

# **“Jewish” and “Democratic”—Can They Co-exist?**

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Rabbi Yuval Cherlow is Rosh Yeshiva of Yeshivat Hesder Petah Tikva, Israel. He is a graduate of Yeshivat Har Etzion, ordained by the Israeli Chief Rabbinate, a retired major in the Israel Defense Forces, and a founding member of Tzohar, a rabbinical organization. Rabbi Cherlow has published many books and articles dealing with halakha, biblical exegesis, modern Jewish philosophy, and contemporary questions. This article is based on a presentation made at the IAJLJ Congress, Dead Sea, 2011, translated from the Hebrew by Perry Zamek. The article originally appeared in *Justice*, no. 49, fall 2011, and is reprinted in *Conversations*, issue 14, with the permission of IAJLJ. *Justice* is the magazine published by the International Association of Jewish Lawyers and Jurists.

## Introduction

The contradiction between a monotheistic, faith-based worldview and a democratic worldview seems almost irreconcilable. This inherent contradiction comes about for two reasons. The first is the question of authority. A theocentric worldview places God at the center, with God being the source of authority, whereas a democratic worldview places the people at the center. In a theocentric worldview, the majority may not adopt decisions that are contrary to Jewish law; indeed, the Torah commands us not to follow the majority when the majority is acting inappropriately (Ex. 23:2). If the issue were merely one of how decisions are made and the principle of majority rule, then this problem could be resolved, at least on a practical level. However, there is a more fundamental problem: Western liberal democracy today is characterized by values that the majority categorically cannot annul. This list of values is a statement of those areas in which—notwithstanding the wishes or desires of the majority—the individual cannot be denied basic rights. The majority may not limit freedom of speech, of

association, of occupation, of religion, and so on. These principles are supposed to be protected by a constitution, and by the courts' interpretation of that constitution. A theocentric worldview, on the other hand, requires that, at times, individual rights be infringed, or posits a different set of rights than those commonly accepted. God's commandments sometimes require that an individual's freedom be curtailed, particularly when those commandments are obligatory upon that individual as a member of the Jewish collective.

The definition of the State of Israel as a Jewish, democratic state thus suffers, ostensibly, from a fundamental contradiction. There are two sources of authority—Judaism and democracy, and two different lists of areas that cannot be reshaped, even by the majority. What makes this conflict more aggravating is the language that is used. Those who speak for "Judaism" often claim that they cannot use the mediating terminology of democracy, which involves compromise, concession, and agreement; they are not presenting their own views, but representing standpoints that derive from a divine source, and that cannot be subject to negotiated agreement or compromise. Those who speak for democracy claim that there can be no authority whatsoever that is entitled to infringe on the rights of the individual.

#### Attempts to Resolve This Contradiction

This issue has beset the State of Israel since its inception, and a number of different proposals have been suggested to resolve the contradiction. Some sought to resolve it by demonstrating that Judaism, too, recognizes the power of the majority as the principal tool for determining or resolving disputes. They based themselves on sources that discuss the power of the majority, and on Jewish history, particularly the patterns of Jewish communal life, in which disputes were decided by virtue of the power of the *kahal* (community), rather than by virtue of religious authority.

Along those lines, there were some who noted that the Torah itself commanded the establishment of a royal regime, "like all the nations around me." That is to say, the Torah's teachings do not intervene in decisions on the appropriate form of government; rather, the Torah recognizes that what is accepted by the enlightened nations of the world is something appropriate for emulation by the Jewish people. The role of the Torah is to shape, in certain areas, whatever governmental framework is chosen, but not to determine the character of that government. In effect, this approach claims that Judaism has no problem with adopting democracy.

As noted above, this attempt seems to indicate a misunderstanding on the part of both extremes—democracy and halakha. On the one hand, modern democracy, in its present form, is not merely a formal tool for ruling on disputes by means of the majority. Rather, it constitutes a broad worldview, one that touches on human autonomy and freedom, individual rights, liberalism, and egalitarianism.

Democratic people are educated, open, and independent; they enjoy freedom of communication, freedom of association, and freedom of expression. All of these are an integral part of democracy, and thus it is insufficient to rely only on halakhic sources that discuss the power of the majority. On the other hand, it is also incorrect to say that halakha recognizes an individual's absolute autonomy, and grants the majority an unfettered right to make determinations. It is precisely the expression that teaches us the power of the majority, *aharei rabim lehatot*, that says exactly the opposite: "and do not respond to a grievance by yielding to the majority to pervert [the law]" (Ex. 23:2)).

The strongest proof for my argument regarding the apologetic nature of claims that Judaism accepts democracy is to put the following question to anyone who makes such a claim: What would be the position of "Judaism," should the social structure of the State of Israel change, so that there would be a religious majority and a secular minority? Would halakha recognize the right of the minority to desecrate the Sabbath by traveling in private vehicles in public? Would halakha recognize freedom of expression, allowing even the most severe statements against the Torah, against halakha, and against the rabbinate? It should be remembered that this question is not merely hypothetical. If current demographic trends continue, the possibility of a religious majority is quite realistic. It is interesting to note that, as far as I know, not one halakhic discussion has taken place on the issue of halakhic policy in a situation in which a majority loyal to halakha is in power in the State, alongside a minority that is not halakhically observant. This question is exacerbated in light of the ancient Jewish sources that call for criminal sanctions against, for example, those who transgress the Sabbath laws. Once such a discussion develops, we will see the extent to which halakha has adopted democracy in the fullest sense of the word.

Another possibility, this time coming from the opposite direction, is attributed to the former president of the Israeli Supreme Court, Justice Aharon Barak. This approach claims that the term "Jewish" is subordinate to "democratic," that is to say, the State of Israel should adopt only those values from Judaism that are consistent with democratic criteria. This position is more like lip service, since in effect it omits "Judaism" from the fundamental definition of the State of Israel. If every conflict between democracy and Judaism is resolved in favor of democracy,

the real outcome is that the State of Israel will become a state that operates solely by virtue of universal values, leaving “Judaism” as mere window dressing for democracy, by offering some appropriate quotes from Jewish sources.

I would argue that we should call a halt to these attempts to reconcile the contradiction, as such a reconciliation would be impossible. As I wrote in the introduction to this essay, the contradiction derives from a fundamental polarization, and thus cannot be resolved using customary methods for conflict resolution. There are those who would argue that, once the State of Israel has a constitution, this contradiction will disappear. In response, one would first have to examine the proposed constitution to see if it indeed resolves the contradiction. In my opinion, no potential constitution for the State of Israel would be able to resolve this contradiction. If it is a “minimalist” constitution—without the inclusion of lists of rights and without a formal definition of the State of Israel as a Jewish state—it will not be able to resolve the contradiction. Rather, it will leave the questions to be resolved outside the constitutional framework. If the constitution also includes a list of rights, but not a preamble to the constitution (for example, the Declaration of Independence)—it will thus come down in the “democratic” direction, but it will not be an expression of the will of the absolute majority in the State of Israel, which wants the state to also be defined as a “Jewish” state. And if the constitution includes both a list of rights and the Declaration of Independence as a preamble, then it will have brought the contradiction back inside itself.

Hence, it seems that we need to concentrate our efforts elsewhere. This ongoing conflict between Jewish law and democracy will accompany the State of Israel as long as there are communities within it that oppose each other and that choose one of the two extremes. However, it is within our power to mitigate this conflict. We need to exert our efforts in an attempt to bring the two extremes closer together; even if we know that absolute harmony is impossible, an ongoing mitigation of this tension will allow the State of Israel to continue to exist. Furthermore, it will change that tension from a fundamental problem to an empowering challenge.

### Possible Methods of Mitigation

I would argue that there are three methods that offer the possibility of significantly mitigating the tension.

The first approach is to reexamine some basic assumptions. Modern democracy does not in fact recognize the absolute sovereignty of the people; this leaves room for the acceptance of ideas from outside the human world. On the other hand, halakha offers room for human judicial autonomy in two ways—as a

legislator and as an interpreter. Thus, the democratic point of view may accept some of religion's positions, while religion itself will recognize just how great its own human component is, and thus not profess to speak in the name of an uncompromising divine standpoint.

The second approach is to examine the conflict between democracy and halakha in the area of their respective standpoints. There exists a mutual recognition of democratic values in Judaism, and of national values in democracy. The language of human rights is not foreign to Judaism, and the language of nationhood is not foreign in terms of democracy. These voices can thus be empowered to further mitigate the tension.

The third approach comes from the perspective of risk management. Even if we assume that the conflict we have described is a fundamental one, one that cannot be resolved through theology or political theory, halakha may still be willing to see democracy as a necessary evil to be accepted, simply because the alternative is worse, and vice versa. This third approach speaks in terms of practicality—the prevention of ongoing conflict by means of practical arrangements that, rather than solve the problem, simply find a way around it.

#### The First Approach—A Reevaluation of Basic Assumptions

A reevaluation of the basic assumption underlying the religious position: The claim that halakha views the Master of the Universe as the source of authority is indeed the core of religious belief. At the same time, two key perspectives point to individual autonomy and importance. The first is in the area of interpretation. Although the Torah is perceived as a divine source, it is a principle of halakha that the Torah has been given to humanity, and therefore humans must interpret it. Hence, the claim that halakha represents God's viewpoint inflates the status of the halakhic authorities. Individuals have enormous room to maneuver and freedom of thought; so those who speak for halakha thus have the ability to engage in negotiation and dialogue over the approach of halakha, rather than suggesting that it is not open to discussion.

The second perspective is in the realm of legislation. There are sources that point to the considerable autonomy given to halakhic authorities, when they function not only as interpreters of the divine texts, but also as legislators of the halakhic approach. Hence, one cannot argue that Judaism is merely a matter of obeying the divine commands alone. Halakhic interpreters and legislators also include their own inner worldviews, their cultural perspectives, and the social milieu in which they live. Recognition of the specifically human components existing within

the world of halakha allows a softening of the uncompromising, segregationist position sometimes presented as fundamental to the world of halakha.

A reevaluation of the basic assumption underlying the democratic position: Democracy presents itself as stating that it is the people who are the ultimate sovereign, and that the majority determines democratic behavior. However, a deeper analysis of today's democratic standpoints indicates that not all powers are in the hands of the people, and thus it is not the people who should be seen as sovereign. The democracies of today—both on the philosophical level and on the practical, organizational level, as in the European Union—argue that there are universal values of “humankind,” against which even the majority may not act. There is deep division over the source and validity of those values, as well as their scope, but the very recognition that not everything can be determined by the people, and that there are general, universal values that are also binding on the majority is indisputable.

This structure allows one to argue that democracy may also be capable of adopting additional values that are not subject to majority decision, even if it appears that they detract from the principle of majority rule. These values may include religious values, and democracy may view them as a basis for national existence, beyond the principles of democracy. I am not arguing that religion is universal to the same extent as the universal lists of rights that we have discussed. My argument is that, once democracy accepts principles that are not subject solely to majority rule, the way is open for the entry of additional values within this framework.

Narrowing the gap between democracy and Jewish law does not totally eliminate it, nor does it create a system of authority that everyone can live with. There are two reasons for this, stemming from the two perspectives discussed above.

The first comes from the religious direction. Even though there is a greater recognition of the individual's authority as interpreter and legislator, this does not eliminate the fact that, at its core, it is divine revelation that is the source of authority. Moreover, people of faith do not see themselves as legislating against the will of God, but merely as uncovering that will. The intent of people of faith is to achieve the most faithful interpretation of those categorical imperatives whose source is external to humanity. Hence, the freedom that these individuals can take for themselves is limited; they must constantly aim to clarify the exact requirements of the divine commands.

From a democratic perspective, too, one cannot see the gap being eliminated. Although there are values that are outside the purview of majority decision, these are nevertheless still based on human determination as sovereign, or on other human determining factors, such as international agreements. It would be difficult to add a religious perspective into this framework.

### The Second Approach—Bringing Judaism and Democracy Closer Together

The gap between Jewish law and democracy may also be narrowed if we reexamine the possibility that halakha indeed recognizes elements that are fundamental to democracy—the language of rights. This recognition by halakha may come from either of two directions. One direction is the recognition by halakha of the derekh erets that preceded halakha, while the other possibility is that the foundations of the list of rights can be found within the halakha itself.

The statement that derekh erets preceded the Torah requires explanation. In using the term derekh erets, I am not referring to the present-day meaning of good manners, etiquette, and so on. Rather, I am referring to the term's original meaning. In the language of the sages, the term derekh erets means the accepted, normal mode of conduct in the world. Derekh erets is synonymous with earning a living, conjugal relations, and the normal conventions of human behavior. One who adopts a life of derekh erets is one who follows the way of the world. The sages often spoke in praise of derekh erets, and of humans' obligation to conduct themselves according to those principles.

The statement of the sages, that derekh erets preceded the Torah, therefore adopts human interaction within a normal, ordered state as being the norm. When human beings adopt a set of rights, this need not necessarily derive from halakha, but from human determinations as to appropriate, normative behavior. It is this spirit that pervades the words of the prophets. They spoke constantly of the obligation to act justly and honestly, with fairness and social sensitivity. This is far beyond the strict realm of halakha, and imposes much higher standards than those imposed by the law. When the “Jewish” side of the “Jewish, democratic state” equation sees itself as obligated to the world's universal values, we can see this as mitigating the enormous tension between the two worlds.

Furthermore, the list of rights is integral to the world of halakha itself. What needs to be emphasized is that halakha, in general, does not speak in terms of rights, but rather in terms of duties. Halakha does not say that a person has a right to a good reputation, but it does impose an obligation on others not to slander or embarrass him; it does not relate to the right of the poor to a decent living, but it

obligates the community to care for the weaker members of society; it does not deal with the rights of parents over their children, but rather it addresses the obligations of children toward their parents; and so on.

Thus, one cannot simply transfer the language of halakha into the language of democracy. However, the very fact that halakha imposes numerous obligations toward the “other” is an indication of the way in which the Jewish aspect of the State can be shaped in this spirit. Furthermore, Judaism is not limited to halakha alone. The words of the prophets, who made the moral framework into the basis for society, and who argued that God measures society primarily through how it treats its weaker members, reinforce further the possibility of bringing the “Jewish” and “democratic” sides closer together.

This would be an opportunity to comment on an important aspect of this issue. In general, when we think of Israel as a “Jewish” state, we tend to look solely at those areas that are between man and God—marriage and divorce, kashruth, Shabbat, and so on. However, the Torah and Jewish tradition also deal at length with questions of social justice, and the prophets made these issues fundamental to the nation’s existence. What we need is a significant change in the public’s perception of what Judaism is about, with an emphasis on the State of Israel as a state in which justice and welfare are goals common to all parties to this debate. Such a conceptual shift could also play its part in reducing the tensions between the two sides.

Democracy, too, must play its part in bringing the two sides closer together. Although it is essential to ensure that individual rights are protected, it is also important to recognize the rights of the collective to define its own public domain. The democratic idea may thus also be consistent with the idea of the nation state, and with the desire of the broader community to choose its own road in the spirit of its unique communal nature.

As we have mentioned, there is an ongoing debate within the State of Israel in regard to the constitution that is taking shape. One of the issues being debated is whether such a constitution will also include a “preamble,” and whether Israel’s Declaration of Independence, or some similar document, will thus become an integral part of the constitution. If the State of Israel indeed rejects the radical, Western, liberal model, which denies the right of the national state to exist, and instead adopts a softer democratic approach, there is a good chance for reducing the tension between state and religion, since the State itself can encompass significant elements of religious, national identity.



## The Third Approach—Practicality

These two approaches together do not totally eliminate the contradiction. They blur it, and allow the coexistence of various perceptions of the nature of the state. The State of Israel will nonetheless need to resolve the gap that remains between democratic life and Judaism through practical means. Most of the Jewish citizens of the State of Israel, who constitute the absolute majority within the state, have a deeply held connection with both democratic ideals and their desire that the State of Israel be a Jewish state, even if they have not defined exactly which Jewish foundations they wish the state to apply. Furthermore, both those who tend toward the “democratic” position and those who lean toward the “Jewish” position recognize that there are those who disagree with their own opinion, and understand that any resolution cannot be imposed coercively.

The recognition that it is not possible to determine the nature of the state merely by means of a chance majority vote in the Knesset, and that this internal debate is deep-seated and may last for many years to come, has led many to abandon any attempt to end the debate through political means. Moreover, that the State of Israel is the only state in the world that is constantly under threat from elements that negate its very existence, reinforces its citizens’ sense that they are in a life or death situation, and their understanding that national unity is more important than resolving questions of religion and state. Most of the state’s citizens understand the need to be practical. Too great a gap between fundamental conceptions or ideology, and any constitution that may be adopted, cannot continue to exist for long, and may even endanger the existence of the State of Israel.

Hence it is possible that the status quo may persist for a long time. I would hazard the opinion that the process of adopting a constitution for the State of Israel will be characterized by one of two possibilities. The more likely possibility is that the State of Israel will remain without a constitution, or, at least, without the inclusion of articles in the constitution to regulate the issues of religion and state.

The second possibility is that a constitution will be adopted without broad consent; in that case, it will, in effect, not have any real meaning, because of the enormous gap between reality and the text of the constitution. On the other hand, a continuation of the status quo, albeit with mutual restraint on the part of both sides, appears to be the most reasonable—and perhaps even the most correct—thing to do.

From the side of the supporters of “Judaism,” this restraint will come from two directions. The first is a recognition of the limitations of power, and a recognition that the ideas of man’s freedom and autonomy do not permit broad religious legislation, or allow the imposition of religious principles under the auspices of the law. This fact is beginning to be assimilated within religious society. Religious society has learned that, notwithstanding existing legislation (for example) in the area of family law, many secular couples choose not to establish their homes in the manner that the law attempts to impose on them; on the contrary, they find numerous ways around the law. This is also true of other laws, such as the laws relating to Shabbat rest. A second direction from which restraint will come is internal to the religious community. Religious thought will begin to recognize that too close a connection between the state and religion harms religion itself. This is for various reasons: religious authorities are less than free to rule, because, in effect, religious rulings are subject to the High Court and other state institutions; a religion that depends on the law makes itself distasteful to the community; it is particularly in those observances to which no legislation applies (for example, observance of the Passover Seder, Yom Kippur, circumcision) that the power of religion is greater; and, in general, it is not clear whether there is religious significance to keeping the commandments by virtue of secular legislation, and so religion itself might not be interested in coercive arrangements under the auspices of the law, except to a very limited extent.

From the other side, that of “democracy,” restraint will come from a recognition of the enormous significance that Israeli society attributes to Jewish values. The Supreme Court is ultimately a reflection of the society within which it operates, and it cannot continue making “Judaism” subject solely to democratic values. And if the Court does not do so of its own accord, Knesset legislation may force it to do so; indeed, we already see signs of this in other spheres, for better or for worse. A Supreme Court that restrains itself, while strictly protecting human rights and maintaining limitations on the collective, is a necessary condition for restraint.

I believe that the three approaches to mitigation proposed above will permit coexistence in the State of Israel, and may even be a blessing for the unique, almost untenable, path taken by the “Jewish, democratic state,” which is ultimately an expression of the cultural uniqueness of the State of Israel. I believe that if we give up our pretensions of being able to solve the problem in absolute terms, and accept the anomaly of “Jewish and democratic” as a special Israeli challenge, different from those faced by other countries, this tension may have an ongoing positive influence on both opposing sides, and we will all ultimately

benefit.