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MINORITY RIGHTS IN DEEPLY DIVIDED SOCIETIES: A FRAMEWORK FOR ANALYSIS AND THE CASE OF THE ARAB-PALESTINIAN MINORITY IN ISRAEL

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This Article makes observation about contemporary ethnic relations in Israel. Its primary focus is to analyze a central element in the legal status of the Arab-Palestinian minority in Israel: namely, Arab-Palestinians' minority (or group-differentiated) rights. The theoretical framework employed, however, may also be useful in the comparative legal study of minorities elsewhere.

B. *A Loaded Triangle: Minority, State, and People—A Brief Historical and Political Account of Israel and Palestine*

In the land of Israel/Palestine live two peoples who are divided into three main communities. The Arab-Palestinian minority shares the Palestinian nationality, but yet carries Israeli citizenship. It has special features that distinguish it from both the rest of the Palestinian people and from the majority Jewish community in Israel. This community has a complex group identity, with more intricate cultural attributes (one of

which is bilingualism), a political leadership and civil society of its own, and, among other distinguishing characteristics, a political agenda that does not entirely overlap with that of either Palestine or Israel.[11] The Jewish and Arab-Palestinian communities are currently engaged in one of the most violent and deadly episodes of warfare between them since 1948; yet, the Arab-Palestinian minority, collectively, is not participating in this war and has not done so since the establishment of Israel. Whether it will participate in the future and whether such participation would result in a violent rupture of inter-communal relations in Israel is difficult to predict and, in any case, is not an issue addressed in this Article.

If, for many years, the Israeli Palestinians saw themselves as a possible bridge between the two peoples,[12] they now appear more as a tightrope walker balancing precariously over an abyss and buffeted by winds from both sides.

Israel was born in war. The hostilities that accompanied the establishment of the state from 1948-1949 caused many casualties on both sides and resulted in 600,000-760,000 Palestinian refugees.[13] Israel was established on the basis of rather wide international agreement, as manifested in the U.N. General Assembly Resolution 181 of November 29, 1947.[14] This resolution set up two states in Mandatory Palestine, an Arab one and a Jewish one, and granted the city of Jerusalem special international status.[15] In the background of the U.N. resolution stood the Holocaust of the Jewish people in the Second World War—an horrific and unprecedented catastrophe. After the 1948 War, the Arab state was never established, not even within narrower borders than those that had been allot-

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11. *See* Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. MIDDLE E. STUD. 321, 324-26 (1998).

12. Shany Payes, *Palestinian NGOs in Israel: A Campaign for Civic Equality in a Non-Civic State*, 8 ISRAEL STUDIES 60, 82 (2003).

13. Benny Morris, *Birth of the Palestinian Refugee Problem, 1947-1948*, 297-98 (1987).

14. *Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question*, G.A. Res. 181, U.N. Doc. A/519, at 131 (1947) [hereinafter Partition Resolution].

15. *Id.* at 133.

ted to it by the U.N. resolution, and Jerusalem was physically divided between the states of Israel and Jordan.[16]

By end of the 1948 War, about 150,000 Palestinians remained in what was to become Israel (commonly known as Israel within the Green Line—i.e., the borders established by the Armistice Agreements of 1949) and they became Israeli citizens.[17] Currently, the Arab-Palestinian minority constitutes about 19 percent of the Israeli population.[18] In the first two decades of statehood, this minority lived under Israeli military rule that greatly limited its civil and political rights. Thus, for example, although the right to vote and to be elected was not formally limited, in many ways such rights were diminished and weakened.[19] This military government, however, was removed in 1966.[20]

The 1948 War fragmented the Palestinian people and left them stateless. Some Arab-Palestinians remained in Israel, where they became a minority group; some remained in the other parts of Mandatory Palestine—i.e., the West Bank, which became part of Jordan, and the Gaza Strip, which came under Egypt's control; and, others fled or were expelled from the territory that became Israel and ended up in refugee camps in

16. For a discussion of the 1948 war, its aftermath, and the establishment of Israel, see, for example, BARUCH KIMMERLING & JOEL S. MIGDAL, PALESTINIANS: THE MAKING OF A PEOPLE 127-56 (1993); MERON BENVENISTI, SACRED LANDSCAPE, 144-92 (2000).

17. *See* KIMMERLING & MIGDAL, *supra* note 16, at 160; GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 110-11 (2002).

18. According to data from Israel's Central Bureau of Statistics, the Arab population constitutes about 19 percent of all residents of Israel (1.3 million people). CENTRAL BUREAU OF STATISTICS (ISRAEL), THE STATISTICAL ABSTRACT OF ISRAEL 2004, 2-10 *available at* http://www1.cbs.gov.il/reader. The figures include the Palestinian residents of East Jerusalem as well as Israeli citizens who have settled in the territories. *Id.* at 27-28. The internal segmentation of the Arab population in Israel is as follows: Christians—8.9 percent (115,700 residents), Druze—8.5 percent (110,800), Muslims/unclassified—82.6 percent (1,075,100). *Id.* at 2-10.

19. The most authoritative analysis of this period is LUSTICK, ARABS IN THE JEWISH STATE, *supra* note 4. For other important accounts, see also SABRI JIRYIS, THE ARABS IN ISRAEL (1976); MENACHEM HOFNUNG, DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL 73-123 (1996).

20. SHAFIR & PELED, *supra* note 17, at 125.

the West Bank, the Gaza Strip, Transjordan, Syria, and Lebanon.[21]

The civil status of Palestinian refugees in these various regions has not been uniform; conditions have largely depended on the policy of the host Arab state. In Lebanon, most refugees never received citizenship status; the same held true for the Gaza Strip, which belonged to Egypt until 1967.[22] The Palestinian people thus became both a "transstate people" and a "stateless people"—a people dispersed among nations, but lacking a state of its own—a mirror picture of what the Jews were for so long. The determinative experience of the Palestinian national consciousness is, however, not only the fragmentation of their people and the nation's lack of political sovereignty; the core reality also includes the *nakba*—their catastrophe in 1948.[23] Dispossession, expulsion, and becoming refugees without a homeland have caused a deep sense of resentment and pain among Palestinians.[24] Their sense of victimization was intensified by the perception of the Jews as colonizers or foreign (mainly Western) settlers.[25]

Palestinians and Arab states were not willing to accept the result of the 1948 War.[26] War, terror, violence, and counterviolence came to characterize Israel's relations with Palestinians and the Arab world (although in the late 1970s the weight of the conflict began to confine itself to the Israeli-Palestinian sphere). The 1967 War was the most fateful of the wars after 1948. In this war, Israel conquered, among other areas, the

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21. *See* KIMMERLING & MIGDAL, *supra* note 16, at 146-56; ELIA ZUREIK, PALESTINIAN REFUGEES AND THE PEACE PROCESS 9-10, 16-27, 29-64 (1996) [hereinafter ZUREIK, PALESTINIAN REFUGEES].

22. *See* ZUREIK, PALESTINIAN REFUGEES, *supra* note 21, at 33-35.

23. *See* RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF A MODERN NATIONAL CONSCIOUSNESS 178 (1997).

24. *Id.* at 177-79, 190-95; KIMMERLING & MIGDAL, *supra* note 16, at 127-29; BENVENISTI, SACRED LANDSCAPE, *supra* note 16, at 254, 268, 308-09; EDWARD W. SAID, THE END OF THE PEACE PROCESS: OSLO AND AFTER 267 (2000).

25. *See* Joseph H. Weiler, *Israel and the Creation of a Palestinian State: The Art of Impossible and the Possible*, *in* PALESTINE AND INTERNATIONAL LAW 55, 68-69 (Sanford R. Silverburg ed., 2002).

26. *See* MICHAEL B. OREN, SIX DAYS OF WAR 4-12 (2002); *see also* KHALIDI, *supra* note 23, at 177-209 (describing the Palestinians' state of mind following the 1948 War).

remaining parts of the Land of Israel/Mandatory Palestine.[27] A profound, threefold transformation occurred as a result. First, the Israeli occupation turned a large part of the Palestinian people—namely, the Palestinians in the West Bank and Gaza Strip—into "a people occupied in its land," subject to Israeli military rule without the protection of Israeli citizenship.[28] Second, Israel launched a multidimensional colonization project mainly in the West Bank, adding dispossession to occupation.[29] Moreover, Israeli settlements in the territories were viewed by many Palestinians as manifesting Israel's aim of making the occupation a permanent state of affairs,[30] presenting the danger of a further *nakba* (the threat of transfer, or ethnic cleansing). Third, for the first time since 1948, the Arab-Palestinian minority within Israel proper became linked to the wider Palestinian people through common subjection to the rule of a single political entity—Israel.[31]

This Article addresses a particular aspect of the legal status of the Arab-Palestinian minority, focusing mainly on the last two decades. It is important, then, to look closely at this period, which witnessed great political fluctuation.

In 1987, the first *Intifada* erupted in the territories.[32] The struggle was waged primarily via mass demonstrations, stone-throwing, and the killing of people regarded as collaborators with Israel.[33] The Palestinian minority in Israel did not participate in the violence at all,[34] which largely benefited inter-com-

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27. *See* SAID, *supra* note 24, at 160; *see also* SHAFIR & PELED, *supra* note 17, at 160-61, 190; OREN, *supra* note 26, at 306-12.

28. *See* KIMMERLING & MIGDAL, *supra* note 16, at 209-12; OREN, *supra* note 26, at 307 (noting that 1.2 million Palestinians were subject to the Israeli occupation).

29. *See* SAID, *supra* note 24, at 103-05, 169-70, 270-72; SHAFIR & PELED, *supra* note 17, at 159-65; Oren Yiftachel, *The Territorial Restructuring of Israel/Palestine: Settlement Versus Sumud*, *in* TENSION AREAS OF THE WORLD 105, 114-19 (D. Gordon Bennett ed., 1997).

30. *See* SAID, *supra* note 24, at 104, 169-70.

31. *See* NUR MASALHA, IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION 21-24 (2000).

32. *See* SHAFIR & PELED, *supra* note 17, at 197-98.

33. *Cf. id.* at 198-99, 210.

34. *See id.* at 128 (noting "the restraint exercised by citizen Palestinian[s]").

munal relations within Israel by allaying the majority community's traditional fear of the minority as a "fifth column."[35]

The *Intifada* ended with the Oslo agreement of 1993[36] and the establishment of the Palestinian Authority.[37] Concurrently, inter-communal relations within Israel improved substantially. The Israeli government adopted more egalitarian policies toward the Arab-Palestinian minority (such policies were especially evident in the areas of budgeting and public services).[38] The period of the Rabin-Peres government (1992-1996)—which was marked by the simultaneous unfolding of the Oslo process and growing Arab-Jewish conciliation within Israel—was a "golden age" for minority-majority relations in Israel. The tension between the two peoples greatly diminished, and, consequentially, the dilemma that once beset the minority lost some of its sting; at the same time, the minority received fairer treatment from its state.[39]

In late September 2000, the Oslo process collapsed. Palestinians in the West Bank and Gaza launched a second uprising against Israel, which this time included an armed struggle and terrorist acts.[40] The purpose of this uprising is not entirely clear. It is evident that most are fighting to be liberated from the yoke of Israel's occupation and colonization.

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35. *Cf.* ALAN DOWTY, THE JEWISH STATE: A CENTURY LATER 190 (1998); Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 NATIONS & NATIONALISM 475, 486 (2002) [hereinafter Smooha, *Model of Ethnic Democracy*] (explaining the majority's view of the Arab population as a "second threat").

36. *Declaration of Principles on Interim Self-Government Arrangements*, U.N. GAOR, 48th Sess., Annex, Agenda Item 10, U.N. SCOR, 48th Sess., Annex, U.N. Doc. A/48/486-S/26560 (1993).

37. *Agreement on the Gaza Strip and the Jericho Area*, U.N. GAOR, 49th Sess., Annex, Prov. Item 38, U.N. SCOR, 49th Sess., Annex, art. III(1), U.N. Doc. A/49/180-S/1994/727 (1994); *see also* Michel Paradis, Comment, *The Biggest Peace: The Structure of the Palestinian Legislative Council and the Politics of Separation*, 26 FORDHAM INT'L L.J. 1265, 1278 n.58 (2003).

38. *See* SHAFIR & PELED, *supra* note 17, at 131; Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 ISR. STUD., 198, 217-18 (1997).

39. DOCH VA'ADAT HACHAKIRA HAMAMLACHTIT LEBERUR HA-HITNAGSHUIOT BEIN SHERUTEI HABITACHON LEVEIN EZRACHEIM ISRAELIM BE-OCTOBER 2000 [THE REPORT OF THE OFFICIAL COMMISSION OF INQUIRY INTO THE OCTOBER 2000 EVENTS] pt. 1, § 85-87 (2003), *available at* http://or.barak.net.il/inside_index.htm. [hereinafter OR REPORT]; Smooha, *Model of Ethnic Democracy*, *supra* note 35, at 487-88.

40. *See* SHAFIR & PELED, *supra* note 17, at 202.

However, segments of the Palestinian people seek the total rectification of what they regard as the terrible injustice of 1948.[41] Is the current armed struggle, then, a struggle against Israel's very existence? For some Palestinians, it certainly is; for others, it is not.[42] It is not clear how this internal tension within the Palestinian community will work itself out, but it has, in any case, renewed the focus on two central questions of the Palestinian agenda. First, should the Palestinians attempt to achieve the solution that they believe is most just: the creation of a single state in the entire territory of Mandatory Palestine—perhaps not on the basis that was proposed in the past (a "secular-democratic state"), but rather on the basis of a "binational state" (a term that is clarified below)? Second, to what extent should the Palestinians insist on the "right of return" (the physical return of Palestinian refugees and their descendants to the territory of Israel proper)? These two questions are interlinked, since large-scale realization of the right of return would probably mean a profound change in the demographics of Israel, allowing (or, perhaps, causing) the new Palestinian majority to decide to unify Israel and Palestine into a single state.

As to the Arab-Palestinian minority, soon after the eruption of the second *Intifada*, something momentous occurred in the inter-communal relations in Israel. The Palestinian citizens of Israel engaged in violent demonstrations in October 2000.[43] In the course of the demonstrations, thirteen Palestinian demonstrators were killed by the police.[44] Several points need to be stressed with respect to these grave incidents. First, the Palestinian violence within Israel was limited to stone-throwing (in rare instances firebombs were also thrown).[45]

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41. *See* SHAUL MISHAL & AVRAHAM SELA, HAMAS: A BEHAVIORAL PROFILE, 10-16 (1997); KHALED HROUB, HAMAS: POLITICAL THOUGHT AND PRACTICE 78-80 (2000).

42. Justus Weiner, *Peace and Its Discontents: Israeli and Palestinian Intellectuals Who Reject the Current Peace Process*, 29 CORNELL INT'L L.J. 501 (1996); HROUB, *supra* note 41, at 48, 73-86.

43. *See* Thomas L. Friedman, *Arafat's War*, N.Y. TIMES, Oct. 13, 2000, at A33.

44. OR REPORT, *supra* note 39, at pt. 6, §§ 2-3; OCTOBER 2000—LAW AND POLITICS BEFORE THE OR COMMISSION 11 (Marwan Dalal ed., 2003) [hereinafter Dalal]; SHAFIR & PELED, *supra* note 17, at 134 (placing the death toll between ten and fifteen).

45. OR REPORT, *supra* note 39.

Second, to the discredit of some demonstrators, policemen were not their only target; occasionally, stone-throwing was also directed at Jewish civilians and, in one incident, a Jewish civilian was in fact killed.[46] Third, in some cases, particularly in mixed cities, civil violence was perpetrated in the opposite direction, with Jewish demonstrators attacking Arabs and Arab property.[47] Fourth, and most important, these violent events produced a deep and unprecedented distrust between the two communities within Israel. Israeli Palestinians, for their part, experienced a confluence of external repression (of their brethren in the occupied territories) and internal repression (of themselves).[48] The Jewish majority's experience, however, mirrored that of Israeli Palestinians: They were assaulted both externally (in the territories) and internally.[49] What made this worse from the standpoint of the majority community was that the reasons for the Palestinian activity in the territories and in Israel appeared to be conjoint: Israel's policy toward the Palestinian people in the territories and in Jerusalem (Haram al-Sharif/the Temple Mount), as distinct from the domestic complaints of the minority.

This Israeli-Jewish interpretation of events is somewhat simplistic, as the minority's claim (substantiated by the actual order of events) is that the magnitude and violence of the demonstrations in Israel intensified precisely because the police reacted so violently to the Israeli Palestinians' protest against Israel's policies in the territories.[50] The state's violence was perceived by Palestinian citizens as evidence of the "unbearable lightness" of the meaning of their citizenship, reinforcing their longstanding domestic complaint.[51] Meanwhile, the dominant Israeli-Jewish narrative continued to describe Palestinian violence on both sides of the Green Line as the manifestation of a long-standing fear—the development of a fifth column minority in Israel. This, then, is the mutually

46. *Id.*
47. *Id.* at pt. 2, § 203, pt. 3, ch. 10.
48. *Id.*
49. *Id.* at pt. 6, § 4.
50. *Id.* at pt. 1, § 265.
51. Dalal, *supra* note 44, at 21-25.

blinded lens with which the two sides view the events of October 2000.[52]

The wave of violent demonstrations within Israel receded and ended within the same month.[53] Due to public pressure from different sectors of Israeli society, the government established a commission of inquiry to investigate the events (the Or Commission), headed by a Supreme Court justice and including an Arab district-court judge.[54] The Commission wrestled with the problem for many months, and eventually issued its report in September 2003.[55] It is truly an important document which speaks lucidly and courageously about the faults and discriminatory nature of government policies towards the minority by nearly all Israeli governments.[56] The report also includes the minority's narrative, which is unprecedented in official Israeli documents, and, in so doing, it reflects the vitality that still remains in Israeli democracy. The work of the Or Commission led to three major achievements: First, the report included institutional recommendations for remedying past wrongs and addressing deep disparities between the two communities with respect to material, symbolic, and political resources.[57] Second, it dealt extensively with police-minority relations and advocated significant changes in police attitudes towards minorities; among other things, the report outlined strict restrictions on the use of lethal power (including rubber bullets) in future outbreaks of public disorder.[58] Third, the

52. Inter-communal relations within Israel since its establishment have witnessed only two violent episodes of a similar magnitude. One is the Kfar Kassem massacre, which occurred during the Sinai War of 1956, in which the Border Police killed forty-nine peaceful civilians who were returning from their work in the fields and did not know that a curfew had been imposed on the village. *See* SHAFIR & PELED, *supra* note 17, at 134. A second violent incident took place in March 1976 on what is now known as "Land Day." *See id.* at 115. In the course of violent demonstrations in the Galilee to protest the expropriation of Arab land in Israel, six Palestinian civilians were shot dead by Israeli security forces. *See id.*

53. OR REPORT, *supra* note 39, at pt. 2, § 203.

54. Dalal, *supra* note 44, at 11-12.

55. OR REPORT, *supra* note 39.

56. The main findings of discriminatory policy are outlined in the OR REPORT. *See id.* at pt. 1, §§ 18-67. The report's main recommendations for rectifying the past (and present) wrongs appear in *id.* at pt. 6, §§ 12-13, 41-42.

57. *Id.*

58. *Id.* at pt. 4, ch. 1&2, pt. 6, §§ 28-39.

Or Commission provided personalized recommendations for most of those in the chain of command involved in the killing of Arab demonstrators, including the former minister for internal security, the former chief of police, the former commander of the Northern Region, and the former commander of the Valleys district.[59]

The Israeli government adopted the Commission's recommendations in principle, but implemented only part of them. The personalized recommendations and a substantial part of the police-minority recommendations were executed. However, with respect to the institutional recommendations, this was not the case. The government appointed a ministerial committee (Lapid Committee), which was given time to study the Commission's recommendations and provide detailed suggestions concerning their implementation.[60] The Lapid Committee handed down recommendations for mild steps to rectify Israel's wrongs towards its national minority.[61] The recommendations were adopted by the government in June 2004; however, at present it does not appear that even these mild recommendations have been put into practice.

This short outline of the sociopolitical background is incomplete without mentioning at least one additional factor that has considerable legal implications. Israel is a country with multiple divisions. Beyond the national cleavage between the Jewish majority and the Arab Israeli minority, there are major internal divisions within the Jewish majority community. One is the fissure between the Orthodox-religious minority (which includes both ultra-Orthodox or *haredi* Jews and national-religious Jews) on the one hand, and the non-religious (secular and traditional) majority on the other. The main dispute here concerns the validity and extent of applicability of the Orthodox *Halachah* (Jewish law) to the public life of Israeli society.[62] However, this fissure is characterized also by different attitudes vis-à-vis the Palestinian/Israeli conflict and the relative force of Jewish ethnocentric feelings in general. A fur-

59. *Id.* at pt. 5, pt. 6, §§ 10-11.

60. Cabinet Communiqué, Cabinet Secretariat, Israel Minister of Foreign Affairs (Sept. 14, 2003), 2003 WL 62524814.

61. *Id.*

62. *See* BARUCH KIMMERLING, THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY 174 (2001); SHAFIR & PELED, *supra* note 17, at 30-32.

ther division exists between Ashkenazi Jews (immigrants from Europe and from North and Latin America) and Mizrahi Jews (immigrants from North Africa and the Middle East).[63] These divisions are of great significance to Israeli society, and deserve to be closely examined.[64] Nonetheless, the observations here will be restricted to the following legal dimension of Israel's reality: the country's internal divisions are all managed within a single legal system. This has important implications, which are referred to elsewhere as "peripheral radiation."[65] This term means that, due to the generic nature of legal norms, it is difficult to design or apply them in a selective fashion. This is especially true with respect to court decisions, but it also applies to various kinds of legislation. For instance, it is difficult to create an electoral system that protects Favored Minority A and simultaneously works to the disadvantage of Marginalized Minority B. As a result, in the case of Israel, although the state may want to protect Jewish minority groups, the Palestinian minority will sometimes inevitably receive unintended protection.

Third, this Article has not, thus far, dealt sufficiently with a special sub-category of group-differentiated rights, namely, historical rights. These rights, which are of special relevance to the Israeli situation, are clearly derived from the demands of compensatory justice, as opposed to distributive justice.[105]

105. *See* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 7, at 219 n.5 (defining the compensatory argument). *But see id.* at 220-21 n.5 (explaining

They derive from dramatic past occurrences in specific societies.

In Israel, historical rights have been claimed both by the majority and minority communities. The establishment of the state as a Jewish state was largely based on such historical rights.[106] On the other hand, important parts of the Arab-Palestinian minority also demand the realization of historical rights by arguing for the right of return for Palestinian refugees; the right of displaced persons (internal refugees) to return to their lands;[107] and the right to compensation and rectification for the dispossession of land undergone by many Arab-Palestinian citizens, particularly in the first three decades of the state.[108] To this may be added the minority's demand for affirmative action, grounded in the longstanding violation of the obligation of distributive justice—that is, a claim based on the history of ongoing, routine discrimination against the Arab citizens for more than half a century.

Fourth, the above-outlined framework of analysis for group-differentiated rights lacks a further refinement: distinctions between the situations and conditions of different minorities. One major distinction among minorities exists between those having a multilateral structure and those with a bilateral structure. A multilateral structure is one in which a minority community lives near other members of its community (i.e., a kin-state), while being part of a state in which another commu-

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that group-differentiated these rights derive from a theory of distributive justice).

106. Compare the opening passages of Ha-Hakhraza Al Hakamat Medinat Yisra-el [Declaration of Independence of Israel] (May 14, 1948), with GANS, *supra* note 84, at 97-104, and Asa Kasher, *Justice and Affirmative Action: Naturalization and the Law of Return*, 15 ISRAEL Y.B. ON HUM. RTS. 101 (Yoram Dinstein ed., 1985).

107. Over 15 percent of the Palestinian citizens of Israel are displaced persons or descendants of displaced persons—people who in the course of the 1948 war or shortly thereafter fled or were expelled from their homes to a different community within Israel, and were not permitted to return. *See* HILEL KOHEN [HILLEL COHEN], HA-NIFKADIM HA-NOKHAKHIM: HA-PALITIM HA-PALISTINIM B-ISRA-EL ME-AZ 1948 [THE PRESENT ABSENTEES: THE PALESTINIAN REFUGEES IN ISRAEL SINCE 1948] 7, 21-25 (2000).

108. *See* DOWTY, *supra* note 35, at 198; YIFTACHEL, *supra* note 72, at 78, 166, 172; Alexander (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L L. & POL. 923, 947-48 (2001).

nity constitutes a majority. Familiar examples, apart from the Arab-Palestinian minority in Israel, are Kashmir (India and Pakistan), Northern Ireland (where the Irish-Catholic minority, who are citizens of the United Kingdom, lives in close proximity to the Republic of Ireland), Cyprus (in which two national communities are each closely linked to Greece and Turkey), and the Albanian minorities in Serbia and Macedonia.[109] By contrast, other minorities are bilateral and more internal in nature. Examples include the French-speaking minority in Canada, the Catalan minority in Spain, and most indigenous peoples throughout the world. This distinction is important in group-differentiated rights because, in multilateral situations, group-differentiated rights are likely to encompass expressions of the link between the minority and members its community living elsewhere. In Northern Ireland, for example, a central element in the 1998 peace agreement and related legislation was the establishment of special institutions in which the Irish Republic participates and—in a formal and symbolic way—influence various matters in Northern Ireland.[110]

Fifth, members of different minority groups often strive for different kinds of group-differentiated rights. The main distinction here is between homeland minorities and immigrant groups.[111]

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109. *See, e.g.*, Donald Horowitz, *Irredentas and Secessions: Adjacent Phenomena, Neglected Connections, in* IRREDENTISM AND INTERNATIONAL POLITICS 9 (Naomi Chazan ed., 1991) (discussing secessionist and irredentist movements in ethnically heterogeneous societies).

110. *See* Antony Alcock, *From Conflict to Agreement in Northern Ireland: Lessons from Europe, in* NORTHERN IRELAND AND THE DIVIDED WORLD: THE NORTHERN IRELAND CONFLICT AND THE GOOD FRIDAY AGREEMENT IN COMPARATIVE PERSPECTIVE 169, 170-76 (John McGarry ed., 2001); Geoff Gilbert, *The Northern Ireland Peace Agreement, Minority Rights and Self-Determination*, 47 INT'L & COMP. L.Q. 943, 946, 950 (1998); Brian Thompson, *Transcending Territory: Towards an Agreed Northern Ireland?*, 6 INT'L J. ON MINORITY & GROUP RTS. 235, 255-59 (1999).

111. For the terminology of "homeland" versus "immigrant" groups, see Milton J. Esman, *Two Dimensions of Ethnic Politics: Defense of Homelands, Immigrant Rights*, 8 ETHNIC & RACIAL STUD. 438, 438-40 (1985); Oren Yiftachel, *The Ethnic Democracy Model and Its Applicability to the Case of Israel*, 15 ETHNIC & RACIAL STUD. 125-37 (1992). For the normative ramifications of this distinction, see KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 7, at 95-96; KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 7, at 53-55 and ch. 8; GANS, *supra* note 84, at 62-63.

There are two primary differences between homeland minorities and immigrant groups. First, immigrants undergo a profound process of transition from their homeland to a new land. This transition is individual in nature, and involves elements of separation. Most times, there is an unwritten agreement between immigrants and the new society: they come to it and are received as individuals who wish to integrate into the state, not as a separate national community that seeks to comprehensively preserve its original culture within its adopted country.[112] Second, because the immigrant culture is built on the basis of personal and family immigration, it usually lacks elements that are important to the existence of a separate, comprehensive culture, such as territorial concentration.[113]

E. *The Distinction between Different Kinds of Divided States*

1. *Civic Nation-State, Ethnic Nation-State, and Binational States*

States that are divided along national lines—i.e., states whose situation is multinational—may be distinguished in two ways based on their reaction to this division. The first distinction is between binational (or, as the case may be, multinational) states and nation-states; the second is between two kinds of nation-states.

Binational or multinational states are states whose multinationality is not just demographic, but also foundational.[126] Such states are built on two foundations: communalism and

125. For criticism of this distinction and for proposals for its modification, see AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001) 17-18, 30-32 and ch. 6.

126. *See* LIJPHART, DEMOCRACIES, *supra* note 10.

partnership.[127] Communalism means that the state accepts the centrality of the link between its citizens and their ethnonational communities. It does so in practice by maintaining, and even structuring, the links between individuals and ethnonational institutions, which became or remain a significant mediator between the individual and the state. In the classic examples of the binational or multinational state—e.g., Switzerland, Canada, and Belgium—the federal structure reflects the attribute of communalism. The federal structure includes territorial subunits (cantons or provinces), in at least one of which the minority community is the majority, meaning that, in such territorial units, the minority community is largely self-governed through provincial institutions and elected representatives.[128] In cases without such federal structure, the minority may enjoy cultural, as distinct from territorial, autonomy, meaning that major cultural institutions—such as education and religion—are subject to self-government by the members of the minority community.[129]

A second element of binationalism concerns the form of inter-communal relations. Partnership is involved here even if tensions are sometimes also involved. Every community is given a substantive role and fair share in the allocation of the goods of the state: material goods (budgets, services, immigration quotas, etc.); symbolic goods (the state's official languages, values, heroes, holidays, the names of its sites, etc.); and political goods of the state (i.e., representation in allocating and policy making governmental institutions). In the above-mentioned examples of binationalism—Switzerland, Belgium, and Canada—the minority's representation in the societal political institutions is twofold. First, it stems from the powers granted to the provinces and the obligation to include them in certain nation-wide decisions. One example is the ability provinces have to oppose, and sometimes veto, changes to the federal constitution.[130] In this regard, the minority is

127. *See id.*

128. *See* DANIEL ELAZAR, EXPLORING FEDERALISM 71-78 (1987); Yoram Dinstein, *The Degree of Self-Rule of Minorities in Unitarian and Federal States*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW, *supra* note 116, at 221, 222, 230-31.

129. LIJPHART, DEMOCRACIES, *supra* note 10, at 41-43.

130. For the changing nature of Quebec's veto power in Canada, see PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 13 (1988);

represented in federal decisions by dint of its governance of one of the subunits of the federation. Second, it may be based on direct representation in the federal government itself. Sometimes the constitution mandates minority representation in the federal government; other times there is no such legal requirement, but a political practice exists.[131]

In contrast to binational/multinational states, there is a clear link between the state and a particular nation in nation-states. Nation-states, however, are defined by the identity and nature of the nation, which divides nation-states into two types. The first comprises states that, like binational states, maintain multiple national identities, but, unlike binational states, accord clear, institutionalized dominance to a particular ethno-national community. This group of states can be called ethnic nation-states. By contrast, the other type of nation-state energetically seeks to dispel national, ethnic, and other divisions by amalgamating the different communities into a single nation—a nation in which common citizenship is the overarching identity of the members of the society. These are civic nation-states.[132]

PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 53-77 (2d ed. 1985); JOSEPH E. MAGNET, CONSTITUTIONAL LAW OF CANADA (1998).

131. *See, e.g.*, BELG. CONST. (Coordinated Constitution of February 17, 1994) tit. III, ch. III, § II, art. 99 (mandating that "the Council of Ministers include[ ] as many French-speaking members as Dutch-speaking members"), *available at* http://www.fed-parl.be/constitution_uk.html (English language Belgian Constitution at Belgian Parliament website). For historical background and comparison to Canada, see Maureen Covell, *Federalization and Federalism: Belgium and Canada, in* FEDERALISM AND THE ROLE OF THE STATE 57 (Herman Bakvis & William M. Chandler eds., 1987).

132. The distinction between the two types of nation-states is based on a difference in the type of nationalism possessed by the dominant group. The ethnic nation-state is characterized by ethnic nationalism: nationalism which is based on deep, emotional, and quite closed identity components of ethnic extraction (real or imaginary), particular culture and historical commonality. *Cf.* ANTHONY D. SMITH, NATIONAL IDENTITY 11 (1991). Civic nationalism, on the other hand, is much more inclusive. *Cf. id.* It is primarily built on a common residence in the same territory and the existence of a basic, common normative nucleus. *Cf. id.* The nature of nationalism in a given society may change, but this is a complex and gradual process that occurs only under certain circumstances. For an extensive discussion including an illustration by means of the Canadian example, see Raymond Breton, *From Ethnic to Civic Nationalism: English Canada and Quebec*, 11 ETHNIC & RACIAL STUD. 85 (1988).

Outstanding examples of civic nation-states are all large immigration states, such as the United States, Australia, and Canada (with respect to its immigrant minorities, not including its French-speaking minority), and older immigration states of Europe, such as France and Britain. Israel, on the other hand, is an ethnic nation-state. This is manifested both on the practical and formal-legal levels. On the legal level, this involves, among other things, Israel's self-declaration—in its constitutive documents—that it is a "Jewish state" and a "Jewish and democratic state."[133] In this, Israel is not alone. Consider the following examples: Malaysia, regarding the difference in status between the Malays and the Chinese and Indian minorities; Northern Ireland, at least until the 1970s, regarding its treatment of the Irish Catholic minority; Sri Lanka, regarding the Tamil minority.[134] Likewise, a significant proportion of the states that emerged following the fall of communism, the dissolution of the Soviet Union, and the dissolution of Yugoslavia fit this description. This pertains to Romania and Slovakia, regarding the Hungarian minorities; to the Baltic states and Ukraine, regarding their Russian minorities; to the Caucasian countries, such as Armenia and Azerbaijan; to the states that seceded from the Yugoslavian Federation, except for Bosnia, following the Dayton Agreement; and in a more limited way, to Macedonia.[135]

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133. Declaration of Independence of Israel, *supra* note 106; Khok Yesod: Kvod Ha-Adam V'Kheruto [Basic Law: Human Dignity and Liberty], art. 1A 1992, S.H. 150; Khok Yesod: Khofesh Ha-Isuk [Basic Law: Freedom of Occupation], art. 2, 1994, S.H. 90; Khok Yesod: Ha-Knesset [Basic Law: The Knesset], art. 7A, 1958, 12 L.S.I. 85.

134. For Malaysia, see Diane Mauzy, *Malaysia: Malay Political Hegemony and 'Coercive Consociationalism'*, *in* THE POLITICS OF ETHNIC CONFLICT REGULATION 106, 106-27 (John McGarry & Brendan O'Leary eds., 1993) (discussing Malay hegemony over the non-Malay minority). For Northern Ireland, see BRENDAN O'LEARY & JOHN MCGARRY, THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND 170-77 (1993). For Sri-Lanka, see HANNUM, *supra* note 93, at 280-307.

135. For Slovakia, see Karen Henderson, *Minorities and Politics in the Slovak Republic*, *in* MINORITIES IN EUROPE: CROATIA, ESTONIA AND SLOVAKIA, 143 (Sanzana Trifunovska ed., 1999); Beata Kovacs Nas, *Hungarians in Slovakia: The Last Stage of Communism Is Nationalism*, *in* PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 183, 183-84 (Ted Robert Gurr ed., 2000). For Estonia, see Vello Pettai & Klara Hallik, *Understanding Processes of Ethnic Control: Segmentation, Dependency and Co-Optation in Post-Communist Estonia*, 8 NATIONS & NATIONALISM 505 (2002) (discussing Estonian dominance over

3. *Maintaining Minority Religions and Their Institutions*

The pressures on the minority for biculturalism in the context of religion and freedom of religious worship are different from those operating in the domain of education. This reflects the ethnocentric and non-missionary nature of Jewish Orthodoxy. Yet, there are pressures on Arab-Palestinian religious traditions, and their source is the common enemy of all orthodoxy, namely, secularization. Since the establishment of Israel, Arab society has undergone processes of modernization that have been influenced by secular currents in Israeli society, as well as (to a more limited extent) by secular Israeli legislation that will be mentioned below. At the same time, social processes in Arab-Palestinian society in Israel are not uniform, and the power of the Islamic movement in the country is evidence of the dialectical forces at play.

A further point is that, in contrast to the Jewish majority community, only one option was offered the Arab-Palestinians in regard to state education—namely, education that is a-religious in nature. Thus, in their elementary and high school education, the two sexes study jointly in the classrooms, as do members of different religious communities and believers and non-believers; the curriculum includes only a very small component of religious studies.[212] Although there is an option of

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210. *See* HUMAN RIGHTS WATCH, *supra* note 201, at 18-19 (although noting that few parents choose this option).

211. Ruth Gavison, *Does Equality Require Integration? A Case Study*, 3 DEMOCRATIC CULTURE 37 (2000); *see also*, H.C. 4091/96, Abu Shamis v. Iriyat Tel-Aviv Yafo [Abu Shamis v. The Municipality of Tel Aviv-Jaffa] (unpublished decision), *available at* http://62.90.71.124/files/96/910/040/f07/96040910.f07.HTM

212. *See* AL-HAJ, *supra* note 200, at 86-101, 139.

private-religious education, with state funding, it is available only to the Christian community.[213]

In addition, corrosive pressures on all minority religions are intensified by meager budgetary allocations for religious services. 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.[214] In other words, for religious Jews, the pressures of secularization have been more counterbalanced than for believers of other religions.

These are indeed significant limitations; still, it is important not to obfuscate the fact that the minority is granted important accommodation rights in the area of religion. The key factor is that an Ottoman legal legacy that was also maintained in Mandatory law—the *millet* regime—has been left in place. The main significance of this legal regime in the present is twofold. First, personal law for the individual (the family law that pertains to the establishment and dissolution of a family and to parent-child relations) is to a large extent religious law, i.e., the set of norms created by the religious community to which the individual belongs. Second, these matters (i.e., matters of personal status) are partially subjected to the exclusive jurisdiction of the religious courts of the individual's religious community.[215]

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213. *See id.* at 94-101. The demographic data in regard to the internal division of the minority community are: about 82.6 percent Muslims or unclassified; about 8.9 percent Christians; about 8.5 percent Druze. *See* THE STATISTICAL ABSTRACT OF ISRAEL 2004, *supra* note 18, at 2-10.

214. A distinct echo of this is found in data that are detailed in the following rulings of the Supreme Court: H.C. 240/98, Adalah v. Misrad Ha-Datot [The Ministry for Religious Affairs], 52(5) P.D. 167, 172; H.C. 1113/99, Adalah v. Misrad Ha-Datot [The Ministry for Religious Affairs], 54(2) P.D. 164.

215. For a comprehensive discussion of the legal status of the religious communities of the Arab minority in Israel, 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 224-226 (1998) [hereinafter ISRAELI ICCPR REPORT]; Moussa Abou-Ramadan, *Les Minorities en Israel et le Droit International* [*Minorities in Israel and International Law*] (These de Droit, Universite d'Aix-Marseille III, 2001); KRETZMER, *supra* note 142, at 166-68; Moussa Abou-Ramadan, *Judicial Activism of Shari'a Appeals Court in Israel (1994-2001): Rise and Crisis*, 27 FORDHAM INT'L L.J. 254 [hereinafter Abou-Ramadan, *Shari'a Court*]; Raday, *supra* note 121, at 492-93.

More specifically, Articles 51-54 of the Palestine Order-in-Council, 1922[216]—which, like most legal norms that prevailed in the Mandatory period, were absorbed into Israeli law—stipulated that marriage and divorce, custody and adoption, and other matters of personal status are to be determined (for the most part) according to the religious law of the religion to which the individual belongs and are to be adjudicated (for the most part) in the framework of the court system of the pertinent religious community.[217] A parallel option of civil marriage does not exist, and a legal provision for civil burial was enacted only in the mid 1990s. The upshot of this legal regime is, from many standpoints, a religious endogamy involving the lack of a domestic legal option for mixed marriages, as most of the religious communities recognize only intra-religious marriage.[218]

Parallel legislation manifests high sensitivity toward the matter of religious conversion. Among other things, it imposes criminal sanctions for attempting to lure someone into religious conversion.[219]

The *millet* legal regime and the related legislation accord well with the model of the ethnic nation-state to which Israel belongs. They clearly act in accordance with the dominant community's ethnic nationality, which seeks to maintain a relative social segregation from the other communities in the

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216. Palestine Order-in-Council, arts. 51-54, *in* 3 LAWS OF PALESTINE, *supra* note 138, at 2581-82.

217. Article 53 has since been largely annulled. Its main sections were replaced with the Khok Shiput Batei Deen Rabaniyim (Nisuin Ve-Girushin) [Rabbinical Courts Jurisdiction (Marriage and Divorce) Law], 1953, 7 L.S.I. 64.

218. Sammy Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. SOC'Y & HIST. 256, 260-61 (1980). Accuracy requires adding that, from a legal standpoint, the religious endogamy was not total. The *Shari'a* courts could, according to the *Shari'a*, marry a non-Muslim woman to a Muslim man without her having to change her religion. However, the Israeli Interior Ministry ordered the *Shari'a* courts to marry Muslim men and Jewish women only after the woman had converted to Islam. *See* JIRYIS, *supra* note 19, at 199; AMNON RUBINSTIYN [AMNON RUBINSTEIN] & BARAK M'DINAH [BARAK MEDINA], HA-MISHPAT HA-KONSTITUTZI-ONI SHEL M'DINAT YISRA-EL [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL] 196 (5th ed. 1996).

219. *See* Khok Ha-Onshin [Penal Law], § 174a & 174b, 1977, Special Volume L.S.I. . *See also* Khok Imutz Yeladim [Adoption of Children Law], § 5, 1981, 35 L.S.I. 360 ("The adopter shall be of the same religion as the adoptee.").

state.[220] A major question that arises in these contexts is whether the segregation (the discouragement of mixed marriages, etc.) is pursued unilaterally by the dominant community or, instead, reflects a common desire among all the relevant communities. In other words, does the segregation take the form of separation arrangements (such as the *millet*) that are imposed on the nondominant communities (as in the example of racial segregation in the southern United States until the 1960s or of prohibitions on interracial marriage under the Apartheid regime); or, instead, is the segregation desired by the overwhelming majority of individuals who compose all the relevant communities? The evidence suggests that the latter is the case; that is, the continuing *millet* regime in Israel is a manifestation of "segregation by will" of the communities in the area of personal status.[221]

I shall now look more closely at the response of Israeli law to the internal limitations that exist in the relations between the minority community and its individuals and are based on religion or social tradition.

In general, Israeli law is wary of direct intervention in the traditional ways of life of the national minority, even if they are problematic from a liberal standpoint. However, certain legal developments have impacted the *millet* regime and other aspects of the culture and social structure of the minority community. With respect to the status of women, for example,

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220. The *millet* system provides another possible advantage for the Israeli ethnic democracy: Religious identities—as sub-groups' identifications within the Arab minority—may somewhat detract from the minority's ability to construct a single, powerful *national* identity. For a similar point see Barzilai, *supra* note 182, at 436.

221. *See* Lerner, *supra* note 116. The term "segregation by will" is likely to mislead: The lack of coercion is on the level of inter-community relations, but substantial coercion still exists in community-individual relations. The religious law, recognized by the *millet*, imposes limitations on the individual regarding his ability to seek emotional involvement with whomever he chooses and contains other derogations from freedom of conscience. In Kymlicka's terms, this involves "internal restrictions" (as opposed to "external protections"). *See* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 7, at 35-37. At the same time, the elements of intra-communal coercion have been mitigated in different ways for members of all the religious communities in Israel. There is, for instance, official recognition of common-law marriages and marriages performed outside of Israel (if the marriages are valid according to the law of the foreign country). *See* RUBINSTEIN & MEDINA, *supra* note 218, at 199-211.

new civil legislation, as well as innovative Supreme Court rulings in areas of property relations between couples, child custody, succession, and so on, have affected all citizens of Israel, as well as the religious courts of all communities.[222] Likewise, important criminal prohibitions are part of the penal code, such as those against bigamy,[223] the marriage of minors,[224] and murder in the name of family honor.[225]

These developments have fostered a clear change in the status of Arab (and Jewish) women; at the same time, many argue that the above-mentioned prohibitions are too weakly enforced.[226] This reflects the authorities' caution, and perhaps also certain indifference, in regard to implementing these norms.

In less sensitive areas of women's status, the wariness about intervening in traditional ways of life appears in the norms themselves. In regard to accommodation rights, this takes the form of exemptions from certain society-wide obligations. For example, women from the Druze minority group, whose males are required to do military service, are themselves exempt from service; and Muslim and Druze women are exempt from presenting pictures of themselves for purposes of the residents' registrar and identity cards.[227]

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222. *See* Khok Shivui Zkhuyot Ha-Isha [Women's Equal Rights Law], 1951, 5 L.S.I. 171 (with important amendments over the years, especially in 2000); Khok Gil Ha-Nisuin [Marriage Age Law], 1950, 4 L.S.I. 158; Khok Shivyon Hizdamnuyot Ba-Avoda [Equality of Opportunities in Labor Law], 1988, 42 L.S.I. 31; Khok Sakhar Shaveh La-Oved V'La-Ovedet [Equal Pay for Men and Women Employees Law], 1996, S.H. 230; Khok Yakhasey Mamon Bein Bney Ha-Zug [Spouses (Property Relations) Law], 1973, 27 L.S.I. 31; ISRAELI ICCPR REPORT, *supra* note 215.

223. Diney Ha-Onshin (Ribuy Nisuin) [Penal Law Amendment (Bigamy) Law], 1959, 13 L.S.I. 152.

224. Khok Limni-at Hatrada Minit [Prevention of Sexual Harassment Law], 1998, S.H. 166.

225. Khok Limni-at Alimut Ba-Mishpakha [Prevention of Violence in the Family Law], 1991, S.H. 138.

226. THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, COMMENTS ON THE COMBINED INITIAL AND FIRST PERIODIC REPORT CONCERNING THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 173 (1998).

227. Tzav Mirsham Ha-Toshavim (Ptor Nashim Muslamiyot V'Druziyot Mimesirat Tmunot) [Population Registry Order (Exemption for Muslim and Druze Women from Providing Photographs)], 1954; Khok Mirsham Ha-Okhlusin [Population Registry Law], art. 25, 1965, 19 L.S.I. 288.

In regard to religion, accommodation rights are granted in certain other legal domains. One very important area is that of employment. Article 7 of the Hours of Work and Rest Law, 1951,[228] stipulates a right to weekly rest for every worker; and for a non-Jew, this right pertains to the day he regards as his weekly rest day. Article 9(c)(a) of this law forbids discriminating against a worker because of his unwillingness to work on the weekly rest days during which his religion prohibits labor.[229] Article 18A of the Law and Administration Ordinance, 1948,[230] extended the provision on weekly rest to Jewish holidays as well; thus, for a non-Jew, the provision pertains either to Jewish holidays or to holidays of his own community, "according to his practice."[231]

A critical examination will reveal, however, that leaving the issue of the rest day to the discretion of the non-Jewish worker means that, given the overwhelming dependence on a Jewish-dominated labor market, many Arab workers do not have real freedom of choice. On the other hand, for the most part, the right of private Arab-owned businesses to observe their rest days rather than those of the Jewish population is protected. The spatial separation between the communities facilitates operation of different observance days, as does the separation between neighborhoods in the mixed cities.[232]

Similarly, in comparable contexts in which "internal limitations" have been imposed for religious reasons on members of the majority Jewish community—such as in regard to raising pigs—Israeli law has been careful to include an exemption for Arab or Christian neighborhoods and communities.[233]

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228. Khok Sh'ot Avoda V' Menukha [Hours of Work and Rest Law], 1951, 5 L.S.I. 125.

229. Hours of Work and Rest Law, art. 9(c)(a), 1951, 5 L.S.I. 125.

230. Law and Administration Ordinance, art. 18A, 1 L.S.I. 7 (1948).

231. *See* RUBINSTEIN & MEDINA, *supra* note 218, at 212, 286; KRETZMER, *supra* note 142, at 21.

232. Article 9(a)(c) of the Hours of Work and Rest Law contains an order exempting from the official rest days any business owner, store owner, or factory owner who operates in a local authority at least one-fourth of whose residents are non-Jews. Hours of Work and Rest Law, 1951, 5 L.S.I. 125.

233. Khok Khag Ha-Matzot (Isurei Khametz) [Festival of Matzot (Prohibition on Leaven) Law], art. 2, 1986, 40 L.S.I. 231; Khok Isur Gidul Khazir [Pig-Raising Prohibition Law], art. 2(1) & Schedule, 1962, 16 L.S.I. 93.

2. *Limited Self-Government Rights in the Area of Religion*

The main sub-domains in the domain of religion are services for religious needs of believers and the religious courts. In regard to the latter, the minority community enjoys a modest degree of self-government. As noted earlier, Israeli law left the Ottoman *millet* system in place. Under this system the individual was subject, in most areas of family law, to the jurisdiction of the religious courts of the individual's religion.[261] Moreover, Article 83 of the Palestine Order-in-Council, 1922, adds that "[e]ach religious community recognised by the Government shall enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner."[262]

One should note however, that Article 83 is not directly applicable to the Muslim community, given that the Ottoman *millet* regime protected the non-Muslim religious communities. There was no need to protect Islam at that time because it was the official religion of the Ottoman Empire. The status of the Muslim community was indeed enhanced by this fact and certain aspects of this once-special status remain in Israeli law, with the *Shari'a* courts holding, until recently, broader jurisdictional powers than other religious courts on the basis of Article 53 of the Order-in-Council.[263]

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260. This distinction as to degrees of schools' autonomy has some significance. *Jabareen* dealt with an issue in the area of intra-communal relations within the minority, and the enhanced autonomy of some of the ecclesiastical schools was one of the bases for the Court's decision to confirm the right of a school from this group to reject a religious Muslim girl who practices head covering and refuses to participate in certain activities. *Id.*

261. *See* Part II.A.3.

262. Palestine Order-in-Council, art. 83, *in* 3 LAWS OF PALESTINE, *supra* note 138, at 2588.

263. *See* S.T. 1/62 Abu-Anjela v. Pakid Ha-Rishum Shel Lishkat Mirsham Ha-Toshavim, Tel Aviv-Yaffo [Registration Clerk of the Bureau of Registra-

The degree of self-government existing in the legal framework regulating the *Shari'a* courts and family law is important, but, over the years, their self-government potential has diminished in several ways. One way is via the majority community's control over the budgets of the religious courts and its great influence over appointments to them. The sole source of budgeting for the *Shari'a* court system is the state budget, and, until recently, the relevant budget was controlled by the Religious Affairs Ministry, and the relevant department was always headed by a Jew.[264] As for the appointment of *qadis* (the judges of the *Shari'a* courts), this was done according to the Qadis Law, 1961.[265] A nine-member committee appoints the *qadis*.[266] A certain degree of self-government is guaranteed by the requirement that that at least five members of the committee must be Muslims.[267] Nevertheless, the choice of the Muslim and non-Muslim members is not made by the minority community itself. Apart from the two *qadis* who are members of the appointing committee, two other members are government Ministers, three are Members of the Knesset elected by a majority of the Knesset, and the two remaining members are chosen by the Israeli Bar.[268] All three bodies are Jewish-controlled.[269]

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tion of Residents, Tel Aviv-Jaffa], 17(4) P.D. 2751; Abou-Ramadan, *Shari'a Court*, *supra* note 215.

264. *See* Saban, Legal Status, *supra* note 6, at 296-97.

265. Qadis Law, 1961, 15 L.S.I. 123.

266. *Id.* art. 4.

267. *Id.*

268. *Id.*

269. *See* JIRYIS, *supra* note 19, at 198. One may add another interesting and non-coincidental point with regard to the nomination process of *qadis*. While the nomination of judges in Israel is also by a nine-member committee (Article 4 of the Basic Law: The Judiciary), there is an important difference between the two committees concerning the balance between professional and political members. In the judges nomination committee, the ratio is five to four in favor of the professional side (three Judges and two representatives of the Bar versus two ministers and two members of the Knesset); the balance in the *qadis* nomination committee is the other way around, or four to five (two *qadis* and two members of the Bar versus three ministers and two members of the Knesset). The non-coincidental nature of this difference is reinforced when we add a comparison with the nomination process of the Rabbinical (Jewish-religious) Courts' Judges (*Dayaneem*). There the nomination committee consists of ten members, whose balance is six to four in favor of the professionals (six from the rabbinical side and the Bar

A second way in which the extent of self-government is diminished is by limiting the exclusive jurisdictional powers that were granted to the *Shari'a* courts in Article 52 of the Palestine Order-in-Council. This restriction stemmed from three measures. The first involved taking away the power of the *Shari'a* courts to manage the religious endowments (i.e., the Muslim *Waqf*), a power they possessed in the past based on Article 52 and on the Procedure of the Religious Muslim Courts Law of the Ottoman period. This power was transferred to a governmental authority, the Custodian of Absentee Properties.[270] Second, a general limitation was imposed on the *Shari'a* courts, and all other religious courts, regarding the substantive law that they apply. At issue is the subjugation of these courts (and other religious courts—rabbinical and ecclesiastical) to certain major secular norms in the area of family law.[271] A third limitation was imposed by a 2001 amendment to the Family Courts Law,[272] which curbed the enhanced exclusive jurisdiction powers that the *Shari'a* courts enjoyed on a variety of personal-status issues and equalized their powers with those of the other religious courts. It left the *Shari'a* courts with exclusive jurisdiction only in "matters of marriage and divorce."[273] On all other personal-status matters, concurrent jurisdiction was granted to the civil courts (the family courts).[274] The initiators of this legislative move in the Knesset—themselves members of the minority community—justified the proposed amendment in terms of protecting the "minority within the minority," namely, women.[275] As can be expected, this amendment—an attenuation of minority, self-government rights, in the name of protecting the individual rights of minority members—sparked a controversy within the group.[276]

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versus four from the political branches). *See* Khok Ha-Dayanim [Rabbinical Courts' Judges Act], art. 6, 1955, S.H. 68.

270. *See infra* text accompanying note 286.

271. *See supra* text accompanying notes 224-227.

272. Khok Beit Mishpat L'Inyanei Mishpakha (Tikun Mis. 5) [Family Court Law (Amendment No. 5)], 2001, *at* http://www.knesset.gov.il/privatelaw/data/15/3/1421_3.rtf.

273. *Id.*

274. *Id.*

275. *See* BARZILAI, COMMUNITIES AND LAW, *supra* note 155, at 108, 174-76.

276. *See* Lisa Hajjar, *Between a Rock and a Hard Place: Arab Women, Liberal Feminism and the Israeli State,* MIDDLE EAST REP. 27 (Summer 1998).

Along with the judicial powers in personal-status areas, the minority could have had additional self-governing ability in the domain of religion by controlling the institutions that provide religious services; but this ability, too, has been diminished. Moreover, this diminution of the potential for self-government was done in a discriminatory fashion: Diminution of this potential was greater for the Muslim community than for the Christian communities (or the Druze community).[277] The damage to the Muslims' degree of self-government in regard to religious services stemmed from two main sources. First, certain autonomous tools that this community had possessed during the Mandatory period—particularly the *Waqf*—were taken from it. Second, the resulting institutional vacuum was not filled by a new, recognized institutional framework, such as the "religious councils" (which were established by law and receive state funding) that the Jewish majority community and the Druze community were granted.[278] The State makes certain that the religious services it provides to Muslims, however modest and budgetarily biased, are extended directly, without the involvement of any mediatory-institutional actor from the Muslim community (let alone a representative actor) and without input from the local authorities.[279]

As noted, the first and main source of the damage to the self-government of the Muslim religious community was the removal of the organizational framework that it possessed before the establishment of the State, particularly the elimination of institutional control of the *Waqf*. In the Mandatory period, a Supreme Muslim Religious Council was established on the ba-

277. *See* Abou-Ramadan, *Shari'a Court*, *supra* note 215.

278. *See* Khok Sheirutey Ha-Dat Ha-Yehudiyim (Nosakh Meshulav) [Jewish Religious Services Law (Consolidated Version)], 1971, 25 L.S.I. 125; Takanot Ha-Edot Ha-Datiyot (Irgunan) (Ha-Eda Ha-Druzit) [Religious Communities Regulations (Organization) (The Druze Community)], 1996, K.T. 127. The Christian communities have also generally enjoyed a recognized religious leadership, although Christian religious councils have not been established. Their leadership is appointed or elected internally via the autonomous procedures of the Christian denominations, and generally is recognized by the State. Complaints, however, are sometimes voiced about the State's political interference.

279. Furthermore, the religious and administrative functionaries in the mosques are employed by the State on the basis of special and temporary contracts. *See* STATE COMPTROLLER—ANNUAL REPORT 46, 282-284 (1996). In other words, usually they do not receive tenure.

sis of an order of the British High Commissioner in December 1921.[280] The Council was elected in a manner that was stipulated in the order, and its function, among other things, was to administer and oversee the *Waqf*.[281] To this end, a General Endowments Council and local councils were established.[282] A year after the outbreak of the Arab Revolt (1936-1939), administration of the endowments was transferred to an appointed committee, based on the Defense Regulations (Moslem Trusts), 1937.[283]

In 1948, most of the members of the appointed committee left the territory that was to become Israel and became absentees according to Israeli law.[284] The Supreme Court confirmed in the *al-Saruji* case that the administrative powers of the appointed committee had become an "absentee property" based on Absentees' Property Law, 1950, and that, until the appointment of a new committee of this kind, the endowments would continue to be administered by the Custodian of Absentee Properties.[285]

In 1965, the Absentees' Property Law was amended, and authority was granted to establish boards of trustees for administering *Waqf* properties in certain Arab and mixed cities.[286] Article 29B of the law states that these committees are to be appointed by the government, with no express obligation to consult with the Muslim community itself.[287] Therefore,

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280. Supreme Moslem Sharia Council, 1921, *in* 2 LAWS OF PALESTINE, 1918-1925, at 704 (Moses Doukhan ed., 1934).

281. H.C. 282/61, al-Sarouji v. Misrad Ha-Datot [Ministry for Religious Affairs], 17(1) P.D. 188, 192.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Khok Nikhsei Nifkadim [Absentees' Property Law], 1950, 4 L.S.I. 68.

287. *Id.* In actuality, committees were established only in some of the towns mentioned in the law, and the minority community has been sharply critical of most of the existing committees. It has been suggested that they do a poor job at keeping and preserving the endowments (the collective assets of the Muslim community, such as lands, buildings, and cemeteries) in the face of development entrepreneurs of various kinds. *See* MICHAEL DUMPER, ISLAM AND ISRAEL: MUSLIM RELIGIOUS ENDOWMENTS AND THE JEWISH STATE 30-35, 44-51, 125-27 (1994); KRETZMER, *supra* note 142, at 167-68; LUSTICK, ARABS IN THE JEWISH STATE, *supra* note 4, at 59, 189-90.

the potential for self-government rights related to the *Waqf* has been eroded.

There are other domains in which the reduction in potential for self-government could have been analyzed—e.g., control over the state television and radio in Arabic and the issue of an Arab university in Israel. However, the picture that emerges from discussing the areas of education and religion is reasonably representative, and it illuminates two major aspects of the status of the minority.[288]

First, the picture reveals how the self-government potential or rights possessed by the Israeli national minority have been eroded. As discussed above, there are four ways in which this has happened: (1) Certain self-governing institutions that the Arabs possessed in the Mandatory period have been eliminated (e.g., the *Waqf*); (2) the autonomy of private bodies that retained autonomous potential, such as the private schools, has been limited; (3) existing public institutions with potential for self-government (e.g., the Arab state education and the religious courts) have been staffed via appointment by members of the majority community, and their budgets are supplied primarily by the state budget, which is under the Jewish majority's control; and (4) certain self-governing public bodies (e.g., the religious councils) were established for the religious sectors within the Jewish majority community and for the Druze minority, but not for the Arab-Muslim minority.

Second, the above discussion of self-government rights enables more precise diagnosis of the status of the Arab-Palestinian minority. For many writers, the main problem regarding the minority's group-differentiated rights is that the Arabs are recognized only as a religious and ethnic minority and not as a national minority.[289] This claim should be refined and supple-

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288. As noted at the beginning of this Article, I have almost completely forgone a discussion of the Arab local authorities. One reason is that the important group-differentiated power provided to the minority in the form of the local authorities is a result of the exercise of individual rights (to vote and be elected). The main reason, however, is the space limitations of this Article. For an account of the Arab local government, see, for example, AS'AD GHANEM, THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948-2000, at 137-153 (2001).

289. *See* KRETZMER, *supra* note 142, at 164-65; Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389, 404-05 (1990) [hereinafter Smooha, *Minority Status*]; Elia

mented: (a) The exemption from military service is, as discussed above, a group-differentiated right that is based on recognition of the Arabs as a national minority and (b) the main problem seems to be that the rights that the Arab minority receives belong to the accommodation category. Thus, whereas other religious minorities in Israel (the Jewish national-religious minority, the *haredi* minority, and, to a certain extent, the Druze minority) receive extensive rights of self-government in areas of religion, education, and culture, the Arab-Palestinian minority community (and especially the Muslim community within it) has been divested of almost any dimension of self-government in those areas.

3. *The Allocation of Political Goods: Minority Representation in Societal Decision-making Institutions*

This section turns more explicitly from the question of participation in material and symbolic goods to the question of the Arab-Palestinian minority's rights to representation in the allocating institutions themselves. There are three main possible avenues for minority participation in societal decision-making institutions: (a) The right to ongoing participation in the central government (as in binational states such as Switzerland, where the government is of necessity a "grand coalition" of parties on both sides of the linguistic-cultural divide or of parties that contain both sides of the divide within them); (b) a federal governmental structure that allocates governmental powers between the national and regional levels and in which the minority, because of its governance of at least one province, necessarily obtains partial participation in government; and (c) limited-government mechanisms.[328]

In limited-government mechanisms, the majority principle is limited by the fact that special standards or procedures are put in place to control legislative and governmental decision-making. The main mechanisms are: (1) Constitutionalism in the form of a limitation, on the highest normative level, on harm to certain rights that people enjoy as individuals and sometimes as a group (which limits the ability of the parliament to harm these protected rights through legislation); (2) the requirement that any major governmental-structural change, not only a change in basic rights, be approved by a special majority and/or a special procedure (e.g., a change in the federative structure, if it exists, in the structure of the parliament, in the electoral system, in the system of appointing judges, etc.); and (3) the creation of veto points, such as the creation of two houses of parliament rather than one, the establishment of an independent executive with partial veto power in regard to parliamentary legislation (Presidential regime), and so on.

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328. Here I make extensive use of the categorization of institutions that was lucidly outlined in the works of Lijphart, Weaver, and Rogowski. *See generally* Weaver, *supra* note 10, at 9-15 (describing mechanisms for managing societal conflicts); LIJPHART, DEMOCRACIES, *supra* note 10; Lijphart et al., *Cleavage Management*, *supra* note 10.

For the minority community, a key question is to what extent all the above-mentioned devices—a grand coalition government, a federative structure, or limited-government mechanisms—enable it to obtain veto power over decisions that are likely to harm it. This question is important, since these mechanisms may sometimes turn out to be a double-edged sword so far as the minority community is concerned. For example, the demand for a special majority may in fact enable a political minority among the majority community to obstruct constitutional or legislative processes that would improve the status of the national minority.[329]

The Arab-Palestinian minority in Israel, with limited exceptions mentioned below, does not have a group-differentiated right of participation in societal decision-making institutions, nor does it have special veto powers. First, there is no right, constitutional practice, or even informal practice of including Arab (or binational) parties in the government; on the contrary, at present at least, there is a political taboo on their inclusion. Second, Israel is not a federal state but rather a unitary state and, furthermore, can be classified among the more centralized unitary states (the local-government level being granted relatively narrow powers). Having dealt with the first two options, the question that remains is whether the minority possesses power as a group based on limited-government mechanisms.

In the early 1990s, elements of constitutionalism did, in fact, become part of the Israeli regime. This included impressive constitutional developments, which came to be known as the "constitutional revolution."[330] There were three such de-

329. An illuminating example is the way in which, in 1990, the complex procedure for changing the Canadian constitution allowed two of the nine Anglophone provinces to block constitutional amendments aimed at improving the status of the one Francophone province, Quebec (the Meech-Lake Agreement). *See* KENNETH MCROBERTS, QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS 398-399 (3rd ed. 1993).

330. For discussions of these major constitutional developments, see, for example, Eayal Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 ISRAEL STUD. 80 (1998); Ran Hirschl, *Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 428 (1998); Rut Gavizon [Ruth Gavison], *Ha-Mahpekhah Ha-Khukatit: Teyur Ha-M'tzi-ut o N'vu-ah Ha-Magshimah et Atzmah?* [*The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy?*], 28 MISHPATIM 21 (1997); Yoav Dotan, *Khukah L-M'dinat Yisra-el—Ha-Di-alog*

velopments: the passing of Basic Law: Human Dignity and Liberty; the passing of Basic Law: Freedom of Occupation; and *Mizrachi Bank v. Migdal Co-operative Village*, perhaps the most important ruling ever in Israeli law, in which the Supreme Court determined the significance of the other two developments.[331]

The net outcome has been a change in the normative pyramid of Israeli law, involving the granting of a new status—constitutional—to an important spectrum of human rights and the granting of constitutional status to Israel's entire set of Basic Laws, including those dealing with state institutions, which were enacted before the 1990s but had been viewed as being on the normative level of regular legislation. This means that new legislation is now deemed valid only if it does not conflict with the Basic Laws. Crucial here are the conditions of the limitation clause, which states that: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[332]

The new constitutional situation has profound importance in regard to the protection of individual rights, emerging implications in regard to the prohibition of discrimination based on group membership, and a broader impact on the Israeli democratic culture. Moreover, in certain, albeit rare, cases the protection of human dignity in Basic Law: Human Dignity and Liberty has enabled the Supreme Court to produce a decision supportive of certain group-differentiated rights—e.g., language representation, as in *Adalah v. Municipality of Tel Aviv-Jaffa*. These achievements notwithstanding, the new constitutional framework does not appear to have created a veto power for the minority—a power that would allow it, at least in part, to prevent damage to the rights essential to

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Ha-Konstitutzi-oni L-Akhar "Ha-Mahpekhah Ha-Khukatit" [*Constitution to Israel?—The Constitutional Dialog after "The Constitutional Revolution"*], 28 MISHPATIM 149 (1997); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 311 (1995).

331. *See* C.A. 6821/93, Mizrachi Bank v. Migdal Kfar Shitufi [Mizrachi Bank v. Migdal Co-operative Village], 49(4) P.D. 221.

332. Basic Law: Human Dignity and Liberty, art. 8, 1992, S.H. 150. A similar provision appears in Article 4 of the Basic Law: Freedom of Occupation, 1994, S.H. 90.

its existence and culture. There are at least two reasons for this state of affairs.

One major weakness in Israel's new constitutional structure—and thus one major flaw in the protection provided by the Basic Laws—is that the Constituent Branch is not itself subject to any special requirements. It may enact the Basic Laws or amend them by a simple majority decision. The Constituent Branch in Israel is the Knesset, which carries two hats, or works in two guises, functioning as the Constituent Branch and as the Legislator; and, in most cases, a special procedure is not required for purposes of enacting, annulling, or amending the Basic Laws.[333]

Therefore, the difference between the constitutional amendment procedures in Israel and those of most other democratic countries is very significant. Basic Law: Freedom of Occupation,[334] for example, has already been amended three times since it was passed in 1992. In short, the national minority has little ability to prevent the diminution of the constitutional protection of fundamental rights.

A second weakness of the minority protection provided by Israel's emerging constitutionalism was alluded to above. Limited-government mechanisms—primarily the Basic Laws and the Constitutive authority—may become a double-edged sword from the standpoint of the Arab-Palestinian minority. Property rights, for example, which are protected in Basic Law: Human Dignity and Liberty,[335] are an area in which this could easily happen. The protection of these rights comes many years after the dispossession of the land of many Palestinian citizens, and now these rights may pose obstacles to re-

333. At the same time, in a few Supreme Court decisions and in the literature, views have been expressed that may point to the possibility of limiting the Knesset even when it is acting as the Constituent Branch. *See Mizrachi Bank*, 49(4) P.D. at 393-94, 582-83, 324-27. Former Chief Justice Shamgar's opinion expressly raised the possibility of applying judicial review to the issue of "the extent to which the Knesset is entitled, as a Constitutive Branch . . . to infringe on a basic right, even if this is via a Basic Law." *Id.* at 324-27.

334. Basic Law: Freedom of Occupation, 1994, S.H. 90.

335. Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

distributive measures aimed at redressing that past dispossession.[336]

In short, the legal developments associated with Israel's constitutional revolution create protective barriers for the minority that are relatively weak and do not provide the Arab-Palestinians with real veto power over constitutional amendments or over diminutions of human rights.

Are there other norms in Israeli law that guarantee minority representation in societal decision-making institutions (apart from the Knesset)? Does the minority have the right to be consulted in regard to matters that affect its collective fate? Until recently, the minority was neither guaranteed representation in societal decision-making institutions apart from the Knesset, nor did it have a right to be consulted in regard to matters affecting its collective fate.

Here and there, certain legal requirements of consultation appeared that are relevant to the Arab minority.[337] At first, those requirements that did exist were focused not on the minority, but instead had a general character, involving local authorities in general, representatives of the religions, and so on.[338] Even when an obligation to consult with minority representatives is cast upon the State, however, a difficulty arises in identifying the representatives of the adherents of the Muslim religion in Israel and of the Arab minority. The lack of clarity in this regard, a problem to which the State has greatly contributed, has increased the flexibility and discretion that are

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336. *See* Eyal Gros, *Z'khut Ha-Kinyan Ki-Z'khut Khukatit V-Khok Yisod: K'vod Ha-Adam V-Kheyruto* [*Property Rights as a Constitutional Right and Basic Law: Human Dignity and Liberty*] 21 IYUNEY MISHPAT 405, at 408, 439-40 (1998).

337. *See* Khok Ha-Shmira Al Ha-Mekomot Ha-Kdoshim [Protection of Holy Places Law], 1967, 21 L.S.I. 76. The Protection of Holy Places Law states: "The Minister of Religious Affairs is charged with the implementation of this Law, and he may, after consultation with, or upon the proposal of, representatives of the religions concerned and with the consent of the Minister of Justice make regulations as to any matter relating to such implementation." *Id.*, § 4. It is worth noting that, so far, no regulations have been formulated in regard to Christian and Muslim holy places (compare, however, the Nohel Hatzavat Kupot Tzedakah Be-Mekomot Ha-K'doshim Le-Yehudim [Preservation of Places Holy to Jews Regulations], 1981). This appears to be due, at least in part, to the lack of clearly defined representatives of the Muslim religion in Israel, which, moreover, appears to stem from the State's desire to avoid creating or recognizing such an official representatives.

338. Saban, Legal Status, *supra* note 6, at 303-06.

granted to the governmental authorities—they have had the pretext for not consulting anyone; moreover, this flexibility occasionally has been exploited for purposes of fragmenting and co-opting the elites among the minority.[339]

This state of affairs was worsened by other steps taken by the State. First, as if it was not enough that Israel did not grant the minority group-differentiated rights of participation in societal decision-making and institutions, the State also pursued an active policy that damaged the minority's capacity to exert political influence based on individual rights (the rights of common citizenship of minority individuals).[340] A salient example, which I shall discuss in the concluding section of the article, is that of the state-imposed limitations on the right of Palestinian citizens to vote and be elected.

A second major point is that the minority's inclusion in societal decision making could also have been achieved by having the State consult with minority bodies that do not have an official function, but almost no consultation took place. From the end of the military regime in 1966, a network of such Arab bodies began to emerge. The most prominent among them are national in scope: The National Committee of Arab Mayors (established in 1974), the High Follow-Up Committee on Arab Affairs (which was established in 1982, and brought together mainly the Arab Members of Knesset and the heads of the local authorities), and the Follow-Up Committee on Arab Education (set up in 1974 and subsequently linked to the National Committee of Arab Mayors).[341] In addition, there has been a burgeoning of Arab nonprofit organizations, both local and national, in areas including education, welfare, religion, unrecognized villages, and the legal rights of the minority, beginning mainly in the latter half of the 1980s. The most prominent of these organizations is the Islamic Movement.[342] A related, particularly important development has occurred on the party level, namely, the emergence and growth of all-Arab parties. In the 1996 elections, independent Arab parties won 67

339. For a comprehensive discussion of the techniques of co-optation and fragmentation, see LUSTICK, ARABS IN THE JEWISH STATE, *supra* note 4, chs. 4, 6.

340. *See infra* Part III.A.

341. For a history of Arab civil society in Israel, see GHANEM, *supra* note 288, at 123-25, and Payes, *supra* note 12.

342. *See, e.g.*, KIMMERLING & MIGDAL, *supra* note 16, at 179-80.

percent of the Arab vote; in 1999, 70 percent; and in 2003, 76 percent.[343]

The state authorities have generally resisted this trend, in part by avoiding extensive, legitimizing contact with these Arab parties and organizations. The nation-wide organizations are not recognized (that is, they neither possess official powers, nor have an obligation to consult with them), generally do not receive budgets, and are targeted by efforts to keep political negotiations with them on a low-key level.[344]

This situation of a paucity of rights of representation in regard to political goods, however, has undergone a moderate change since the mid 1990s. Developments benefiting the minority have occurred in three areas: in legislation, in adjudication, and in practices that shape the composition of special regulatory institutions. I shall begin with the last of the three areas.

Beginning in mid 1990s, a practice began to emerge of appointing an Arab member to official commissions of inquiry. This is done particularly for commissions dealing with the national cleavage. Commissions of inquiry are established on the basis of the Commissions of Inquiry Law, 1968.[345] Their mandate is set by the government, but their composition is determined by the Chief Justice of the Supreme Court. In the Commission of Inquiry into the Events in the Machpela Cave (Hebron), in 1994, an Arab judge was a member of the three-member panel. An Arab judge was also included in the three-member panel for the above-mentioned Commission of Inquiry into the violent clashes of October 2000 (the Or Commission).[346]

In regard to minority rights of representation and allocation, there has also been important legislation that stipulates a principle of minority participation in certain societal institutions, namely, the civil service and the directorates of the government corporations. Two statutory developments are in-

343. *See* Amal Jamal, *Abstention as Participation: The Labyrinth of Arab Politics in Israel, in* THE ELECTIONS IN ISRAEL 2001 55, 70, 82-83 (Asher Arian & Michal Shamir eds., 2002). For background on these all-Arab parties, see GHANEM, *supra* note 288, at 39-42.

344. *See* GHANEM, *supra* note 288, at 163-66.

345. Khok Ve-adot Khakira [Commissions of Inquiry Law], 1968, 23 L.S.I. 32.

346. Dalal, *supra* note 44, at 12.

volved in this regard. First, in May 2000, the Knesset passed an amendment to the Government Corporations Law, 1975, adding Article 18A1,[347] which established an obligation that "the composition of the directorate of the government corporation will give appropriate expression to the representation of Arabs" and that "until the achievement of appropriate representation, the Ministers will appoint, so far as possible under the relevant circumstances, directors from among the Arab population."[348] Second, in December 2000, the Knesset amended Article 15A of the Civil Service Law (Appointments), 1959,[349] extending to Arab citizens its existing obligation to work towards ensuring appropriate representation among civil servants of women and people with disabilities. It states:

> Among the workers in the civil service, in all the ranks and professions, in every ministry and in every autonomous unit, appropriate expression will be given, under the relevant circumstances, to the representation of members of both sexes, of disabled people, and of members of the Arab population, including the Druze and the Circassians.[350]

And, for the first time, the law establishes a requirement of consultation with organizations involved in the protection of minority rights. Article 15A(d) of the Civil Service Law (Appointments)[351] states that the Commissioner of the Civil Service must consult with such bodies before submitting his report on the targets the government should set in fulfilling the requirement of appropriate representation in the civil service.[352]

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347. Khok Ha-Khavarot Ha-Memshaltiyot (Tikun Mispar 7) [Government Corporations Law (Amendment No. 7)], 2000, S.H. 207.

348. Government Corporations Law (Amendment No. 7), 2000, S.H. 207.

349. Khok Sheirut Ha-Medina (Minuyim) [State Service (Appointments) Law], 1959, 13 L.S.I. 87.

350. To complete the outline of the trend to impose an obligation of "appropriate representation", see article 4(c) of Culture and Art Law, 2002, which stipulates that in composition of the Israeli Council for Culture and Art "an appropriate representation will be provided . . . to the different societal sectors." Khok Ha-Tarbut V'Ha-Omanut [Culture and Art Law], 2002, S.H. 64.

351. State Service (Appointments) Law, 1959, 13 L.S.I. 87.

352. *Id.*

There are several points worth emphasizing here. The principle of appropriate representation does not clearly entail the principle of proportionality as the criterion for the composition of the civil service and the directorates of government corporations. As the Supreme Court makes clear, however, in complaints about discrimination, "the importance of statistical evidence has increased"[353] (i.e., evidence about the ratio between the number of members of the disadvantaged minority in the governmental or semi-governmental positions in question and the number of potential minority candidates for these positions). The Court has also made clear that the obligation of appropriate representation entails affirmative action (i.e., a preference for members of the protected communities even in situations where their qualifications are somewhat lower than those of others, provided these qualifications are sufficient for the position in question).[354] At the same time, in the context of the Arab-Palestinian minority, these new obligations have not yet been seriously implemented, by either the executive branch or the judicial branch in its supervisory role.[355]

A final important step regarding the Arab-Palestinian minority's right to representation in societal decision-making institutions is a normative innovation of the Supreme Court, which came in a ruling dealing with the composition of the

353. The leading opinion is H.C. 453/94, Shdulat Ha-Nashim B'Yisra-el v. Memshelet Yisra-el [Women's Network in Israel v. Government of Israel], 48(5) P.D. 501, 521 (appointment of women as directors of government corporations).

354. *Id.* at 528.

355. *See* H.C. 9472/00, Ha-Va-ad Ha-Artzi L'Rashey Ha-Rashuyot Ha-Araviyot B'Yisra-el v. Sar Ha-Pnim [National Committee of Heads of Arab Authorities in Israel v. Interior Minister], *at* http://62.90.71.124/files/00/720/094/j05/00094720.j05.HTM (a petition that was rejected in regard to the national composition of the District Committee for Planning and Construction in the Northern District, a district in which the minority constitutes 50 percent of the population but only two of the seventeen members of the committee); H.C. 10026/01, Adalah v. Rosh Memshelet Yisra-el [Adalah v. Prime Minister of Israel], 57(3) P.D. 31 (decided on April 2, 2003) (a petition that was rejected regarding obligations that are supposed to apply to the choice of directors—men and women—for government corporations among the Arab-Palestinian minority). *See also* Eyal Benvenisti & Dahlia Shaham, *Facially Neutral Discrimination and the Israeli Supreme Court*, 37 N.Y.U. J. INT'L L. & POL. 677, 712-14 (2005) (describing the ineffectiveness of adequate representation programs).

Council of the Israel Lands Administration.[356] Based on a comprehensive examination of developments regarding the right to equality in Israeli Constitutional law—and especially the above-mentioned legislative developments—the Supreme Court states that there is a general obligation of appropriate representation for Arabs in the public service.[357] This obligation, which the Court termed "an obligation according to the doctrine," applies even where no specific statutory or regulatory obligation applies.[358] Thus, the obligation applies not only to the civil service and the directorates of government corporations (which were explicitly included in the law) but also to the entire public sector and, within this, to bodies "outside of the government apparatus, such as other public councils, commissions of inquiry, administrative tribunals and so on," including the Council of the Israel Lands Administration, which was the subject of the ruling.[359]

The Court added two important points. First, the obligation is not fulfilled by the token representation of one person from the protected group in the public body whose composition is in question.[360] Second:

> The question of what is appropriate representation in a particular body depends, among other things, on the nature of the body, and on its practical importance from the standpoint of the group that is entitled to appropriate representation. Accordingly, it appears that the importance of the representation and the extent of the representation in the Israel Lands Administration are greater for members of the Arab population than, for example, for people with disabilities.[361]

This distinction between the Arab-Palestinian minority and other marginalized groups in the Israeli society and the use of the distinction as a basis for enhanced protection or rights for Arabs constitutes an important and innovative step.

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356. H.C. 6924/98, Ha-Agudah L-Z'Khuyot Ha-Ezrakh B'Isra-el v. Memshelet Yisra-el [Ass'n for Civil Rights in Israel v. Israel], 55(5) P.D. 15, 19.

357. *Id.* at 37-38.

358. *Id.*

359. *Id.* at 37.

360. *Id.* at 40.

361. *Id.*

As discussed above, *Adalah v. Municipality of Tel Aviv-Jaffa* went in the same direction when the Court emphasized the difference between the Arabic language and the languages of immigrant groups in Israel. These two rulings mark a welcome development, and one can only wait to see if it will be sustained.

One should note, however, that the ruling does not address whether the obligation of appropriate representation in the civil service includes the involvement of the minority community in the choice of the candidates for various positions—an important question that the petitioners were cautious not to emphasize. The Court explicitly points only to the individual's group affiliation as a reason for being chosen; it is silent about the connection between the selection of an individual and the group's attitude toward her or him.[362] One hopes that the obligation of appropriate representation will become a genuine protective tool for the minority, something that often can only happen if the minority has a substantial role in choosing its representatives. A narrow, statistical understanding of the obligation of appropriate representation may render it hollow, as it does not appear that such an obligation can benefit the minority and its interests if it is fulfilled by staffing such positions with people co-opted by the government, the closest representative of the majority group.[363]

In sum, the overall picture of the group-differentiated rights actually held by the Arab-Palestinian minority is complex. The minority possesses important group-differentiated rights, but they are relatively few and limited. The key minority rights that the minority believes it lacks will be clarified shortly when I discuss the fate of radical minority claims. However, the preceding discussion already indicates two main ar-

362. Adalah v. Municipality of Tel-Aviv-Jaffa, 56(5) P.D. at 393, para. 9 (Barak, C.J.).

363. On the question of representation, it is important, however, to avoid conflating all State institutions into a single, homogeneous package. What is suitable as a criterion for representation in an ordinary allocating institution, especially those based from the start on a mixture of professionalism and representation of different interests and viewpoints, is not necessarily suitable for institutions with more rarified and specialized societal function. In my view, the courts and their composition are a good example of the latter. To use Weaver's terminology, they are "arbitral mechanisms," whose power to fulfill their vocation is based (and should be based) on a different, nonrepresentational, and non-directly-accountable foundation. Weaver, *supra* note 10, at 15.

eas of difficulty. First, the rights of the national minority in Israel are meager in two of the three main categories of such rights: self-government rights (the degree of collective autonomy) and rights of special representation and allocation. Second, the link between the minority and its people—the Palestinian people—does not find expression (except to the extent that this link is negated) in the minority rights that are granted by Israeli law. The important, but sole, exception is the exemption from the obligation of military service.

The discussion in the last paragraphs has added greater complexity to this picture by pointing to developments of the past decade that have mitigated some of these areas of difficulty. Although these developments have not moved in uniform directions, overall they add up to a not inconsiderable expansion of group-differentiated rights.[364] The main areas of expansion highlighted in this Article are: the language rights of the minority (which have been somewhat reinforced, and whose implementation has improved); the emergence of obligations of appropriate representation of the minority in the public service; and a legal limitation of the ability to discriminate against the minority community in the allocation of public goods of any kind, with the exception of immigration quotas. This dynamic is interesting, and the final section of this Article tries to suggest the factors that underlie it.

III. THE TABOO TERRITORIES: TO WHAT EXTENT IS THE MINORITY LIMITED IN ITS ABILITY TO STRIVE FOR THE GROUP-DIFFERENTIATED RIGHTS THAT IT LACKS?

Two major, clearly interrelated elements are still lacking in this analysis. First, it has not sufficiently dealt with the legal limitations on the minority's ability to work politically to change basic aspects of its paucity of group-differentiated rights. Second, it has sufficiently considered neither the concrete form such political activism is likely to take, nor the concrete form its limitation is likely to take. In other words, it has not sufficiently clarified which collective political claims of the Arab-Palestinian minority are likely to be legally obstructed.

364. An area in which there has been, however, a reduction of self-government rights is the diminution of the exclusive jurisdiction of the *Shari'a* courts. *See supra* text accompanying notes 264-273.

The potential for such legal obstruction relates to the most far-reaching claims, which can be summarized by means of the following questions:

(1) Does Israeli law permit efforts to change Israel's national identity as a Jewish state—to transform it into a binational state (or a "secular-democratic" state, or an "Islamic state")? (2) Does it permit efforts to unify the two political entities—Israel and Palestine (once it is established)—into a single binational state? (3) Does it permit the demand for the comprehensive fulfillment of a historical right that is laden with implications—a right of return for the Palestinian refugees to Israel proper? (4) Does it permit seeking the annexation of the minority, on its land, to the state of Palestine? (5) Does it permit the minority to work for territorial autonomy or personal-cultural autonomy? Each of these questions, were it to be transformed into a viable claim, would constitute a far-reaching transformation of the map of the minority's group-differentiated rights (some of these claims would transform it from a minority to a component of an eventual majority). Are any or all of these claims legally restricted?

The constraining statutes in Israeli law were quoted earlier, but because of their importance they are worth repeating. Article 7A of Basic Law: The Knesset states that:

> No list of candidates will participate in elections to the Knesset and no individual will be a candidate for elections to the Knesset, if among the goals or acts of the list or among the acts of the person is included, as might be the case, explicitly or implicitly, any one of the following:
>
> (1) Denial of the existence of the State of Israel as a Jewish and democratic state;
>
> (2) Incitement to racism;
>
> (3) Support for an armed struggle, of a hostile state or a terror organization, against the State of Israel.[365]

Article 5 of the Parties Law, 1992, states that no party will be registered if its goals or acts include, explicitly or implicitly, "denial of the existence of the State of Israel as a Jewish and

365. Khok Yesod: Ha-Knesset [Basic Law: The Knesset], art. 7A, 1958, 12 L.S.I. 85.

democratic state."[366] Provision 134(c) of the Knesset Regulations state that: "The chairperson of the Knesset and the deputies will not approve a bill that is, in their opinion, racist in nature or denies the existence of the State of Israel as the state of the Jewish people."[367]

This legislative framework invests Israel's Jewish identity with a quasi-axiomatic status. And as David Kretzmer puts it, these articles establish the "incontrovertible constitutional fact[s]" of the State of Israel.[368]

Five aspects of this limiting legislative framework should be noted. First, the separate treatment that Israeli law gives to the question of prohibited means (armed struggle and support for it) and to the question of illegitimate goals indicates that denial of Israel's existence as a Jewish (and democratic) state is likely to be disallowed even if political groups strive for it by peaceful means. Second, the arena in which such peaceful efforts will be obstructed is not the full range of possible political expression, but rather the party-parliamentary level: In other words, the ability to challenge Israel's basic principles is not entirely denied; however, the more effective paths for doing so are obstructed.[369] Third, the obstacles that are posed by these statutes apply to any party that works for prohibited goals, whether it is Arab, Jewish, or Arab-Jewish. Fourth, these statutes limit the political activities of the national minority but at the same time grant it some extent of protection—protection against denial of the existence of the State of Israel as a (Jewish and) democratic state, and against incitement to racism. Such protection is not illusory: Certain racist parties

366. Khok Ha-Miflagot [The Parties Law], art. 5, 1992, S.H. 190.

367. Hakhlatat Ha-Knesset Bidvar Takanot Ha-Knesset [Knesset Decision Regarding the Knesset Regulations], § 134(c), 1962, Y.P. 590.

368. KRETZMER, *supra* note 142, at 28-29 (internal quotations omitted).

369. The situation is less clear for activities that fall between freedom of expression and party-parliamentary activities (e.g., those of nongovernmental organizations). Khok Ha-Amutot [Non-profit Organizations Law], art. 3, 1980, S.H. 210, states that "a nonprofit organization will not be registered if one of its goals denies the existence of the State of Israel or its democratic nature;" however there is no judicial decision on the question of whether denial of "the existence of the State of Israel," when combined with other elements or in itself, refers to objection to the physical existence of Israel or also to a mere denial of its national essence—its being the "State of the Jewish people." *See also* Knesset Decision Regarding the Knesset Regulations, § 134(c), 1962, Y.P. 590..

have been disqualified from national and local elections.[370] Fifth, the above-mentioned statutes do not contain a probability test: They do not condition the limitation of political-party activity on some level of probability that the prohibited goal will be achieved because of this activity. The Supreme Court did, however, add the important mitigating conditions that, for the disqualification or non-registration of a party, it is not sufficient that its platform express a prohibited goal. The prohibited goal constitutes a basis for disqualification only if it is a major objective and when that objective forms "part of a practical, serious, and active agenda" of the party.[371]

These aspects of the normative framework mitigate some of the limitations on the minority's ability to strive for a change (and sometimes even give it protection against sectors of Israeli society that are very hostile to it); however, they still leave substantial taboo territories in regard to the minority's ability to generate change in its own status. What are the precise boundaries of these taboo territories? What part of group-differentiated rights falls within them?

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370. The Kach Movement was disqualified from running for the Knesset in the 1988 elections, as were its offshoots. *See* Elec. Appeal. 1/88, Naiman v. Yoshev Rosh Ve-adat Ha-Bkhirot Ha-Merkazit La-Knesset Ha-Shteim Esreh [Chairman of the Central Elections Committee for the Twelfth Knesset], 42(4) P.D. 177; Elec. Appeal. 2858/92, Movshovitz v. Yoshev Rosh Ve-adat Ha-Bkhirot Ha-Merkazit La-Knesset Ha-Shlosh Esreh [Chairman of the Central Elections Committee for the Thirteenth Knesset], 46(3) P.D. 541; Elec. Appeal. 2805/92, Reshimat "Kakh" La-Knesset Ha-Shlosh Esreh v.Yoshev Rosh Ve-adat Ha-Bkhirot Ha-Merkazit La-Knesset Ha-Shlosh Esreh ["Kakh" List v. Chairman of the Central Elections Committee for the Thirteenth Knesset] (unpublished). Also disqualified in 1998 was the Moledet-Gesher-Tsomet movement in the election for mayor of the city of Nazareth-Illit. *See* C.A. 6709/98, Ha-Yo-etz Ha-Mishpati La-Memshalah v. R'shimat Moledet-Gesher-Tzomet Li-V'khirut L-R'shuyot Ha-M'komi-ot, Natzarat-Ilit [Attorney Gen. v. Moledet-Gesher-Tsomet List for the Elections for the Local Auths., Nazareth-Illit], 53(1) P.D. 351, 354, 359.

371. *Naiman*, 42(4) P.D. at 187-88; Elec. Appeal. . 2/88, Ben Shalom v. Ve-adat Ha-Bkhirot Ha-Merkazit La-Knesset Ha-Shteim Esreh [Central Elections Committee for the Twelfth Knesset], 43(4) P.D. 221, 250. The special requirement protects both the *haredi* parties that favor a Halachic state and the Arab parties.

A. *Legal Limitations in Israeli Law on the Scope and Type of Group-Differentiated Rights: The Positive Law of the Taboo Territories*

1. *Is the Minority's Ability to Strive for Autonomy—for Far-Reaching Self-Government Rights—Limited?*

The taboo territories that are relevant to the national minority are those that concern Israel's ceasing to be "the state of the Jewish people" and "a Jewish and democratic state." In terms that were clarified above, this means a limitation on the ability to work to transform Israel from an ethnic nation-state—a Jewish and democratic state—into a civic nation-state or a binational state. I observed earlier that the more relevant possibility in regard to the national minority's aspirations is *a binational state*, since very few Palestinian Israelis, even among the elites, envision a civic nation-state (a state in which an overarching, common civil identity—Israeli—replaces the present national identities).[372] Actively pushing Israel to become a binational state, then, constitutes the main relevant red line for the parliamentary activity of the Arab-Palestinian minority. In other words, the restricted group-differentiated rights sought by the minority are those that would turn Israel into a binational state.

What does this mean in practice? As discussed in the Part I.E on the types of divided states, the binational paradigm is based on two interrelated elements: communalism and partnership. Communalism is essentially a cultural, and sometimes physical, separation between national communities. This primarily fosters group-differentiated rights of the self-government type that generate autonomy for each community. By contrast, the element of partnership in binationalism exists in a context that is beyond the community, that is, in the common state. This involves equal group-differentiated rights of the third category: rights of special representation and allocation. Each community is able to be a more or less equal

372. For an elaboration of the one-state/binational vision, see As'ad Ghanem, *The Binational Idea in Palestine and Israel: Historical Roots and Contemporary Debate*, 1 HOLY LAND STUD. 61 (2002), and compare with Lama Abu-Odeh, *The Case for Binationalism*, BOSTON REV. (December 2001/January 2002), available at http://www.bostonreview.mit.edu/Binationalism, and Salim Tamari, *The Dubious Lure of Binationalism*, J. PALESTINE STUD. 83 (2000) (discussing the problematic nature of a move towards a binational state).

partner in the symbols of the state, in the material goods that it allocates, and in societal decision-making institutions. Comparative politics and comparative law, however, clearly indicate that communalism may also appear by itself in a state that is not binational. The self-government rights that characterize communalism appear, in practice, in a multicultural variant of civic nation-states, as well as in a multicultural variant of ethnic nation-states. Consider the following examples of civic nation-states that maintain autonomy for the minority: Italy vis-à-vis the Austrian minority in the South Tyrol region;[373] Spain vis-à-vis Catalonia and the Basque country;[374] the Scandinavian countries vis-à-vis the Sami; Canada and the United States vis-à-vis the Native Americans and the Inuit; Australia vis-à-vis the aborigines; New Zealand vis-à-vis the Mauri;[375] recently Britain vis-à-vis Scotland and Wales;[376] and even the French Republic vis-à-vis Corsica.[377]

Similarly, ethnic nation-states may also move toward providing autonomy to the minority. One historical example is Estonia, which, between the world wars, granted the right of cultural autonomy to the Jewish minority and the German minority.[378] Macedonia, especially after the Ohrid Agreement of 2001, is a current example that provides far-reaching autonomy to its Albanian minority.[379]

In other words, the binational state is distinguished from others only in the far-reaching provision of equal special rights of representation and allocation. The important conclusion here is that the Arab-Palestinian minority's pursuit of extensive self-government rights—i.e., cultural autonomy (and even ter-

373. Palley, *supra* note 3, at 143.

374. *See* Michael Keating, *Northern Ireland and the Basque Country, in* NORTHERN IRELAND AND THE DIVIDED WORLD, *supra* note 110, at 181, 181-83.

375. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).

376. *See* Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 308 (2002); Colin B. Picker, *"A Light unto the Nations"—The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States*, 77 TUL. L. REV. 1, 22-42 (2002).

377. *See* Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogeneous States*, 47 DRAKE L. REV. 209, 234-36 (1999).

378. *See* LAPIDOTH, *supra* note 93, at 94-95.

379. *See* Brunnbauer, *supra* note 135, at 14-17; Engström, *supra* note 135, at 9-11.

ritorial autonomy, if it desires it)—would not, in itself, transform Israel into a binational state. Therefore, parliamentary activity in pursuit of autonomy falls outside the area that Israeli law designates as prohibited.[380]

2. *Are Limitations Imposed on an Irredentist Aspiration for the Annexation of the Arab-Palestinian Minority to the State of Its People?*

It also does not appear as if the Arab-Palestinian minority is constrained by existing law from striving to secede and unite with the Palestinian state (once it exists) alongside Israel.[381] An altération in Israel's borders does not put an end to its being a Jewish and democratic state. There is, then, no prohibition in existing law on the pursuit of this objective, even by parliamentary means.

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380. The details of this possibility of autonomy (or, more precisely, personal/cultural autonomy) for the Arab-Palestinian minority are outlined in, for example, CLAUDE KLEIN, ISRAEL AS A NATION-STATE AND THE PROBLEM OF THE ARAB MINORITY: IN SEARCH OF A STATUS 19-25 (1987). *Personal autonomy* is the granting of self-regulation to a certain community only in regard to people who personally belong to or are affiliated with it. *Territorial autonomy* transfers self-government powers to residents of a region in the country in which the minority group constitutes a majority. The minority thereby possesses the power to regulate matters even in the lives of members of the majority community who live in the autonomous area. *See Id.*; *see generally* LAPIDOTH, *supra* note 93.

381. I shall not discuss whether the national minority in Israel is likely to pursue irredentism. The following comment, however, is in order. Attitudes on the national issue have an opportunistic, versatile character; they may shift with changing conditions. A change in the assessment of the balance of power, a change in the magnitude of the legitimacy of Israel and its policy, or a change in the structure of incentives for unification with Palestine could all alter the attitudes of the Arab citizens toward belonging to the Palestinian state or toward the struggle for the establishment of a binational framework in the entire territory of Mandatory Palestine. An example of versatility on national positions is illustrated by the Irish Catholic minority in Northern Ireland. Its demands underwent a transformation at the time of the violent collapse of the regime there from 1969 to 1972. From demands focusing mainly on civil equality and other civil rights, a transition (or, more precisely, a return) was made to the original national demand for a united Ireland. *See, e.g.*, Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 ANGLO-AM. L. REV. 368, 443-44 (1972).

Clear confirmation of this may be found in the Supreme Court ruling in *Isaacson v. Parties Registrar.*[382] There, opposition to the registration of the Arab Party for Renewal, headed by Dr. Ahmad Tibi, was rejected.[383] The opponents of the party referred, among other things, to its support for the partition of Jerusalem between Israel and Palestine.[384] The Court stated:

> The State of Israel was and will be a Jewish state come what may, and the respondent's objective of turning East Jerusalem into the capital of the Palestinian state in no way negates the existence of the state as a Jewish state. Indeed, as we remarked to the petitioner's attorney during his presentation to us, the state of Israel was a "Jewish state" even before the Six Day War, a time in which only the western part of the city was within the state.[385]

3. *The Palestinian Right of Return*

Is working for the recognition and realization of the right of return of the Palestinian refugees to Israel, within the Green Line, barred on the level of party-parliamentary activity?[386]

In May 2003, the Supreme Court handed down a well-reasoned opinion in what is probably the most significant series of cases so far on the issue of the right to participate in elec-

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382. C.A. 2316/96, Ayzakson v. Rasham Ha-Miflagot [Registrar of the Parties], 50(2) P.D. 529.

383. *Id.* at 535, 559.

384. *Id.* at 550.

385. *Id.*, art. 25.

386. The connection between the issue of the right of return and the question of the group-differentiated rights of the Arab-Palestinian minority is not a simple one. First, the right to return to an original dwelling place, if it exists, is first and foremost an individual right of the refugee (or, derivatively, of the refugee's descendants). Second, is it not true that the group-differentiated aspect of the right of return is simply the right of a people to return to its homeland—i.e., of the Palestinian people as a group, and not of the Arab-Palestinian minority as a group? Yet there is justification for discussing the right of return here, since, as I explained earlier, it involves an additional group-differentiated aspect. The right of return is influenced by the general question of immigration quotas to Israel. In other words, it is connected to the question of the national minority's right to participatory allocation of these public goods.

tions.[387] This ruling brought together the litigation on several appeals of decisions of the Central Elections Committee concerning the elections to the sixteenth Knesset. The Committee had decided to disqualify the candidacy of the *Balad* Party and its chairperson, MK Azmi Bishara, and of MK Ahmad Tibi, while deciding to approve the candidacy of a far-right Jewish activist, Baruch Marzel. The key paragraph in the ruling outlines the normative framework for disqualifying parties or candidates from participating in Knesset elections:

> What, then, are the "core" characteristics that constitute the minimum definition of the State of Israel as a Jewish state? These characteristics have both a Zionist and a heritage aspect . . . . At their center stands the right of every Jew to immigrate to the State of Israel, in which Jews will constitute a majority; Hebrew is the main official language of the state and most of its holidays and symbols reflect the national revival of the Jewish people; the Jewish heritage is a major element of its religious and cultural heritage. A list of candidates or a candidate will not participate in the elections if their denial or rejection of these characteristics is central and dominant in their goals and activities; and they are working energetically for the realization of these goals; and it is possible to prove all this with persuasive, clear, and unequivocal evidence.[388]

Most of the operative consequences of this ruling (which allowed the *Balad* Party, two Arab members of Knesset whom the Central Elections Committee had sought to disqualify, and a candidate from the Jewish extreme Right, Baruch Marzel, to participate in the elections) were accepted by a majority of seven justices, with four justices dissenting; however, the above key paragraph was not disputed.

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387. This involves the following rulings, which were joined on appeal: Elec. Approval 11280/02, Ha-Yo-etz Ha-Mishpati La-Memshala v. Tibi [Attorney General v. Tibi], 57(4) P.D. 1 (incorporating Elec. Approval 50/03, Veadat Ha-Bkhirot Ha-Merkazit La-Knesset Ha-Shesh Esreh v. Khaver Ha-Knesset Azmi Bashara [Central Election Committee for the Sixteenth Knesset v. Knesset Member Azmi Bishara]; Elec. Appeal 55/03, Knesset Member Ofir Pines-Paz v. Baruch Marzel; Elec. Appeal 83/03, Ha-Yo-etz Ha-Mishpati La-Memshala v. Baruch Marzel [Attorney-General v. Baruch Marzel].

388. Attorney-General v. Tibi, 57(4) P.D. at ¶ 12 (Barak, C.J.).

From this point of departure, Chief Justice Barak continued to address directly the question of the Jewish right of return and the Palestinian right of return. He remarks in paragraph four of the ruling:

> He [Member of Knesset Bishara] does not demand the annulment of the Law of Return. Indeed, along with the right of return for Jews he seeks recognition of the right of return for Arabs, but he distinguishes between recognition of this principle and its realization. He agrees that the realization would be an outcome of negotiations. It appears, then, that the statements of Member of Knesset Bishara do not contain negation of the Jewish majority in the State of Israel.[389]

This passage does not demarcate clearly the taboo area in regard to the key issue of immigration to Israel. One may hazard a guess that determinations regarding the potential disqualification of Knesset candidates who support the Palestinian right of return will be affected by three considerations. The first is whether such support is accompanied by a call for the annulment of the Law of Return—the right of return of Jews to Israel. Calling for the annulment of the Law of Return—if it is part of a practical, serious, and active agenda of a party—is indeed likely to lead to disqualification from participating in Knesset elections. Second, the Court will have to grapple with the question of whether Israeli law enables the disqualification of candidates who call for a Palestinian return to Israel *along with* the Jewish return. Should immigration quotas in a Jewish and democratic state be maintained *exclusively* for the Jewish majority, or is it sufficient that the majority have *priority*, or dominance, in regard to these quotas? In the *Kaadan* ruling, mentioned in the discussion of the issue of land allocation, the following relevant statement appears:

> [T]he values of the State of Israel as a Jewish and democratic state do not entail that the state should practice discrimination between its citizens. Jews and non-Jews are citizens with equal rights and obligations in the State of Israel . . . . *Indeed, a special key to the house was given to the members of the Jewish people (see*

389. *Id.* at para. 4.

the Law of Return, 1950). But when a person exists in the house as a citizen by law, he enjoys equal rights like all the other members of the house.[390]

The term "special key to the house" refers to a full and comprehensive Jewish right of return to Israel: "Every Jew has the right to come to this country as a *oleh*."[391] One may reasonably argue that this special status does not invalidate the claim for a Palestinian right of return, so long as that claim is not for a right of equal and comprehensive realization. Here, however, the third consideration comes into play. One of the basic attributes of Israel as a Jewish and democratic state (according to the Court's interpretation) is that it is a state with a Jewish majority. If so, the disqualification of Knesset candidates who seek a right of return for the Palestinian refugees will depend on the probable demographic dynamics at the time the proposal is to be realized—in other words, is the Jewish majority in Israel likely to be lost as a result?

In short, if the support of a Palestinian right of return does not encompass one of these three elements, then the taboo has probably not been breached.

4. *Is the Arab-Palestinian Minority Restricted in Pursuing a Transformation of the Symbolic Order of the State?*

Whereas a binational state is, by definition, neutral toward the communities that constitute it, Israel is strongly linked to one of its national communities. The Supreme Court has highlighted two manifestations of this strong bond that are protected: the Law of Return and the state's connection to the symbolic-cultural order of the Jewish people.[392]

To a certain extent, the Court thereby appears to posit an additional axiomatic boundary—beyond the issue of immigration—that pertains to the minority. Does this mean any serious attempt to penetrate the array of state symbols with new symbols, whether common symbols or ones that represent the minority, is barred? Apparently not, as a closer link of the state to the Jewish people in these areas, namely, immigration and symbols, is open to two different interpretations: exclusiv-

390. *Kaadan*, 54(1) P.D. at 281, para. 31 (Barak, C.J.) (emphasis added).
391. Law of Return, art. 1, 1950, 4 L.S.I. 114.
392. Attorney-General v. Tibi, 57(4) P.D. 1 (Barak, C.J.).

ity or priority. The priority interpretation maintains that the quasi-axiomatic principle in regard to symbols is upheld so long as the *main* source of the state symbols is the symbolic order of the Jewish people. In this it differs from the assertion of exclusivity for the symbols of the majority community.

The claim of exclusivity is inconsistent with the status of Arabic as Israel's second official language. Moreover, exclusivity *is not* necessary for a distinction between Israel and a binational state. Israel still guards its preferential link to the Jewish people even if most, rather than all, of its symbols are taken from the symbolic order of the Jewish people. Thus, it appears as if the priority interpretation is preferred by positive law.

This, apparently, is the interpretation favored by the Supreme Court.[393] In the above-quoted paragraph from the ruling in the 2003 Election Case—which posits that the core characteristics of Israel are as a Jewish and democratic state—the Court speaks only of a state "most of [whose] holidays and symbols reflect the national revival of the Jewish people."[394] The majority opinion in the ruling also did not regard the efforts of Member of Knesset Azmi Bishara to annul the special status of the national institutions (i.e., the Jewish National Fund and the Jewish Agency) as grounds for disqualifying him.[395]

Thus, the taboo territories in regard to attempting to change Israel's national identity may be summed up as follows. There is no limitation in Israeli law on the Palestinian minority's pursuit of autonomy (cultural or territorial); nor is there any limitation on its working for its secession and unification with the state of its people—so long as these objectives are pursued by peaceful means. There is, however, a clear limitation on the minority's ability to strive for a binational state (or a secular-democratic or Islamic state), either within the Green Line or in the whole territory of the Land of Israel/Mandatory Palestine. The minority is also limited in its ability to claim an exclusive right of return for Palestinians, and even its ability to claim a Palestinian right of return parallel to the Law of Re-

393. The position in favor of the non-exclusivity of Jewish symbols among official symbols seems to be shared also by the Or Commission. *See* OR REPORT, *supra* note 39, pt. 6, para. 42.

394. Attorney-General v. Tibi, 57(4) P.D. at ¶ 12 (Barak, C.J.).

395. *Id.*

turn is subject to certain qualifications. Similarly, the minority is limited in terms of working for full, equal partnership in the symbols of the state, but apparently is not limited in its ability to partially alter Israel's symbolic order. Striving for a prohibited objective is limited even when it is done by peaceful means. The limitation, however, applies to party-parliamentary activities, as distinct from other forms of expression; and it applies to a parliamentary or party's activity only when the taboo objectives are a real, serious, and active agenda of that party.