within the framework of the relevant religion's evolution. The adherents of feminism should initiate dialogues with spiritual leaders of those groups that preserve patriarchal rules and traditional practices and attempt to convince them that they could and should interpret their religious laws in a manner that will enhance the best interests of women.

The feminist political philosopher Susan M. Okin would not agree with such a solution, arguing that it grants too much weight to multiculturalism by preserving patriarchal principles and conduct. Okin would argue that feminism should be afforded more weight, as it seeks to promote respect and equality for all individuals.¹¹⁹ Nevertheless, she concedes that we can justify the protection of certain aspects of a minority culture, such as its language, and should attempt to be empathetic when cultural groups implement legitimate cultural practices and rules that are different from those of the majority culture.¹²⁰

The approach of Professor Ruth Halperin-Kaddari is similar

¹¹⁸ Will Kymlicka, *Liberal Complacencies*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 117, at 31. Kymlicka adheres to a proper balance between different, colliding values and rights, including a possible conflict between multiculturalism and human rights. In his opinion, there are limitations imposed upon the cultural rights of those who belong to minority groups, as a result of the relevance of principles such as freedom, democracy, and social justice. *See also* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 76 (1996).

¹¹⁹ Okin, *supra* note 117, at 9.

¹²⁰ *See id.* at 18, 23. In the author's opinion the liberal approach which leads to the justifications of multiculturalism should be balanced with the fear that support of multiculturalism means support of patriarchy and damage to women. Okin's basic position is shared by Leti Volpp, a feminist scholar who believes that as a matter of principle, feminism should be the paramount consideration when we cannot resolve the conflict between feminism and the cultural principles of certain groups of immigrants to the United States, although Volpp believes that all cultures are patriarchal. In these groups, customs such as marriage of young girls are commonly an outcome of unequal power relations between men and women. *See* Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J.L. & HUMAN.* 89, 105–06 (2000); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 *COLUM. L. REV.* 1573 (1996).

to that of Okin. She argues that the fact that women choose to belong to a group that implements unequal and oppressive norms towards them does not justify their oppression and discrimination. Yet, she shares Okin's opinion that an effort should be made to promote the status of women in their group through a creative use of the group norms, including the interpretation of its rules.¹²¹ Okin and Halperin-Kaddari granted more weight to feminism but did not choose the approach of direct confrontation with the traditional and religious groups and their norms. They were realistic and did not want to endanger the positive results that the nascent feminist movement had already achieved for women in these groups. While holding feminism to be paramount, they avoided the external path—a total attack on traditional groups and their patriarchal rules and practices. Their goal was to find an optimal solution for women who choose to belong to these groups.¹²²

The tension between multiculturalism and feminism as discussed above was presented in a manner relevant to the reality of many liberal democratic countries. However, there is a significant distinction between the analysis of the relationship between multiculturalism and feminism in Israel and the analysis of this issue in other countries, such as the United States and Canada. In the latter countries, the main problem consists of the patriarchal practices of minority populations. Taking multiculturalism seriously, the state should grant protection to the minority culture. The culture of the majority should not suppress or extinguish that of the minority. The legal situation is different in the State of Israel.¹²³ Recognized religious sects and their religious courts hold sole or parallel jurisdiction in the law of the State of Israel in matters of personal status. In certain matters, such as the marriage and divorce of Jews, an exclusive jurisdiction had been granted to the Rabbinical courts. The relevant principles of Jewish law are applied in these courts and interpreted by a traditional group—the religious judges, *Dayanim*—who are trained in Orthodox religious institutions and share a conservative approach to the boundaries of legitimate interpretation of Jewish law. Consequently, the

¹²¹ Halperin-Kaddari, *supra* note 114, at 342.

¹²² Such “external” direct attack could result in the adoption of uncompromising policies in the religious community that resists what it conceives as “coercion” from the outside. The result of the adoption of these policies might be stronger opposition in the religious community to new interpretation of religious law in light of the contemporary ideology of gender equality in modern society.

¹²³ Halperin-Kaddari, *supra* note 114, at 342.

process of balancing between multiculturalism and feminism in Israel should be different from that in nations such as the United States and Canada.

Indeed, the religious customs and practices of Orthodox Jews in Israel are those of a minority culture, but it is not a minority at risk of extinction. On the contrary, this culture is granted enforceable legal power in Rabbinical courts. It can coerce individuals from the minority and the majority to adhere to principles of Jewish law that are sometimes patriarchal. The State of Israel granted a conservative minority group the power to implement its ideology in one of the more significant areas of family law—marriage and divorce of Jews—and sometimes this power is granted to this group in other matters of personal status, such as custody and guardianship of children. In this regard, the majority population in Israel could be subjected to the ideology and legal practices of the minority. According to liberal ideology, this policy is controversial. It could potentially violate human rights, which are granted to all individuals living in the country. Some claim that this policy is unacceptable for the majority of Jews in Israel who do not belong to the conservative religious group. A minority ideology cannot justify the price many Jews in Israel pay in the domain of human rights and liberal values in many spheres, including equality between the sexes.¹²⁴

There are some religious Jews in Israel who are also feminists and argue that the implementation of Jewish legal principles, which are not always egalitarian,¹²⁵ in Israeli Rabbinical courts is problematic from the feminist perspective because it results in application of unequal rules in regulating the relationship between men and women.¹²⁶

The Israeli legislature, however, has chosen to grant binding status to the principles of this conservative religious group and has

¹²⁴ Liora Bilski, *Cultural Import: The Case of Feminism in Israel*, 25 TEL AVIV UNIV. L. REV. 523, 561–62 (2002); Ruth Halperin-Kaddari, *Legal Pluralism in Israel and the Rabbinical Courts in Israel After the Court Verdicts of Bavli and Lev*, 20 TEL AVIV UNIV. L. REV. 683, 745 (1997); Ruth Halperin-Kaddari, *More About Legal Pluralism in Israel*, 23 TEL AVIV UNIV. L. REV. 559, 567 (2000).

¹²⁵ Halperin-Kaddari, *supra* note 114, at 352.

¹²⁶ *See id.* at 348–52. In the author's opinion, the division of roles and spheres of activity between men and women, which is an outcome of the patriarchal family structure, is reinforced in the Israeli legal system as a result of the legal importance granted to principles of Jewish law on marriage and divorce. *See also* Halperin-Kaddari, *More About Legal Pluralism in Israel*, *supra* note 124, at 567–71 (discussing the “dark side” of legal pluralism, which portrays an inherent confrontation between liberalism and pluralism).

reaffirmed this legal practice by renewing its validity. In 1992, the *Knesset* enacted two important constitutional laws—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. These Basic Laws preserved all the rules of law enacted in the past, including rules that incorporated, implicitly or explicitly, unequal religious principles that sometimes discriminate against women. In addition, Israel's current political reality makes it unlikely that any attempt in the *Knesset* to enact new rules which will change the aforementioned foundations of family law will be successful.

In Israel's unique reality, what is the proper balance between multiculturalism and feminism? An interpretation of Jewish law that takes into consideration the special needs and aspirations of women is the more realistic alternative. Such an interpretation can elevate the legal status of Jewish women in Israel in legal matters that are within the jurisdiction of the Rabbinical courts. It is not surprising that religious feminist scholars in Israel prefer the "internal" mode of action—reform within the religious constraints of Orthodox Judaism. These scholars believe that this mode of action can produce an effective result for those who wish to enhance the power and rights of Jewish women in the Rabbinical courts.¹²⁷

Religious feminists, such as Israel's Orthodox Jewish women, prefer the "internal" solution because it coincides with their religious beliefs. The radical, "external" approach attempts to uproot power structures in society, religion, and culture, thereby challenging the foundations, morals, and principles of the religious establishment and religious ideology. Religious women prefer efforts to bridge and compromise, as much as possible, between feminism and religion. These women, including religious Jewish feminists, are aware of the fact that their mission is problematic at present. They must face the difficulty resulting from their double fidelity: the commitment to a life of faith versus their loyalty to humanistic values of liberty and equality.¹²⁸ One activist has stated that religious Jewish feminist women today are faced with the following dilemma: from the feminist viewpoint, is it possible that the *Torah*, which Jews believe displays eternal truth, lacks the egalitarian perception and the values that feminist women cherish so much today?¹²⁹ The religious conviction of these women leads them to conclude that it is unacceptable to re-

¹²⁷ See Halperin-Kaddari, *supra* note 114, at 344–45, 365.

¹²⁸ Hanna Kehat, *Breaking the Patriarchal Circle*, 22 PANIM 23, 28 (2002).

¹²⁹ Rivkah Lubitz, *The Pain of Tzlophad's Daughters*, 22 PANIM 129, 133 (2002).

gard the *Torah* as being old and irrelevant to modern women. These women are believers and are committed to an ideology that the *Torah* is the eternal truth.¹³⁰

Performing an “internal” act within a religious society can lead to a change that will be accepted by both the religious establishment and religious feminists. We can derive this conclusion from the struggle that led to the granting of the status of *Toa’anut rabaniyot* to women in Israel. *Toa’anut rabaniyot* are Orthodox Jewish women who are capable of implementing their knowledge of Jewish law when they represent their clients—many times women—in legal proceedings before the Rabbinical courts. Originally, only men could represent clients in legal proceedings in these courts. When women wished to enter this profession and requested authorization to represent clients in the Rabbinical courts, they encountered strong opposition from sections of the Jewish religious community in Israel, including some of the *Dayanim*. As a result, women had to overcome various obstacles and resistance. When women pushed to obtain the requisite licenses to represent clients before these courts, the scope of the requirements was expanded and the difficulty level of the exams was heightened. Women who were preparing for the exams were not given proper information regarding the material they were required to study. Many *Toanim rabaniyim*—men who represent clients in Rabbinical courts—refused to accept women as interns, thereby denying women the necessary experience. Some of the *Dayanim* prohibited women from sitting in court as spectators, so they could not learn practical aspects of litigation procedure and evidence, which they would need to implement when they represented clients in the courtroom.¹³¹ Nevertheless, women were successful in their struggle and eventually received the accreditation to be *Toa’anut rabaniyot*.

This is perceived by some scholars as a feminist achievement within the boundaries set by Jewish law and the Jewish religious establishment. *Toa’anut rabaniyot*, as women who are dedicated to their religious conviction, did not wish to undermine the religious system of the Rabbinical courts. They had to operate within the limi-

¹³⁰ See *id.* at 134.

¹³¹ Ronen Shamir, Michal Shitrai & Nelly Elias, *Mission, Feminism and Professionalism: Toa’anut Rabaniyot in the Orthodox Community*, 38 MEGAMOT 313, 328–29 (1997); see also Bilski, *supra* note 124, at 561–62 (interpreting the struggle of the *Toa’anut Rabaniyot* for recognition of their status as a feminist struggle); Halperin-Kaddari, *supra* note 114, at 354–56.

tations set by the religion and the religious establishment. Since this establishment can be hostile to the feminist movement, they sometimes had to publicly claim they were not part of this movement.¹³² In addition, they emphasized that they were dedicated to a religious ideology and lifestyle.¹³³ However, their accreditation and work on behalf of women in the Rabbinical courts is de facto a feminist achievement.

The rest of the world follows a similar pattern. The difficulty experienced by Orthodox Jewish women—who wish to combine their personal outlook that women should promote their own status in society and law as much as possible together with their religious commitment—is not a phenomenon unique to Judaism.

This aspiration to enhance women's rights in a traditional religious society is also evident in the writings of some Muslim women. Certain rules of Islamic law and the practices of Islamic society reflect the fact that in several domains Muslim women retain an inferior status.¹³⁴ Therefore, it is sometimes difficult to implement a policy of compromise between feminism and Islamic ideology. It is not a simple task to convince Muslim spiritual leaders that they can and should interpret Islamic law in an attempt to enhance the status of Muslim women. Fundamentalist Muslims will reject “external” influences, but moderate forces within Islam may welcome an attempt to interpret Islamic law in a manner that will produce a common denominator between the feminist Western outlook and the religious perspectives of Muslim law.¹³⁵

Some have claimed that the international standards concerning the status of women in law and society, adopted by the international community as a response to the initiative of Western states, contradict the basic principles of Islam and therefore the effort to promote these standards should be conceived as an imperialistic, anti-Islamic attempt to subject Islamic society to foreign attitudes. These

¹³² Shamir et al., *supra* note 131, at 331.

¹³³ *Id.*

¹³⁴ Adrienne Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149, 157–61 (1994).

¹³⁵ See Aziza Al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1 (1997); Sajeda Amin & Sara Hossain, *Religious and Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View From Bangladesh*, 44 AM. U. L. REV. 1319 (1995); Abdullahi Ahmed An-N'aim, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990).

scholars held that the judgment of Islamic lifestyle through a Western prism is actually a control mechanism used by the world's powerful groups in developed countries.¹³⁶ These groups oppress and suppress the traditional ideology of the Islamic countries and use their power in an attempt to silence the voice of the weaker segments of society in the world. Many Islamic countries opposed the concept of adopting new trends in Islamic law in light of Western feminist ideology. These Islamic countries regard this as a revolution from the outside, using the enhancement of women's liberty as a justification for imposition of foreign and problematic ideas. Scholars sometimes believe that the assumption that feminism should be the dominant ideology in these circumstances is similar, to an extent, to the viewpoint of some Western women during the colonial period, who believed that colonialism was positive since it improved the legal and social status of women in the colonies. These Western women stressed that the necessary mission of colonial powers was to import the values of the Western civilization into "backward" societies.¹³⁷

Presently, the objection to the trend of importing Western feminist ideology to Muslim societies is based upon the assumption that the goal of the feminist movement today is the implementation of "external" Western norms onto Muslim women. This opposition to feminist influences is presented as an objection to Western dominance, which is viewed as a threat to the preservation of authentic Islamic culture. These opponents claim that their objection stems from their sensitivity and due respect to the values of Muslim societies that wish to preserve Islamic women's traditional lifestyle.¹³⁸ In addition, in a number of cases in the past, the Western pressure of trying to improve the status of Muslim women was counterproductive, as it sometimes caused the toughening of traditional standards and practices common in these societies in reaction. Many times the external pressure resulted in a tendency to reject the basic foundations of the Western women's equal rights movement altogether.¹³⁹

¹³⁶ Deniz Kandiyoti, *Introduction to WOMEN, ISLAM, AND THE STATE* 1, 7 (Deniz Kandiyoti ed., 1991).

¹³⁷ See ANTOINETTE BURTON, *BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN, AND IMPERIAL CULTURE 1865–1915* (1994); VRON WARE, *BEYOND THE PALE: WHITE WOMEN, RACISM, AND HISTORY* 156–67 (1992); WESTERN WOMEN AND IMPERIALISM: *COMPLICITY AND RESISTANCE* (Nupur Chaudhuri & Margaret Strobel eds., 1992).

¹³⁸ See Kandiyoti, *supra* note 136, at 8.

¹³⁹ Regarding Muslim society's attitude towards the new agenda of women's human rights, see SHAHEEN SARDAR ALI, *GENDER AND HUMAN RIGHTS IN ISLAM AND*

One opponent to the implementation of Western feminist ideology in Muslim society was the scholar Al-Hibri. She investigated women's status in Islamic culture and claimed that Okin's balance between traditional religious ideologies and the conflicting outlook of feminism was not appropriate. Her criticism was that Okin did not grant due weight to traditional religious ideology. She also claimed that the weight of multiculturalism should be more significant when it is balanced against feminism. In her opinion, Okin granted too much weight to the fact that certain principles in the Islamic world and religion promoted the dominance and authority of men over women.¹⁴⁰ Al-Hibri stressed that a feminist perspective in favor of reform in Muslim countries or within groups of Muslim immigrants in Western countries should always be balanced by the counter-perspective: respect for the religious and cultural principles of Muslims. She was under the impression that Okin silenced the authentic voice of Muslim women and that the adoption of her policy infringed upon their freedom of expression. According to Al-Hibri, Muslim women should be given a fair opportunity to express their original voice. Her criticism was that Okin enabled this voice to be heard only when it coincided with the dominant concepts of Western feminism that shape policy in liberal democratic societies. Al-Hibri claimed that the imposition of Western feminist concepts upon the populations in Muslim countries and Muslims in Western countries was an attempt to oppress their Islamic culture. She believed that this approach stemmed from a patronizing agenda that is implemented by the world's majority and by multicultural societies upon Muslim members in minority groups.¹⁴¹

Some critics even claimed that the attempt to impose Western principles on groups that adhere to a conservative agenda regarding women is an act of arrogance. According to these critics, the imposition of values from the outside stems from a lack of respect and tolerance towards the beliefs and choices of the women belonging to these groups.¹⁴² They held that this strong paternalistic approach is a sub-

INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 24–49, 220–46 (2000).

¹⁴⁰ Aziza Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 117, at 41, 42.

¹⁴¹ *See id.* at 41–46.

¹⁴² David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide?: The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 171 (1995–96).

stantial danger to human freedom since it does not enable these women—who wish to act as they please in the fundamental aspects of their lives, such as religion, family, parenting, and education—to live according to their convictions.¹⁴³

The tension between the desire of women to belong to a traditional patriarchal society and the attempt of the feminist movement to “save” them from the hegemony of men in their society exists not only in regard to Muslim communities in Western countries, but also in regard to female members of other conservative communities, such as ultra-Orthodox Jewish groups in the United States, including two groups: *Chasidey Satmer* and *Lubavitch*.¹⁴⁴ From the feminist perspective, women who maintain a religious Jewish patriarchal lifestyle desire to preserve this tradition as a result of “false consciousness.”¹⁴⁵ However, men and women who choose this path sometimes claim that this attitude is an insult and this accusation about their mental awareness requires empirical proof, since they have adopted a religious and conservative ideology with full awareness and consciousness. They perceive their opponents’ low evaluation of their choice to adopt a traditional lifestyle as a lack of appreciation and due respect for their intelligence. There are millions of women in all regions of the world who adhere to a religious or traditional ideology, and believe it is a very important and meaningful guideline for their lives.¹⁴⁶

Several scholars have claimed that Western society should take seriously the feelings, conviction, and choice of traditional and religious women. The principles of many religions today and their ideological foundations should not be utterly rejected by feminists claiming that religion oppresses women. They suggested that women’s struggles for the increase of equality and the narrowing of power gaps between men and women should be the preferable policy.¹⁴⁷

¹⁴³ *Id.* at 170.

¹⁴⁴ *Id.* at 158, 163.

¹⁴⁵ Elisabeth Schüssler Fiorenza, *Public Discourse, Religion, and Women’s Struggles for Justice*, 51 DEPAUL L. REV. 1077, 1088 (2002).

¹⁴⁶ Cf. CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 151 (1989); Fiorenza, *supra* note 145, at 1084; see also Emily Fowler Hartigan, *Practicing and Professing Spirit in Law*, 27 TEX. TECH L. REV. 1165, 1167–68 (1996) (regarding a Catholic woman in the United States, who encountered hostility from feminist scholars as a result of her religious belief and approach to current society).

¹⁴⁷ Fiorenza, *supra* note 145, at 1084; Farida Shaheed, *The Cultural Articulation of Patriarchy: Legal System, Islam and Woman*, 6 S. ASIA BULL. 43 (1986).

However, feminism should be implemented in a cautious manner. Feminists should advance their agenda, but also reflect in their actions a desired understanding and respect for the religious culture in which many women wish to act. The feminist movement should not oppose or exclude the principles of religion, or ignore them, if it truly wishes to aid all women, including those who maintain a religious lifestyle.¹⁴⁸

A new approach is evident in the feminist movement as a result of this criticism. Admittedly, coexistence between feminism and religion has been problematic in Islamic society. Islamic principles are sometimes patriarchal or were interpreted as such in the past, as in the issues of polygamy or the laws of divorce. Scholars like Okin, who held that feminist ideology should be dominant, wrote that the coexistence of a feminist outlook with the principles of Islam is very difficult. She preferred a pragmatic approach. She held that whenever possible, it is preferable that the change of rules and religious practices should come from the inside. Women with a religious outlook should try to initiate a new interpretation of the principles of their religious law in an attempt to enhance equality between the sexes.¹⁴⁹

However, Okin was not optimistic about this process. She believed that often, religious law is rigid, and consequently the process of change is problematic. She expressed her concern that the outcome of this process will not always be the elevation of women's status in religious societies.¹⁵⁰

Interpretation of religious law could assist women in Israel in a specific context: conversion to Judaism. Within Jewish law, important scholars in recent generations have adopted an approach that can assist those who wish to be accepted as converts, who are often women. We should believe in the promise of interpretation of religious law. In one sphere of Jewish law—conversion to Judaism—the rules in the modern period have often been interpreted in a manner

¹⁴⁸ Fiorenza, *supra* note 145, at 1084.

¹⁴⁹ Susan Moller Okin, *Reply*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 117, at 117, 122–23.

¹⁵⁰ Although Okin thought that interpretation of religious law could produce effective results, she was not very optimistic about the outcome. Okin argued that the problem facing women as a result of patriarchal principles in Islamic law should not be ignored. In this sphere, there are not only difficulties concerning legal principles, but also practical difficulties, with which those who wish to abolish patriarchal trends in existing Islamic law will have to cope. *See id.*

that assisted females desiring to join the Jewish nation. This proves that when interpreters of religious law wish to elevate the status of women, they can apply an effective method of interpretation bearing good results.

VIII. CONCLUSION

Israel was established in an attempt to create a shelter for Jews in the Diaspora. In The Law of Return, Israel encourages the immigration of Jews and those related to Jews and married to them to the Jewish state. A Jewish and democratic state could impose limits upon immigration to the state in an attempt to grant due weight to the right of self-determination of the Jewish majority. The unique circumstances of Jewish history and survival justify this special policy of affirmative action. The Jewish society in Israel has a right to preserve the characteristics of its cultural-national Jewish identity in a unique Jewish state. From a liberal point of view, the right to culture is important since it facilitates autonomy, which is possible only when the individual has many good options. Furthermore, solidarity is important in all societies including the society of a Jewish and democratic state. An essential foundation of a strong and stable society is a strong mutual goal which is the foundation of the social contract of its members.

Many of the converts in Israel are immigrants and women. Israel should encourage, as much as possible, the implementation of a lenient conversion policy for these converts. Sensitivity and empathy to the converts and immigrants to Israel, and an attempt to avoid the undesirable consequences of a strict religious approach in the sphere of conversion, are desirable. An ancient Jewish text states that scholars of Jewish law, including the *Dayanim* in Rabbinical courts, should enhance peace in the world.¹⁵¹ The path of peace is preferable. This perspective of Jewish law and the perspective of enhancing autonomy, human liberty, and freedom coincide. And these perspectives lead to the same conclusion: the lenient approach is preferable in the sphere of conversion of members of weaker segments in Israeli society.

Within Jewish law, important scholars in recent generations have adopted an approach that can assist those who wish to be ac-

¹⁵¹ See *Bamidbar Rabbah* 11:18.

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cepted as converts, who are many times women. When interpreters of religious law wish to elevate the status of women, they can apply an effective method of interpretation bearing good results.