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The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel

Michael M. Karayanni*

I. INTRODUCTION

¶1 For Israelis, religious affiliation means much more than an expression of freedom of conscience. Religious identity can also serve as a connecting factor between the self and a legal system.[1] A person's religion in Israel will serve to identify the governing law in a number of family law matters just as the place where a tort has been committed, the place of a contract, or the place of domicile can serve as factors identifying the governing law of a certain relationship. The most evident example of this is the law governing matters of marriage and divorce: Israeli citizens are governed by their religious community court and religious community law in such matters.[2] This reality of having one's personal law, instead

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An earlier version of this article that dealt with the multicultural aspects of religious accommodations in Israel was presented at a conference organized by the Center of Comparative Constitutionalism of the University of Chicago Law School in January 2004. I would like to thank the organizers of the conference, Martha Nussbaum and Cass Sunstein, for inviting me, and together with them to also thank all of the other participants of the conference for their helpful and valuable comments. A more advanced version of the article was presented at a conference organized by the Minerva Center for Human Rights of the Faculty of Law of the Hebrew University and the Faculty of Law of the University of Heidelberg held in Heidelberg, Germany in July 2005. I would also like to thank a number of colleagues and friends who made comments at the last stage of writing the article, especially Barak Medina, Daniel Statman and Steven Wilf and to Sharon Shakargy and Ehud Brosh for their excellent research assistance.

[1] *See* Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101 (2000).

[2] *See* Amnon Rubinstein, *Law and Religion in Israel*, 2 ISR. L. REV. 380, 384-88 (1967) [hereinafter Rubinstein, *Law and Religion*]; *see also* Asher Maoz, *Religious Human Rights in the State of Israel*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: LEGAL PERSPECTIVE 349, 355 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) [hereinafter Maoz, *Religious Human Rights*]; Asher Maoz, *Enforcement of Religious Courts Judgments Under Israeli Law*, 33 J. CHURCH & ST. 473 (1991).

This also means that when litigating matters of marriage and divorce before the religious courts, the parties need to abide by the procedure devised by that particular court that could also be influenced by religious notions. This is particularly relevant to rules dealing with the capacity of witnesses to testify before a religious court, rules that are able to explicitly discriminate on the basis of gender and the religious affiliation of the witness. In this respect, local rules dealing with the conflict of jurisdictional authority of the different religious courts, or between a religious court and the civil court, resemble to a great extent the methodology applied in the sphere of private international law. As it is well known in the teachings of this latter discipline, forums follow their own local law (the *lex fori*) in matters of procedure even when the

of the state's territorial law, governing certain family law matters is in essence a legacy from the Ottoman Empire's *millet* system.[3]

¶2 However, control of marriage and divorce is only one of many other spheres in which religion is of regulatory significance. Historically, religion in Israel dictated policies concerning official holidays and days of rest, public education in schools and higher education, public transportation, burials, the handling of cemeteries and even regulations of the importation of meat.[4] As a result, it is widely admitted that Israel does not exhibit separation between religion and state.[5]

¶3 Nonetheless, the question arises whether this entanglement of religion and state is of the same nature and to the same extent in all the religious communities that exist in Israel.[6] The answer this article provides is in the negative. Though there is no separation between religion and state in Israel, separation does exist in the nature and justification for the existing religious accommodations of the Jewish majority on the one hand and those of the Palestinian-Arab minority on the other hand. The article asserts that because of the Jewish nature of the State of Israel, almost all of the apparatuses governing the "religion and state" debate have centered around Judaism. Religious accommodations granted to the Palestinian-Arab minority, on the other hand, were relegated to a separate realm—that of minority (group) accommodations. The result of this disparate treatment has led to a "paradigm of separateness" in religion and state relations in Israel. The political and legal environment in Israel has also reinforced this "paradigm of separateness," especially in light of the national conflict that exists between the Palestinian-Arab minority in Israel and the state itself.

¶4 The article begins by giving an overview of the diverse nature of the population in Israel both in terms of its national composition and in terms of the religious affiliation of its citizens. This discussion, that takes place in section I, also seeks to characterize the type of issues typically dealt with when relating to national and religious tensions in Israel. After observing how entrenched the paradigm of separateness is in the religion and state debate, section II of the article discusses in detail how this paradigm was constructed. Section III identifies two major forces that have worked to re-enforce the paradigm of separateness over the years: external factors related to the overall Israeli policy towards the Palestinian-Arab minority, and internal factors related to intra Palestinian-Arab social and political dynamics. Section IV of the article highlights the fact that the paradigm of separateness as identified here has normative implications as well.

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governing law (the *lex causae*) happens to be the law of a foreign country. *See* IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 177-98 (1975).

[3] Amnon Rubinstein, *State and Religion in Israel*, 2 J. CONTEMP. HIST. 107, 111-12 (1967) [hereinafter Rubinstein, *State and Religion*].

[4] *See* THE STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): COMBINED INITIAL AND FIRST PERIODIC REPORT OF THE STATE OF ISRAEL 226-45 (1998) [hereinafter ISRAELI ICCPR REPORT].

[5] David Kretzmer, *Constitutional Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 39, 48 (Amos Shapira & Keren C. DeWitt-Arrar eds., 1995); Izhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 192 (1987); Pnina Lahav, *The Status of Women in Israel – Myth and Reality*, 22 AM. J. COMP. L. 107 (1974).

[6] Reference to Israel as made in this article relates to the pre-1967 borders of the State of Israel. Consequently, the discussion does not relate to East Jerusalem, or to any other territory occupied by Israel during the Six-Day War.

II. BACKGROUND

¶5 Israel is a diverse country and nearly one-fifth of the total population, consisting of about 1.2 million citizens, is Palestinian-Arab, while the rest of the population is predominantly Jewish.[7] The religious composition of the non-Jewish population is made-up of Moslems, Christians and Druze.[8] Moreover, within the different religious groups themselves, there are a number of various factions. The Jewish community is divided into secular, traditional, and religious groups,[9] with the latter containing a well-established Ultra-Orthodox camp.[10] In addition, Reform and Conservative Judaism have gained force recently creating new challenges to the dominant Orthodox establishment.[11] The Christian population is divided into ten recognized religious congregations,[12] and each has its own body of institutions including a court system. In some cases these congregations even have substantial ties to foreign governments.[13]

¶6 The existence of different national and religious groups in Israel has been a constant source of tension. On the national level, the most obvious tension is between the Palestinian-Arab minority and the Jewish majority. Moreover, since Israel as a state is officially defined on national, ethnic and religious grounds as a Jewish state, this national conflict has, in many cases, also turned into a conflict between the Palestinian-Arab minority and the Israeli establishment as a whole.[14] Underlying this national tension is of course the overall Israeli-Arab (Palestinian) conflict that has left both sides not only with a great amount of anguish and grief

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[7] The total population of Israel was estimated for the year 2001 to be 6,439,000, out of which 1,227,500 (18.76%) is Palestinian-Arab. *See* 53 STATISTICAL ABSTRACT OF ISRAEL 2002, tbl. 2.1 (Jerusalem: 2002). The full tables are available at http://www.cbs.gov.il/shnatonenew.htm. Though it should be noted that the Palestinian-Arab population in the official statistics of Israel include the Palestinian-Arab population of East Jerusalem as well.

[8] The Jewish population is estimated for the year 2001 to be 4,990,200 (77.50%), the Moslem 987,300 (15.33%), the Christian Arab 112,200 (1.74%), other Christians 24,600 (0.38%), Druze 105,000 (1.63%) and a total of 216,200 (3.35%) is unclassified. STATISTICAL ABSTRACT , *supra* note 7. An additional recognized religious community is Baha'i. The official statistics do not have any specific category for the Baha'i, but their number barely exceeds a couple of thousand.

[9] *See* SHLOMIT LEVY ET AL., A PORTRAIT OF ISRAELI JEWRY, BELIEFS, OBSERVATIONS, AND VALUES AMNG ISRAELI JEWS 5-6 (2002).

[10] GAD BARZILAI, COMMUNITIES AND THE LAW, POLITICS AND CULTURES OF LEGAL IDENTITIES 10-11, 55-56 (2003).

[11] *See* Ephraim Tabory, *The Israel Reform and Conservative Movements and the Market for Liberal Judaism*, *in* JEWS IN ISRAEL: CONTEMPORARY SOCIAL AND CULTURAL PATTERNS 285 (Uzi Rebhun & Chaim I. Waxman eds., 2004).

[12] MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 3 (1994).

[13] *See* URI BIALER, CROSS ON THE STAR OF DAVID: THE CHRISTIAN WORLD IN ISRAEL'S FOREIGN POLICY, 1948-1967 (2005); *see also* HCJ 963/04 Loiffer v. The Government of Israel [2004] IsrSC 58(3) 326 (holding that courts in Israel have a limited form of judicial review over government handling of the election of the Greek Orthodox Patriarch given the fact the whole subject also implicates Israel's foreign policy).

[14] *See, e.g.*, JACOB M. LANDAU, THE ARABS IN ISRAEL, A POLITICAL STUDY (1969); ELIA ZURIEK, THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM (1979); IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980); Sammy Smooha & Don Peretz, *The Arabs in Israel*, 26 J. CONFLICT RESOL. 451 (1982); CLAUDE KLEIN, ISRAEL AS A NATION-STATE AND THE PROBLEM OF THE ARAB MINORITY: IN SEARCH OF A STATUS (1987); Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389 (1990); JACOB M. LANDAU, THE ARAB MINORITY IN ISRAEL, 1967-1991: POLITICAL ASPECTS (1993); NADIM N. ROUHANA, PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT (1997).

over the loss of so great a number of human lives but also with constitutive national narratives. The Palestinian narrative has stressed the tragic outcome whereby the majority of the Palestinian people were deprived of their homeland, and the Jewish (Zionist) national narrative has stressed the emancipation of the Jewish people by becoming sovereign in a state of their own.[15]

¶7 On the religious level, the most apparent field of tension is intra-Jewish, and its manifestation is multifaceted. One of these facets is the application of Jewish religious norms, particularly those of the orthodox approach to regulate the personal legal status of Jews. This includes matters pertaining to the law of marriage and divorce,[16] or in setting the standards in defining who is a Jew, mainly for immigration purposes and public records.[17] Another facet is the extent to which Jewish religious norms should regulate the public domain, such as laws penalizing Jewish shop owners who operate their business on the Sabbath or laws prohibiting public transportation from operating on the Sabbath.[18] A third facet is the public funding of Jewish religious institutions, be they religious councils or school systems of the various religious factions.[19]

¶8 The secular-religious friction among the Jewish community has frequently been the cause of intense debate.[20] Protagonists within the secular camp have argued against the coercive nature of the religious norms, especially in matters pertaining to marriage and divorce, and have persistently called for limiting public funding for Jewish religious institutions. The Jewish religious camp, on the other hand, has called for a tolerant stand toward Jewish religious norms and Jewish religious institutions, frequently invoking the need to preserve Jewish religious heritage and the fostering of Jewish unity.[21] Interestingly, an unofficial pact has been reached between political leaders representing both camps, a pact that has managed so far to maintain the various religious normative institutions. Referred to in Israel as that of the "status quo,"[22] this reality has been challenged over the years,

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[15] Yochanan Peres, *Ethnic Relations in Israel*, 76 AM. J. SOC. 1021, 1028 (1971) ("It is a commonplace that the relationship between Israeli Jews and Arabs as ethnic groups has to be understood in the context of the wider Arab-Israeli conflict."); *see also* Judith T. Shuval, *The Structure and Dilemmas of Israeli Pluralism*, *in* THE ISRAELI STATE AND SOCIETY, BOUNDARIES AND FRONTIERS 216, 229, 233 (Baruch Kimmerling ed., 1989).

[16] Erica R. Clinton, *Chains of Marriage: Israeli Women's Fight for Freedom*, 3 J. GENDER RACE & JUST. 283, 291 (1999).

[17] *See* Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 245-47 (1999); Mark J. Altschul, *Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining its Present Language*, 2002 U. ILL. L. REV. 1345, 1352-55 (2002).

[18] Rubinstein, *State and Religion*, *supra* note 3, at 110-11.

[19] Stephen Goldstein, *The Teaching of Religion in Government Funded Schools in Israel*, 26 ISR. L. REV. 36 (1992).

[20] *See* Martin Edelman, *A Portion of Animosity: The Politics of the Disestablishment of Religion in Israel*, 5 ISR. STUD. 204 (2000).

[21] *See* GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 142 (2002); Patricia J. Woods, *Gender and the Reproduction and Maintenance of Group Boundaries, Why the "Secular" State Matters to Religious Authorities in Israel*, *in* BOUNDARIES AND BELONGING, STATES AND SOCIETIES IN THE STRUGGLE TO SHAPE IDENTITIES AND LOCAL PRACTICES 226, 235-42 (Joel S. Migdal ed., 2004).

[22] Actually, the *status quo* agreement precedes the establishment of the State of Israel. It was first formulated in a letter on June 19, 1947 by David Ben-Gurion, then the Head of the Jewish Agency, to Agudath Israel, an Ultra-Orthodox and an anti-Zionist religious organization, in which an outline was made with respect to the attitude to be adopted by the future Jewish state towards religious demands. While the

making the relationship between Jewish religious institutions and norms with secular liberal ideals a persistent matter of debate among all factions of the Jewish community.[23]

¶9 Despite its complicated character, the religion and state debate in Israel has one additional feature that is rather plain and straightforward. The discussion paid little attention to "religion and state" issues among the Palestinian-Arab minority in Israel. Specifically, matters pertaining to public accommodations for non-Jewish religious institutions have escaped the sharp scrutiny associated with religion and state in Israel in general. The public dialogue concerning religion and state in Israel is often reduced to a conversation about synagogue and state.[24]

¶10 This should not be taken to mean that there are no religion and state tensions concerning the religious accommodations for the Palestinian-Arab minority, whether in terms of government policy toward their religious institutions,[25] or in terms of the illiberal nature of the norms applied by Palestinian-Arab religious communities to their members.[26] For indeed there are. However, the discussion of these matters was conducted for the most part as a particular issue within the more general topic of the collective status of the Palestinian-Arab minority, as a non-Jewish minority that came under Israeli rule. And in this context, the accommodations granted to the Palestinian-Arab religious communities were taken to be a form of a minority (group) accommodation that is pluralistic and autonomous in nature.[27] So if authority is conceded to the Palestinian-Arab religious communities giving them power to adjudicate personal status matters of

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letter stated that the future state would essentially be a secular state, it nevertheless stated the following four guarantees: (a) the Sabbath will be the official day of rest, while the non-Jewish population will be entitled to its own days of rest; (b) dietary laws of *Kosher* food will be observed in any state-owned establishment to which Jews resort; (c) the continuation of rabbinical courts' jurisdiction over personal status matters; (d) a separate system of religious schools would be maintained. *See* Rubinstein, *State and Religion*, *supra* note 3, at 113.

[23] *See* Gerald M. Steinberg, *Interpretations of Jewish Tradition on Democracy, Land, and Peace*, 43 J. CHURCH & ST. 93, 98-101 (2001).

[24] *See* Lucy E. Bassli, Note, *The Future of Combining Synagogue and State in Israel: What Have We Learned in the First 50 Years?*, 22 HOUST. J. INT'L L. 477 (2000); Asher Maoz, *State and Religion in Israel*, *in* INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE 239, 239 (Menachem Mor ed., 1993) [hereinafter Maoz, *State and Religion*].

[25] *See* ROBERT H. EISENMAN, ISLAMIC LAW IN PALESTINE AND ISRAEL (1978); ALISA RUBIN-PELED, DEBATING ISLAM IN THE JEWISH STATE, THE DEVELOPMENT OF POLICY TOWARD ISLAMIC INSTITUTIONS IN ISRAEL (2001).

[26] *See* AHARON LAYISH, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE: A STUDY BASED ON DECISIONS OF THE SHARI'A COURT IN ISRAEL (1975); Andrew Trietel, *Conflicting Traditions: Muslim Shari'a Courts and Marriage Age Regulation in Israel*, 26 COLUM. HUM. RTS. L. REV. 403 (1995).

[27] *See* Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT'L L. & POL. 885, 900, 942-48, 954-60 (2004) (characterizing the religious accommodations granted to the Palestinian-Arab minority in Israel as a "group-differentiated right" and as a "modest form of self-government"); DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 163-68 (1990) (discussing the religious organization of the Palestinian-Arab religious communities under the heading of "group rights") [hereinafter KRETZMER, LEGAL STATUS]; *see also* Itzhak Zamir, *Shivyon Zekhuyot Klapey Aravim be-Israel* [*Equality of Rights for Arabs in Israel*], 9 MISHPAT U-MIMSHAL 11, 26, 30 (2005) (in Hebrew) (regarding the jurisdiction of Palestinian-Arab religious communities to adjudicate matters of marriage and divorce as a group right); 1 AMNON RUBINSTEIN & BARAK MEDINA, HA-MISHPAT HA-HUKATI SHEL MEDINAT YISRAEL [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL] 429-35 (6th ed. 2005) (in Hebrew) (referring to the religious organization of the Palestinian-Arab religious communities as a limited form of self-government).

their members, it is conceded because of Israel's proclaimed democratic norms that seek to respect the religious diversity among its non-Jewish religious communities. Thus, in terms of normative justification, the religious accommodations for the Palestinian-Arab minority in Israel are a continuation of the long-standing Ottoman *millet* system by which minority religions were tolerated by granting leaders of religious minorities jurisdictional powers over their members.[28] This ontology is inherently different from the one that characterizes the religious accommodations pertaining to the Jewish majority. Given the Jewish nature of the State of Israel such accommodations were configured as yet another public feature, albeit controversial at times, of the State of Israel as a Jewish state. Obviously a great deal of this entanglement is owed to the inherent entanglement of religion and nation within Judaism itself.[29] But still, it is Israel's definition as a Jewish state, and not its definition as a democratic state, that has justified the religious accommodations granted to Jewish religious institutions and Jewish religious norms. Consequently, after the establishment of the state of Israel as a Jewish state it can no longer be said that the Jewish community in Israel is just another *millet*.[30] Rather, the matter of Jewish religious accommodations has essentially been "nationalized" thus becoming part of Israel's "public" sphere.[31]

¶11 This schism in the nature of the religious accommodations relevant to each of the two communities is what this author has chosen to call the "paradigm of separateness" in religion and state relations in Israel. And this schism also explains why in fact the religion and state debate in Israel has excluded the Palestinian-Arab community. For if the debate on religion and state focuses on the public nature of religious accommodations, it was only natural that in the Israeli context the debate will focus on what dominated Israel's public sphere: the religious accommodations granted to the Jewish community. Issues of religion and state of the Palestinian-Arab minority, characterized as a group accommodation of an autonomous nature of the different non-Jewish religious communities, were taken to be of a "private"

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[28] *See* Benjamin Braude, *Foundation Myths of the Millet System*, *in* 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE 69 (Benjamin Braude & Bernard Lewis eds., 1982); WALTER F. WEIKER, OTTOMAN TURKS AND THE JEWISH POLITY: A HISTORY OF THE JEWS OF TURKEY (1992); CHARLES A. FRAZEE, CATHOLICS AND THE SULTANS: THE CHURCH AND THE OTTOMAN EMPIRE (1983).

[29] *See* Maoz, *State and Religion*, *supra* note 24, at 243 ("Divest Jewish culture and heritage from religious elements and one is left rather empty handed."). Therefore, scholars in Israel who seek to legitimize the Jewish character of the State of Israel go out of their way to stress how wrong it is to impose Jewish religious norms on members that do not opt for a religious lifestyle. *See* ALEXANDER YAKOBSON & AMNON RUBINSTEIN, YISRAEL U-MISHPAHAT HA-AMIM: MEDINAT LE'OM YEHUDIT U-ZEKHUYOT HA-ADAM [ISRAEL AND THE FAMILY OF NATIONS: JEWISH NATION-STATE AND HUMAN RIGHTS] 150-65 (2003) (in Hebrew); ASA KASHER, RUAH ISH: ARBA'AH SHE'ARIM [SPIRIT OF A MAN: FOUR GATES] 19 (2000) (in Hebrew).

[30] Rubinstein, *Law and Religion*, *supra* note 2, at 408 (noting that while under the Ottoman rule and the British mandate the religious accommodations granted to the Jewish community were motivated by the value of autonomy and the interest of not intervening in the internal affairs of the Jewish community, the reason today is the "reverse": the interest is that of preserving the unity of the Jewish People).

[31] I have previously doubted the normative utility of the public/private distinction, given the fact that many public interests can be translated into private ones and vice versa. *See* Michael M. Karayanni, *The Myth and Reality of a Controversy: "Public Factors" and the Forum Non Conveniens Doctrine*, 21 WIS. INT'L L.J. 327 (2003). Nonetheless, I do think that the distinction can still contribute to our understanding of certain factual and normative patterns, at least in such cases in which the pattern itself has taken the distinction to be a valid one. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

nature and thus beyond the parameters of Israel's religion and state debate. The discussion in the following sections essentially describes in greater detail how this paradigm of separateness was constitutionally, politically and socially erected.

III. THE PARADIGM OF SEPARATENESS

A. The Constitutional Configuration of the Religion and State Conflict in Israel

¶12 The constitutional definition of Israel as a "Jewish and democratic state" has been at the forefront of legal debates for over a decade now.[32] Passionate arguments have been put forward claiming that the two concepts are compatible,[33] and are in fact only one variation of the nation-state structure existing in many other countries.[34] Yet others have claimed that the two terms are inherently at odds.[35] A state that defines itself as a Jewish state will necessarily undermine the rights of non-Jews and even Jews themselves if the Jewish nature of the state embodies principles that stand against their own personal ideals. Yet a third camp has claimed that while there is an apparent tension between the two concepts, they could be made consonant through interpretation. As the argument goes, this is possible due in a large part to the elastic nature of Jewish and democratic norms, for if both are brought to their minimal core values, a Jewish state can still be considered to be democratic.[36]

¶13 The enactment in 1992 of two major Basic Laws, Basic Law: Freedom of Occupation[37] and Basic Law: Human Dignity and Liberty,[38] a step considered as constituting a form of a constitutional revolution,[39] accelerated this debate. While

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[32] *See, e.g.,* RAV-TARBUTIYUT BI-MEDINAH DEMOKRATIT VI-YEHUDIT: SEFER HA-ZIKARON LE-ARIEL ROSEN-ZVI ZA"L [MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: THE ARIEL ROSEN-ZVI MEMORIAL BOOK] (Menachem Mautner et al. eds., 1998) (in Hebrew); ADAM D. DANÉL, MEDINAH YEHUDIT VE-DEMOKRATIT: MABAT RAV-TARBUTI [A JEWISH AND DEMOCRATIC STATE: A MULTICULTURALIST VIEW] (2003) (in Hebrew).

[33] Menachem Elon, *The Values of a Jewish and Democratic State: The Task of Reaching a Synthesis*, *in* ISRAEL AMONG THE NATIONS 177 (Alfred E. Kellermann et al. eds., 1998); Maoz, *Religious Human Rights*, *supra* note 24, at 358 ("[t]he Jewishness of the State of Israel does not contradict its democratic nature"). *See also* HCJ 6698/95, Qa'adan v. Minhal Mikarke'ei Israel [2000] IsrSC 54(1) 258, 282 (stressing, per President Barak, that there is no contradiction between Israel's values as a Jewish and democratic state and complete equality between its citizens).

[34] The former president of the Supreme Court of Israel, Meir Shamgar, once observed: "The existence of the State of Israel, as the state of the Jewish people does not negate its democratic character, just as the Frenchness of France does not negate its democratic character." Election Appeal 1/88 Neiman v. Chairman of the Central Elections Committee for the Twelfth Knesset [1988] IsrSC 42(4) 177, 189.

[35] *See* Nadim Rouhana, *The Political Transformation of the Palestinians in Israel: From Acquiescence to Challenge*, 18 J. PALESTINIAN STUD. 38, 40-41 (1989) ("a state that is defined as belonging to only one people, when its population is composed of two, cannot offer equal opportunity to all its citizens").

[36] *See* RUTH GAVISON, YISRAEL KI-MEDINAH YEHUDIT VE-DEMOKRATIT: MET AKHIM VE-SIKUYIM [CAN ISRAEL BE BOTH JEWISH AND DEMOCRATIC: TENSIONS AND PROSPECTS] (1999) (in Hebrew).

[37] Basic Law: Freedom of Occupation, S.H. 1454. For an English translation see Basic Law: Freedom of Occupation (1994), http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (last visited Dec. 4, 2006).

[38] Basic Law: Human Dignity and Liberty, S.H. 1391. For an English translation see Basic Law, Human Dignity and Liberty, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Dec. 4, 2006).

[39] *See* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995); Ran Hirschl, *Israel's "Consitutional*

these laws were not the first basic laws enacted by the Knesset,[40] they were unique as they related specifically to certain basic human rights such as human dignity, liberty, mobility, privacy, and property.[41] Furthermore, these basic laws have also elevated the status of the norms they protect to a higher level in the general hierarchy of laws by providing the courts with some level of judicial review.[42] However, relevant to our discussion is the fact that in both of these laws, the values of the State of Israel as a Jewish and democratic state were also explicitly stated as a purpose that these laws seek to promote.

¶14 Nevertheless, one should not be misled to think that the existing tension between the Jewish nature of the State of Israel and democratic norms has surfaced only recently. Ever since the state's inception, the comprehensive structure of the Israeli legal system has evolved and continues to evolve around these two ideals: the existence of a Jewish state that provides more than lip service to Jewish religious norms and Zionist teachings, and a state that also respects democratic principles and freedoms for all citizens of Israel, Jewish and non-Jewish alike.[43] Such a normative agenda was already evident in Israel's Declaration of Independence which simultaneously recognized Israel as a Jewish state that would open its door to every Jew, granting the Jewish people the status of a nation with equal rights among the family of nations, and yet promised to develop the country for the benefit of all its inhabitants, maintaining complete equality of political and social rights for all citizens, irrespective of race, religion, or gender.[44]

¶15 The ensuing formative decades of Israel were characterized by the development of legal landmarks that worked to give substance to the Jewish nature of the state, as well as to guarantee certain democratic freedoms. These two competing norms were evident when the Knesset enacted laws considered by many to represent the central ethos of the Jewish state; the Law of Return, 1950,[45] in which every Jew in the world was granted the right to immigrate to Israel and

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Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order, 46 AM. J. COMP. L. 427 (1998). *Cf.* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238 (1992).

[40] In addition the following basic laws exist: Basic Law (The Knesset), 12 LSI 85 (1957-58) (Isr.); Basic Law: Israel Lands, 14 LSI 48 (1960) (Isr.); Basic Law: The President of the State, 18 LSI 111 (1963-64) (Isr.); Basic Law: The Government, 22 LSI 257 (1967-68) (Isr.)(replaced in 1992); Basic Law: The State Economy, 29 LSI 273 (1974-75) (Isr.); Basic Law: The Army, 30 LSI 150 (1975-76) (Isr.); Basic Law: Jerusalem, Capital of Israel, 34 LSI 209 (1979-80) (Isr.); Basic Law: Judicature, 38 LSI 101 (1983-84) (Isr.); Basic Law: The State Comptroller, 42 LSI 24 (1987-88) (Isr.). For background information about the whole enterprise of basic law enactment in Israel, *see* Asher Maoz, *The Institutional Organization of the Israeli Legal System*, *in* INTRODUCTION TO THE LAW OF ISRAEL 11, 12-13 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

[41] *See, e.g.*, Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3 (1997).

[42] *See* Gary J. Jacobsohn, *After the Revolution*, 34 ISR. L. REV. 139 (2000). On the nature of judicial review in Israeli constitutional law after the enactment of the two mentioned basic laws see Menachem Hofnung, *The Unintended Consequence of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585 (1996).

[43] *See* Kretzmer, *Constitutional Law*, *supra* note 5, at 39; Dan Avnon, *The Israeli Basic Laws' (Potentially) Fatal Flaw*, 32 ISR. L. REV. 535 (1998).

[44] *See* Declaration of the Establishment of the State of Israel, 1 LSI 3 (1948) (Isr.).

[45] Law of Return, 5710-1950, 4 LSI 114 (1949-50) (Isr.).

thereupon, through the working of the Nationality Law, 1952,[46] become an Israeli citizen.[47] At the same time, the judiciary worked relentlessly to carve out, almost from scratch, such basic rights as the freedom of expression, freedom of association, and more.[48] Similarly, while the Knesset worked to enact a general law guaranteeing equal treatment of all women in Israel,[49] the legal system, guided by the Israeli Supreme Court, realized the necessity to create, also from scratch, a legal doctrine that restricts the participation of a list of candidates for the parliamentary elections that adopt a political agenda purporting to negate the Jewish nature of the State of Israel, which the court regarded as a basic constitutional fact.[50]

¶16 The debate over the Jewish and democratic nature of the State of Israel will certainly continue well into the future. However, it is also equally true, that past debates and arguments have already established a number of constitutional paradigms. One very important paradigm concerns the public sphere in the State of Israel that is principally committed to Jewish collective ideals.[51] Thus it was natural that the flag, national emblem, anthem and official holidays of the state would be identified, as a matter of course, with the Jewish tradition.[52] Jewish Zionist organizations, such as the World Zionist Organization and the Jewish Agency, received official status[53] and under the auspices of the law they are "to continue acting within the State of Israel for developing and settling the land, absorption of immigrants from the Diaspora and coordination in Israel of Jewish institutions and organizations active in the field."[54] But the Jewish domination of

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[46] Nationality Law, 5712-1952, 6 LSI 50 (1951-52) (Isr.).

[47] *See* Rubinstein, *Law and Religion*, *supra* note 2, at 413 (characterizing the Law of Return as the *raison d'être* of Israel as a Jewish State). *See also* HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 395 (1996) (noting that the very *raison d'être* of Israeli statehood was to provide "a homeland for all who wished to forsake the Diaspora and come home").

[48] *See* Allen Zysblat, *Protecting Fundamental Rights, in Israel without a Written Constitution*, *in* PUBLIC LAW IN ISRAEL 47 (Izhak Zamir & Allen Zysblat eds., 1996); Asher Maoz, *Defending Civil Liberties without a Constitution – The Israeli Experience*, 16 MELB. U. L. REV. 815 (1988); Amos Shapira, *The Status of Fundamental Individual Rights in the Absence of a Written Constitution*, 9 ISR. L. REV. 497 (1974).

[49] Women's Equal Rights Law, 5711-1951, 5 LSI 171 (1950-51) (Isr.).

[50] Election Appeal 1/65 Yardor v. Central Election Committee for the Sixth Knesset [1965] IsrSC 19(3) 365 (per President Simon Agranat). The power to disqualify a list of candidates who wish to run for elections to the Knesset received statutory recognition in 1984, when the Basic Law: The Knesset was amended to include the following provision (section 7A): "A list of candidates shall not participate in the elections for the Knesset if its aims or actions, expressly or by implication, point to one of the following: (1) negation of the existence of the State of Israel as the State of the Jewish people; (2) negation of the democratic nature of the State; (3) incitement to racism." Based on subsections (2) and (3), the Supreme Court in Israel upheld the disqualifications of Me'ir Kahane's *Kach* party in 1988 who called for a variety of racist restrictions to be imposed on the Palestinian-Arab community in Israel. *See* Election Appeal 1/88 Neiman v. Chairman of the Central Elections Committee for the Twelfth Knesset [1988] IsrSC 42(4) 177.

[51] *See* Mark A. Tessler, *The Middle East: The Jews in Tunisia and Morocco and the Arabs in Israel*, *in* PROTECTION OF ETHNIC MINORITIES 245, 247 (Robert G. Wirsing ed., 1981) (noting the official commitment of the State of Israel to its Jewish identity and how the State of Israel "is officially committed to perpetuating and enriching the Jewish heritage and to meeting the needs of Jews throughout the world").

[52] For a survey of state-enacted laws that deal with state symbols see KRETZMER, LEGAL STATUS, *supra* note 27, at 17-22; *see also* BARZILAI, *supra* note 10, at 110 ("State law officially recognizes no Arab-Palestinian festival.").

[53] World Zionist Organization – Jewish Agency (Status) Law, 5713-1952, 7 LSI 3 (1952-53) (Isr.).

[54] It is also worth mentioning that the specific role and function of WZO and the Jewish Agency were defined in covenants signed between them and the Government of Israel. Such covenants enabled WZO

the public sphere goes beyond such symbols.[55] The concept of citizenship, for example, has also been influenced by the Jewish nature of Israel.[56] There are two types of citizenship: the first type is republican in nature and has strong collective goals of a shared moral purpose, a perception of the common good and core civic values.[57] The second type, individual in nature—relevant to the non-Jewish population—builds on liberal ideals of personal (not collective) rights. Another example concerns the official state language. Though under the black letter of the law, Arabic and Hebrew are both considered official languages, it is Hebrew that dominates the public sphere.[58] Indeed, on some occasions courts have even compelled public bodies to add Arabic inscription to signs and documents.[59] This is to be done, as the Israeli Supreme Court made clear, only as long as it does not undermine the hierarchal relationship existing between the two languages under which Hebrew is regarded as "senior sister."[60] Thus it has been stated that the Palestinian-Arab community in Israel is "the most remote, excluded community from the state's metanaratives,"[61] and enjoys the status of "second"[62] or even "third"[63] class citizenship. In many respects this hierarchical structure has determined the boundaries of the public sphere in Israel,[64] thereby also making it possible to characterize the Palestinian-Arab community in Israel as "the invisible

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and the Jewish Agency to perform semi-governmental activities, which, in light of their statutory mandate, were restricted to the Jewish community, whether in Israel or in the Diaspora. Foremost among these functions is the responsibility for agricultural settlement. As a result, "while many new agricultural settlements have been created for the Jews, none have been established for Arabs." Kretzmer, *Constitutional Law*, *supra* note 5, at 50.

[55] Henry Rosenfeld, *The Class Situation of the Arab National Minority in Israel*, 20 COMP. STUD. SOC'Y & HIST. 374, 400 (1978) (stating that the State of Israel "fosters a Jewish state-nation ethos and economy and therein sees the Arab strictly as a minority, or a series of minority groupings, and regards development as relating specifically to Jews"); Mark A. Tessler, *The Identity of Religious Minorities in Non-Secular States: Jews in Tunisia and Morocco and Arabs in Israel*, 20 COMP. STUD. SOC'Y & HIST. 359, 360 (1978) (noting how Israel is firmly committed to a Jewish identity in different spheres that go beyond national symbols).

[56] *See* Gershon Shafir & Yoav Peled, *Citizenship and Stratification in an Ethnic Democracy*, 21 ETHNIC AND RACIAL STUD. 408 (1998); Shachar, *Whose Republic?*, *supra* note 17, at 260-62.

[57] *See* Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992); *see also* Raphael Cohen-Almagor, *Cultural Pluralism and the Israeli Nation-Building Ideology*, 27 INT'L J. MIDDLE EAST STUD. 461, 462 (1995).

[58] *See* Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Changes*, 36 ISR. L. REV. 5 (2002).

[59] *See* Ayelet Harel-Shalev, *Arabic as a Minority Language in Israel: A Comparative Perspective*, 14 ADALAH'S NEWSLETTER 1, 5-6 (2005); BARZILAI, *supra* note 10, at 111-13.

[60] *See* HCJ 4112/99, Adalah - The Legal Center for Arab Minority Rights in Israel v. The Municipality of Tel-Aviv Jaffa [2002] IsrSC 56(5) 393, 418 (per President Aharon Barak).

[61] BARZILAI, *supra* note 10 at 7. *See also* As'ad Ghanem, *State and Minority in Israel: The Case of Ethnic State and the Predicament of its Minority*, 21 ETHNIC & RACIAL STUD. 428, 432-34 (1998) (stating that as a result of Israel's structural identification with its Jewish ethnic ideals the Palestinian-Arab minority was collectively excluded from the official public domain of the state).

[62] Ahmad H. Sa'di, *Israel as Ethnic Democracy: What are the Implications for the Palestinian Minority*, 22 ARAB STUD. Q. 25, 25 (2000).

[63] SHAFIR & PELED, *supra* note 21, at 110.

[64] Baruch Kimmerling, *Sociology, Ideology, and Nation-Building: The Palestinians and Their Meaning in Israeli Sociology*, 57 AM. SOC. REV. 446, 450 (1992) ("[A]rabs in Israel] remained … outside of the collectivity's boundaries as nonmembers of 'Israel.'"); MICHAEL WALZER, ON TOLERATION 41 (1997) (noting how the Palestinian Arab minority in Israel, though citizens of the state, nevertheless "do not find their history or culture mirrored in its public life").

man,"[65] or as the "odd man out."[66] By virtue of the same process, the Jewish nature of the State of Israel, this time in its religious form, also came to dominate Israel's public sphere.[67] Accordingly, the entity of the State of Israel itself has become both the domain as well as the instrument for handling the Jewish community's religion and state relations.[68] Moreover, the whole state political apparatus has been recruited to help ease religious and state tensions among the different factions of the Jewish community, namely the secular and the religious orthodox camps.[69] Since religion and state matters concerning the Palestinian-Arab minority were by definition excluded from such a constitutional configuration, such matters simply continued to be regarded as they were before the establishment of the State of Israel – a group accommodation of a religious community that the state seeks to tolerate as a group. Such accommodations were to stay a "private" matter, or to use one of Virginia Woolf's famous titles – "a room of one's own" instead of that of the state.[70]

¶17 Another important ingredient of this group accommodation perception is that the religious accommodations of the different Palestinian-Arab religious communities were conceived as a group accommodation of the Palestinian-Arab minority in Israel as a *national* group, instead of just a group accommodation of a particular Palestinian-Arab religious community.[71] Thus it became relatively

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[65] Sammy Smooha & Don Peretz, *The Arabs in Israel*, 26 J. CONFLICT RESOL. 451 (1982) (adding that this characterization is also true with respect to the surrounding Arab countries that have also absented the Palestinian-Arab minority in Israel from the overall Israeli-Arab conflict).

[66] Joel S. Migdal & Baruch Kimmerling, *The Odd Man Out: Arabs in Israel*, *in* THROUGH THE LENS OF ISRAEL: EXPLORATIONS IN STATE AND SOCIETY 173 (Joel S. Migdal ed., 2001).

[67] *See* CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, CIVIL RELIGION IN ISRAEL: TRADITIONAL JUDAISM AND POLITICAL CULTURE IN THE JEWISH STATE 12, 161-62 (1983) (stating that the conception of civil religion in Israel that came to dominate the public sphere builds on the Jewish identity of the state of Israel and thus excluded from it the Arab population in Israel).

[68] Izhak Englard, *The Conflict Between State and Religion in Israel: Its Ideological Background*, *in* INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE 219 (Menachem Mor ed., 1993) (explaining how the tendency to integrate Jewish religious institutions into the framework of the State of Israel did not meet any substantial opposition, though motives of the secular and Orthodox camps varied).

Interestingly, in a relatively recent article it was stated that in the first two decades after the establishment of the State of Israel, the Jewish religious camp was not successful in transforming the public domain of Israel into a Jewish religious one. *See* Aviad Hacohen, *"Medinat Yisrael, Kan Makom Kadosh!": Itsuv "Reshut Rabim Yehudit" bi-Medinat Yisrael* [*"The State of Israel – This is a Holy Place!": Forming a "Jewish Public Domain" in the State of Israel]*, *in* SHNEY IVREY HA-GESHER: DAT U-MEDINA BE-REISHIT DARKA SHEL YISRAEL [ON BOTH SIDES OF THE BRIDGE, RELIGION AND STATE IN THE EARLY YEARS OF ISRAEL] 144 (Mordechai Bar-On & Zvi Zameret eds., 2002) (in Hebrew).

Even if I were to set aside the problematic classification that Dr. Hacohen makes in his article in terms of differentiating between the "public" and the "private" domain (classifying, for example, issues pertaining to the law of marriage and divorce and the determination of the status of a "Jew" as matters of the private domain, *id*. at 145), his analysis seems to be totally irrelevant to the context of this study. Nowhere in his article, does Hacohen compare the recognition that was nevertheless accorded to Jewish religious institutions with the recognition accorded to the non-Jewish religious communities. Rather, his analysis, like the vast majority of the scholarly work that dealt with religion and state in Israel, was restricted to the intra-Jewish context.

[69] CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL (1984); ASHER COHEN & BERNARD SUSSER, MI-HASHLAMAH LE-HASLAMAH: HA-SHESA HA-DATI-HILONI BE-FETAH HA-ME'AH HA-ESRIM VE-AHAT [FROM ACCOMMODATION TO ESCALATION, THE SECULAR-RELIGIOUS DIVIDE AT THE OUTSET OF THE 21ST CENTURY] (2003) (in Hebrew).

[70] VIRGINIA WOOLF, A ROOM OF ONE'S OWN (1929).

[71] *See supra* note 27.

common in the literature dealing with Israel's attitude toward the Palestinian-Arab community to portray religious accommodations as a sort of "autonomy,"[72] a "multicultural entitlement,"[73] and as a sign of "pluralism."[74] Returning to Israel's definition as a "Jewish and democratic state", it is Israel's democratic and liberal principles that serve as a constitutional anchorage for the grant of religious accommodations for the Palestinian-Arab minority.[75]

¶18 This narrative about religious accommodations being a form of liberal and multicultural accommodation is totally absent from the discussion on the nature of religious jurisdiction of Jewish institutions. In fact, this latter discussion particularly stressed the coercive and illiberal nature of the jurisdiction of certain Jewish religious institutions especially in matters of marriage and divorce,[76] and that such a jurisdiction continued to exist as a matter of necessity,[77] compromise and the need to preserve unity.[78] Moreover, because there seems to be a secular majority within the Jewish community that would prefer to be free from certain

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[72] *See* Goldstein, *The Teaching of Religion*, *supra* note 19, at 40 (characterizing the judicial jurisdiction of the non-Jewish religious communities to administer their religious law in matters of personal status as a form of "communal autonomy of minority groups"); LANDAU, THE ARAB MINORITY IN ISRAEL, *supra* note 14, at 24 (noting that the autonomous administration historically enjoyed by the different religious communities continued to persist in the State of Israel); ORI STENDEL, THE MINORITIES IN ISRAEL: TRENDS IN THE DEVELOPMENT OF THE ARAB AND DRUZE COMMUNITIES 1948-1973 8 (1973) (stating that all of the Palestinian-Arab religious communities "maintain a considerable measure of internal autonomy"); ERVIN BIRNBAUM, THE POLITICS OF COMPROMISE: STATE AND RELIGION IN ISRAEL 113 (1970) (noting how the Ministry for Religious Affairs in Israel has "carefully safeguarded" the "autonomy" of the non-Jewish religious minorities).

[73] In fact authorities refer to all accommodations of the religious communities, Jewish and non-Jewish alike, in terms of a group accommodation which is a form of a multicultural accommodation. *See* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS, CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 8 (2001) (indicating that Israel together with India and Kenya have adopted expansive accommodation policies in various social arenas); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 387 (2000) (stating that the concept of differentiated citizenship, a synonymous concept of multicultural citizenship, is currently adopted in a variety of different forms in Israel as well as in Canada, England, the United States, India and Kenya); Shachar, *Whose Republic?*, *supra* note 17, at 263 (indicating that "[t]he communal autonomy granted to the various recognized religious communities in Israel is important in terms of permitting different citizens to preserve their cultural and religious group identity"); Galanter & Krishnan, *supra* note 1, at 105 (indicating that personal laws, including those of religious segments are designed to preserve each community's laws).

[74] *See* Ruth Lapidoth, *Religious Pluralism in Israel*, 37 STUDI PARMENSI 45, 57 (1988).

[75] Rubinstein, *Law and Religion in Israel*, *supra* note 2, at 390 (characterizing the government's attitude towards the Christian communities in Israel as "liberal" given the fact that such communities are in some cases even directed and controlled from Arab countries).

[76] In his recently published autobiography, Haim Cohn, a pre-eminent Israeli jurist, Supreme Court justice and a champion of human rights, has called the rabbinical courts' jurisdiction to adjudicate matters of personal status (but interestingly just the rabbinical courts' jurisdiction) as "a blot on Israel's democracy." HAIM HERMANN COHN, MAVO ISHI: OTOBIYOGRAFIYAH [A PERSONAL INTRODUCTION :AUTOBIOGRAPHY] 242 (2005) (in Hebrew).

[77] *See* Stephen Goldstein, *Israel: A Secular or a Religious State*, 36 ST. LOUIS U. L.J. 143, 149 (1992) ("Secular Zionists have sought to unify the Jewish population in Israel by constructing public life in a manner that ensures full participation by religious Jews."); *see also* EDELMAN, *supra* note 12, at 51 (in the context of the jurisdiction ascribed to the rabbinical courts in Israel and the religious accommodation in accordance with the status quo agreement, identifying the "extremely high value placed on the need for unity", especially in light of the fact that "the external threat to Israel has not disappeared"); Englard, *supra* note 5, at 193 (noting that political compromises between Jewish secular and religious parties were facilitated inter alia, by "the common striving for national unity").

[78] COHEN & SUSSER, *supra* note 69; Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617 (1999).

religious norms,[79] it has been observed that this state of being, "turns the conventional multicultural dilemma on its face, from a question of awarding respect and rights to patriarchal minority culture at the expense of its own members, into a question of imposition of the patriarchal minority culture over the liberal majority, at the expense of the members of the majority."[80]

¶19 This fundamental difference in the nature of the religious accommodations granted to the Jewish community as opposed to those granted to the Palestinian-Arab communities was particularly highlighted by Israel's official justification for the continuation of the Ottoman *millet* system. Israel's arguments for preserving this system have varied depending on the community. The argument associated with the Jewish community (cumulatively or alternatively) stresses the political necessities derived from the *status quo* document, the need for the major parties to unite with the Jewish religious parties in order to form government coalitions, and the need to preserve Jewish unity and Jewish heritage.[81] Israel's argument with respect to the Palestinian-Arab community has been based on the desire not to interfere in this community's internal religious affairs,[82] especially in light of the fact that the "interfering" establishment was identified with a group that differs religiously and faces national tensions with the nation of the Palestinian-Arab minority.

¶20 Consider in this respect the observations of two Israeli scholars in the field of religion and state. Professor Frances Raday has attempted to show how the incorporation of the Ottoman *millets* in the Israeli legal system, especially in terms of granting various religious courts the judicial capacity to apply their religious norms, made it possible to preserve the existence of what she called "a patriarchal legal system." In explaining why Israel inherited the *millets* from the British Mandate Professor Raday states the following:

> There was a national consensus that there was a need to salvage the remnants of a Jewish people and culture after these had been on the verge of annihilation in the holocaust. In addition, this was the price exacted by

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[79] Margit Cohn, *Women, Religious Law and Religious Courts in Israel*, 27 RETFAERD: SCANDINAVIAN J. SOC. SCI. 57, 58 (2004) (characterizing the problem of institutionalizing religion of the Jewish community as an infringement on the rights of a liberal majority instead of the right of a religious majority to express their beliefs); EDELMAN, *supra* note 12, at 60-61 (noting the troublesome fact that rabbinical courts in Israel decide matters of personal status on the basis of halachic norms to which the majority of the Jewish community does not subscribe). The division of the Jewish community between a secular majority and a religious minority seems to have been made on the basis of surveys inquiring as to whether the Jewish public accepts the compulsory nature of Jewish religious norms, such as having only orthodox religious marriage, the closing of shops and restaurants on the Sabbath, restricting public transportation on the Sabbath and the funding of Jewish religious institutions. When asked about these issues, a considerable portion within the Jewish community seems to be against such religious accommodations. *See* LEVY ET AL., *supra* note 9, at 8.

[80] Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFF. 339, 343 (2000).

[81] *See, e.g.*, Rubinstein, *State and Religion*, *supra* note 3, at 115, 121; Maoz, *Religious Human Rights*, *supra* note 2, at 363; Bassli, *supra* note 24, at 488-90.

[82] *See* STENDEL, *supra* note 72, at 8 (Former Deputy Advisor in the Office of the Advisor to the Prime Minister on Arab Affairs, the principal governmental office that articulated the official policy towards the Palestinian-Arab community in Israel, stating that "[f]rom the establishment of the State, the government policy has been not to interfere in the religious affairs of the various communities.").

> the religious political parties for giving coalition support to the party in power. Furthermore, there was a reluctance to intervene in the internal social organization of minority communities.[83]

¶21 Note the schism in the proposed arguments that explain the manner in which the *millet* system has become part of the Israeli legal system—one set of arguments is relevant for the Jewish community and the other set is relevant for the "minority communities."

¶22 Another statement embodying a contrast between the religious accommodations granted to the Palestinian-Arab minority in Israel and those granted to the Jewish community is that of Izhak Englard, a former Supreme Court Justice and Professor of Law who stated:

> The problem faced by the substantial non-Jewish minority—mainly Moslem and Christian Arabs—differs fundamentally from that of the Jewish inhabitants. Their position is inevitably influenced by the broader and age-old Israeli Arab conflict over Palestine. For them the issue is not merely the place of religion in the modern state, but that the very existence of the Jewish state has created a deeply felt national, and, for some, religious dilemma … this politically delicate background has caused a shifting of concern from individual freedom of religion to collective autonomy. This tendency is probably one of the main reasons why the traditional system of legally recognized religious communities exercising jurisdiction over their members has been rigorously maintained in contemporary Israel in relation to non-Jewish minorities. In fact, any proposal to change the status quo in this field runs the risk of being interpreted as an attempt to reduce the national cultural identity of the Arab population. The whole problem of law and religion in relation to the non-Jewish minority has, therefore, to be understood in the light of that particular sensitivity and concern for collective Arab identity.[84]

¶23 Israel's constitutional definition as a Jewish state that is also committed to democratic ideals has determined the nature and justifications for the religious accommodations of both the Jewish majority and the Palestinian-Arab minority. The Jewishness of the state is considered to be the constitutional basis for recognizing Jewish religious institutions and Jewish religious norms. However, it is Israel's democratic principles that led to the recognition of religious accommodations for the Palestinian-Arab religious communities.

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[83] Frances Raday, *Israel – The Incorporation of Religious Patriarchy in a Modern State*, 4 INT'L REV. COMP. PUB. POL'Y 209, 210 (1992).

[84] Englard, *supra* note 5, at 189-90.

B. Substantiating Evidence of the Public/Private Nature of Religious Accommodations in Regulation and Methodology

¶24 Two revealing pieces of evidence substantiate the assessment made here about how religious accommodations of the Jewish community came to dominate Israel's public sphere and by the same process, the religious accommodations of the Palestinian-Arab minority were relegated to the private sphere of minority-group-accommodations. The first concerns the public accommodation and state funding of Jewish religious institutions and the second concerns the pervasive methodology of texts dealing with religion and state in Israel that clearly shows its Jewish centrality.

1. The Issue of Public Recognition and Public Funding

¶25 The Jewish community is far more privileged in the public accommodation and state funding of its religious institutions.[85] The Chief Rabbinate of Israel is an institution that is statutorily recognized, regulated,[86] and also fully supported by public funds.[87] Specific legislation regulates Jewish religious services,[88] Jewish religious councils,[89] and Jewish religious sites.[90] Also in the foreign diplomacy arena, the Chief Rabbis of Israel receive protocol priority over the heads of other religious communities in Israel.[91] The Israeli Ministry of Education operates a religious school system alongside the regular Jewish school system.[92] There is no equivalent legislative recognition of non-Jewish religious institutions.[93]

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[85] *See* Francis Raday, *Religion, Multiculturalism and Equality: The Israeli Case*, 25 ISR. Y.B. HUM. RTS. 193, 213 (1995) ("Israel was established as a 'Jewish State' and this results in a preferred status for Judaism….") [hereinafter Raday, *Religion, Multiculturalism and Equality*]. Even official reports submitted by the Israeli Government have admitted the great gap between state funding of Jewish and non-Jewish religious institutions. *See* ISRAELI ICCPR REPORT , *supra* note 4, at 228 ("In comparison with funding of Jewish religious institutions, the non-Jewish communities are rather severely undersupported by the Government.").

[86] Chief Rabbinate of Israel Law, 5740-1980, 34 LSI 97 (1979-80) (Isr.).

[87] *See* Goldstein, *The Teaching of Religion*, *supra* note 19, at 39 ("State law regulates the appointment of central and local rabbinic bodies, administrative as well as judicial, with all such bodies being financed by state funds.").

[88] Jewish Religious Services (Consolidated Version) Law, 5731-1971, 25 LSI 125 (1970-71) (Isr.); *Kasher* Food for Soldiers Ordinance, 5709-1948, 2 LSI 37 (1948-49) (Isr.); Prevention of Fraud in Torah Books, Prayer Scrolls, Phylacteries and Mezuzot Law, 1974, S.H. 749; Prohibition of Fraud in Kashrut Law, 1983, S.H. 1088; Prohibition of Opening Places of Entertainment on Tisha'a bi-Av (Special Authorization) Law, 1997, S.H. 1637; Residence of Rabbis in their Place of Service Law, 2002, S.H. 1877; The Counsel for the Perpetuation of the Heritage of Sephardic and Oriental Jewry Law, 2002, S.H. 1876.

[89] *See* EDELMAN, *supra* note 12, at 52 (describing how religious councils work to minister to the religious needs of the Jewish community in such matters as, maintenance of synagogues, cemeteries, ritual baths, supervision of *kashrut*, and the appointment of marriage registrars).

[90] *See* BARZILAI, *supra* note 10, at 109 ("Formally, state law protects all religious sites in Israel without distinction [referring to Protection of Holy Sites Law, 1967]. Yet in a regulation issued by the minister of religions, only Jewish religious places were mentioned as protected sites [referring to Protection of Holy Sites Regulations, 1981].").

[91] Rubinstein, *State and Religion*, *supra* note 3, at 117.

[92] *See* Goldstein, *The Teaching of Religion*, *supra* note 19.

[93] Rubinstein, *Law and Religion*, *supra* note 2, at 400.

¶26 Additionally, outright disparity exists at times between the budgets available to Jewish religious institutions as opposed to non-Jewish ones.[94] This is true even though some authorities might imply that support is divided equitably.[95] For example, it was noted by one scholar that in 1981 the salary of a Rabbinical Court judge (*dayyan*) was raised to the equivalent of "a magistrate in the civil court system, but the salary of a Muslim *qadi* remained that of a Justice of the Peace."[96] Only in the mid-1990s did such patterns of disparity manage to receive some legal attention from the courts. A civil rights organization, *Adalah*, The Legal Center for the Rights of the Arab Minority in Israel, proved to the Supreme Court that despite the fact that the Palestinian-Arab minority composes approximately 20 percent of the total population of Israel, its portion of the Ministry for Religious Affairs budget amounted to only 2 percent.[97] However, even with this proof, the Court was still unprepared to intervene until the petitioner offered further evidence showing that specific religious services of each of the religious communities are treated unequally by the Ministry for Religious Affairs.[98] This evidence was found in the Ministry for Religious Affairs' 1999 fiscal year budgetary allotment to cemeteries operated by different religious communities.[99] While a sum of NIS 16.658 million (equivalent to approximately US $3.7 million) was principally allocated to cemeteries in the Jewish communities, only NIS 202,000 (equivalent to approximately US $44,888) of the standing budget for cemeteries was allotted to the non-Jewish population. In light of these findings, the Supreme Court instructed the Ministry for Religious Affairs to divide its budget in accordance with the principal of equal treatment between the cemeteries of the different religious communities.[100] As noted by Professor Asher Maoz, the reality in which Jewish

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[94] Saban, *supra* note 27, at 943 ("Throughout Israel's history, there has been major, ongoing discrimination in budgeting for religious services for the Muslim and Christian communities in comparison to that for the Orthodox Jewish community.").

[95] Ori Stendel, *The Rights of the Arab Minority in Israel*, 1 ISR. Y.B. HUM. RTS. 134, 152 (1971) (noting how in the area of religious services Israeli government authorities have carried out improvements "on an ongoing basis" with respect to Moslem religious institutions, whether constructing new mosques, maintaining cemeteries and holy places and establishing local committees to handle community property); Rubinstein, *Law and Religion*, *supra* note 2, at 388 (noting that though the affairs of the non-Jewish religious communities in Israel are not all regulated by law, they still "enjoy Government support in maintaining religious services").

[96] EDELMAN, *supra* note 12, at 78. However, this practice seems to have stopped after 1981. A table of the current salaries of judges of all courts, including those of the rabbinical and *Shari'a* courts, can be found at http://www.hilan.co.il/moked_yeda_lesachar/laws/mskchk66t.htm (last visited Oct. 3, 2006).

[97] HCJ 240/98 Adalah The Legal Center for the Rights of the Arab Minority in Israel v. The Minister for Religious Affairs, [1999] IsrSC 52(5)167, 178.

[98] *Id*. at 171.

[99] HCJ 1113/99 Adalah The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Religious Affairs, [2000] IsrSC 54(2) 164 [hereinafter HCJ 1113/99 *Adalah II*].

[100] It is also worth mentioning that this is not the first instance in which the Supreme Court has intervened in budget allocations that were heavily biased in favor of the Jewish community. In HCJ 1113/99 *Adalah II* Justice Zamir mentions the case of HCJ 2422/98 Adalah. The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Labor and Welfare (not published), where it was exposed that the Ministry of Labor and Welfare regularly gives out special allowances for the needy in the Jewish community on the eve of Passover. No such practice existed concerning the needy members of any of the Palestinian-Arab religious communities on the eve of any of their holidays. As a result of the petition, the Ministry of Labor and Welfare agreed to amend its practice and to distribute the mentioned allowances in an equitable manner. HCJ 1113/99 *Adalah II*, *supra* note 99, at 174.

religious institutions enjoy substantially more state funding than other religions "is more than just a matter of demography, that is, the vast preponderance of (Orthodox) Jews in Israel."[101] It is attributed to "[n]ational, historical and political factors."[102] Maoz adds:

> Israel, as the homeland of the Jewish people, has assumed as one of its major tasks the maintenance and development of Jewish culture and tradition, which naturally have religious dimensions. Moreover, following the Holocaust that destroyed the world center of Jewish learning, Israel assumed the task of replacing those centers in Israel, and rebuilding the institutions of learning destroyed in Europe.[103]

2. The Issue of Pervasive Methodology

¶27 It is widely admitted that the pervasive methodology of study relating to matters of religion and state in Israel is one in which the context of the discussion as well as the normative implications are primarily Jewish.[104] For example, the entrenchment of this phenomenon was evident when looking into a legislative initiative undertaken by a Member of Knesset (MK) from the National Religious Party, Nahum Langenthal, in 2000. The title of the bill proposed by MK Langenthal was "Religion and State." However, the section entitled "objective" stated that the purpose of the draft bill was "to mold, regulate and determine rules and principles in the matter of compatibility and relation of the Jewish religion in the State of Israel." The provisions of the draft bill make clear that the initiative did not accidentally overlook the religious issues of the other religious communities in Israel. For example, section 10 of the draft bill, appearing in the chapter discussing the Sabbath as the official day of rest, specifically refers to regions in Israel populated by a non-Jewish majority in which exemptions to the ordinary rules may apply.

¶28 Another striking example is an article published by two researchers from the social sciences entitled "Interreligious Conflict in Israel: The Group Basis of Conflicting Visions."[105] The article focuses on the tension between the Jewish Orthodox establishment and the secular camp, making clear that the discussion is in fact intra-Jewish. No caveat even appears in the text acknowledging that the title of the article may mislead readers to believe that the referenced interreligious conflict might be among and between the Jewish community and the other 13 recognized religious communities existing in Israel as well. These examples only reflect the general trend in the research conducted on religion and state in Israel. For example, a recent survey of research trends conducted on major subjects concerning

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[101] Maoz, *Religious Human Rights*, *supra* note 2, at 369.
[102] *Id.*
[103] *Id.*
[104] *See, e.g.*, Nachoum Langenthal & Shuki Friedman, *Mevo* [*Introduction*], *in* HA-KONFLIKT: DAT U-MEDINA BE-YISRAEL [THE CONFLICT: RELIGION AND STATE IN ISRAEL] 9, 13-14 (Nachoum Langenthal & Shuki Friedman eds., 2002) (in Hebrew).
[105] Kenneth D. Wald & Samuel Shye, *Interreligious Conflict in Israel: The Group Basis of Conflicting Visions*, 16 POL. BEHAV. 157 (1994).

communities and state in Israel[106] was written by Professor Eliezer Don-Yehiya,[107] a renowned Israeli academic in the field of religion and state whose previous work mainly concerned the political aspects of Jewish religious accommodations.[108] In his introduction, Professor Don-Yehiya pointed to the complexity of the definition of religion and state in Israel, given its relation to the national identity of Israel, its society and the inter-communal relations existing among the different groups. Thus the relevant research conjures up Zionism, political culture, the relationship between Israel and the Jewish Diaspora and the relationship between Jews and Arabs.[109] But as one proceeds to read the survey itself, it is striking how much the subject, as perceived in practice, is Jewish oriented and homogenous in terms of the communities surveyed. The survey redundantly focused on issues such as: the status of *halacha* in Israel, the Jewish religious parties, the question of who is a "Jew," nationalism and fundamentalism within the Jewish religious community, the status quo agreement, the ultra-orthodox community, the exact meaning of Israel as a Jewish and democratic state as the structural context for the relation between religion and state in Israel, and comparative studies on the standing of Judaism in Israel as compared with the standing of minority religions in other Western countries. Consequently, it was natural for one of the commentators on Professor Don-Yehiya's paper to caution against the possibility of researchers on the subject of religion and state in Israel not having a proper knowledge of Jewish *halacha*.[110]

¶29 This same trend found its way into the political and legal literature as well. Major scholarly works on religion and state in Israel have also focused on the tension existing between Jewish religious norms, accommodations given to Jewish religious institutions, and secular-liberal ideals.[111] Treaties and surveys on family

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[106] MEDINA VE-KEHILAH [STATE AND COMMUNITY] (Moshe Naor ed., 2004) (in Hebrew).

[107] Eliezer Don-Yehiya, *State and Religion in Israel: Developments and Trends in Research*, *in* STATE AND COMMUNITY, *supra* note 106, at 151 [hereinafter Don-Yehiya, *State and Religion in Israel: Developments*].

[108] *See, e.g.*, LIEBMAN & DON-YEHIYA, CIVIL RELIGION IN ISRAEL, *supra* note 67; LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, *supra* note 69; Eliezer Don-Yehiya, *Religion and Coalition: The National Religious Party and Coalition Formation in Israel*, *in* THE ELECTIONS IN ISRAEL-1973 255 (Asher Arian ed., 1975); Eliezer Don-Yehiya, *Jewish Messianism, Religious Zionism and Israeli Politics: The Impact and Origins of Gush Emunim*, 23 MIDDLE E. STUD. 215 (1987); Eliezer Don-Yehiya, *Religion, Social Cleavages and Political Behavior: The Religious Parties in the Israeli Elections*, *in* WHO'S THE BOSS? THE ELECTIONS IN ISRAEL, 1988 AND 1989 83 (Daniel J. Elazar & Shmuel Sandler eds., 1993); Eliezer Don-Yehiya, *Religion, Ethnicity and Electoral Reform: The Religious Parties and the 1996 Elections*, *in* ISRAEL AT THE POLLS 1996 73 (Daniel J. Elazar & Shmuel Sandler eds., 1998).

[109] Don-Yehiya, *State and Religion in Israel: Developments*, *supra* note 107, at 151.

[110] Asher Cohen, *Discussion*, *in* STATE AND COMMUNITY, *supra* note 106, at 183.

[111] *See, e.g.*, Natahn Rothenstreich, *Secularism and Religion in Israel*, 15 JUDAISM 259 (1966); Aharon Lichtenstein, *Religion and State: The Case forInteraction*, 15 JUDAISM 387 (1966); BIRNBAUM, *supra* note 72; S. CLEMENT LESLIE, THE RIFT IN ISRAEL, RELIGIOUS AUTHORITY AND SECULAR DEMOCRACY (1971); Ephraim Tabory, *Religious Rights as a Social Problem in Israel*, 11 ISRAEL Y.B. HUM. RTS. 256 (1981); LIEBMAN & DON-YEHIYA, CIVIL RELIGION IN ISRAEL, *supra* note 67; LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, *supra* note 69; CHARLES S. LIEBMAN, RELIGION, DEMOCRACY AND ISRAELI SOCIETY (1997); Izhak Englard, *The Relationship Between Religion and State in Israel*, 16 SCRIPTA HIEROSOLYMITANA 254 (1966); Shimon Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue*, 4 ISR. Y.B. HUM. RTS. 194 (1974); Ariel Rosen-Zvi, *Freedom of Religion: The Israeli Experience*, 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTICHES RECHT UND VÖLKERRECHT 213 (1986); Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL-AVIV STUD. L. 185 (1988); Sapir, *supra* note 78; Shimon Shetreet, *State and Religion: Funding of Religious Institutions – The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUBL. POL'Y 421 (1999); Zaharah R.

law—a discipline traditionally influenced by religious law—have also tended to restrict their discussion to the Jewish community though their titles suggest that they are relevant to Israel in general.[112]

¶30 All of this cannot be coincidental. Given the Jewish nature of the state, the subject of religion and state conflict has been transformed and essentially restricted to a conflict between Jewish religious ideals and secular-liberal norms. The shape and type of the public sphere that developed in Israel over the years, and is in essence centered around Judaism, demanded this treatment of the religion and state controversy. Just as Israel's national symbols and ethos, concepts of citizenship, and legislation of religious institutions is Jewish-centered, so are all other issues that relate to religion and state.

¶31 However, it is not the intention of this article to suggest that minority religions in Israel, primarily those of the Palestinian-Arab community, are altogether excluded from public accommodations, whether it be in the form of recognition or in the form of funding. For indeed, the Moslem, the Druze and the major Christian communities all enjoy official legal status that affords them the legal capacity to administer their own religious norms in matters under their jurisdiction, a jurisdictional capacity that is essentially no different from that accorded to the Rabbinical courts of the Jewish community.[113] In fact, the Moslem *Shari'a* courts have historically enjoyed the widest jurisdictional authority in matters of personal status, which corresponds to the adoption of the Ottoman *millet* system by Israel.[114]

¶32 Yet the thesis of this article is not about the religious freedoms of the non-Jewish communities in Israel to practice and apply their religious norms through their religious institutions. Rather, it is principally about the nature of religious accommodations accorded to such communities in a state that is officially defined as a Jewish state. This article argues that religious accommodations for the Palestinian-Arab religious communities are perceived as accommodations justified on the basis of a minority group right, and thus are fundamentally different in nature from the religious "accommodations" allotted to the Jewish community. The latter are commonly justified in terms of the nature of the State of Israel as a whole.

Markoe, Note, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L & COMP. L. 319, 327-28 (2000); Ezra Kopelowitz, *Religious Politics and Israel's Ethnic Democracy*, 6 ISR. STUD. 166 (2001); Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 TUL. L. REV. 659 (2003).

[112] *See, e.g.*, BENZION SCHERESCHEWSKY, DINNEY MISHPAKHA [FAMILY LAW IN ISRAEL] (4th ed. 1993) (in Hebrew); PINHAS SHIFMAN, MI MEFAKHED MI-NISSUIN EZRAKHI'IM? [CIVIL MARRIAGE IN ISRAEL: THE CASE FOR REFORM] (1995) (in Hebrew); BOAZ KRAUS, GERUSHIN: MADRIKH MA'ASI LE-GERUSHIN [DIVORCE, A GUIDE TO FAMILY LAW] (4th ed. 1998) (in Hebrew); MICHAEL CORINALDI DINNEY ISHIM, MISHPAKHA VE-YERUSHA: BEIN DAT LE-MEDINA, MEGAMOT HADASHOT [STATUS, FAMILY AND SUCCESSION LAW BETWEEN STATE AND RELIGION] (2004) (in Hebrew).

[113] Raday, *Religion, Multiculturalism and Equality*, *supra* note 85.

[114] *See, e.g.*, Ori Stendel, *The Arabs of Israel, Between Hammer and Anvil*, 20 ISR. Y.B. HUM. RTS. 287, 302 (1990); EDELMAN, *supra* note 12, at 77.

IV. THE PARADIGM OF SEPARATENESS RE-ENFORCED

¶33 In Israel, this paradigm of separateness was further entrenched in the religion and state conceptual framework as a result of two other forces: The first is external, brought to bear by state executive authorities, and the second is internal, derived from intra-Palestinian-Arab perceptions.

A. External Re-Enforcements

¶34 The implementation of state policies regarding the Palestinian-Arab minority has traditionally underscored the presumed security threat posed by the Palestinian-Arab minority remaining within the 1948 borders.[115] After all, this population not only lost its majority status in what they considered their homeland; many members were also displaced from their homes.[116] Moreover, many of the Palestinian-Arab minority members were detached from close family relatives and some were even considered legally absent, though physically present, making it possible for the government to take over their possessions.[117] This minority was also an ethnic and national continuation of a nation at war with the state in which they became citizens.[118] Consequently, a number of measures were taken by state authorities with the intention of controlling the Palestinian-Arab minority, thereby mitigating their perceived threat to state security.[119] One such measure was the military government imposed on the Palestinian-Arab population for more than 18 years (1948-1966).[120] Another method used was fragmentation—to create new and

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[115] Kimmerling, *supra* note 64, at 447 ("Arabs inside of Israel were suspected of being 'a fifth column' or a 'Trojan Horse.'").

[116] *See* DON PERETZ, ISRAEL AND THE PALESTINIAN ARABS 91 (1958).

[117] Over time, this odd legal status of present but legally absent *personas* came to be regarded as a metaphor for the absence of the Palestinian-Arab minority in Israel from many facets of Israeli society. *See* DAVID GROSSMAN, SLEEPING ON A WIRE: CONVERSATIONS WITH PALESTINIANS IN ISRAEL (Haim Watzman trans., 1993). The Hebrew title of the book is "*Nochaheem Nifkadeem*," which literally means "Present Absentees."

[118] *See* LIEBMAN & DON-YEHIYA, CIVIL RELIGION IN ISRAEL, *supra* note 67, at 165 ("Israeli encouragement of an Arab national identity, including a measure of Arab autonomy, is fraught with the danger of turning the population into agents of enemy countries, of encouraging them to demand territorial separation from Israel and unification with a neighboring state."); *see also* Rebecca Kook, *Dilemmas of Ethnic Minorities in Democracies: The Effect of Peace on the Palestinians in Israel*, 23 POL. & SOC'Y 309, 312 (1995).

[119] *See* LUSTICK, *supra* note 14.

[120] Suhaila Haddad et al., *Minorities in Containment: The Arabs of Israel*, *in* THE POLITICAL ROLE OF MINORITY GROUPS IN THE MIDDLE EAST 76, 84 (R.D. McLaurin ed., 1979) ("The principal tool employed to control the Arab sector was the military government."). In daily life, military government meant the following:

> [T]he military governor could "proclaim any area or place a forbidden area." To enter or leave such an area one needed "a written permit from the military commander or his deputy…failing which he is considered to have committed a crime." All the Arab villages and towns, even in the Negev, were declared "security zones" (forbidden areas); so Arabs required permits from the military government to leave and enter. Each village constituted, in effect, a separate zone, making travel between villages subject to permission of the military governor. Article 109 of the military government regulations allowed the military government to banish individuals – in effect to force them to live in designated areas. Other such regulations permitted imposition of partial or complete curfews in any area."

Id. at 79.

strengthen existing barriers—within the Palestinian-Arab minority groups, under the premise that a segmented society could be controlled better.[121] The separate religious communities of the Palestinian-Arab minority in Israel proved to be a rich natural resource that facilitated this fragmentation policy.[122]

¶35 One characteristic mark of this government policy is to view the Palestinian-Arab community as separate religious groups while combining all other efforts to deny the community's collective national rights.[123] Thus, while in the national front of state-minority, the Palestinian-Arab citizen is principally viewed in his or her individual capacity, in the religious sphere the Palestinian-Arab citizen is contemplated by his or her collective religious identity.[124]

¶36 There may have also been another purpose behind the interest of the Israeli establishment in maintaining the *millet* infrastructure among the Palestinian-Arab minority, something that strengthened their separate and different nature even further. The system also enabled the government to formalize differential treatment among the various Palestinian-Arab religious communities that accorded to pre-conceived policies toward each one of them.[125] Such an attitude would have been much harder to formalize if the religious accommodations of the different Palestinian-Arab religious communities would have been regarded as public in nature and thus susceptible to the regular body of norms governing public institutions, religious or otherwise.

¶37 The Christian communities gained very little statutory recognition.[126] Such communities appoint their own clergyman to serve as judges in Christian ecclesiastical courts and they determine their internal court structure as they deem necessary.[127] Moreover, each of the Christian religious communities appoints local

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[121] *Id.* at 80-81; LUSTICK, *supra* note 14, at 133.

[122] NAOMI SHEPHERDED: PLOUGHING SAND, BRITISH RULE IN PALESTINE 1917-1948 245 (1999) (noting how preserving the Ottoman *millet* system suited Israel's interests, *inter alia*, for maintaining the status of the Palestinian-Arab population not as one but several minority groups); KAIS M. FIRRO, THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY 99-104 (1999) (depicting the formation of government policy in preventing the creation of a single Arab group and in maintaining the different Palestinian-Arab religious communities as divided groups).

[123] *See* Gad Barzilai, *Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics and the Israeli Arab-Palestinian Community*, 34 ISR. L. REV. 425, 436 (2000) ("The state inherited the mandatory colonial recognition of religious communities or tribes, and has formally respected it so as not to be domestically and internationally delegitimized. Yet, by formalizing and legalizing the religious aspect of the minority, the minority's other identities have been marginalized, enabling the State to better control it."); *see also* BARZILAI, *supra* note 10, at 97, 107 ("State law excludes the [Palestinian-Arab] minority by framing it as religious groups that are entitled to a confined religious and juridical autonomy."); Tessler, *The Identity of Religious Minorities*, *supra* note 55, at 359-60 (1978) (noting the fact that the Arabs in Israel are viewed as a religious minority).

[124] During his first term as prime minister, Yitzhak Rabin specifically stated that Arabs in Israel constituted only a cultural-religious minority rather than a political or national one, a statement that elicited criticism from Palestinian-Arab political leaders. Haddad et al., *supra* note 120, at 93.

[125] EDELMAN, *supra* note 12, at 76 ("While all Palestinians who are Israeli citizens share a common linguistic and ethnic background, the Jewish authorities tend to treat each religious group as culturally, economically and politically distinguishable.").

[126] Some churches operating in the State of Israel have been in fact directed and controlled by authorities in other Arab countries, even when such countries had no diplomatic relations with Israel. *See* Rubinstein, *Law and Religion in Israel*, *supra* note 2, at 390.

[127] *See* ISRAELI ICCPR REPORT , *supra* note 4, at 227 (describing how the Christian communities actually maintain the highest degree of independence in conducting their internal affairs).

clergy who provide various religious services to their community members according to the wishes of the heads of the relevant religious community. It is also worth noting that most of the property held by the different churches prior to the establishment of the State of Israel was retained in their possession. This undoubtedly lenient and accommodating policy stems from the fact that from its establishment, Israel's relation with its Christian communities was tied up with its foreign policy towards the Christian West,[128] something that eventually worked to shield local Christian communities from government intervention.[129]

¶38 On the other hand, the government's policies regarding the Moslem community are genuinely different. First, all Moslem *qadis* to the *Shari'a* courts are appointed by a special statutory committee.[130] Although the committee has representatives from the Moslem community, its agenda was controlled by the Minister of Religions, today the Minister of Justice.[131] In addition, local *Imams* are appointed by the state and are in essence state officials. A substantial portion of Moslem religious endowments (*waqf*), regarded as absentee property,[132] was transferred to the hands of the Israeli government.[133] The Moslem community is indubitably the largest Palestinian-Arab religious community in Israel, and is perceived as posing a security threat due to its religious affinity with the surrounding Arab countries.[134] As a result, government agencies have endeavored to gain a stronger grip on the Moslem community in contrast to the regulation, or the lack of regulation, of the Christian communities.[135]

¶39 The relationship existing between the Druze community and the Israeli government is completely different from both the Christian and Moslem communities. With the establishment of the State of Israel, a close relationship was constructed between the Israeli government and the leadership of the Druze community which led to Druze male members being conscripted into the Israel Defense Forces.[136] In due course, the Israeli establishment considered the Druze identity as a national identity and not a mere religious attribute, making the Druze

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[128] *See* BIALER, *supra* note 13, at 122 ("From the first, the problem of Christian communities in Israel was bound up and interrelated with the issue of Israel's relations with world church centers.").

[129] *See* RUBIN-PELED, *supra* note 25, at 7.

[130] Qadis Law, 5721-1961, 15 LSI 123 (1960-1961) (Isr.).

[131] BARZILAI, *supra* note 10, at 107; EDELMAN, *supra* note 12, at 77-78.

[132] *See* Ilan Saban, *Ha-Zekhuyot ha-Kibbutsiyot shel ha-Mi'ut ha-Aravi-Falestini: Ha-Yesh, ha-Ein ve-Tkhum ha-Tabu* [*The Minority Rights of the Palestinian-Arabs in Israel: What Is, What Isn't and What Is Taboo*], 26 IYUNEI MISHPAT 241, 282-85 (2002) (in Hebrew) (stating that government policy towards the Moslem community's religious endowments was conducted with a clear view to weaken the community through diluting its power to control its property).

[133] *See* KRETZMER, LEGAL STATUS, *supra* note 27, at 167-68.

[134] EDELMAN, *supra* note 12, at 76 ("The Jewish majority generally considers the Muslims as the greatest security risk. Their religion is perceived as yet another bond with the surrounding Arab forces threatening Israel's survival.").

[135] BARZILAI, *supra* note 10, at 108 ("The state is not interested in having a professional non-Jewish juridical body [referring to the Moslem Sharia courts], which would be autonomous from direct state political control. The state is interested in a religious body with partial religious autonomy, the Sharia court, which in actuality is subject to supervision by Jewish Orthodox and ultra-Orthodox establishment in the Ministry for Religious Affairs.").

[136] *See* Laila Parsons, *The Palestinian Druze in the 1947-1949 Arab Israeli War*, *in* NATIONALISM, MINORITIES AND DIASPORAS: IDENTITIES AND RIGHTS IN THE MIDDLE EAST 144 (Kirsten E. Schulze et al. eds., 1996).

community even more distinct from their fellow Palestinian-Arab citizens. On these terms, the Druze community was regarded as the most favored minority in Israel and received full recognition as a separate and independent religious community shortly after the establishment of the State of Israel.[137] Consequently, the Druze religious courts became important political institutions controlled entirely by the Druze community, including the process of selecting judges.[138]

¶40 This disparate treatment of the Israeli establishment toward the different Palestinian-Arab religious communities was to a great deal facilitated by maintaining the separate and private nature of such accommodations. This separateness made it possible to apply separate policies among such communities, policies that because of the accommodation's private nature, were also "privatized" to suit pre-conceived governmental policies.

B. Internal Re-Enforcements

¶41 The paradigm of separateness is also strengthened as a result of the internal Palestinian-Arab minority conceptions of the nature of their religious accommodations.[139] The discourse among community leaders, even those belonging to secular political parties,[140] tends to focus on religious matters of the Palestinian-Arab minority as minority affairs, autonomous in nature and distinct from those of the Jewish majority.[141]

¶42 This tendency was evident immediately after the establishment of the State of Israel when calls were made for abolishing the *millet* system altogether. Representatives of the Moslem community argued that such a move would amount to a historical injustice, for when the Jews were a minority under Ottoman rule they were accorded exclusive jurisdiction in matters relating to personal status.[142] A similar argument was made by representatives of the Christian churches who also stressed the long-standing ecclesiastical jurisdiction in the country.[143]

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[137] Aharon Layish & Salman Hamud Fallah, *Ha-Irgun ha-Edati shel ha-Druzim, Communal Organization of the Druzes*, *in* HA-ARAVIM BE-YISRAEL: RETSIFUT VE-TMURA [THE ARABS IN ISRAEL: CONTINUITY AND CHANGE] 123 (1981) (in Hebrew).

[138] EDELMAN, *supra* note 12, at 90-92.

[139] *See* Raday, *Religion, Multiculturalism and Equality*, *supra* note 85, at 194 ("After the founding of the State, the religious autonomy retained by the non-Jewish minorities has continued to be regarded, from the perspective of these communities, as a central element for their national cultural autonomy, representing, in a wider sense, a form of community autonomy."); Lisa Hajar, *Between a Rock and a Hard Place: Arab Women, Liberal Feminism and the Israeli State*, MIDDLE E. REP. 207 (1998), *available at* http://www.merip.org/mer/mer207/lisa207.htm ("[A]s long as Israel is a Jewish state, the Muslim, Christian and Druze religious institutions will remain important sources of communal identity for Israel's Arabs (women and men) since the civil state is not really 'theirs.'").

[140] *See* Danny Rubinstein Ha-Shesa ha-Dati-Khiloni Bekerev ArvieiYisrael [*The Religious-Secular Rift Among Israeli Arabs*], *in* SHNATON DAT U-MEDINAH [STATE AND RELIGION YEARBOOK] 1993 89, 95 (Avner Horvits ed., 1994) (in Hebrew) (noting that within the Palestinian-Arab community in Israel there is no "secular activism" in matters pertaining to family and social life and no real political agenda in this respect on behalf of the main political parties, not even the communist party that has traditionally had a strong national program).

[141] EDELMAN, *supra* note 12, at 88 (noting how the Moslem *Shari'a* courts through their *Qadis* worked to nourish the sense of their community's sense of collectivity and separateness).

[142] Haim H. Cohn, *Religious Freedom and Religious Coercion in the State of Israel*, *in* ISRAEL AMONG THE NATIONS 79, 94 (Alfred E. Kellermann et al. eds., 1998).

[143] *Id.*

¶43 The tendency was also evident when government authorities sought to introduce regulations that limited the application of certain religious norms or religiously sanctioned practices. This was the case when government authorities took control of Moslem *waqf* property,[144] when polygamy was criminalized,[145] when the jurisdiction of the *Shari'a* and Christian courts over maintenance claims made by women against their husbands was made concurrent to civil courts instead of remaining exclusive,[146] and when there was an initiative to abolish the practice of dowry among members of the Moslem community.[147]

¶44 The Palestinian-Arab religious leadership understandably internalized the group right perception with respect to their individual religious communities, because this perception helped to preserve and legitimize their power structure.[148] The political leadership on the other hand, contributed to the internalization process primarily through acquiescence.[149] From their point of view, challenging existing religious authority may cause internal friction among community members, something that might jeopardize their political campaign for and among their constituencies.[150] After all, patriarchy is still central to the social structure of the Palestinian-Arab society in Israel – a patriarchy that to a large extent is embedded and nourished by the existing religious institutions.

C. A Caveat on Group Rights Qualifications

¶45 Probably, the most peculiar feature about how the paradigm of separateness was constructed and re-enforced is that this process managed to take place without even inquiring whether what stands as the paradigm's most basic tenet is normatively valid; namely, whether the religious accommodations accorded to the Palestinian-Arab religious community in Israel, in their current form and context, can be viewed under democratic and liberal ideals as indeed autonomous and multicultural in nature. As the analysis afforded here will demonstrate, such a qualification is in serious doubt. However, the fact that the autonomy and multicultural perception persists only demonstrates how entrenched this basic tenet of the paradigm of separateness has become.

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[144] See Michael M. Karayanni, Al ha-"Shelanu": Rav-Tarbutiyut ba-Heksher ha-Aravi-Yehudi, [On the Concept of "Ours": Multiculturalism with Respect to Arab-Jewish Relations], 27 IYUNEI MISHPAT 71, 97-98 (2003) (in Hebrew).

[145] *See* UZI BENZIMAN & ATALLAH MANSOUR, DAYAREI MISHNEH [SUBTENANTS] 136-37 (1992) (in Hebrew).

[146] *See* Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 200 (2003).

[147] *See* EDELMAN, *supra* note 12, at 80 (noting the objection of the Moslem judges (*Qadis*) to the idea of reform through "the predominantly Jewish Knesset").

[148] David M. Neuhaus, *Between Quiescence and Arousal: The Political Functions of Religion, A Case Study of the Arab Minority in Israel: 1948-1990* 16 (1991) (unpublished Ph.D. dissertation, The Hebrew University of Jerusalem) (stating that traditional religious institutions within the Arab minority have sought to preserve traditional confessionalism "in their efforts to preserve the social structure from which their authority derives").

[149] *See* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 276-77 (2004).

[150] Ran Hirschl & Ayelet Shachar, *Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course*, *in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 205, 224-25 (Beverley Baines & Ruth Rubio-Marin eds., 2005).

¶46 This paper assumes that not all group-based normative entitlements qualify as "autonomous", as "multicultural" or as "pluralistic" accommodations, at least when judged in terms of liberalism.[151] For that to happen, certain conditions, or "qualifying factors", must be met. Indeed, in the literature dealing with multiculturalism, scholars have already touched on such qualifying factors when dealing with the question of whether a multicultural accommodation can be considered legitimate when it also entails the application of norms that violate basic conceptions of individual well-being. In an effort to help differentiate between "good" and "bad" group-based entitlements, scholars have offered a basic classification between such "good" accommodations that entail "external protection" only (claims of the group against the larger society – such as when allocating a representation quota for a minority group in governmental bodies) and such "bad" group accommodations that entail "internal restrictions" and thus legitimize group practices that violate basic human rights (claims of the group against their own members – such as in the case of granting autonomy to a group whose norms systematically discriminate on the basis of gender).[152] Some have argued that a group accommodation of the latter kind can in some cases be possible if the individual belonging to the group is offered the option to "exit" from the group, thereby relieving himself, or most probably herself, of the internal restrictions.[153] Serious questions therefore arise as to whether the existing group accommodation granted to the Palestinian-Arab religious communities can qualify as a multicultural accommodation.

¶47 The possibility of applying one's religious law to his or her personal status is problematic in many respects, at least from a liberal point of view.[154] First, the individual member might be secular and thus not interested at all in conducting his or her matrimonial life under a religious regime. The exclusive control of religious law in matters of marriage and divorce thus compels Israeli citizens to tolerate a body of norms that might be completely foreign to their personal beliefs. Second, within the religious laws of the different religious communities there exist a number of norms that are discriminatory in nature, especially in terms of gender. In fact, many religious norms explicitly discriminate against women and work to preserve the internal patriarchal hierarchy.[155]

¶48 One extreme example can be found in the Code of Family Law of the Greek Orthodox community, which is essentially a code compiled in the fourteenth century during the reign of the Byzantine Empire.[156] The Code allows for only a limited number of reasons for divorce that are asymmetrically gendered. For

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[151] *See* Will Kymlicka, *Two Models of Pluralism and Tolerance, in* TOLERATION: AN ELUSIVE VIRTUE 81 (David Heyd ed., 1996).

[152] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 37 (1995) ("[L]iberals can and should endorse certain external protections, where they promote fairness between groups, but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices.").

[153] *See* Oanagh Reitman, *On Exit, in* MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 189 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

[154] *See* Rubinstein, *State and Religion*, *supra* note 3, at 117; Bassli, *supra* note 24, at 491, 516.

[155] Frances Raday, *Culture, Religion and Gender*, 1 INT'L J. CONST. L. 663, 669-76 (2003).

[156] *See* F.M. GOADBY, INTERNATIONAL AND INTER-RELIGIOUS PRIVATE LAW IN PALESTINE 134-35 (1926).

example, under the Code a husband can petition the Greek Orthodox court for divorce if his wife slept outside of their house without his permission. However, a wife cannot petition for divorce when the husband chooses to do the same without his wife's consent.[157] But the most intriguing aspect of the Code is the causes enumerated in a special section on circumstances in which divorce is not to be granted. According to the relevant provision, a wife cannot petition for divorce in cases where her husband whipped her with a lash or hit her with a stick. This of course is only a sample, albeit extreme in its content, of religious norms that do not treat men and women equally in matrimonial matters. These are very severe "internal restrictions". Moreover, in the absence of a civil regime of marriage and divorce in Israel, it is also questionable whether there is an option to exit from the group, for there is simply nowhere to exit to.

¶49 In this author's view there is yet a more serious flaw in the position which views the religious authority granted to the different Palestinian-Arab religious communities in Israel as a sort of "autonomy" or a group right of a "multicultural" or "pluralistic" nature. To be regarded as such, one fundamental qualifying factor also needs to be met. This qualifying factor concerns the "will" of the group itself. It is essential that the group subject to the accommodation is interested in the type of accommodation granted. Otherwise, and especially if the accommodation is in the interest of a minority within that group, the group accommodation is at best just a group accommodation and at worst a product of coercion. This fundamental qualifying factor is derived not only from basic notions of justice,[158] but also from the rationale of having multicultural and autonomous accommodations in the first place.

¶50 If such accommodations are justified in terms of serving the interests of the group members themselves, whether because individuals are embedded in their community or because they need their community in order to realize their individual virtues and aspirations,[159] it becomes essential that the group accommodation accords with their interests instead of those belonging to some minority group within them.

¶51 Take for example the case of two major religious communities: the Greek Orthodox and the Moslem. The Greek Orthodox community is controlled by a group of a foreign clergy from Greece, who can barely speak Arabic, the mother tongue of the local Palestinian-Arab Greek Orthodox community.[160] Judges are

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[157] Michael M. Karayanni, *"Yehudit ve-Demokratit" - Rav-Tarbutiyut ve-ha-Eda ha-Yevanit-Ortodoksit* [*Jewish and Democratic: Multiculturalism and the Greek Orthodox Community*], *in* HA-KONFLIKT: DAT U-MEDINA BE-YISRAEL [THE CONFLICT, RELIGION AND STATE IN ISRAEL] 227 (Nachum Langental & Shuki Friedman eds., 2002) (in Hebrew).

[158] *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 34 (1990) ("For a norm to be just, everyone who follows it must in principle have an effective voice in its consideration and be able to agree to it without coercion.").

[159] *See* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture, in* 61 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY OF THE SOCIAL SCIENCES 491 (Arien Mack ed., 1994).

[160] DAPHNE TSIMHONI, CHRISTIAN COMMUNITIES IN JERUSALEM AND THE WEST BANK SINCE 1948, AN HISTORICAL, SOCIAL, AND POLITICAL STUDY 37 (1993) (observing how the Greek Orthodox Arab community "considered the Greek upper hierarchy an alien element that has usurped the spiritual authority of the church and its property from the indigenous Christians"). *See also* ROBERT BRENTON BETTS, CHRISTIANS IN THE ARAB EAST, A POLITICAL STUDY 44 (revised ed. 1978).

appointed to the Greek Orthodox ecclesiastical courts at the sole discretion of the Church's administration without any input or supervision from either state authorities or community members.[161] It is worthwhile to mention that this situation has existed in the past in a number of other Middle Eastern countries, such as Egypt, but was changed through reform that abolished foreign control of local churches.[162] However, calls from the local Palestinian-Arab community for change have not been very successful, neither before nor after the establishment of the State of Israel.[163]

¶52 Thus, serious questions arise as to whether the existing accommodation granted to this community is really autonomy or multicultural given the fact that its form and practice run counter to the wishes of the constituency. Moslems' community affairs have been handled over the years by *qadis* and *imams* coming from the ranks of the community itself, but state authorities have applied different control policies over the handling of community affairs.[164] This policy was evident in the appointment process of such religious figures to their posts, always conducted under the close supervision of government authorities.[165] A request made by Moslem leaders to have a Moslem as head of Moslem affairs in what was the Ministry of Religious Affairs was denied as the position was "passed from one Jew to another."[166] But most probably, what really curtailed the community's control over its own affairs was the state authorities' handling of the Moslem religious endowments (*waqf* property).[167] Because various members of the Supreme Moslem Council, the body that administered such property in Mandatory Palestine, have left the country, this property was characterized as absentee property via legal constructs.[168] In turn this made it possible for the State of Israel, through the authority granted to the governmental organ, the Custodian of Absentee Property, to take over such property.[169] Thus, it is once again questionable whether the jurisdiction and authority granted to the Moslem community in Israel is really autonomy or a genre of multiculturalism, even outside of the question of internal restrictions and the option to exit.

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[161] Maoz, *Religious Human Rights*, *supra* note 2, at 357, 364; Rubinstein, *Law and Religion*, *supra* note 2, at 390.

[162] Karayanni, *supra* note 157, at 238-40.

[163] *See* Daphne Tsimhoni, *The Greek Orthodox Community in Jerusalem and the West Bank 1948-1978: A Profile of Religious Minority in a National State*, 23 ORIENT 281 (1982) (observing it is because of this distance between the local Greek Orthodox community and the Greek clergy that associations and clubs, governed by community members, developed among the Greek Orthodox community); Daphne Tsimhoni, *Continuity and Change in Communal Autonomy: The Christian Communal Organizations in Jerusalem 1948-80*, 22 MIDDLE E. STUD. 390, 398 (1986).

[164] *See* RUBIN-PELED, *supra* note 25.

[165] *See supra* text accompanying notes 130-135.

[166] Tessler, *supra* note 51, at 265.

[167] *See* PERETZ, *supra* note 116, at 126 (noting how the appointment of a Jewish official by the Ministry of Religious Affairs to control w*aqf* property and to be in charge of other functions regarding the Moslem community "aroused much resentment" among the Moslem community religious leadership).

[168] KRETZMER, LEGAL STATUS, *supra* note 27, at 167-68.

[169] *Id*. It was once held that the Custodian of Absentee Property transferred the income received from administering Moslem *waqf* to the Ministry of Religious Affairs who in turn distributed back to community members according to the recommendation of an advisory committee. *See* Rubinstein, *Law and Religion*, *supra* note 2, at 389. However, as things turned out, only a small portion of such income went back to the Moslem community. *See* RUBIN-PELED, *supra* note 25.

¶53 In light of this discussion it is thus remarkable how reference is still made to the religious accommodations of the Palestinian-Arab religious communities in terms of an autonomous jurisdiction and a genre of multiculturalism. This only demonstrates how overwhelming the paradigm of separateness has become.

V. THE PARADIGM OF SEPARATENESS AND ITS NORMATIVE IMPLICATIONS

¶54 At the core of the paradigm of separateness identified here stands the claim that religious accommodations for the Palestinian-Arab minority are a matter of minority group accommodations. Yet, the same "accommodations" with respect to the Jewish majority are considered to be a dictate of the Jewish nature of the State of Israel. The first case concerns the "private" issues of minorities, and the second case concerns the "public" nature of the State of Israel.

¶55 My argument in this respect goes further and suggests that this paradigm of separateness carries with it a number of normative implications. In the interest of succinctness, I will examine four different implications rather briefly.[170] The first implication is dominance. The official Jewish nature of the State of Israel and the Palestinian-Arab community's internalization of the paradigm of separateness with respect to religious accommodations created a legal environment with interesting consequences. This environment made it possible to devise and shape, first and foremost according to the interests of the Jewish community, public norms with religious implications as well as legal reforms intended to benefit individual members. I chose to term this type of normative implication "the dominance effect." This notion of dominance can be found in the Israeli adoption law, particularly the stipulation that demands the adoptee be of the same religion as the adopting parents.[171] This strict and uncompromising requirement was originally implemented in Section 3 of the Adoption of Children Law, 1960, and was strongly influenced by the sensitivity of the Jewish community to the possibility that Jewish children could be adopted by non-Jewish parents.[172] The dominance was so strong that this norm became the law of the land while overlooking the possibility that the local Palestinian-Arab community might not be equally opposed to inter-religious adoption among their community members.

¶56 The second implication is what I chose to call "the distancing effect." The paradigm of separateness has a distancing effect on the individual members of the Palestinian-Arab religious communities when it comes to liberal norms of the individual-secular welfare of these members. In order to reach the individual member and care for his, but mostly her, individual liberal rights, the paradigm requires a justification of the infiltration of the outer and well-guarded limits of a minority group's existing autonomy on behalf of such an individual.[173] This barrier

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[170] For a detailed study in this respect see Michael M. Karayanni, *A Group of One's Own: A Dialectical Legal Analysis of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 6 UCLA J. ISLAMIC & NEAR E. L. (forthcoming *2007*).

[171] Michael M. Karayanni, *A Historical Analysis of the Religious Matching Requirement under Israeli Adoption Law, 2* PALESTINIAN SOC'Y & HIST. REV. (forthcoming 2007) (in Arabic).

[172] *Id.*

[173] The effect of group-based norms on individual members has received particular attention in the literature dealing with multiculturalism. Therefore, it has become particularly important to think of

does not exist within the Jewish community, for once again its religious accommodations are not perceived as a minority accommodation of an autonomous and multicultural nature. On the contrary, many of the religious accommodations within the Jewish community are viewed as a minority imposition made on the majority who prefer freedom from religious norms and have strong secular tendencies, or at least support the right to choose in regard to their own religious accommodations.[174] Thus in the case of the Jewish community, change in religious accommodations can occur once the liberal norm is preferred over the religious norm. In the case of the Palestinian-Arab community there is an additional step before this can happen: whether a group accommodation that is considered to be autonomous ought to be changed by official state organs, whether by the courts or the Knesset.

¶57 Examining scholarly historical analysis of the overall tendencies of courts and government agencies to intervene in religious practices within each of the communities is telling. The tendency has been to curtail and restrict the jurisdiction of the Jewish community's religious institutions and its ability to apply religious norms, whereas the tendency with respect to the Palestinian-Arab community was one of reluctance to interfere and effectuate changes.[175] A more tangible example is illustrative: Jewish wives gained the legal right to bring a maintenance claim against their husbands before a civil court in 1953, but the same right was granted to Moslem and Christian women only in 2001.[176]

¶58 The third implication concerns the internal dynamics that arose within the Palestinian-Arab community as a result of both its perception of the nature and type of religious accommodations accorded to its different religious communities and the national conflict that exists between the State of Israel and the Palestinian-Arab community as a whole. On a number of occasions, calls for liberal reforms from within the Palestinian-Arab community were suppressed for fear of creating internal conflicts within the religious communities that would eventually weaken the national struggle.[177] This effect is termed herewith as "the internal barrier

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mechanisms that can work to lessen this group-individual tension. *See, e.g.*, MINORITIES WITHIN MINORITIES (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005); SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 9-24 (1999); Leslie Green, *Internal Minorities and Their Rights*, *in* THE RIGHTS OF MINORITY CULTURES, 257, 258 (Will Kymlicka ed., 1995).

[174] *See supra* text accompanying notes 76-80.

[175] *Compare* Steinberg, *supra* note 23, at 100-101 ("Over time, the combination of religious/ideological and political/cultural factors gradually led to a weakening of the consociational structure, and the clash between secular and religious norms has become particularly pronounced. The expanded authority and scope taken on by the secular court system in the past decade has contributed to the undermining of the status quo. Under the influence of Judge Aharon Barak (Chief Justice of the High Court of Appeal [sic]), the courts have entered into areas and assumed powers that had, in the past, been rejected by the secular courts as outside their areas of jurisdiction."), *with* EDELMAN, *supra* note 12, at 87 ("For their part, the Jewish majority has not been anxious to upset Muslim sensibilities on matters of personal status. There have been only isolated legal actions to bring the *Shari'a* Courts into strict compliance with Israeli law…On matters of personal status, the Jewish elite is more concerned with modernizing the practices of their fellow Jews who came to Israel from Arab lands. The governing elite's priorities are reflected in the more restricted jurisdiction of the Rabbinical Courts and the greater administrative-legal supervision of personal status practices within the Jewish population.").

[176] *Compare* § 4 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 5713-1953, 7 LSI 139 (1952-53) *with* § 3(b1) of the Court of Family Affairs Law, 1995, S.H. 1537 (enacted in 2001, S.H. 1810).

[177] Michael M. Karayanni, *Ontologiya Hukatit le-Hesderei ha-Dat Bekerev ha-Mi'ut ha-Aravi be-*

effect." An extreme example can be found in the notes of a Palestinian-Arab sociologist who studied the phenomena of the murder of Palestinian-Arab women for the alleged shame they caused to their family or clan ("honor killing").[178] One argument she encountered, which was supported by community leaders, was that this was not the time for raising such an issue, even though the same community leaders stood against the phenomenon.[179]

¶59 The fourth normative implication of the paradigm of separateness is genuinely different from the previous three because it implies the possibility of greater reform in the religious accommodations granted to the Palestinian-Arab community. These accommodations differ from those granted to the Jewish community, meaning it may be possible to make such accommodations susceptible to different sets of considerations and norms than those relevant to the Jewish community. This implication should be emphasized given the fact that, as the socio-political reality that exists in Israel demonstrates, there are more spheres in which the Palestinian-Arab community can move for more liberal reforms than those in the Jewish community. The paradigm of separateness should work to facilitate such reforms, for it also implies that the impediments to reform within the Jewish community do not similarly impede the Palestinian-Arab community. A meaningful precedent can be found in the basic legal instrument regulating surrogacy agreements in Israel, the Surrogate Mother Agreement (Approval of the Agreement and the Status of the Child) Law, 1996.[180] This enactment was heavily influenced by Jewish *halacha*, especially in determining the kind of preconditions necessary for making legal and valid surrogacy agreements.[181] One such precondition is the requirement contained in Section 2(5) of the Law under which the carrying mother must be of the same religion of the intended mother.[182] However, because the dictates of the Jewish *halacha* are irrelevant to the non-Jewish population, the same section continues to prescribe that the statutory committee in charge of approving surrogacy agreements can deviate from the religious matching requirement "where all parties to the agreement are non-Jews."[183] Thus, one is also able to imagine that a less restrictive religious matching

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Yisrael: Rashei Prakim le-Diyun, [*A Constitutional Ontology of the Religious Accommodations of the Arab Minority in Israel: General Topics for Discussion*], *in* KHASAMIM BIFNEI SHIVYON; HA-ARAVIM BE-YISRAEL [ARABS IN ISRAEL, BARRIERS TO EQUALITY] 43 (Shlomo Hasson & Michael M. Karayanni eds., 2006) (in Hebrew).

[178] Manar Hasan, *Ha-Politika shel ha-Kavod: Ha-Pariarkhiya, ha-Medina ve-Retsakh Nashim Beshem Kvod ha-Mishpakha* [*The Politics of Honor: The Patriarchy, the State and the Murder of Women in the Name of Family Honor*], *in* MIN MIGDAR POLITIKA [SEX GENDER POLITICS] 267, 297-301 (Dafna N. Izre'eli et al. eds., 1999) (in Hebrew).

See also Aida Touma-Sliman, *Culture, National Minority and the State: Working Against the "Crime of Family Honour" within the Palestinian Community in Israel*, *in* 'HONOUR' CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN 181, 182 (Lynn Welchman & Sara Hossain eds., 2005).

[179] *Id.*

[180] Carmel Shalev, *Halakha and Patriarchal Motherhood – An Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51, 60 n.26 (1998) ("It should be noted that the terms 'surrogate motherhood' or 'surrogacy' are not used in the Hebrew title of the law. If the title had been literally translated it would have read as 'Embryo Carrying Agreements.'").

[181] *Id.*

[182] *Id.* at 66-67.

[183] Surrogate Mother Agreement (Approval of the Agreement and the Status of the Child) Law, 1996, S.H. 1577, § 2(5).

requirement can apply in adoptions taking place in Israel among adopters and adoptees from the Palestinian-Arab community. For once again the place and meaning of religion in preserving the national unity and interests of the Palestinian-Arab minority are separate and different from those relevant for the Jewish community. However, it remains to be seen how far the Palestinian-Arab minority will be able to pursue this path for change and reform. As previously discussed, external and internal forces have worked to enforce separateness among the different Palestinian-Arab religious communities. This state of being is also influenced by a patriarchal social structure.

VI. CONCLUSION

¶60 The discussion in this article purports to offer a legal diagnosis of how religious accommodations of the Palestinian-Arab minority in Israel are perceived through dominant views. This article has suggested that a legal paradigm is apparent in matters concerning the Palestinian-Arab religious communities, which is perceived as an autonomous accommodation for a minority group. As the preceding discussion endeavored to show, the paradigm of separateness is closely linked to Israeli constitutional and political conceptions. However, it is equally important to note that if these arguments prove to be valid in the Israeli context, they might also be helpful in understanding the role religion plays within the state in a number of other countries in which the majority religion acquires some form of constitutional and political dominance. This could be especially true in such states that have recognized some form of relationship between religion and state that have caused certain tensions to evolve between the different groups.