

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.

I. A THEORETICAL FRAMEWORK FOR ANALYZING GROUP-DIFFERENTIATED RIGHTS AND THE BACKGROUND OF ETHNIC RELATIONS IN ISRAEL

A. *The Complexity of the Legal Status of a Minority*

This Article focuses on one aspect of a minority's legal status, but, at the outset, it is necessary to clarify the term "legal status." The following definition directs this work: The legal status of a minority is the set of relevant legal norms affecting that minority's reality (i.e., its sociopolitical status). Such norms primarily concern the following three questions: What are the key norms that take part in establishing power differentials between the minority and the other communities in society; what are the key norms that influence whether these differentials are exploited to the minority's advantage or disadvantage; and, how does the law provide mechanisms that preserve and stabilize the inter-communal state of affairs or, conversely, mechanisms that help generate changes in it?

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While one might restrict the focus to legal norms that confer rights or impose obligations on the minority, this would inaccurately depict the minority's legal status. Such a limited focus would not capture legal dimensions that profoundly, albeit less directly, affect the status of the minority. Hart contributes to this analysis by distinguishing between two types of legal rules: primary rules and secondary rules of law.<sup>1</sup>

Primary rules are those rules that mainly impose "do" and "do not" obligations, thereby, determining rights and obligations. Secondary rules determine the establishment, operation, maintenance, and alteration of primary rules.<sup>2</sup> An analysis of the legal status of a minority group must, therefore, embrace questions involving not only rights, but powers, institutions, and procedures as well.<sup>3</sup> These institutional norms are of great relevance to the minority, because they address how its rights, protections, obligations, and privileges are both formulated and implemented, if at all. More specifically, questions such as the following arise: Does the electoral system provide the minority with representation and influence in the main norm-setting institution (such as, the Parliament) in a way that reflects its proportion in the state's population? Are there norms dealing with the minority's representation in the main institutions that implement the norms (i.e., the government and the civil service)? How much access does the minority have to supervisory mechanisms, like the courts? Are norms that protect the minority constitutionally guaranteed against alteration by a simple majority?

Yet, the complexity of analyzing the legal status of a minority group does not solely consist of the questions Hart provokes. Missing from this analysis is how the law maintains or destabilizes the status quo. Here, additional questions arise. First, how does law conceal problems within the current state of affairs (e.g., how does law constrain the exposure of

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1. See H.L.A. HART, *THE CONCEPT OF LAW* 78-79, 91-95 (1961).

2. See *id.*

3. See John Morison, *How to Change Things with Rules*, in *LAW, SOCIETY AND CHANGE* 5, 9-14 (Stephen Livingstone & John Morison eds., 1990); Claire Palley, *The Role of Law in Relation to Minority Groups*, in *THE FUTURE OF CULTURAL MINORITIES* 120, 121-26, 157-59 (Antony E. Alcock et al. eds., 1979); Robert Wirsing, *Dimensions of Minority Protection*, in *PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES* 3, 12-14 (Robert Wirsing ed., 1981).

problems, and provide mitigating explanations and legitimacy when problems are exposed)? Second, how does the law deter people from working to achieve social change (e.g., by making them dependent on the state, contributing to co-optation of elites and potential elites, and buttressing the state's capacity to threaten minorities with punishment)? Third, in what ways and with what tools does the law enable minorities and other marginalized groups in the society to take steps toward the transformation of both the group itself and the wider society?<sup>4</sup>

Finally, a discussion of the legal status of a minority requires demarcation. Everyone is subject to at least two legal regimes: the domestic law of the state in which one lives and international law. Some must also abide by regional laws, such as those that have developed in Europe. A few others conform to the religious laws of their religious communities, and so on. Thus, when analyzing legal status, it is important to identify the legal regime to be analyzed. If, for example, the domestic laws of a state are explored, then the norms of international law or religious law have a legal (as distinct from psychological or political) significance only insofar as the domestic law confers legality on them.<sup>5</sup>

Given the complexities described above, it is difficult if not impossible, within the confines of an article, to present a comprehensive framework of analysis for the legal status of a minority, and then employ it in a particular context. This Article, therefore, is limited to two tasks: It examines the legal status of the minority only in the domestic law of its state, and

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4. There is important theoretical work in the area of law and society that deals with the law's involvement in counter-hegemonic projects and other destabilizing processes, and there is an important social science literature addressing in detail the stabilizing mechanisms that states develop in deeply divided societies. See generally ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* (1993); IAN LUSTICK, *ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY* (1980) [hereinafter LUSTICK, *ARABS IN THE JEWISH STATE*]; ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 530-35 (1987); Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism Versus Control*, 31 *WORLD POLITICS* 325 (1979) [hereinafter Lustick, *Stability*].

5. At the same time, the minority's sociopolitical status (its reality) is affected by all the legal regimes that apply to it; hence, one should not lose sight of the overall picture, and the relationships between the different legal regimes.

analyzes only one aspect of the minority's legal status—its group-differentiated rights.<sup>6</sup>

Group-differentiated rights, or minority rights, are rights that stem from group distinctness. They are rights that are granted to the members of a certain group to enable them to continue preserving and giving expression to their distinct culture and identity. Such rights appear in two basic forms.<sup>7</sup> The first are rights granted to a certain community as a community. An outstanding example may be found in the realm of international law: The right to self-determination is bestowed on those, and solely on those, who constitute a people. The second are rights granted only to the individuals of a minority community because of their special group affiliation.<sup>8</sup> For example, members of the minority community may have the right not to attend the regular public education system and, instead, receive a publicly funded education that accords with their culture, is conducted in their language, and is run by the community's members themselves.

The full spectrum of group-differentiated rights is wide, and this Article attempts to present a framework of analysis for

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6. For a comprehensive discussion, which reflects a European conception of the various dimensions of the legal status of a minority (or, what is called "Minority Protection: Law and Practice"), see MONITORING THE EU ACCESSION PROCESS: MINORITY PROTECTION: COUNTRY REPORTS, BULGARIA, CZECH REPUBLIC, ESTONIA, HUNGARY, LATVIA, LITHUANIA, POLAND, ROMANIA, SLOVAKIA, SLOVENIA, 16-68 (2001). For another discussion on the comprehensive dimensions of minority "legal status" from the perspective of law and society, and an analysis applied to the contexts of Canada and Israel, see Ilan Saban, *Ha-Ma-amad Ha-Mishpati shel Mi-utim B'M'dinot Demokrati-ot Shasu-ot: Ha-Mi-ut Ha-Aravi B-Isra-el V-Ha-Mi-ut Dover Ha-Tzarfatit B-Kanadah* [The Legal Status of Minorities in Democratic Deeply-Divided Countries: The Arab Minority in Israel and the Francophone Minority in Canada] (2000) (Ph.D. thesis, the Hebrew University, Jerusalem) [hereinafter Saban, *Legal Status*].

7. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS*, 45-47 (1995) [hereinafter KYMLICKA, *MULTICULTURAL CITIZENSHIP*]; WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP*, 17-38 (2001) [hereinafter KYMLICKA, *POLITICS IN THE VERNACULAR*].

8. Because the subjects of most of these special rights are individuals (belonging to special groups) I adhere to Kymlicka's preference for the term "group-differentiated rights" (or, interchangeably, "minority rights"), as opposed to corresponding, but less precise, terms that appear in the literature—e.g., "group rights" and "collective rights." See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7.

it. Such a framework is of interest because, on the theoretical plane, group-differentiating rights are less familiar, and more nuanced and complex, than both the paradigmatic category of individual rights and the concomitant prohibition of discrimination. Moreover, the implications of minority rights extend well into what Hart calls secondary rules—the norms that determine how rights and obligations are established, implemented, maintained, and changed. The category of minority rights is also profoundly linked to both the ability and motive of the minority to destabilize the status quo.<sup>9</sup>

In the task of constructing a theoretical framework for the analysis of minority rights, this Article draws extensively from the work of Kymlicka in regard to the conceptualization of group-differentiated rights and their subtypes. The Article also looks to the works of Lijphart and Weaver for the institutional manifestations of these rights.<sup>10</sup> Before turning to the analytical framework and its application to the Arab-Palestinian minority in Israel, this Article briefly outlines the sociopolitical context of ethnic relations in Israel.

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

9. See Stephen Livingstone, *Using Law to Change a Society: The Case of Northern Ireland*, in LAW, SOCIETY AND CHANGE, *supra* note 3, at 51, 53, 60-64; Joseph Magnet, *National Minorities and the Multinational State* (pts. 1 & 2), 26 QUEEN'S L.J. 397, 423-24 (2001), 27 QUEEN'S L.J. 207, 221-23 (2001).

10. See R. Kent Weaver, *Political Institutions and Canada's Constitutional Crisis*, in THE COLLAPSE OF CANADA? 7, 9-16 (R. Kent Weaver ed., 1992) (describing different types of political mechanisms for dealing with conflict in divided societies); Arend Lijphart, Ronald Rogowski, & R. Kent Weaver, *Separation of Powers and Cleavage Management*, in DO INSTITUTIONS MATTER?: GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 302 (R. Kent Weaver & Bert A. Rockman eds., 1993) [hereinafter Lijphart et al., *Cleavage Management*]; AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984) [hereinafter LIJPHART, DEMOCRACIES].

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.<sup>11</sup> 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,<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> Currently, the Arab-Palestinian minority constitutes about 19 percent of the Israeli population.<sup>18</sup> 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.<sup>19</sup> This military government, however, was removed in 1966.<sup>20</sup>

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

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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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> Dispossession, expulsion, and becoming refugees without a homeland have caused a deep sense of resentment and pain among Palestinians.<sup>24</sup> Their sense of victimization was intensified by the perception of the Jews as colonizers or foreign (mainly Western) settlers.<sup>25</sup>

Palestinians and Arab states were not willing to accept the result of the 1948 War.<sup>26</sup> War, terror, violence, and counter-violence 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.<sup>27</sup> 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.<sup>28</sup> Second, Israel launched a multidimensional colonization project mainly in the West Bank, adding dispossession to occupation.<sup>29</sup> 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,<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> The struggle was waged primarily via mass demonstrations, stonethrowing, and the killing of people regarded as collaborators with Israel.<sup>33</sup> The Palestinian minority in Israel did not participate in the violence at all,<sup>34</sup> 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."<sup>35</sup>

The *Intifada* ended with the Oslo agreement of 1993<sup>36</sup> and the establishment of the Palestinian Authority.<sup>37</sup> 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).<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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 LEVIN 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](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.<sup>41</sup> Is the current armed struggle, then, a struggle against Israel's very existence? For some Palestinians, it certainly is; for others, it is not.<sup>42</sup> 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.<sup>43</sup> In the course of the demonstrations, thirteen Palestinian demonstrators were killed by the police.<sup>44</sup> 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).<sup>45</sup>

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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.<sup>46</sup> Third, in some cases, particularly in mixed cities, civil violence was perpetrated in the opposite direction, with Jewish demonstrators attacking Arabs and Arab property.<sup>47</sup> 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).<sup>48</sup> The Jewish majority's experience, however, mirrored that of Israeli Palestinians: They were assaulted both externally (in the territories) and internally.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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

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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.<sup>52</sup>

The wave of violent demonstrations within Israel receded and ended within the same month.<sup>53</sup> 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.<sup>54</sup> The Commission wrestled with the problem for many months, and eventually issued its report in September 2003.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Third, the

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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.<sup>59</sup>

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.<sup>60</sup> The Lapid Committee handed down recommendations for mild steps to rectify Israel's wrongs towards its national minority.<sup>61</sup> 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.<sup>62</sup> 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-

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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).<sup>63</sup> These divisions are of great significance to Israeli society, and deserve to be closely examined.<sup>64</sup> 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."<sup>65</sup> 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.

### C. *Summary of the Analysis of the Group-Differentiated Rights of the National Minority in Israel*

In addition to an understanding of the sociopolitical context, an analysis of the group-differentiated rights of a certain minority (in this case, the national minority in Israel) requires several components and analytical steps, which include: (1) a theoretical discussion of the nature of group-differentiated rights and the different kinds of deeply-divided states; (2) a legal analysis aimed at identifying the group-differentiated rights that are presently granted to the Arab-Palestinian minority; (3) a description of the "taboo territories" that insulate

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63. See Sammy Smooha, *Class, Ethnic, and National Cleavages and Democracy in Israel*, in ISRAELI DEMOCRACY UNDER STRESS 309, 316-25 (Ehud Sprinzak & Larry Diamond eds., 1993) [hereinafter Smooha, *Class, Ethnic, and National Cleavages*].

64. For an extensive discussion of the composite cleavages in Israeli society from a sociopolitical and historical standpoint, see, for example, KIMMERLING, *supra* note 62, at 110-11; SHAFIR & PELED, *supra* note 17, at 30-32; Smooha, *Class, Ethnic, and National Cleavages*, *supra* note 63, at 316-25.

65. Ilan Saban, *Hashpa-at Beyt-Ha-Mishpat Ha-Elyon al Ma-amad Ha-Aravim B-Yisra-el* [*The Impact of the Supreme Court on the Status of the Arabs in Israel*], 3 MISHPAT U-MIMSHAL [LAW AND GOVERNMENT IN ISRAEL] 541, 550-51 (1996).

Israeli law from attempts to implement certain group-differentiated rights for the minority that are not currently provided; and (4) a critical discussion of whether these “taboo territories” are justified.

Because of the multiplicity and complexity of these elements, I will deviate somewhat from the usual order of things and present the main thrust of each in advance.

1. The concise definition of minority rights offered above is “rights that stem from group distinctness.” More specifically, these are special rights that are granted to members of a certain group (or to a group as a group) so that they can preserve and give expression to their distinct culture and identity. This category of rights is divided into several subcategories, the important differences between which are presented below.

2. Israeli legislation confers important, albeit limited, group-differentiated rights on the Palestinian minority: (1) the status of Arabic as an official language;<sup>66</sup> (2) the division of public education such that it contains an elementary and high school system that is conducted in the Arabic language;<sup>67</sup> (3) the group exemption from the obligation of military service;<sup>68</sup> (4) the preservation of the Ottoman *millet* system, in which each person is subject—in the field of personal status (i.e., family law)—to the religious law of her or his religious community, and sometimes to the exclusive judicial authority of the religious courts of her or his community;<sup>69</sup> (5) the right of workers and business owners to observe their days of rest and holidays;<sup>70</sup> and (6) some initial (cautious) requirements for “appropriate representation” in the Israeli civil service and parts of the broader public sector, which involve measures of affirmative action.<sup>71</sup>

The minority also has an important group power at the level of local government in the form of Arab local authorities. This power, however, is primarily based on the geographical separation of Jews and Arabs in Israel and the right every indi-

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66. See *infra* Part II.A.1.

67. See *infra* Part II.A.2.

68. See *infra* Part II.A.4.

69. See *infra* Part II.A.3.

70. See *id.*

71. See *infra* Part II.C.3.



vidual has to vote and be elected in local elections.<sup>72</sup> Analytically classifying this state of affairs in terms of group-differentiated rights, therefore, is a bit dubious and problematic. The issue concerning Arab local authorities is not covered extensively in this Article.

3. Israeli law demarcates “taboo territories,” which prohibit any significant political activity that aims for radical change in the nature of group-differentiated rights granted to the Arab-Palestinian minority. Such prohibitions are evident in the limitations placed on political activity at the party-parliamentary level. The three most relevant provisions are as follows: First, Section 7A of Basic Law The Knesset stipulates:

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.<sup>73</sup>

Second, Section 5 of the Parties Law states:

A party will not be registered if among its goals or deeds, implicitly or explicitly, is 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;

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72. For an analysis of the spatial, or social, separation which characterizes ethnic relations in Israel, see OREN YIFTACHEL, *PLANNING A MIXED REGION IN ISRAEL: THE POLITICAL GEOGRAPHY OF ARAB-JEWISH RELATIONS IN THE GALILEE* 62-64 (1992); *see generally* ISSACHAR ROSEN-ZVI, *TAKING SPACE SERIOUSLY: LAW, SPACE AND SOCIETY IN CONTEMPORARY ISRAEL* (2004).

73. *Khok Yesod: Ha-Knesset [Basic Law: The Knesset]*, 1958, 12 L.S.I. 85.

(4) A reasonable basis for the conclusion that the party will serve as a camouflage for illegal activities.<sup>74</sup>

Finally, Section 134(c) of the Knesset Regulations stipulates:

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.<sup>75</sup>

The significance of these provisions with respect to the Arab-Palestinian minority in Israel and its group-differentiated rights, explained in detail below,<sup>76</sup> is threefold: First, Israeli law restricts the minority's ability to work, on the party-parliamentary level, for change in Israel's national identity. It limits the minority's ability to transform Israel from an "ethnic nation-state"—a Jewish (and democratic) state—to a "civic nation-state" or a "binational state."<sup>77</sup>

Second, the term "civic nation-state" is less relevant to this discussion, which focuses on the group-differentiated rights of the Arab-Palestinian minority. This option is inconsistent with significant group-differentiated rights and, more important, is not the option preferred by Arab-Palestinians. A binational state, on the other hand, provides very substantial minority rights, and is favored by certain segments of the Arab-Palestinian minority.

Third, on the party-parliamentary level, the minority is prevented from seeking the group-differentiated rights that would be granted to it were Israel to change from an ethnic nation-state to a binational state. This leads to the following secondary questions: What is a binational state? Why is the minority constrained only in regard to some of the group-differentiated rights that are granted to a national minority in a binational state? Which of the group-differentiated rights that are not granted it at present can the Arab-Palestinian minority strive for without limitation? These questions are explored below.

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74. Khok Ha-Miflagot [Parties Law], 1992, S.H. 190.

75. Hakhlatat Ha-Knesset Bidvar Takanot Ha-Knesset [Knesset Decision Regarding the Knesset Regulations], § 132(c), 1962, Y.P. 590.

76. See *infra* Part III.A.

77. See *infra* Part I.E.

4. The last issue turns from the description of “taboo territories” to their justification. The following three points underlie the opposition to current constraints on the minority’s ability to work for radical change within its group-differentiated rights discussed here: First, existing prohibitions in Israeli law precludes both violent and nonviolent activities. The law also precludes parliamentary activity that attempts to radically change the national nature of Israel via peaceful persuasion. Second, the prohibitions ignore important characteristics of the minority, especially the fact that the Arab-Palestinian minority in Israel is a homeland minority (as distinct from an immigrant group). The members of the Arab-Palestinian minority did not knock on Israel’s doors and become absorbed into it; Israel came to them. In other words, Israel’s national minority is not in the country out of grace; it does not owe loyalty to any sort of basic framework of an adopted nation—on the contrary, it is a victim of the establishment of that very framework, and, therefore, is entitled to strive for changes in it via the means that democracy is supposed to provide for such a struggle. Third, basic axioms of liberalism recognize a difference between affirming the justice of certain Zionist principles (which I endorse to a substantial extent) and questioning whether it is just to limit the minority’s ability to question those principles. The difference is between labeling a certain position “bad” (if indeed it is) and the further justification that is required to forbid taking that position. Indeed, while this Article includes objections to the binational state alternative, these objections cannot dilute the right of the minority to advocate this idea, or others of its kind, by resorting to the array of peaceful means of dissent generally allowed in a free and democratic society.

This Article is devoted, then, to exploring these issues. It begins with a theoretical framework of analysis that sheds light on the nature of group-differentiated rights.

#### D. *Categories and Sub-categories of Rights*<sup>78</sup>

##### 1. *Individual Rights: Equal Citizenship Rights*

Individual rights consist of rights that apply to every individual based on his or her humanity or state citizenship. This essentially involves two kinds of rights, which are rights of freedom and rights of claim. Rights of freedom are derived from the cardinal value that we ascribe to human autonomy; salient among them are freedom of expression, association, movement, religion, and conscience. Rights of claim are derived from both the fundamental equality between people's human dignity (or autonomy) and the understanding that human autonomy lacks meaning unless people are granted a corresponding realization of certain fundamental needs. Salient among rights of claim is the prohibition of discrimination—the obligation not to discriminate against a person on the basis of race, ethnic origin, religion, gender, sexual orientation, or other group identity. In addition, some rights of claim are obligations imposed on the state to realize basic human needs that are a necessary condition of individual freedoms. This includes the obligation to maintain minimum standards of nourishment, health, housing, employment, and education. The principal freedoms are commonly referred to as civil and political rights. The principal rights of claim are commonly referred to as social and economic rights.

Sometimes, in special circumstances that affect weak or disadvantaged groups (e.g., national and religious minorities, women, people with disabilities, etc.), the principle of equality or the demands of justice require more than the prohibition of discrimination against the individual on the basis of group membership. They call for increasing the provision of rights and allocations to individuals belonging to these afflicted groups. The justification for such affirmative action policies is a need for special efforts, because of past deprivation, to break the vicious cycle created by ingrained biases.

Affirmative action in the area of individual rights, however, is different from the distinct category of group-differentiated rights. Implicit in affirmative action is a basic element of

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78. As mentioned, the categorization of rights presented below rests to a great extent on the groundbreaking work of Will Kymlicka. See, e.g., KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 10-48.

temporariness. It is extended, for example, to women, with the goal of removing, over time, the rationale (i.e., discrimination) that justified the temporary provision in the first place.<sup>79</sup> That is, affirmative action for women hopes that intervention will dispel biases, and alleviate distorted expectations and unfair conditions that underlie the longstanding discriminatory treatment of women. Unlike affirmative action, group-differentiated rights are designed and implemented on a nearly permanent basis as part of the fundamental structure of a given society.

When individual rights are granted and properly maintained, they create substantial protection for the members of a minority community. Rights such as freedom of expression and freedom of association enable individuals in the minority community to form and maintain subgroups and organizations that preserve different aspects of the minority culture, and allow the minority flexibility in adjusting its culture to changing social conditions.<sup>80</sup>

That said, the granting of individual rights does not in itself provide sufficient protection to minority cultures. First, there is likely to be a gap between rhetoric and practice where minorities lack representation in national institutions. The ability of members of the minority to realize the individual rights that are normatively granted to them—freedom of expression, prohibition of discrimination on the basis of group membership, and so on—at least partly depends on their ability to participate in the legal determination of the relevant modalities for those rights and in the institutions responsible for implementing those modalities. Thus, the minority needs special means—i.e., group-differentiated rights—to provide it with significant involvement in the protection of the individual rights that it ostensibly possesses.

Second, some aspects of cultural distinctness clearly require modalities of protection that go beyond individual rights. Kymlicka, for example, presents this issue in the con-

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79. A clear reflection of this position appears in a recent case involving affirmative action in state universities in the United States. *See Grutter v. Bollinger*, 539 U.S. 343 (2003) (O'Connor, J.) (stating that the claim for the need for affirmative action will diminish, or disappear altogether, at some point in the future).

80. *See* KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 26.

text of the survival and degree of vitality of the minority's language.<sup>81</sup> For a minority culture to exist, at least in the modern era, its language must be one of the languages used in public life. This means that the courts, legislatures, health services, welfare agencies, and, particularly, the education system and mass media must be conducted to a significant extent in the language of the minority as well as that of the majority. Prohibiting discrimination against speakers of a minority language and protecting their freedom to express themselves in this language generally will not, by itself, keep the language (and the culture built on it) alive. Economic, cultural, and other pressures the majority exerts to induce the minority to adopt and master the majority's language are likely to erode the language of the minority, unless special protective measures—primarily, group-differentiated rights—are taken to protect the minority's linguistic environment. "The state can (and should) replace the use of religious oaths in courts with secular oaths, but it cannot replace the use of English [or any other language] in courts with no language."<sup>82</sup>

## 2. *Minority Rights: Group-Differentiated Rights*<sup>83</sup>

Whereas the equal rights of citizenship are extended to every individual on the basis of the individual's humanity and/or citizenship—that is, apart from her or his membership in any social subgroup—there are some rights that may be possessed by individuals and organizations precisely because of their special group membership. These rights are intended to compensate for the fact that the minority community is vulnerable and that its culture must deal with the interests and pressures of the general society. The source of such pressures and the way in which they are exerted varies, but the principal pressures minorities face are the demands of the labor market,

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81. *Id.* at 110-11.

82. *Id.* at 111.

83. The term "minority rights" has appeared for some time in the literature, and has acquired different meanings. Sometimes it serves as a term corresponding to the broad picture of the legal status of the minority and sometimes it has narrower meanings, including that which I use in this Article—group-differentiated rights. For a helpful terminological discussion of minority rights from the perspective of international law, see Patrick Thornberry, *Introduction: In the Strongroom of Vocabulary*, in *MINORITY RIGHTS IN THE 'NEW' EUROPE* 1, 3-4 (Peter Cumper & Steven Wheatley eds., 1999).

the education system (its language, subject matters, and general messages), the language the bureaucracy uses when dealing with citizens, the mass media and its messages, and the consumer culture and its values. The minority culture's collective identity (national or other), its language, and its religion (vis-à-vis a different religion or secularism) are most affected by such pressures.

The moral argument in favor of group-differentiated rights is that minority cultures are fragile and that people belonging to these cultures would suffer great pain and bereavement if their culture were indeed lost. Cultural (national, religious) affiliation is, for most of us, part of our core self-identity. It gives our lives content and meaning that profoundly influence many of the choices that we make. To put it differently, cultural affiliation is a building block of human autonomy.<sup>84</sup>

Groups are entitled, therefore, to significant (though not unlimited) protection against external attempts—direct and indirect, intentional and unintentional—to weaken a group-cultural identity, replace it with another identity, and so on. Among the means used to protect against gradual minority cultural erosion are group-differentiated rights, which must be regarded as inherent rights.<sup>85</sup>

Furthermore, because group-differentiated rights protect a permanent value—preserving the minority and its culture in the face of ongoing corrosive pressures—their existence in the legal system must be likewise permanent. In this, these rights differ from the temporariness that characterizes “affirmative action.”

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84. For an extensive theoretical discussion of these points, see KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 107-53; KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 7, at 28-29, 74-75, 79-80; Yael TAMIR, *LIBERAL NATIONALISM* 35-37 (1993); DAVID MILLER, *ON NATIONALITY* 120-54 (1995); CHAIM GANS, *THE LIMITS OF NATIONALISM* 58-65, 70-78 (2003).

85. A note of caution: The inherent nature of, and justification for, group-differentiated rights is highlighted in the context of national, ethnic, and religious communities—groups that are, or have the potential to be, comprehensively communal, and that carry a culture that encompasses most of the dimensions of human life. There is doubt as to the extent other marginalized groups—such as women, homosexuals, or people with disabilities—possess most group-differentiated rights, at least in their full magnitude.

There are three sub-categories of group-differentiated rights.

a. Accommodation Rights

The first sub-category of rights that stem from group distinctness is accommodation rights, which are also called poly-ethnic rights.<sup>86</sup> Obligations derived from these rights go significantly beyond the obligations that individual rights impose on the state. The latter might indeed require the state to adopt strict policies against discrimination, and allow freedom of religion and a privately owed and financed education system for children of the minority. Accommodation rights, however, impose positive obligations of a broader nature on the state—i.e., obligations of intervention. First, they impose an obligation on the state to participate actively in preserving major cultural practices of the minority. The two main examples are granting minority group members the right to public funding for education in their mother tongue and for museums, cultural events, and community organizations of the minority group. A second obligation they impose, which extends beyond budgetary assistance, is that of making special adjustments on behalf of the minority. The purpose of such adjustments is to ensure that minority members are not faced with a dichotomous decision that forces them to choose between preserving their cultural identity and having a reasonable chance of success in social and political life. Common examples of special adjustments include the following:

(1) The most straightforward adjustments involve granting an exemption to members of the minority from norms that are prejudicial to them because of their religious or cultural practices—e.g., Sabbath laws and mandatory dress codes (permitting the turban for Sikhs who wish to serve in the police, etc.).<sup>87</sup>

(2) More difficult and much more controversial special adjustments concern the state's reaction to situations in which there is dissonance of values between practices of the majority

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86. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 30-31; KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 7, at n.51, 159-60.

87. See *id.* at 31.



and those of the minority—e.g., regarding the treatment of women or children, and group decision-making processes.<sup>88</sup>

(3) Other more demanding and rarely implemented special adjustments involve obligations regarding the linguistic environment of the workplace<sup>89</sup>—whether this environment should be bilingual, or perhaps even in the language of the minority alone?

## b. Self-Government Rights

The second sub-category of group-differentiated rights is self-government rights.<sup>90</sup> Like accommodation rights, self-government rights seek to preserve the minority culture and its capacity to develop.<sup>91</sup> The two kinds of rights, however, operate on different levels. Self-government rights enable the minority itself to shape aspects of life relevant to those individuals.<sup>92</sup>

Providing minority groups with these rights decentralizes power and bestows part of that power on the minority. The minority is essentially granted near immunity from decisions that the majority community takes on issues of particular importance to the minority, such as education, religion, language, personal status, mobilization of resources (taxation), immigration within the territory of the minority, and development. For example, in the context of education, the right of self-government moves beyond the accommodation right (publicly-funded education system for the minority) to the issue of whether the minority education system is administered by the minority itself. Specifically, the question is whether, under a system of self-government, the minority, either as a group or as individuals belonging to the group, determines the curriculum, budgetary priorities, and the appointment of principals, superintendents and teachers.

Self-government rights assume different forms. They may have either a territorial or a cultural basis<sup>93</sup> and they may be

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88. *See id.* at 152-55.

89. *Id.*

90. *See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra* note 7, at 27-30.

91. *See id.* at 27.

92. *See id.* at 28.

93. Autonomy permits self-regulation by the minority group, rather than regulation by the society at large, of certain aspects of life. Personal or cul-

manifested in a federal governmental structure (the minority constituting a majority in a province/canton) or in the creation of a special entity (an autonomous region) within a unitary state. Often, groups with self-government rights have a representative institutional body, and here too the possible variation is large. For instance, the minority may be represented by the political authorities of the province/canton in which it constitutes a majority, or by a representative party that plays in the national politics, or both.

The ultimate expression of self-government rights is full self-determination for the minority—that is, the right to a sovereign state. For example, a segregated minority may wish to secede from the state to which it is subject and establish a state of its own, or an irredentist minority may detach itself and join a neighboring state of its own people. The theoretical topic of the right to self-determination is beyond the scope of this Article. It shall suffice to note that this right, which is solidly anchored in international law, is given to peoples and, therefore, the question of its existence and significance becomes complicated where a national minority is part of a different, external people that has obtained political self-determination, or in cases of national communities that share a single territory with a considerable degree of spatial mix.<sup>94</sup>

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tural autonomy grants minority communities the authority to regulate people who belong to their own group or who are affiliated to it. Territorial autonomy transfers powers of self-government to the residents of a region in the state, among whom the minority group constitutes a majority. This means, among other things, that the minority is given certain powers over members of the majority who live in these autonomous minority-dominated regions. For a more extensive discussion, see HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 458-68 (rev. ed. 1996); RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* (1996).

94. See Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT'L L.* 1, 38 (1998); Dominic McGoldrick, *From Yugoslavia to Bosnia: Accommodating National Identity in National and International Law*, 6 *INT'L J. ON MINORITY & GROUP RTS.* 1, 20-21 (1999); Stephen Tierney, *In a State of Flux: Self-Determination and the Collapse of Yugoslavia*, 6 *INT'L J. ON MINORITY & GROUP RTS.* 197 (1999); LAPIDOTH, *supra* note 93, at 19-23, 172-74.

### c. Rights of Special Representation and Allocation

Unlike self-government rights, which mainly affect the “internal life” of the minority community, special representation and allocation rights focus on the national government, and concerns the power resources that are allocated to the minority on this level.<sup>95</sup> This involves rights related to the following two questions: (1) to what extent does the minority have access to the goods that are allocated by societal institutions; and, (2) to what extent is the minority a participant in the allocating institutions themselves, the most important of which are the parliament, the government, the judicial authority, and the civil service? The question of representation and allocation centers, then, on appointments in important agencies such as the government and the civil service, the allocation of budgets and public services, and the allocation of aspects of culture and status, such as the official languages and other state symbols.

If the minority enjoys far-reaching rights of special representation and allocation, then, on the level of governmental appointments, the criterion of allocation will not only be the personal merit of the candidates but their group affiliation as well. There will also be an attempt to maintain a basic correlation between appointments and demographic proportions of the communities. Moreover, under special circumstances involving matters that are essential to the minority group, it may receive increased representation—such that it has a right of veto regarding those matters.

As for the joint allocation of symbolic resources, such as societal symbols, proportionality is often not an appropriate basis for allocation. Therefore, a state that chooses to grant the minority community a comprehensive special allocation in this context may resort to one of the following alternatives: (1) the symbols of the state will be new or external—they will not be the distinctive symbols of any one of the constituent communities; (2) the symbols will indeed be ones that are historically rooted in one of the constituent communities, but that, over time, have acquired a common significance;<sup>96</sup> or (3)

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95. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 31-33.

96. Compare, for example, the context of the religious-secular rift within the Jewish majority community in Israel, in which religious symbols are adopted by the entire Jewish national community only after being invested

where a symbol cannot be either external or common, it will be multiple—bilingualism, for example.

3. *Additional Theoretical Observations and Distinctions with Respect to Group-Differentiated Rights*

There are several additional noteworthy observations and distinctions regarding group-differentiated rights.

First, the distinction between individual rights and group-differentiated rights is, indeed, not clear-cut, but it is still recognizable. Group-differentiated rights, as opposed to individual rights, are not granted on a general-universal basis.<sup>97</sup> They belong to a special community and/or its members, not to all citizens or residents of a state.<sup>98</sup> Furthermore, two of the sub-categories of group-differentiated rights have a special function. Similar to individual rights, they constitute a limitation on the ability of the general society to use majority rule to disadvantage and discriminate against minorities; they do so, however, by empowering, not merely protecting, the minority community.<sup>99</sup> Through empowerment, the protection of the minority extends beyond the reliance on external supervisory mechanisms, such as courts. The minority community itself becomes an agent of protection. The sub-category of self-government rights provides the minority community with most of the decision-making power involving internal issues vital to it and its members.<sup>100</sup> In the second sub-category—rights of special representation and allocation—the minority community becomes a constantly involved party, enjoying representation in legislative and executive institutions, sometimes even acquiring veto power.<sup>101</sup>

The second observation is that the discussion on the “rights” of the minority focuses on modalities, which are legally anchored. In this regard, it is important to note that there is no simple correlation between the relevant legal norms for the minority (its legal status) and the reality of its

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with national significance. See CHARLES LIEBMAN & ELIEZER DON-YEHIYA, CIVIL RELIGION IN ISRAEL: TRADITIONAL JUDAISM AND POLITICAL CULTURE IN THE JEWISH STATE 165-66, 228-29 (1983).

97. See KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 7, at 6, 26-27.

98. See *id.* at 6.

99. See *id.* at 3-6, 26-33.

100. See *id.* at 27-30.

101. See *id.* at 31-33.

life (its sociopolitical status). This is apparent in two regards. First, non-legal, socio-political modalities are often interchangeable with legal modalities, and thus may render them superfluous. For example, the religious minority within the Jewish majority community enjoys permanent and significant representation in Israel's executive institutions, with no formal legal basis for the right to such representation. Second, the existence of legal rights alone does not ensure their influence or fulfillment in practice. More concretely, the difficulties of the Arab-Palestinian minority in Israel with respect to its group-differentiated rights are not only manifested in a lack of the truly powerful types of these rights, but also in the erosion of the significance of some formally granted group-differentiated rights.<sup>102</sup> The disparity between rhetoric and practice is a major issue, a full discussion of which is beyond the scope of this Article.<sup>103</sup> In short, one must remain cognizant of the distinction between the collective power of a minority community and the group-differentiated rights that it officially possesses.<sup>104</sup>

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.<sup>105</sup>

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102. See *infra* Part II.A.1 for a discussion on the legal status of the Arabic language in Israel.

103. In other writing, I make an effort to present and discuss the mechanisms supporting the gap between the legal status of the Arab minority in Israel and its socio-political status. See Saban, *Legal Status*, *supra* note 6, at 413-16, 423-24, 438, 443-57. See also, the recent and comprehensive work of Yousef Taiseer Jabareen, *Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States* (2003) (unpublished S.J.D. dissertation, Georgetown University Law Center).

104. The distinction between collective power and group-differentiated rights is underlined by another factor alluded to earlier. Collective power may stem directly from the application of an individual right (as opposed to a group-differentiated right). Thus, for example, the individual right to vote and be elected serves as a source of collective power for the national minority in Israel through the power it provides in the form of the Arab local authorities, and the development of a representative national leadership from this local leadership.

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.<sup>106</sup> 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;<sup>107</sup> 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.<sup>108</sup> 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-Hakhrza 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 Dinstejn 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.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup>

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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.<sup>112</sup> 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.<sup>113</sup>

Finally, group-differentiated rights often arouse suspicions, the sources of which vary. Many deeply-divided states fear that group-differentiated rights are a “too-strong medicine”—i.e., they provide excessive power to the minority and encourage secessionist demands.<sup>114</sup> Further, liberals suspect that granting group-differentiated rights necessarily means limiting individual rights—i.e., limiting the rights of individuals within the minority community (“the minority within the minority”).<sup>115</sup>

The suspicions that states harbor toward group-differentiated rights are clearly manifested in international law. From the end of the Second World War through the 1990s, international law upheld a rights regime that was based almost solely on individual human rights.<sup>116</sup>

In the main international conventions on human rights, only two provisions touch upon group-differentiated rights: the right of self-determination that is granted to peoples,<sup>117</sup>

112. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 95-96.

113. KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 7, at 53-55. We should remain mindful, however, of the entitlement of most immigrant groups to not-insignificant group-differentiated rights. See *id.* ch. 8.

114. See HANNUM, *supra* note 93, at 51-60.

115. SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 9-24 (1999).

116. See Natan Lerner, *The Evolution of Minority Rights in International Law*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 77, 87 (Cathrine Brolmann, et al eds., 1993).

117. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 173 [hereinafter ICCPR]; International Covenant



and the individual and group-differentiated rights embodied in Article 27 of the International Covenant on Civil and Political Rights.<sup>118</sup> Article 27 states:

In those States in which ethnic, religious or lingual minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>119</sup>

On its face, Article 27 appears to grant primarily individual rights—freedoms in the areas of culture, religion, and use of language—and perhaps also limits group-differentiated rights within the category of accommodation rights. In any case, until the early 1990s, international legal discourse did not interpret this provision as conferring group-differentiated rights of self-government (cultural or territorial autonomy), or rights of the minority to representation in societal executive institutions.<sup>120</sup> Within the past decade, however, this interpretation has begun to change.<sup>121</sup>

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on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 1, 993 U.N.T.S. 3, 5.

118. ICCPR, *supra* note 117, at 179.

119. *Id.*

120. For a discussion of Article 27 and its significance up to the beginning of the 1990s, see HANNUM, *supra* note 93, at 59-60, 500-01; *see also*, Lerner, *supra* note 116, at 88-91.

121. During the same period, international legal discourse on minority rights has changed substantially. The tragic events leading to the breakup of Yugoslavia, processes of unification in Europe, the empowerment of indigenous communities throughout the world, and other factors have fostered vigorous discourse and quite intensive activity with respect to group-differentiated rights. The two developments that are probably the most significant are: (1) The 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (a declaration that has not yet become a convention) and (2) The 1995 European Framework Convention for the Protection of National Minorities. *See, e.g.*, Patrick Thornberry, *The U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update*, in UNIVERSAL MINORITY RIGHTS 13 (Alan Phillips & Allan Rosas eds., 1995); Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q. 160 (1996). A further important development is the creative interpretation of Article 27 of the ICCPR that appears in General Comment No. 23 (1994) of the Human Rights Committee. *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Vol. I, at 107, U.N. Doc. A/49/40. The right of

The concern about harm to the minority within the minority is well-placed, as the potential for harm to individuals within the minority as a result of group-differentiated rights is a significant one. The claim that there is a necessary, and sharp, opposition between individual rights and the array of group-differentiated rights,<sup>122</sup> however, is exaggerated insofar as it ignores at least two key distinctions.

First, the risks to the minority within the minority appear only when the minority community does not share the majority's liberal-democratic values, as opposed to situations in which both communities share these values.<sup>123</sup> A second important distinction, which is often ignored, involves two different forms of protection that minorities adopt; namely, "internal restrictions" and "external protections."<sup>124</sup> Internal restrictions are demands by the minority group on its members; external protections are its demands on the general society. While these both types of demand aim to protect the community's stability, they respond to different sources of instability. Internal limitations are a response to internal opposition to certain traditional cultural practices within the minority community—e.g., the status of women, the treatment of children, religious conversion and secularization, and change of language; external protections seek to shield the minority community from decisions of the general society that affect it—e.g., decisions regarding education and language.

On a moral level, the following points are important: (1) There is no necessary conflict between external protections and individual rights because demands of this kind protect the freedom of the individuals in the group to preserve their culture, avoid assimilation, and so on—as opposed to internal re-

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minority groups to participate effectively in the political process has been recognized, and the Committee acknowledged the duty of member states to take "measures to ensure the effective participation of members of minority communities in decisions which affect them." *Id.* at 109. For a recent elaboration of these subject matters, see Frances Raday, *Self-Determination and Minority Rights*, 26 *FORDHAM INT'L L.J.* 453, 454-61, 475-77 (2003).

122. See OKIN, *supra* note 115, at 9-24.

123. See Yael Tamir, *Two Concepts of Multiculturalism*, 29 *J. PHIL. EDUC.* 161, 166-70 (1995) (describing the greater difficulties that arise in situations of "thick multiculturalism"—involving liberal as well as non-liberal cultures—as opposed to "thin multiculturalism"—involving only different liberal cultures).

124. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 7, at 35-44.

strictions, which impose these conditions on them.<sup>125</sup> (2) Most categories of group-differentiated rights constitute external protections—such as the obligations cast upon the state to fund an education system in the minority language and to provide minority representation in societal decision-making bodies. (3) The category of group-differentiated rights that most affects the minority community’s ability to apply internal restrictions is the category of self-government rights, which demands a measure of non-intervention in regard to obligations placed on members by the minority community’s governmental authorities. Rather than invalidating this or other group-differentiated rights entirely, moral caution may lead one to set boundaries on the right to self-government.

Before considering which group-differentiated rights are granted to the Arab-Palestinian minority at present and which, of those that it does not receive, it is limited from striving to attain, it is necessary to draw a final theoretical distinction among countries in terms of their national identity. This distinction is indispensable because the red lines that Israeli law sets regarding the national minority’s demands for group-differentiated rights are expressed in terms of preserving Israel’s national and ideological identity; they limit the minority’s ability to negate Israel’s identity as a “Jewish” and democratic state.

### 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.<sup>126</sup> Such states are built on two foundations: communalism and

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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.<sup>127</sup> Communalism means that the state accepts the centrality of the link between its citizens and their ethn-national communities. It does so in practice by maintaining, and even structuring, the links between individuals and ethn-national 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.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup> In this regard, the minority is

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127. *See id.*

128. *See* DANIEL ELAZAR, *EXPLORING FEDERALISM* 71-78 (1987); Yoram Din-stein, *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.<sup>131</sup>

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 ethnonational 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.<sup>132</sup>

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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](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.”<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>

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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

## 2. *The Multicultural State*

There is one more term that is fashionable, but important and requires brief clarification: the multicultural state. Here, the difficulties of conceptualization are great, as, like other trendy concepts, multiculturalism has come to bear a wide variety of meanings and, hence, has been obfuscated. Most of the obfuscation stems from the fact that multiculturalism is a common heading for all practices that involve granting respect and public expression to minority cultures, even if such practices are of substantially different magnitude.<sup>136</sup> The main distinction among the different types of multiculturalism corresponds to the difference outlined above between types of states. There is, on the one hand, comprehensive multiculturalism, such as that of the binational or multinational state, where there is partnership between the primary cultures of the existing national communities in the state, and the state does not take sides between them. On the other hand, different varieties of thin multiculturalism are found in the ethnic nation-state and the civic nation-state.

Which kind of multiculturalism is likely to appear in civic nation-states? These states aim, as noted, to consolidate a single national identity that embraces all citizens. For pragmatic and perhaps also moral reasons, these states may forgo an all-out war against the cultural variety that exists within them. They may settle for a middle course: The state may support certain cultural features of the minority while it seeks to avoid reinforcing the minority's cultural distinctness with long-term social and political measures, such as separate education, granting the minority's language an official status, group representation, and a territorial basis. Thus, for example, mem-

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the Russian minority). For Armenia, see THOMAS AMBROSIO, *IRREDENTISM: ETHNIC CONFLICT AND INTERNATIONAL POLITICS* (2001). For Macedonia, see Ulf Brunnbauer, *The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments*, 1 J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. 1, 14-17 (2002) at <http://www.ecmi.de/jemie/download/Focus1-2002Brunnbauer.pdf>; Jenny Engström, *Multi-Ethnicity or Bi-Nationalism? The Framework Agreement and the Future of the Macedonian State*, 1 J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. 1, 15-16 (2002), at <http://www.ecmi.de/jemie/download/Focus1-2002Engstrom.pdf>.

136. See Tamir, *supra* note 123, at 61-71 (distinguishing thin, intra-liberal multiculturalism from thick multiculturalism—i.e., liberal accommodation of illiberal ideologies).

bers of minority communities may be permitted a separate education, but the heavy economic burden of operating an education system is theirs to carry. This thin multiculturalism accepts pluralism on the level of subcultures, but seeks to maintain a single, societal, primary culture.

In the ethnic nation-state, multiculturalism is likely to take a different form. In these states, it is considered desirable for the collective identities and cultures of all communities to remain separate. This means that a degree of multiculturalism is expected, which likely grants institutional structures to the minority culture, such as a separate public education system conducted in the minority's language and, in unusual cases, even some form of cultural and institutional autonomy. Even in those unusual cases, however, multiculturalism is still thin compared to its binational counterpart. The reason is that ethnic nation-states, of all varieties, continue to favor one community's culture over that of the other community or communities. Therefore, while it accepts the existence of a number of different cultures in the society, the state officially adopts the preferred community's symbols, language, and values.

As noted, these possible configurations are all subsumed under the single heading multiculturalism. Caution, then, is in order, and a policy that is referred to as multicultural must be carefully characterized. Thus, as exemplified by the case of Israel, striving for thick multiculturalism of the sort that characterizes binational states, alone, is restricted by law.<sup>137</sup>

## II. THE GROUP-DIFFERENTIATED RIGHTS OF THE ARAB-PALESTINIAN MINORITY IN ISRAEL

It is necessary to apply the theoretical framework to the case of Israel to determine what exists and what is absent with respect to the group-differentiated rights of Israel's national minority. This section is descriptive; thus, identifying absent minority rights does not, in itself, constitute a valid criticism of it. An evaluative discussion will be offered only in the concluding part of the Article.

The following analysis of the group-differentiated rights of the Arab-Palestinian minority is presented in terms of the three sub-categories of group-differentiated rights that were

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137. See *infra* Part III.A.



outlined in Part 1: accommodation rights, self-government rights, and special rights of representation and allocation.

A. *Accommodation Rights of the Arab-Palestinian Minority*

1. *Language Rights of the Minority: The Status of Arabic as an Official Language*

The most far-reaching group-differentiated right that is granted to the Palestinian minority by Israeli Law is the normative status of Arabic as one of the two official languages of the state. Official language status was bestowed on Arabic in British Mandatory legislation, which was left in force after the establishment of the state. Article 82 of the Palestine Order in Council of 1922 related (under the heading "Official Languages") to English, Arabic, and Hebrew, and stated that:

All Ordinances, official notices and official forms of the Government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in English, Arabic and Hebrew. The three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations to be made from time to time, in the Government offices and the Law Courts.<sup>138</sup>

The first statute enacted by the Knesset, the Israeli Parliament, was the Law and Administration Ordinance of 1948.<sup>139</sup> The ordinance incorporated into the Israeli legal system nearly all of the legal norms of Mandatory rule, save for a few exceptions by which norms were expressly or implicitly excluded.<sup>140</sup> One of the express exclusions was the status of English as an official language in section 15(b) of the ordinance.<sup>141</sup> This move highlights the conscious choice of the Israeli legislature to retain the status of Arabic as an official language.<sup>142</sup>

138. Palestine Order-in-Council, art. 82, in 3 LAWS OF PALESTINE 2569, 2588 (Robert Harry Drayton ed., rev. ed. 1934).

139. Pkudat Sidrey Ha-Shilton V'Ha-Mishpat [Law and Administration Ordinance], art. 10(b), 1 L.S.I. 7 (1948).

140. *See id.*

141. *See id.* at art. 15(b).

142. *See* DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 165-66 (1990); Mala Tabory, *Language Rights in Israel*, in 11 ISRAEL Y.B. ON HUM.

Three issues are dealt with in Article 82 of the Palestine Order in Council, as amended in 1948.<sup>143</sup> On the central-government level, interactions between the government and the citizens must be conducted in both Hebrew and Arabic.<sup>144</sup> Such interactions include directives—Knesset legislation and secondary legislation—and service provisions, which are official announcements to the public, and the forms through which government services are conducted. Thus, Article 82 relates not only to the government's communication with citizens, but also to citizens' communication with the government. It provides citizens with written and oral access to agencies of the central government in either of the two official languages. This language right, however, is potentially subject to qualification through regulations. So far, no such restrictions have been introduced and full (*de jure*) access to the government offices and the courts in the Arabic language exists.

On the local-government level, the requirement of bilingualism established by Article 82 is more limited. It relates only to official announcements and, more important, applies only in districts designated as such by an order.<sup>145</sup> Such an order was issued in the Mandatory period, stipulating certain trilingual districts in which the local authorities were subject to the requirement of publication in the three languages (and today, in the two official languages).<sup>146</sup>

To use the terminology of rights outlined above, the status of Arabic as an official language is a legal arrangement that confers a group-differentiated right of the special representation and allocation type. As distinct from the partially protected status that is sometimes granted to minority languages in divided states, such as that of a working language, the term "official" has a special connotation. Official means representa-

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RTS. 272, 276-77 (Yoram Dinstein ed., 1981); Yuval Merin, *The Case against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT'L & COMP. L. 1 (1999).

143. Palestine Order-in-Council, art. 82, in 3 LAWS OF PALESTINE, *supra* note 138, at 2588.

144. *See id.*

145. *See id.*

146. Use of Official Languages, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE No. 28, 1920.

tive, apparently reflecting the nature of the state.<sup>147</sup> Indeed, bilingualism is a characteristic feature of two small groups of states. First, it characterizes binational states; that is, states that maintain extensive partnership between their national communities, with bilingualism constituting a major expression of this partnership.<sup>148</sup> Second, a subgroup of civic nation-states, those with a multicultural orientation, also grant comprehensive language rights to a number of languages—a notable example of which is South Africa.<sup>149</sup>

Israel clearly does not belong to either of these two groups. It is an ethnic nation-state, a category generally characterized by a policy of a single official language. Consider the official-language regime in other ethnic states, for example,

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147. On the difference between an “official language” and “recognized,” “national,” or “working” languages, see Kenneth D. McRae, *The Principle of Territoriality and the Principle of Personality in Multilingual States*, 4 *LINGUISTICS* 33, 42 (1975); JOSEPH E. MAGNET, *OFFICIAL LANGUAGE OF CANADA* (1995) [hereinafter MAGNET, *LANGUAGES OF CANADA*].

148. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms, §§ 16-23, available at <http://laws.justice.gc.ca/en/charter>) (providing parity of legal status for the two official languages: English and French); CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE [FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION] art. 70 (Switz.) (listing German, French, and Italian as official languages of Switzerland). The provisions of the Belgian Constitution mandate no official language *per se*. See BELG. CONST. (Coordinated Constitution of February 17, 1994), *supra* note 131 at tit. II, art. 30 (“The use of languages current[ly spoken] in Belgium is optional; only the law can rule on this manner. . . .”), available at [http://www.fed-parl.be/constitution\\_uk.html](http://www.fed-parl.be/constitution_uk.html) (English language Belgian Constitution at Belgian Parliament website). However, Article 189 provides that there be official constitutional texts in French, German, and Dutch, and Chapter IV of Title III provides for the establishment of Regional Councils reifying the German, Dutch, and French linguistic communities. See *id.* tit. VII, art. 189; *id.* tit. III, ch. IV (On Communities and Regions), arts. 115-40.

149. See S. AFR. CONST. (Constitution of the Republic of South Africa, Act 108 of 1996) ch. 1, art. 6, at <http://www.concourt.gov.za/constitution/const01.html>. India employs a similar multilingual policy in regard many of its linguistic minorities, see Vasuki Nesiiah, *Federalism and Diversity in India*, in *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES* 53, 53 (Yash Ghai ed., 2000); as does Italy in regard to the Austrian minority in South Tyrol, see Palley, *supra* note 3, at 143; and Spain in regard to Catalonia and the Basque country, see Daniele Conversi, *Autonomous Communities in Spain*, in *AUTONOMY AND ETHNICITY*, *supra*, at 122, 126-29. These policies, however, are limited to the minority regions themselves. See *WORLD DIRECTORY OF MINORITIES* 174-76 (Minority Rights Group ed., 1997).

Sinhalese in Sri Lanka, Malay in Malaysia, Slovak in Slovakia.<sup>150</sup> How is it, then, that in Israel the language of the minority is given a legal status as an official language? Moreover, why is the discussion of the status of Arabic located in the subsection dealing with accommodation group-differentiated rights, rather than in the subsection on the rights of special representation and allocation?

First, Israel's historical-legal background played a key role in Israel's linguistic deviation from the paradigm of the ethnic nation-state. The source of the status of Arabic (along with Hebrew) as an official language is in Mandatory legislation, as opposed to new, original Israeli legislation. The international community would have reacted negatively had the new Israeli state annulled Arabic's status as an official language. Indeed, the U.N. Partition Resolution of November 1947 stipulated that certain human rights and group-differentiated rights, including language rights, were to be upheld in the Arab and Jewish states that were supposed to be established in Palestine.<sup>151</sup>

Nonetheless, the Partition Resolution did not appear to require the preservation of Arabic's official-language status in the Jewish state (nor of Hebrew's status in the Arab state). Rather, it appeared to require only the preservation of the respective minorities' right to use their own language. The resolution explained the right to use the minority language in many contexts, including on the individual level, in commercial relations, religion, journalism and publications of all kinds, and political activities.<sup>152</sup> Likewise, it required that the Jewish state's declaration to the United Nations include an undertaking to the effect that: "In the Jewish State adequate facilities shall be given to Arabic-speaking citizens for the use of their language, either orally or in writing, in the legislature, before the Courts and in the administration."<sup>153</sup> These stipulations give Arabic the status of a working language, but not the status of an official language. For instance, acts of legisla-

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150. See, e.g., Milton Esman, *The State and Language Policy*, 3 INT'L POL. SCI. REV. 381, 385-86 (1992) (describing the unilingual Malaysian language policy and its underlying purposes); Nas, *supra* note 135, at 184 (stating that Slovak is the state language of Slovakia).

151. See Partition Resolution, *supra* note 14.

152. See *id.* § É(B)(10)(d), at 135, § É(C)(2)(7), at 137.

153. See *id.* at 137 n.1 (internal quotations omitted).

tion and secondary legislation, or other documents directed to the public whose source is in legislation, the government or its organs, or in the courts, are not required to be articulated in the two languages. In Jerusalem, on the other hand, the Partition Resolution explicitly states that Arabic and Hebrew are to be the “official languages” of that city.<sup>154</sup> Because the historical explanation does not fully account for Israel’s deviation from the expected position of an ethnic nation-state with regard to language rights, two further explanations are necessary.

The first relates to the familiar gap between rhetoric and practice. It stresses that any lack of accordance between the national identity of Israel and the legal status of its minority language is what is most apparent. Both on the symbolic and practical levels, Israel never fully accepted linguistic parity between Hebrew and Arabic.<sup>155</sup> Rather than annul the official status of Arabic, Israel settled for unilingual practice among all governmental bodies in the country (with the exception of the Arab local authorities), and counted on the dominance of Hebrew in the Israeli labor market to further marginalize Arabic.<sup>156</sup> Such factors compelled the Palestinian minority to adopt bilingualism, and thus the hegemony of Hebrew was ensured.

A second legal explanation for Israel’s treatment of Arab language rights is that the legal guarantee concerning the status of Arabic is more limited in scope than is commonly thought. Israeli law (as a continuation of Mandatory law) does not create a comprehensive normative regime of bilingualism, which means that it does not grant the Arabic language the

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154. See *id.* § IIÉ(C)(10), at 148.

155. See ADALAH THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, LEGAL VIOLATIONS OF ARAB MINORITY RIGHTS IN ISRAEL: A REPORT ON ISRAEL’S IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 66-70 (1998) [hereinafter ADALAH REPORT]; GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES (2003) 110-14 [hereinafter BARZILAI, COMMUNITIES AND LAW]; Ilan Saban & Mukhamad Amarah [Muhammad Amara], *Mamad Ha-Safah Ha-Aravit B-Isra-el: Mishpat, M’tzi-ut, U-G’vulot Ha-Shimush Ba-Mishpat L-Shinuy M’tzi-ut* [The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change], 36 ISR. L. REV. 5 (2002).

156. See Saban & Amara, *supra* note 155.

full and comprehensive status of an official language. A comparative analysis of Canadian law reinforces this point.

The Charter of Rights and Freedoms,<sup>157</sup> which is the heart of the Canadian constitution, includes broad and detailed provisions concerning the official languages of Canada (primarily in Articles 16-23). Article 16(1) of the Charter makes a general, unequivocal stipulation:

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the parliament and government of Canada.<sup>158</sup>

This general stipulation is accompanied by a number of detailed provisions. Among them is Article 17 of the Charter, which states that every person has the right to use English or French in any discussion or procedure that is conducted in the federal parliament.<sup>159</sup> Article 18 lucidly states that the laws, rulings of parliament, and official records will be printed and published both in English and French, and that the two versions are “equally authoritative.”<sup>160</sup> Article 19 explicitly states that every person can use both English and French in any legal proceeding in the courts established by Parliament.<sup>161</sup> Article 20 states that every member of the Canadian community is entitled to use, and receive service in, English or French in any office in the federal civil service (with certain qualifications that will not be specified here).<sup>162</sup>

By comparison, Article 82 of the Palestine Order-in-Council, 1922, with the Charter reveals contains the following weaknesses: First, although Article 82 indeed contains the heading “Official Languages,” according to Israeli law an article’s heading does not have independent normative power.<sup>163</sup> In other

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157. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), at <http://laws.justice.gc.ca/en/charter>.

158. *Id.* § 16(1).

159. *Id.* § 17.

160. *Id.* § 18.

161. *Id.* § 19.

162. *Id.* § 20. For a more extensive discussion of the language rights that are given to the French language in Canada, see MAGNET, LANGUAGES OF CANADA, *supra* note 147.

163. *Cf.* AHARON BARAK, PARSHANUT TAKHLITIT BA-MISHPAT [PURPOSIVE INTERPRETATION IN LAW] 402 (2003) (the plain text of a piece of legislation is more authoritative than its heading).

words, this heading will help in interpreting the obligations set forth in Article 82, but may not have the power to add obligations that are not specified there. Article 82 weaves fewer explicit obligations around the “officiality” of the languages than those that appear in the Charter, and includes no provisions that emphasize and elaborate upon the equal status of the two languages, such as those in the Charter.<sup>164</sup>

Furthermore, while the status of the official languages is entrenched in the constitution of bilingual states, in Israel the status of the minority language is primarily rooted statutory law. Although, certain aspects of the status of Arabic receive protection from Israel’s basic constitutional principles, this does not materially alter the basic state of affairs: Article 82—the main legal provisions establishing Arabic as an official language—is merely a statute. The difference between the normative status of the minority language in Israel and the status of the minority language in the above-mentioned bilingual states is not trivial. A statutory stipulation carries weaker symbolic weight than a constitutional stipulation, and is more easily annulled or altered. Indeed, the Arab-Palestinian minority in Israel fears that Arabic’s legal status will be changed if it is perceived to threaten the axioms of the majority community.<sup>165</sup> In sum, the legal guarantee in regard to the status of Arabic is more limited than is commonly thought.

Nevertheless, the language rights that are provided to the minority in Israel on the basis of Article 82 are, by any standard, very substantial. As analyzed above, they require the publication of legislation and secondary legislation in both languages, the availability of official forms in both languages, full access in Arabic to the courts and the civil service in some of the municipalities. This impressive list of linguistic rights, however, has eroded over the years. Three examples of such erosion are: First, there is the fact that the Arabic version of legislation is published in the *Official Gazette* many months af-

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164. The dimensions of the status of Arabic as an “official language,” as well as the Canadian analogy, were recently discussed in a major Supreme Court case, a discussion of which appears below. Many issues, however, were left unanswered due to the fact that the ruling was passed by majority opinion and the arguments of the majority justices differ from each other. See H.C. 4112/99, *Adalah v. Iriyat Tel-Aviv Yafo* [*Adalah v. The Municipality of Tel-Aviv-Jaffa*], 56(5) P.D. 393, par. 11.

165. See Saban & Amara, *supra* note 155.

ter the Hebrew version.<sup>166</sup> This delay does not affect the legislation's validity because its entry into force does not depend on its publication in the two languages, but rather on "its publication in the *Official Gazette*."<sup>167</sup> The strong preference for publishing in Hebrew stems from the interpretative principle, as stated in the Interpretation Law, 1981,<sup>168</sup> that the two versions are not accorded equal weight: "The authoritative version of any law is the version in the language in which it was enacted."<sup>169</sup> Laws in Israel are largely enacted in Hebrew.

Second, a person can testify in Arabic at his own or someone else's trial, and is entitled to a translator if subject to criminal proceedings;<sup>170</sup> but a person cannot conduct a criminal or civil proceeding primarily in Arabic. The court system—in the vast majority of courts and tribunals—does not contain effective institutional mechanisms for translating from Arabic to Hebrew and vice versa.<sup>171</sup> Often this means that Arab litigants must make due with poor translation, testify in stammering Hebrew, or carry the costs of external translation services. This results in a reduced chance of legal success.<sup>172</sup>

Third, official governmental announcements appear, for the most part, only in Hebrew;<sup>173</sup> and, until recently, road signs, like directions, were largely in Hebrew. Sometimes English was added to road signs, but only rarely Arabic.<sup>174</sup> In most local authorities, municipal signs and by-laws are enacted and available in Hebrew only. This is the case not only in Jewish local authorities, but also, until very recently, in mixed cit-

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166. See KRETZMER, *supra* note 142, at 166; see also Tabory, *supra* note 142, at 277.

167. Law and Administration Ordinance, art. 10(b), 1 L.S.I. 7 (1948).

168. Khok Ha-Parshanut [Interpretation Law], 1981, 35 L.S.I. 370.

169. Interpretation Law, § 24, 1981, 35 L.S.I. 370.

170. See Khok Seder Ha-Din Ha-Plili (Nosakh Meshulav) [Criminal Procedure Law (Consolidated Version)], 1982, S.H. 43.

171. See Hannah Amit-Kochavi, *Translation from Arabic into Hebrew in Israel: An Overview*, 43 META 1, 3 (1998), at <http://www.erudit.org/revue/meta/1998/v43/n1/001883ar.pdf>.

172. See pending petition: H.C. 792/02, Adalah v. Menahel Batey Ha-Mishpat B'Yisra-el [Adalah v. The Director of the Courts of Israel], at <http://62.90.71.118/>. The submission of the petition has already led to partial improvements in the above-mentioned state of affairs.

173. BARZILAI, COMMUNITIES AND LAW, *supra* note 155, at 110-14.

174. ADALAH REPORT, *supra* note 155, at 64.



ies (i.e., those which include a substantial Arab minority). For many years, the only exception was Jerusalem.

Over the past decade, however, there has been a considerable change in this situation. The main official agent of change has been the High Court of Justice (the Supreme Court of Israel that sits on some administrative issues as the first and last instance). More importantly, the Court's attention was drawn to this issue by the activity of civil society, and particularly NGOs established by the Arab-Palestinian minority within the last decade. Since the mid-1990s, human rights organizations, especially Adalah (the Legal Center for Arab Minority Rights in Israel) and the Association for Civil Rights in Israel, have carefully exploited the legal status of Arabic to try to bring about change in its sociopolitical status.<sup>175</sup> Many such changes have occurred in the context of the language of public signs.<sup>176</sup>

The decision in *Ram Engineers* was an important first step in the recent evolution of Arabic language rights.<sup>177</sup> The case arose when an Arab construction company insisted on its right to publish advertisements only in Arabic in particular sections of Nazareth-Illit.<sup>178</sup> The municipality admitted that it opposed Arabic-only advertisements due to "the nature of the local authority as a place of primarily Hebrew and Jewish residence."<sup>179</sup> These words reveal the profound ambivalence aroused by the trend of Arabs moving into Nazareth-Illit because of the housing shortage in Nazareth, with Nazareth-Illit

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175. See Payes, *supra* note 12, at 80.

176. The language conflict in Canada during the past generation was also mainly centered on the language of signs. See, e.g., *Ford v. Quebec* [1988] 2 S.C.R. 712. The emphasis that human rights organizations have placed on the issue of the language of signs reflects the deep symbolic dimensions involved. The language(s) that citizens (and foreigners) encounter in official signs give them direct, non-mediated, important information about the extent of participation of the minority in the state of its citizenship, and the degree of respect accorded to its cultural identity. The language of private signs also provides significant information. It indicates the demographic composition of certain regions and, because private signs are often directed at likely consumers, language indicates the disparities in socioeconomic power between different communities.

177. H.C. 105/92, *Ram Mehandesim Kablanim Ba-am v. Iriyat Natrat Illit* [*Ram Engineers v. Municipality of Nazareth Illit*], 47(5) P.D. 189.

178. *Id.* at 195.

179. *Id.* at 217 (author's translation).

gradually becoming a mixed city. The Supreme Court upheld the construction company's right to publish only in Arabic on public billboards owned by local authorities, even in towns and cities where most or all of the residents are Jewish.<sup>180</sup> The Court invalidated a by-law of the City of Nazareth-Illit requiring that all publications, even private ones, on billboards anywhere in the city be printed in Hebrew.<sup>181</sup>

This outcome is unquestionably important. The Court, however, chose to base its ruling primarily on the individual right to freedom of expression, while referring only in a very secondary way to the official status of the Arabic language.<sup>182</sup>

A second development in the status of Arabic resulted from a petition by Adalah. The case dealt with road signs on the interurban roads. It led to an undertaking by the state to complete the transition to fully bilingual signs on these roads by 2004.<sup>183</sup>

The debate about bilingual signs on interurban roads, however, did not end with that undertaking by the state. Instead, it turned to the question of what precisely would appear in Arabic.<sup>184</sup> Would the names of communities on road signs merely be Arabic transliterations of Hebrew names, or would they be their Arabic names in Arabic script? This ongoing debate sometimes arises even regarding the names of entirely Arab communities, but it occurs most often with respect to mixed communities. The issue is also raised with respect to communities that, in the past, were Arab, but no longer are, such as Tsipori/Saphoori. The state sometimes adopts a "compromise" by posting an Arabic transliteration of the Hebrew name, while adding the Arabic name, in Arabic script, in parentheses. The parentheses, however, signal the different status of the names, and hence this practice is a subject of dis-

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180. *Id.* at 214.

181. *Id.*

182. For a more thorough discussion, see Gad Barzilai, *Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics, and the Israeli-Arab-Palestinian Community*, 34 ISR. L. REV. (2000), 425, 438-39; ADALAH REPORT, *supra* note 155, at 67.

183. H.C. 4438/97, Adalah v. Ma-atz [Adalah v. Public Works Department] (unpublished), at <http://62.90.71.124/files/97/380/044/f07/97044380.f07.HTM>.

184. I am grateful to Jamil Dakwar from Adalah for emphasizing this point to me.

pute.<sup>185</sup> It is perceived by some as a failure to abandon state practices of “Judaizing the common space.”<sup>186</sup>

In terms of the theoretical framework that was presented for group-differentiated rights, the minority’s demand is for a significant right to special representation and allocation, as distinct from merely formal linguistic representation. In other words, the demand is that the minority itself should be able to choose the linguistic representation that is adopted in its language. This will enable its participation—as an ethno-national community—in determining the public human landscape of the country.

A final development, which also gave birth to the most important ruling so far regarding the legal status of Arabic, occurred in July 2002, in the case of *Adalah et al. v. Municipality of Tel Aviv-Jaffa et al.*<sup>187</sup> The importance of the ruling by the Supreme Court is difficult to overstate, even though the case was decided by a panel of three justices—one of which wrote a minority opinion and the two justices who made up the majority wrote diverging opinions. First, on a narrow level, the ruling requires that official signs for mixed cities in Israel include Arabic.<sup>188</sup> This applies to the entire municipal jurisdiction, not only to the Arab or mixed neighborhoods within them. The ruling’s main importance, however, lies in Chief Justice Barak’s opinion.

The specific legal question presented in *Adalah et al. v. Municipality of Tel Aviv-Jaffa et al.* concerned the obligations of mixed local authorities with respect to the language in which municipal signs are printed.<sup>189</sup> The above mentioned Article 82 conditions the imposition of linguistic obligations on the local authority’s inclusion on the list of “areas . . . prescribed by order.”<sup>190</sup> All parties to the *Adalah* petition—petitioners,

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185. For the important analysis of this cross-cutting issue of “naming” and language in Israel, see BENVENISTI, *supra* note 16, at 52-54.

186. I will return to the issue of “Judaizing the common space” below when discussing rights of special representation and allocation and, specifically, the symbolic order of the State.

187. *Adalah v. The Municipality of Tel-Aviv-Jaffa*, 56(5) P.D. at 393.

188. *Id.* para. 1 (Barak, C.J.).

189. *Id.*

190. Palestine Order-in-Council, art. 82, in 3 LAWS OF PALESTINE, *supra* note 138, at 2588. For the full text of Article 82, see the text that accompanies note 138.

respondents, and, consequently, the Court—assumed that such order had not been issued.<sup>191</sup> This assumption appears mistaken because, as mentioned above, a Mandatory order existed and remains in force.<sup>192</sup> Although, for different reasons that will not be discussed here, this order was latent,<sup>193</sup> the important point is the effect this assumption had on the justices' decision.

Because the Court assumed that the order required by Article 82 had not been issued, it was forced to determine whether other major normative sources influence the legal status of Arabic. The Court indicated that an additional, more general and abstract, source of linguistic obligations is found in the basic values of Israel as a Jewish and democratic state, including the right to human dignity (which is in Basic Law: Human Dignity and Liberty).<sup>194</sup> The justices' paths parted, however, on the question of whether this source posits group-differentiated rights in the domain of language (as distinct from protection against discrimination on a linguistic basis), and whether it is the Court that should establish such rights. The majority of the justices, and particularly Chief Justice Barak, decided to declare comprehensive protection and status for the language of the national minority in Israel as derived also from the basic values of Israel and the basic right to human dignity.<sup>195</sup>

In addition, Chief Justice Barak made a further, perhaps even more important, point. He dealt squarely with the question of why the link between language and human dignity does not provide similar protection to the array of other languages that are spoken in Israel; namely, the languages of new immigrants. His answer is based on a crucial distinction between homeland minorities and immigrant groups, and it recog-

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191. *Adalah v. The Municipality of Tel-Aviv-Jaffa*, 56(5) P.D. at 393.

192. *See supra* Part II.A.1.

193. Probable reasons for the parties' unawareness of the existence of a valid Mandatory Order are outlined in Ilan Saban, *Kol (Du-L'Shoni) Boded Ba-Afelah [A Lone (Bilingual) Cry in the Dark?]*, 27 TEL AVIV U. L. REV. 109, 137-38 n.64 (2003).

194. H.C. 4112/99, *Adalah v. Iriyat Tel-Aviv Yafo [Adalah v. The Municipality of Tel-Aviv-Jaffa]*, at 393, para. 24 (Barak, C.J.).

195. *Adalah v. The Municipality of Tel-Aviv-Jaffa*, 56(5) P.D. at 393, paras. 24-25 (Barak, C.J.); *see also* Khok Yesod: Kvod Ha-Adam V'Kheyruto [Basic Law: Human Dignity and Liberty] 1992, S.H. 150.

nized, for the first time, the Palestinian minority's distinctness as a "homeland (national) minority"<sup>196</sup>—recognition much wished for, and needed, by the Palestinian minority for purposes of protection. A central paragraph in the ruling states:

Against this background the following question may arise: What distinguishes the Arabic language, and why is its status different from that of several other languages—in addition to Hebrew—that Israelis speak? Does our approach not imply that residents of different towns in which there are minority groups of speakers of various languages, will now be able to demand that the signs in their towns will be in their language as well? My response is negative, *since none of those languages are the same as Arabic*. The uniqueness of the Arabic language is twofold. First, Arabic is the language of the largest minority in Israel, *who have lived in Israel for ages*. This is a language that is linked to cultural, historical, and religious attributes of the Arab minority group in Israel. This is the language of citizens who, notwithstanding the Arab-Israeli conflict, wish to live in Israel as loyal citizens with equal rights, amid respect for their language and culture. The desire to ensure dignified coexistence between the descendants of our forefather Abraham, in mutual tolerance and equality, justifies recognizing the use of the Arabic language in urban signs—in those cities in which there is a substantial Arab minority (6%-19% of the population)—alongside its senior sister, Hebrew . . . .<sup>197</sup>

Arabic, then, is not similar to the mother tongues of Jews who immigrated to Israel, since a homeland minority is not the same as an immigrant group.

All these developments might, indeed, turn out to be crucial to the legal status of the minority in general and its language rights in particular. It may, however, be misleading to close the subject of the Arabic language without some reserva-

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196. *Id.*

197. *Id.* para. 25 (Barak, C.J.) (references deleted, emphasis added). Moreover, the nature of the Arab-Palestinian minority described as a "native minority" is emphatically held by the Or Commission. OR REPORT, *supra* note 39, pt. 1, para. 5.

tion. Developments in Arabic's legal status and even the possible enforcement of that status are not likely to substantially change its sociolinguistic status. The linguistic reality of Israel is that it is not a bilingual society, and it is not likely to become such in the foreseeable future. A transition to real bilingualism requires certain basic elements, and comparison with Canada shows that this mainly involves two conditions. The first is a political culture, shared by both communities, that is committed to bilingualism on the governmental, public level. The second is a labor market, for the most part bifurcated, that is conducted in both languages. The possibility of creating such a labor market requires far-reaching aspects of self-government for the minority group; for example, in Canada, the powers of the Province of Quebec.<sup>198</sup>

These two conditions do not exist in Israel, and are not likely to emerge in the foreseeable future. Despite the above-mentioned developments, Hebrew more or less continues to be the exclusive language of the common public sphere. It is the language of the government bureaucracy, the language of higher education, the language of the great bulk of Israeli electronic media, and, most important, the language of major segments of the Israeli labor market.<sup>199</sup>

In sum, on the societal level, the Arabic language has an inferior, decidedly secondary role. Its primary significance lies in the opportunity for children within the minority community to be educated in their own language. In our categorization of rights, this constitutes a right of less far-reaching significance; namely, an accommodation right, as opposed to the right of special representation (i.e., partnership in the symbolic order of the state).

## 2. *The Education System: Dimensions of Accommodation Rights*

The language of the national minority in Israel is preserved through the education system. An extensive public education system, at both the elementary and high school levels,

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198. For a more thorough discussion of the limitations of the Canadian analogy to the Israeli context, see Saban & Amara, *supra* note 155.

199. *See id.* at 14.

is conducted in Arabic, and Arabic private schools have received, since the 1980s, almost full state funding.<sup>200</sup>

The Arabic education system in Israel is discussed here and also in the subsequent section on rights and self-government. In considering the accommodation rights of the minority, the following crucial point must be highlighted.

The existing education system is only partially protected against the erosion of the culture and language of the minority. While it plays an important role in preserving Arabic and certain elements of minority cultural, it is susceptible to two interrelated trends. First, the minority is forced to become bilingual and bicultural, without the same occurring in the majority community. Second, the power of the minority's national consciousness is dulled, which erodes the sense of a close link and common fate between the minority and its people. Thus, among other things, the curriculum at Arab state schools is required to include Hebrew, and Jewish culture and history; these are requirements for which there are almost no equivalents in the Hebrew schools.<sup>201</sup> Moreover, the contents of the curriculum, until the late 1990s, were carefully filtered in areas such as history and literature to ensure that they did not contain a Palestinian national narrative.<sup>202</sup>

As for private Arab schools, particularly the high schools, the difference is not great. Most, though not all, Arab private high schools adjust themselves to the state curriculum.<sup>203</sup> This is both because the government uses budgetary pressures to get schools to adopt important parts of the state's curriculum and because graduates need that curriculum to pass standardized state matriculation examinations in order to attend the more prestigious institutions of higher-education. It should

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200. See MAJID AL-HAJ, EDUCATION, EMPOWERMENT, AND CONTROL: THE CASE OF THE ARABS IN ISRAEL 94-101 (1995).

201. See HUMAN RIGHTS WATCH, SECOND CLASS: DISCRIMINATION AGAINST PALESTINIAN ARAB CHILDREN IN ISRAEL'S SCHOOLS 143, 146 (2001).

202. See KRETZMER, *supra* note 142, at 170. The curriculum in Arab schools is a topic of great importance and has been extensively discussed in the literature. See, e.g., SAMI KHALIL MAR'I, ARAB EDUCATION IN ISRAEL (1978); JACOB M. LANDAU, THE ARAB MINORITY IN ISRAEL, 1967-1991: POLITICAL ASPECTS 65 (1993); KRETZMER, *supra* note 142, at 169-70; AL-HAJ, *supra* note 200, at 124-28. For some important recent changes relating to the curricula in Arab schools, see HUMAN RIGHTS WATCH, *supra* note 201, at 155-59.

203. See LANDAU, *supra* note 202, at 71.

also be noted that the language of instruction within Israeli institutions of higher-education is almost solely Hebrew, and the language of the Israeli labor market is predominantly Hebrew.

It is also important to note that this state of affairs does not arise from specific legal norms. The statutory directives concerning the Arabic education system, state or private, are both few and laconic. This grants broad discretion to authorities whose personal composition is, to a very large extent, solely Jewish. For almost half a century, Article 4 of the State Education Law was the only one in the array of provisions dealing with education that explicitly addressed such a major division in Israeli life:

The Minister shall prescribe the curriculum of every official educational institution; in non-Jewish educational institutions, the curriculum shall be adapted to the special conditions thereof.<sup>204</sup>

An important development, however, appears in an amendment of the State Education Law that was ratified in February 2000.<sup>205</sup> This is an amendment of an especially important provision; namely, Article 2, which addresses “the goals of state education.”<sup>206</sup> The original version of Article 2 reads:

The object of state education is to base elementary education in the State on the values of Jewish culture and the achievements of science, on love of the homeland and loyalty to the State and the Jewish people, on practice in agricultural work and handicraft, on *chalutzic* (pioneer) training, and on striving for a society built on freedom, equality, tolerance, mutual assistance and love of mankind.<sup>207</sup>

While the new version reads:

The goals of state education are:

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204. Khok Khinukh Mamlakhti [State Education Law], 7 L.S.I. 113, art. 4 (1952-1953). The State Education Regulations (Advisory Council for Arab Education) were ratified in 1996, a development which is discussed below.

205. Khok Khinukh Mamlakhti (Tikun Mispar 5) [State Education Law (Amendment No. 5)], 2000, S.H. 122.

206. State Education Law (Amendment No. 5), art. 2, 2000, S.H. 122.

207. State Education Law, 7 L.S.I. 113, art. 2.



(1) To educate a person to love humanity, love his people and love his land, and to be a loyal citizen of the State of Israel, who honors his parents and his family, his heritage, his cultural identity, and his language;

(2) To impart the principles of the Declaration of Independence of the State of Israel and the values of the State of Israel as a Jewish and democratic state and to develop an attitude of respect for human rights, basic freedoms, democratic values, upholding the law, and the culture and viewpoints of others, and also to educate towards the aspiration for peace and tolerance in relations between individuals and between peoples;

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(11) To recognize the special language, culture, history, heritage, and tradition of the Arab population and of other population groups in the State of Israel, and to recognize the equal rights of all citizens of Israel.<sup>208</sup>

Although it remains to be seen how it will translate into reality, this legislative development evidences an increased awareness of the minority's existence, as well as an openness to greater consideration of its cultural-educational values. Subsection 11—which admittedly is placed at the end of the list of goals—expresses the need to acquaint the members of the majority community with the culture of the national minority community, as well as the cultures of other groups within the population. Nonetheless, the amended article deviates only slightly from the state's tendency to impose one-sided biculturalism on the minority; and it only subtly acknowledges the link between its people and the minority.

Another point worth mentioning in the educational context is the ability of parents within the minority community to enroll their children in the Hebrew education system. The substantial gaps between the Arabic and Hebrew education systems in terms of educational level and infrastructure,<sup>209</sup> together with the pronounced dominance of the Hebrew lan-

208. State Education Law (Amendment No. 5), art. 2., 2000, S.H. 122.

209. Zama Coursen-Neff, *Discrimination against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT'L L. & POL. 749, 750 (2004).

guage in Israeli public life, lead some Palestinian-Israeli parents to send their children to Hebrew public schools (particularly in mixed cities, where this option is more readily available).<sup>210</sup> It appears that, at present, Israeli law does not allow either the majority community or the minority community to prevent minority children who live in the registration district of a Hebrew school from attending that school.<sup>211</sup>

### 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.<sup>212</sup> 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.<sup>213</sup>

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.<sup>214</sup> 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.<sup>215</sup>

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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<sup>216</sup>—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.<sup>217</sup> 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.<sup>218</sup>

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.<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup> Likewise, important criminal prohibitions are part of the penal code, such as those against bigamy,<sup>223</sup> the marriage of minors,<sup>224</sup> and murder in the name of family honor.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup>

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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 Hizdamnuyt 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,<sup>228</sup> 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.<sup>229</sup> Article 18A of the Law and Administration Ordinance, 1948,<sup>230</sup> 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.”<sup>231</sup>

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.<sup>232</sup>

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.<sup>233</sup>

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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.

#### 4. *The Exemption from Military Service*

One of the most significant group-differentiated rights possessed by the minority is the exemption from military service, which is compulsory in Israel.<sup>234</sup> I classify this exemption as a group-differentiated right because it is granted on the basis of group membership and its moral justification concerns both the national distinctness of the Arab-Palestinian minority and the conflict between its people and the state of its citizenship. While I recognize that humane consideration for the special situation of the Arab-Palestinians was not the only reason for their exemption from military service—the security interest of the majority community favored it in any case—this does not detract from the importance of the exemption. It constitutes a major element of protection in regard to the culture, language, and national identity of the Arab-Palestinians in Israel; and it also has implications for the internal unity of the minority community.<sup>235</sup>

The collective nature of the exemption from military service was discussed and approved in a ruling from the initial years of the state, *Hasuna v. Prime Minister*.<sup>236</sup> The governmental policy that exempts certain sectors of Israeli society from military service was also given certain immunity in this case: The court refused in principle to intervene in the authorities' determinations of whether or not to grant the exemption.<sup>237</sup>

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234. See KRETZMER, *supra* note 142, at 98-102; DOWTY, *supra* note 35, at 213.

235. The link between the issue of exemption/non-exemption from service and collective identity and internal unity of the minority comes to light in the case of a distinct cultural community that is sociologically adjacent to the Arab-Palestinian national minority, namely, the Israeli Druze. Here, complex cause-and-effect relations are involved. On the one hand, the willingness to engage in military service among Druze men stems, probably, from a special collective identity (Druze-Arab, as distinct from the Arab-Palestinian identity). On the other hand, military service has helped greatly in sustaining and structuring this differentiated identity. See KAIS M. FIRRO, *THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY*, ch. 4 & pp. 245-247 (1999); Oren Yiftachel and Michaly D. Segal, *Jews and Druze in Israel: State Control and Ethnic Resistance*, 21 *ETHNIC & RACIAL STUD.* 476 (1998).

236. H.C. 53/56, *Hasuna v. Rosh Ha-Memshala* [*Hasuna v. Prime Minister*], 10(1) P.D. 710.

237. Under the circumstances of *Hasuna*, this involved the non-granting of an exemption from an army service to a Druze who was required to serve. See *id.*



Recently, however, the court reconsidered and decided to examine the validity of the defense minister's decision to grant an exemption. In *Rubinstein v. Minister of Defense*,<sup>238</sup> the Court invalidated the exemption from military service that had been granted to students in *haredi* (Ultra Orthodox) *yeshivas*. The exemption stemmed from a decree issued by the minister on the basis of the Defence Service Law (Consolidated Version), 1986.<sup>239</sup> The Supreme Court ruled that a collective exemption of this kind must be established in primary legislation (i.e., by the Knesset).<sup>240</sup>

The almost certain import of *Rubinstein* is that the exemption from military service granted to the Arab-Palestinian minority was also not legally valid. Indeed, in response to a petition to the High Court of Justice in *Sa-adia v. Minister of Defense*<sup>241</sup>—in which the petitioner demanded that the “members of the Muslim and Christian religious minorities” be required to perform military service, or, alternatively, to perform national service for the same length of time as military service—the state announced that the Attorney General was instructed “to act regarding the minorities’ members as was ruled regarding the yeshiva students . . . . To this end a bill will be prepared that will resolve the issue, as is stated in the above-mentioned ruling [i.e., *Rubinstein*].”<sup>242</sup>

The law that was finally passed only regulates the collective exemption of Ultra Orthodox *yeshiva* students.<sup>243</sup> It left unfulfilled the Attorney General's commitment to a parallel statutory arrangement regulating Arab citizens' exemption from army service.

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238. H.C. 3267/97, 715/98, *Rubinstein v. Sar Ha-Bitakhon* [Minister of Defense], 52(5) P.D. 481.

239. Khok L'Sherut Bitakhon (Nosakh Meshulav) [Defense Service Law (Consolidated Version)], 1986, 40 L.S.I. 112.

240. *Rubinstein v. Minister of Defense*, 52(5) P.D. 481.

241. H.C. 5370/97, *Sa-adia v. Sar Ha-Bitakhon* [Minister of Defense] (unpublished decision), available at <http://62.90.71.124/files/97/700/053/b08/97053700.b08.HTM>.

242. *Id.* The AG position was quoted in the decision.

243. Khok D'Khiyat Sherut Bitakhon Le-Talmidei Yeshivot Sh'Toratam Omanutam [The Postponement of Military Service for Yeshiva Students Law], 2002, S.H. 521.

B. *Self-Government Rights: To What Extent Is the Minority Granted Autonomy in Certain Areas of Its Community Life?*

In contrast to the minority's situation in the domain of accommodation rights, where it enjoys considerable rights in the areas of language, education, religion, and military service, it has meager group-differentiated rights in the other subcategories, namely, self-government rights and rights to special representation and allocation.

Minority self-government is linked to the creation or the maintenance of self-governmental institutions within the relevant community. Such institutions fall into two main categories: those to which governmental powers are granted and those that act on the extra-governmental level, i.e., voluntary self-government institutions. In Israel, the main governmental and semi-governmental institutions that have a potential for minority self-government are the local authorities, the education system, the religious services providers, and the religious courts. The other type of institutions having a potential for self-government—i.e., the voluntary institutions—include parties, mass media, business corporations, NGOs, and third-sector organizations (i.e., extra-parliamentary and noncommercial voluntary organizations such as nonprofit organizations and professional associations). Group-differentiated rights exist in the context of minority self-government institutions if legal rules provide these institutions with governmental powers, or, more indirectly, if the state funds their activity, even if only partially. The following discussion addresses only two kinds of institutions, both of which are vital to the Arab-Palestinian minority: educational institutions and religious institutions.

1. *The Poverty of Self-Government Rights in the Area of Education*

In the state education system, the minority lacks any real measure of self-government. This system is centralized and, in fact, has always been headed by the Jewish Education Minister, a pedagogical council composed of Jews, and a senior bureaucracy that is also almost exclusively Jewish, even on the district level.<sup>244</sup> Legally speaking, the fact that such a system func-

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244. See AL-HAJ, *supra* note 200, at 10-11, 68-72, 216-18; KRETZMER, *supra* note 142, at 169-70.

tioned without substantial Arab representation and with wide governmental discretion regarding the minority stemmed, in large part, from the fact that, for more than fifty years, no right to appropriate representation existed in Israeli law. The beginnings of such a right have emerged only recently.<sup>245</sup> Governmental freedom of action was also facilitated by the fact that the powers of the Education Ministry were not constrained, in terms of content and structural requirements, in regard to Arab education.<sup>246</sup> This lack of self-government rights stands out sharply when one compares Arab state education to the state education system for the national-religious minority within the Jewish majority community.<sup>247</sup>

In 1989, reacting to longstanding pressures, the Education Ministry appointed an Arab educator to the position responsible for Arab education; however, what had been the Division of Arab Education was downgraded to a mere department.<sup>248</sup> The more important process that occurred at that time was the decentralization of control of Arab education to the different districts of the Education Ministry, meaning that Arab education would be administered by a department within each district, with the majority community being dominant in each of the districts.<sup>249</sup> This is an example—whether it is intentional is hard to say—of the way in which a real potential for minority self-government dissipates because of a certain kind of decentralization process: decentralization on a geographic-regional basis, as opposed to decentralization on a group basis (national or religious), which prevails in regard to education for Jewish national-religious children.

In 1996, a legal development suggested improved minority involvement in governmental decisions about the education of minority children. This involved State Education Regulations (Advisory Council for Arab Education), 1996, which established an advisory body:

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245. See *infra* Part II.C.3.

246. See State Education Law, art. 4, 7 L.S.I. 113.

247. Compare Articles 13, 15, and 16 of the State Education Law, which address state-religious education, with Article 4 of the law, which addresses state education in Arabic. *Id.*

248. See AL-HAJ, *supra* note 200, at 70-72; KRETZMER, *supra* note 142, at 169.

249. See HUMAN RIGHTS WATCH, *supra* note 201, at 212. See also AL-HAJ, *supra* note 200, at 69.

whose work will include examining the state of Arab education and proposing to the Minister of Education and Culture programs and endeavors for the advancement and full integration of Arab education in the state education system.<sup>250</sup>

The powers of this council are to include, among others, assisting the minister in “formulating an educational and pedagogical policy . . . that will ensure the equal status of the Arab citizens of Israel while taking into account their linguistic and cultural distinctiveness and their heritage<sup>251</sup>

Although this development is not insignificant, it involves a body on the lowest level of governmental institutions: it is an advisory body only; moreover, it is a body that the Minister has no obligation to consult before making major decisions in areas such as curriculum or staffing of key positions.<sup>252</sup>

Alongside the state education system there is the private education system that was mentioned above. This system presents a greater opportunity for minority communal self-government and cultural autonomy.

The fate of the Muslim *Waqf* (religious endowments)—to be discussed shortly—prevented the preservation and expansion of private-communal Muslim education via the *Waqf* after the birth of the state. The situation was different for the Christian private schools; these were granted relatively large educational autonomy based on the *millet* regime.<sup>253</sup> Over the years, these schools have become less and less religious in nature,

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250. Takanot Khinukh Mamlakhti (Mo-atza Meya-etzet La-Khinukh Ha-Aravi) [The State Education Regulations (Advisory Council for the Arab Education)], 1996, K.T. 1407.

251. The State Education Regulations (Advisory Council for the Arab Education), reg. 5(1).

252. Conspicuous here is the difference between the Advisory Council for Arab Education and the separate council for state-religious education (education for part of the religious community within the Jewish majority community), which is independent and has decision-making powers. The State Education Law grants the latter community, among other things, veto power over the “supplementary program” in the curriculum for the state-religious schools, and establishes an obligation to consult with the council in regard to appointing a director of the religious-education division in the Ministry of Education and Culture and in regard to appointments of superintendents, principals, and teachers in these schools. See State Education Law, arts. 13, 15, 16, 7 L.S.I. 113.

253. See Part II.A.2.

and are currently open to Muslim students. According to data from the early 1990s, 7.5 percent of all Arab students and 30 percent of all Arab high school graduates attended these schools.<sup>254</sup>

In the early years of the state, the legal framework for education provided a relatively large degree of autonomy to the private schools. This was in accordance with the Education Ordinance, which is now the Education Ordinance [new version], 1978.<sup>255</sup> Article 6(b) states that the Director-General of the Education Ministry “is not entitled to require a change in the curriculum or in the internal administration of the school.”<sup>256</sup>

In 1969, however, the situation was changed in a way that limited the autonomy of a large portion of the private schools. The Supervision of Schools Law, 1969, authorized the Education Minister to issue directives to a school so as “to ensure that the education provided in the school will be based on the principles set forth in Article 2 of the State Education Law, 1953.”<sup>257</sup> In other words, it allows the Education Minister substantial intervention in private school curricula. Furthermore, the Supervision of Schools Law, 1969, makes the employment of “educational workers” in these schools conditional on the Education Minister’s approval.<sup>258</sup> The Supervision of Schools Law, 1969, applies to private schools that were established after its coming into force, but it has also been applied to some existing private schools.<sup>259</sup> The cumulative outcome of this state of affairs is that two legal frameworks, which function simultaneously, have emerged: A portion of the Arab private schools are subject to the more autonomous framework of the

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254. See AL-HAJ, *supra* note 200, at 94-101.

255. Pkudat Khinukh Khova (Nosakh Khadash) [The Education Ordinance (New Version)], 1978, D.M.I. 607.

256. At the same time, the Minister was given the power of “supervision of the school to the extent needed for maintaining public order and proper administration.” *Id.*, art. 6(c).

257. Khok Piku-akh Al Batei-Sefer [Supervision of Schools Law], art. 28(a), 1969, S.H. 180.

258. Supervision of Schools Law, art. 16, 1969, S.H. 180.

259. See H.C. 4298/93, Jabareen v. Sar Ha-Khinukh [The Minister of Education], 48(5) P.D. 199, 203 (hereinafter *Jabareen*).

Education Ordinance and a portion are subject to the more limiting framework of the Supervision of Schools Law.<sup>260</sup>

In sum, Israeli law provides the minority self-government rights only in the context of its private schools, and significant rights of this kind are provided only to a portion of these schools.

## 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.<sup>261</sup> 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."<sup>262</sup>

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.<sup>263</sup>

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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.<sup>264</sup> As for the appointment of *qadis* (the judges of the *Shari'a* courts), this was done according to the Qadis Law, 1961.<sup>265</sup> A nine-member committee appoints the *qadis*.<sup>266</sup> A certain degree of self-government is guaranteed by the requirement that that at least five members of the committee must be Muslims.<sup>267</sup> 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.<sup>268</sup> All three bodies are Jewish-controlled.<sup>269</sup>

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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 JIRVIS, *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.<sup>270</sup> 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.<sup>271</sup> A third limitation was imposed by a 2001 amendment to the Family Courts Law,<sup>272</sup> 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.”<sup>273</sup> On all other personal-status matters, concurrent jurisdiction was granted to the civil courts (the family courts).<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup>

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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/private-law/data/15/3/1421\\_3.rtf](http://www.knesset.gov.il/private-law/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).<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup>

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-

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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; Takanat 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.<sup>280</sup> 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*.<sup>281</sup> To this end, a General Endowments Council and local councils were established.<sup>282</sup> 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.<sup>283</sup>

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.<sup>284</sup> 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.<sup>285</sup>

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.<sup>286</sup> 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.<sup>287</sup> 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-Saruji v. Misrad Ha-Datot* [Ministry for Religious Affairs], 17(1) P.D. 188, 192.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Khok Nihsei 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.<sup>288</sup>

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.<sup>289</sup> 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.

C. *Rights of Special Representation and Allocation: The Extent of the Minority's Partnership in the State of Its Citizenship*

The third and final category of group-differentiated rights concerns the degree to which the minority participates in the allocation of political, material, and symbolic power in the state. This category includes rights that pertain to the following two questions: (1) To what extent does the minority enjoy access to the goods that are allocated by the societal institutions? (2) To what extent is the minority represented in the allocating institutions themselves, the most important of which are the parliament, the government, and the civil service? The public goods that are allocated are both material (e.g., jobs, budgets, public services, tax easements, and land) and symbolic.

1. *How Fair Is the Minority's Access to the Material Goods of Society?*

Claims of profound discrimination against the Palestinian citizens of Israel regarding budgets and services are familiar for the most part, and I shall not elaborate on them here. Israel itself acknowledges many of these problems, though it points to steps that have been taken to alleviate the situation.<sup>290</sup>

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Zureik, *Prospects of the Palestinians in Israel* (1), 22(2) J. OF PALESTINE STUD. 90 (1993).

290. See in particular the three comprehensive human rights reports that Israel has submitted to U.N. institutions: the Israeli ICCPR Report; The State of Israel, Implementation of the United Nations Covenant on Eco-

The concern with group-differentiated rights leads to a focus, not on the allocations that are made on an individual-universal basis (such as recourse to health services), but rather on the allocations that are directed at activities conducted on the basis of group affiliation (e.g., budgeting for educational services, and religious services). This distinction, however, is problematic in Israel. For different reasons—one of the most important of which is the spatial separation between the two national communities—there is a built-in practice of allocating many of the universal goods (e.g., welfare services and infrastructure investment) on a community basis.<sup>291</sup>

The following analysis concentrates on the two kinds of goods that are the most sensitive in Israeli society: immigration quotas and public land. These goods are regarded by large portions of the Jewish majority as being owned solely by their community. Thus, it is important to consider the extent to which Israeli law confirms or contests this perception.

#### a. Immigration Quotas

Immigration quotas are social goods that are, indeed, exclusively allocated to the Jewish majority community. “The mission of gathering the exiles” is characterized in Article 5 of the World Zionist Organization—Jewish Agency (Status) Law, 1952, as “the central task of the State of Israel and the Zionist movement in our days.”<sup>292</sup> This goal receives major emphasis in three Israeli statutes: the Law of Return, 1950,<sup>293</sup> the Nationality Law, 1952,<sup>294</sup> and the Entry into Israel Law, 1952.<sup>295</sup> These laws establish the right of Jews and their family mem-

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nomic, Social and Cultural Rights (CESCR): Combined Initial and Second Report of the State of Israel (M. Atlan ed., 1997); The State of Israel, Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Combined Seventh, Eighth and Ninth Periodic Report of Israel (1997).

291. I have discussed this fairly extensively elsewhere under the heading “route of the separate paths.” See Saban, *Legal Status*, *supra* note 6, at 316-321.

292. Khok Ma-amad Ha-Histadrut Ha-Tziyonit Ha-Olamit (Ha-Sokhnut Ha-Yehudit L’Eretz Yisra-el) [World Zionist Organization—Jewish Agency (Status) Law], art. 5, 1952, 7 L.S.I. 3.

293. Khok Ha-Shvut [Law of Return], 1950, 4 L.S.I. 114.

294. Khok Ha-Ezrakhut [Nationality Law], 1952, 6 L.S.I. 50.

295. Khok Ha-Knisa L’Yisra-el [Entry into Israel Law], 1952, 6 L.S.I. 159.

bers to come to and settle in Israel,<sup>296</sup> and to immediately become Israeli citizens.<sup>297</sup> The only immigration law in Israel, apart from the Law of Return, was, until recently, the Entry into Israel Law, which grants wide discretion to the Interior Minister.<sup>298</sup> This discretion has never been used in a way that favors the entry of non-Jews (except for family reunification cases) and has always been applied sternly regarding the residency of Arabs.<sup>299</sup> The uni-national character of Israel's laws of immigration has been supplemented by far-reaching legislation aimed at ensuring the non-return of Palestinians refugees.<sup>300</sup> Israeli law determines, therefore, that the national minority has no right of allocation in regard to its own kin (except for family unification).

Recently, there has been a very disturbing development in the immigration and family unification policy of Israel. The Nationality and Entry into Israel Law (Temporary Order),<sup>301</sup> passed on July 31, 2003, imposes a very cruel dilemma. A citizen of Israel (almost always an Arab-Palestinian) who chooses or has chosen after May 2002 to marry a Palestinian resident of the Gaza Strip or the West Bank is faced with two options: Either leave one's country and go to the place of one's spouse, or leave one's spouse in order to stay in Israel.<sup>302</sup> Once children are involved, the ramifications are even more dreadful.

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296. See Law of Return, 1950, 4 L.S.I. 114; Entry into Israel Law, 1952, 6 L.S.I. 159.

297. See Nationality Law, pt. 1, 1952, 6 L.S.I. 50.

298. See Entry into Israel Law, 1952, 6 L.S.I. 159.

299. See, e.g., H.C. 282/88, *Awad v. Rosh Ha-Memshala V'Sar Ha-Pnim* [Prime Minister and Minister of the Interior], 42(2) P.D. 424.

300. This policy was reflected (and continues to be reflected) in a series of laws: the *Khok L'Meni-at Histanenut* (*Averot V'Shiput*) [Prevention of Infiltration (Offences and Jurisdiction) Law], 1954, 8 L.S.I. 133; the Entry into Israel Law, 1952, 6 L.S.I. 159; the Nationality Law, 1952, 6 L.S.I. 50; the *Pkudat Mirsham Ha-Toshavim* [Registration of Inhabitants Ordinance], 1949, 2 L.S.I. 103, which was subsequently replaced by the Population Registry Law, 1965, 19 L.S.I. 288; and the *Khok Nihksei Nifkadim* [Absentees' Property Law], 1950, 4 L.S.I. 68. Recently, the Law Entrenching the Rejection of the Right of Return was added to this list. See *Khok Shiryun Shlilat Zkhut Ha-Shiva* [Law Entrenching the Rejection of the Right of Return], 2001, S.H. 116.

301. *Khok Ha-Ezrakhut V'Ha-Knisa L'Yisra-el* (*Hora-at Sha-a*) [Nationality and Entry into Israel Law (Temporary Order)], 2003, S.H. 544.

302. Nationality and Entry into Israel Law (Temporary Order), 2003, S.H. 544.

Israel justifies this law as a temporary measure aimed at preventing security risks posed in the current *Intifada* by a few individuals who easily access Israel through these cross-Green Line marriages. What is primarily unacceptable about this statute is that Israel has given up on its duty to conduct a personal inquiry into security risks for each of the applications for family unification. Because of budgetary reasons and maybe even demographic reasons, Israel opted to tear up new families of Palestinian couples that want to unite across the Green Line or force some of its own citizens to leave their country in order to join their loved one. Petitions to the Supreme Court challenge the constitutionality of the statute, and there is still hope that the statute will be invalidated.<sup>303</sup>

## b. State Lands

State lands are another kind of goods whose importance is difficult to exaggerate. Is the legal framework for allocation of land similar to the one controlling immigration to Israel?

In practice, for most of its existence, Israel has behaved as a settler society. The Jewish majority community, by means of the state, has worked energetically to colonize the land under its control.<sup>304</sup> The open state of affairs in regard to allocation (and divestment) of land was, therefore, nationally biased, with land being allocated exclusively to the Jewish majority community.<sup>305</sup> However, important points need to be made in regard to law's involvement in this state of affairs. First, this obvious national bias of the Israeli land regime was not openly manifested in the legal norms.<sup>306</sup> Second, in one of its most

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303. H.C. 7052/03, *Adalah v. Sar Ha-Pnim* [*Adalah v. Minister of Interior*], available at <http://62.90.71.124/files/03/520/070/a21/03070520.a21.HTM> (pending); H.C. 8099/03 *ACRI v. Sar Ha-Pnim* [*ACRI v. Minister of Interior*] (pending), available at [http://62.90.71.124/heb/verdict/search/verdict\\_by\\_case\\_rslt.asp?case\\_year=03&case\\_nbr=8099](http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=03&case_nbr=8099).

304. Here the literature is extensive. See, e.g., JIRYIS, *supra* note 19, 75-136; BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS* 19 (1983); KRETZMER, *supra* note 142, at 49-76; SHAFIR & PELED, *supra* note 17, at 113; YIFTACHEL, *supra* note 72, at 85-86, 233-34; Kedar, *supra* note 108, at 993-1000; RONEN Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 20 *LAW & SOC'Y REV.* 231 (1996) (discussing the expropriation of Bedouin land).

305. OR REPORT, *supra* note 39, pt. 1, paras. 33-44.

306. See KRETZMER, *supra* note 142, at 51-60; Kedar, *supra* note 108, at 993-1000.

important rulings, the Supreme Court recently established limits to the majority community's ability to allocate public lands in a biased fashion.<sup>307</sup> *Kaadan v. Minhal Mekarke'ey Yisrael and Katzir* prohibited blatant discrimination and, more importantly, placed restrictions on some of the indirect methods by which the majority community sought to maintain national preferences.<sup>308</sup> The Court limited the ability of the state—in this case by means of a third party, the Jewish Agency—to discriminate between the national communities in Israel in allocating land.<sup>309</sup>

In the following two paragraphs the Court propounds a real distinction between the question of immigration—the Law of Return—and the question of land allocation, as well as the allocation of other material goods:

[Indeed] the Jewish people founded the Jewish state, a point-of-departure from which we shall continue on our journey . . . but having been established, it [the State] practices equality between its citizens. The State of Israel is a Jewish state within which minorities live, among them the Arab minority. Each member of the minorities that live in Israel enjoys full equality of rights. *It is true that a special key to the house was given to the members of the Jewish people (see the Law of Return, 1950). But once a person resides in the house as a citizen by law, he enjoys equal rights like all the other members of the house.*<sup>310</sup>

In sum, the ruling in the *Kaadan* case sets a fundamental limit on discrimination regarding material public resources that are allocated on an individual or a group basis; the major, and arguably the sole, exception in this domain is immigration quotas.<sup>311</sup>

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307. H.C. 6698/95, *Kaadan v. Minhal Mekarke'ey Yisra-el* [Israel Lands Administration], 54 (1) P.D. 258, 272-74.

308. *Id.*, at 278-79.

309. *Id.* This ruling deserves a thorough analysis, which I shall not carry out here. See Alexander (Sandy) Kedar, "A First Step in a Difficult and Sensitive Road": Preliminary Observations on *Qaadan v. Katzir*, 16 ISR. STUD. BULL. 3-18 (2000).

310. *Kaadan*, 54 (1) P.D. at 282 (emphasis added, author's translation).

311. The Supreme Court indeed sets a boundary for the nationally biased allocation of land—but a boundary that is not very sharp. This lack of precision stems from the fact that the Court (apparently because of the sensitivity



Immediately after the *Kaadan* case, the Supreme Court made an additional ruling in *Adalah v. Ministry for Religious Affairs* that expresses the same fundamental limit.<sup>312</sup> This decision prohibited the discriminatory allocation, on a group basis, of budgets for religious services—in this case, the maintenance and development of cemeteries for members of the different religious communities.

*Adalah v. Ministry for Religious Affairs* begins to answer a fundamental question that is relevant to all group-differentiated rights, namely, the question of the extent to which the principle of non-discrimination may be invoked against discriminatory allocation of a group-differentiated right. In other words, is a complaint of discrimination on the level of group-differentiated rights likely to be rejected because of limitations on the principle of non-discrimination in Israeli law? For example, does the fact that institutional religious services (which involve a degree of self-government) are provided to Jews and to Druze constitute a basis for a claim of discrimination by Muslims? For many years this question was not discussed in Israeli jurisprudence. The first exception is the position taken by Professor Itzhak Zamir (a Supreme Court Justice writing as an academic), who argued: “The principle of equality, which requires the same law for Jews and non-Jews, applies on the level of personal rights. It apparently does not apply on the level of group-differentiated rights.”<sup>313</sup> Nevertheless,

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of its decision) left a few loopholes. See, e.g., *Kaadan*, 54 (1) P.D. at 258, para. 36 (Barak, C.J.):

Not only is the petition forward-looking, it also is focused on the community settlement of Katzir, in the circumstances that were presented to us. Of course there are settlements of different kinds, such as kibbutzim, moshavim, and outposts. Different types of settlements may raise different problems. We have not heard claims concerning settlements of different kinds and thus we also will not take a stance regarding such settlements. Moreover, one must take into account possible special circumstances apart from the kinds of settlement, such as special circumstances in terms of the security of the State, which may be of importance. We have not heard claims concerning the significance of such circumstances, and thus we also will not present an opinion regarding their significance.

312. *Adalah v. Ministry for Religious Affairs*, 52(5) P.D. at 171. Compare with *Kaadan*, 54(1) P.D. at 284.

313. Yitzkhak Zamir, *Ha-Samkhut Ha-Minhalit* [Administrative Power] 44 (Vol. 1, 1996).

Zamir adds the following important caveat: "It may be that in this regard there is room for a distinction between group-differentiated rights, which are fundamentally capable of being provided to the minority, and national rights that are incompatible with the fact that the State of Israel is a Jewish state."<sup>314</sup> Indeed, *Adalah v. Ministry for Religious Affairs*, which was written by Justice Zamir, opens a possibility for claims of discrimination in the context of allocation on a group basis. The ruling states:

The sums that will be allocated to the cemeteries of the different religions, according to religious affiliation, *will be consistent with the relative proportion of the members of each religion among the Israeli population.* Why? Because this proportionality is, in regard to cemeteries, the main criterion, albeit not the only criterion, for establishing equality.<sup>315</sup>

What is innovative here is the recourse to proportionality ("the relative proportion . . . among the Israeli population") as the criterion for allocation. Does a more general principle emerge here: a group-differentiated right to proportional allocation of the array of societal goods? It is difficult to answer this affirmatively. A careful reading of the ruling in *Adalah v. Ministry for Religious Affairs* reveals that the criterion of proportionality was clearly connected to its focus on the issue of burial services—a kind of service that is not hospitable to excuses such as different needs of the different religious communities. Nevertheless, Justice Zamir's appeal to proportionality was not isolated and is beginning to appear in other cases involving budgetary allocation.<sup>316</sup>

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314. *Id.* Recently Professor Zamir's position was cited and adopted by Justice Dornier in the ruling on *Adalah v. The Municipality of Tel Aviv-Jaffa*. See *Adalah v. The Municipality of Tel-Aviv-Jaffa*, 56(5) P.D. at 393, par. 6 (Dornier, J.) ("In general, the principle of equality between Jews and Arabs applies to individual rights. There are a few exceptions to this rule, including the recognition of the Arabic language as a second official language, alongside the Hebrew language.") The Or Commission Report also adheres to Zamir's view. OR REPORT, *supra* note 39, pt. 1, paras. 10, 59, 64.

315. H.C. 240/98, *Adalah v. Ministry for Religious Affairs*, 52(5) P.D. 167, at 182 (emphasis added).

316. See, e.g., H.C. 727/00, *Va-ad Roshey Ha-R'shuyot Ha-M'Komi-ot Ha-Aravi-ot B-Israel v. Sar Ha-Binuy Ve-Ha-Shikun* [Nat'l Comm. of Arab Mayors v. Minister of Bldg. & Hous.], 56(2) P.D. 79, 81-82 (program of rehabilitation of poor towns or neighborhoods); H.C. 2814/97, *Ve-adat Ha-Ma-akav*

These are all important developments: Differentiation between the issue of immigration to Israel and all other material goods allocated by the state; curtailment of mechanisms through which bias in allocation plays out; and recourse (sometimes) to proportionality as a basic criterion for allocation. One should note, however, that Israeli jurisprudence continues to remain almost totally silent or unsupportive with respect to historical rights—that is, claims to rights or allocations that are based on the ongoing discrimination against the minority during the half-century of statehood or claims to rights or remedies based on the price the minority and its people have paid as a result of the State's establishment in 1948.<sup>317</sup> In the *Kaadan* ruling, the Court even stresses that this is a “future-directed petition”—one that does not seek the redress of past wrongs.<sup>318</sup>

## 2. *Minority Participation in the Symbolic Order of the State*

What of the allocation of non-material goods? To what extent is the minority represented in the symbolic order of the state—e.g., its official languages, its national anthem, its flag,

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Ha-Elyona L'Inyaney Ha-Khinukh Ha-Aravi B'Yisra-el v. Misrad Ha-Khinukh, Ha-Tarbut V'Ha-Sport [Follow-up Committee for the Arab Education in Israel v. Ministry of Education, Culture and Sports] 54(3) P.D. 233, 238 (equal access for Arab school students to academic enrichment (*Shahar*) programs).

317. The Supreme Court recently turned down a petition by uprooted residents from the village of Ikrit in northern Israel to resettle in the part of their land that has not been occupied by others. The petitioners, citizens of Israel, pointed at several governmental promises that were given over the years, but the Court deferred to the Government's claim that adverse effects will follow a decision to let the villagers resettle in their home village because it might set a precedent or otherwise be used to substantiate the claim for the right of return of the Palestinian refugees. The Court left, however, a narrow opening for a different decision in the future when (and if) the geopolitical circumstances substantially improve. H.C. 840/97 Sbit v. Memshelet Yisra-el [Sbit v. Israel], 57(4) P.D. 803 (June 26, 2003). I myself have deep reservations as to the government argument (and of the Court's decision not to question it) because there are important moral and political distinctions between refugees outside Israel and the uprooted citizens (internal refugees). The historical background of the internal refugees issue and the case of Ikrit are lucidly summarized in the Or Commission Report. OR REPORT, *supra* note 39, pt. 1, paras. 43-44.

318. *Kaadan*, 54(1) P.D. at 285, paras. 37 & 39 (Barak, C.J.). For a detailed critique, see Jabareen, *Constitutional Protection of Minorities in Comparative Perspective*, *supra* note 103, at 209-230.

its heroes, its values, and its holidays and remembrance days?<sup>319</sup>

The legal—and practical—status of Arabic as an official language was discussed above. Thus, the following addresses the other aspects of the symbolic order of the state. The clear conclusion is that in Israeli law, apart from the context of immigration, there is no area in which the extent of the Arab minority's marginalization is more evident than that of national symbols.<sup>320</sup> Israel grants near total symbolic exclusivity to the Jewish community. Exclusivity involves more than asymmetry or a lack of appropriate (e.g., proportional) representation of the minority, such as a situation in which most of the official holidays are identified with the Jews while a small minority of them are identified with the Arabs. In fact, in Israel, not even a single official holiday is associated with the Arab minority. Moreover, throughout most of the years of statehood there was not even a single official holiday emphasizing the values that both communities purportedly share: the values of democracy, human rights, and Jewish-Arab coexistence. There is much sadness and more than an iota of symbolism in the fact that the first official holiday to be devoted to the importance of democracy (a holiday that emerged almost a half-century after the state's establishment) is the Remembrance Day for the assassinated former Prime Minister of Israel, Yitzhak Rabin.<sup>321</sup> The Jewish exclusivity in regard to state symbols finds legal expression in a series of laws.<sup>322</sup>

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319. The concept of "the symbolic order of the state" is lucidly presented (and applied to Canada), in Raymond Breton, *The Production and Allocation of Symbolic Resources: An Analysis of the Linguistic and Ethnocultural Fields in Canada*, 21 CANADIAN REV. OF SOC. & ANTHROPOLOGY 123 (1984).

320. See Smootha, *Minority Status*, *supra* note 289, at 404-06, 410; KRETZMER, *supra* note 142, at 21; BENVENISTI, *supra* note 16, chs. 1, 6; DOWTY, *supra* note 35, at 187-88. An echo of Arabs' complaints in this regard appears also in OR REPORT, *supra* note 39, pt. 1, para. 60.

321. Article 5(2) of Khok Yom Ha-Zikaron L'Yitkhak Rabin [Itzhak Rabin Remembrance Day Law], 1997, S.H. 186.

322. See, e.g., Khok Ha-Degel V'Ha-Semel [Flag and Emblem Law], 1949, 3 L.S.I. 26; Khok Khotem Ha-Medina [State Seal Law], 1949, 4 L.S.I. 13; Law and Administration Ordinance, 1 L.S.I. 7; Khok Yom Ha-Atzamaoot [Independence Day Law], 1949, 3 L.S.I. 7; Khok Zikhron Ha-Sho-a V'Ha-Gvura—Yad Va-Shem [Remembrance of the Holocaust and Heroism—Yad Vashem Law], 1953, S.H. 144; Khok Yom Ha-Zikaron La-Sho-a U-La-Gvura [Holocaust and Heroism Remembrance Day Law], 1959, S.H. 112; Khok Yom Ha-Zikaron L'Khalalei Ma-arakhot Yisra-el [Heroes' Remembrance Day (War of

A further, intensive area of symbolic activity, in which exclusive consideration is given to Israeli Jews, is that of place names and the designation of certain sites as having a special value. The practice is to confer Hebrew names—which usually replace, not just stand beside, the existing Arab names—as a means of reinforcing the “Jewish-Hebrew” public appearance of Israel, while emphasizing the special bond with the “landscapes of the Bible.”<sup>323</sup> Here, some of the activity is anchored in legal provisions.<sup>324</sup>

At the same time, a substantial part of the activity of bestowing symbolic importance via place names has been conducted without any explicit legal provision. Central here is the activity of the Governmental Naming Committee, whose role is summed up by the committee’s secretary as follows:

The Committee designates names for communities . . . for geographic entities such as rivers, fountains, mountains, nature preserves. The Committee also designates the names for regional councils, for geographic areas of settlement, for interchanges, for junctions and for historical sites.

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Independence and Israel Defense Army) Law], 1963, 17 L.S.I. 85; Khok Ha-Mosad Ha-Elyon La-Leshon Ha-Ivrit [Supreme Hebrew Language Institute Law], 1953, 7 L.S.I. 140; Khok Isur Ptkhat Batei Inugim B'Tisha B'Av (Hasmakha Meyukhedet) [Prohibition of Opening Entertainment Places on Tisha Be-Av Law (Special Ordination)], 1997, S.H. 8; Khok Yom Yerushalayim [Jerusalem Day Law], 1998, S.H. 180; Khok Ha-Shimush Ba-Tarikh Ha-Ivri [Use of the Hebrew Date Law], 1998, S.H. 312. Also see the opening articles of Basic Law: Human Dignity and Liberty, 1992, S.H. 150, and Khok Yesod: Khofesh Ha-Isuk [Basic Law: Freedom of Occupation], 1994, S.H. 90, as well as the document that is probably the most canonical among the documents of Zionism, namely, the Declaration of Independence, *supra* note 106.

323. BENVENISTI, *supra* note 16, at 46.

324. See Khok Ha-Atikot [Antiquities Law], 1978, 32 L.S.I. 93; Khok Reshut Ha-Atikot [Antiquities Authority Law], 1989, 43 L.S.I. 117; T'Kunat Ganim Leumiyyim, Shmurot Teva, Atarim Leumiyyim, Ve-Atarey Hantzakha [National Parks, Nature Reserves, National Sites and Commemoration Sites Law], 1998. I do not deal here with a central claim that is made in this context concerning the *physical destruction* of sites, structures, cemeteries, and so on, whose clear connection is to the Palestinian people in recent generations. The Or Commission Report confirms many allegations that were voiced in this regard. OR REPORT, *supra* note 39, pt. 1, paras. 61, 96-99.

The proposals for names of communities are referred for consideration and comment to settlement movements and the designated settlement nuclei.<sup>325</sup>

The example of the Governmental Naming Committee sheds light on the legal pattern by which far-reaching aspects of the state's symbolic and material allocation are determined. Major portions of allocation activity are based not on express powers, but rather on the residual power of the government<sup>326</sup> or on other broad powers that the law grants to administrative authorities.<sup>327</sup> These authorities are very often staffed exclusively with Jews who act without explicit or clear criteria and, thus, execute broad discretion regarding different allocation activities of the state. We have already encountered this legal pattern in the discussion of the poverty of self-government minority rights in the Arab state education system.

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325. Khanah Bitan, *Va-adot Ha-Shemot Ha-Memshaltit* [Governmental Committee on Names [of Places]], 23 ERETZ-YISRA-EL [LAND OF ISRAEL] 366, 367 (1992). For a comprehensive analysis of the activity of the Naming Committee, see BENVENISTI, *supra* note 16, ch.1. See also the presentation of the committee's goals and mode of activity in the GOVERNMENT YEARBOOK (1951) 278-279, the introductory sentence of which states that: "The Judaization of the geographical names in our land is a basic problem, for us and for the coming generations." See also H.C. 146/81, *See'on v. Va-adat Hashemot Hamemshaltit* [Governmental Names Committee], 46(1) P.D. 103. It is no accident that the secretary of the committee did not mention any consultation with the local residents (who are not "settlement nuclei") or their representatives. Arab residents do not get the chance—normatively or in practice—to be involved in (let alone decide) the naming of local or regional authorities that include them or new settlements to which they are transferred, such as the Bedouin townships in the Negev. A considerable number of entirely Arab local or regional authorities have purely Hebrew names that were determined by orders of the Interior Ministry officials and/or the Governmental Naming Committee.

326. Khok Yesod: Memshala [Basic Law: The Government], 2001, S.H. 1780, art. 40 ("The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority.")

327. For a more extensive discussion, see Saban, *Legal Status*, *supra* note 6, at 244-45, 316-17, 413-14 (discussing the mode of decision regarding the Israel Prize, the portraiture on coins and bills, and the subject-matters and personalities chosen for postage stamps).

### 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.<sup>328</sup>

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.<sup>329</sup>

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.”<sup>330</sup> There were three such de-

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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, Eyal 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-Mahpekha 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.<sup>331</sup>

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."<sup>332</sup>

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.<sup>333</sup>

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,<sup>334</sup> 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,<sup>335</sup> 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-

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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.<sup>336</sup>

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.<sup>337</sup> 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.<sup>338</sup> 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-Kheyrito [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.<sup>339</sup>

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).<sup>340</sup> 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).<sup>341</sup> 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.<sup>342</sup> 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

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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.<sup>343</sup>

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.<sup>344</sup>

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.<sup>345</sup> 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).<sup>346</sup>

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-

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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,<sup>347</sup> 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.”<sup>348</sup> Second, in December 2000, the Knesset amended Article 15A of the Civil Service Law (Appointments), 1959,<sup>349</sup> 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.<sup>350</sup>

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)<sup>351</sup> 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.<sup>352</sup>

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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”<sup>353</sup> (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).<sup>354</sup> 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.<sup>355</sup>

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

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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.<sup>356</sup> 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.<sup>357</sup> This obligation, which the Court termed “an obligation according to the doctrine,” applies even where no specific statutory or regulatory obligation applies.<sup>358</sup> 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.<sup>359</sup>

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.<sup>360</sup> 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.<sup>361</sup>

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. Mem-shelet 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.<sup>362</sup> 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.<sup>363</sup>

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-

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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.<sup>364</sup> 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.

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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.<sup>365</sup>

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

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

democratic state.”<sup>366</sup> 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.”<sup>367</sup>

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.<sup>368</sup>

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.<sup>369</sup> 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

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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-Amatot [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.<sup>370</sup> 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.<sup>371</sup>

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-Tsomet Li-V’khirut L-R’shuyot Ha-M’komi-ot, Natzarat-Illit [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).<sup>372</sup> 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

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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;<sup>373</sup> Spain vis-à-vis Catalonia and the Basque country;<sup>374</sup> 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 Māori;<sup>375</sup> recently Britain vis-à-vis Scotland and Wales;<sup>376</sup> and even the French Republic vis-à-vis Corsica.<sup>377</sup>

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.<sup>378</sup> Macedonia, especially after the Ohrid Agreement of 2001, is a current example that provides far-reaching autonomy to its Albanian minority.<sup>379</sup>

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-

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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.<sup>380</sup>

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.<sup>381</sup> An alteration 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*.<sup>382</sup> There, opposition to the registration of the Arab Party for Renewal, headed by Dr. Ahmad Tibi, was rejected.<sup>383</sup> The opponents of the party referred, among other things, to its support for the partition of Jerusalem between Israel and Palestine.<sup>384</sup> 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.<sup>385</sup>

### 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?<sup>386</sup>

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.<sup>387</sup> 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.<sup>388</sup>

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, *Ve-adat 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.<sup>389</sup>

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 *Kaadán* 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*

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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.*<sup>390</sup>

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*.”<sup>391</sup> 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.<sup>392</sup>

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. *Kaadon*, 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.<sup>393</sup> 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.”<sup>394</sup> 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.<sup>395</sup>

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-

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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.

B. *Differentiating between Naming Something "Bad" and Prohibiting it: The Bad Idea of the Binational State for Israel/Palestine v. the Bad Idea of Making it Taboo*

We have arrived at the concluding section of the discussion. Thus far, this Article has sought to understand the nature of group-differentiated rights, identify the group-differentiated rights that are possessed by the Arab-Palestinian minority in Israel, identify the group-differentiated rights that are denied it, and identify the group-differentiated rights that are beyond the legal pale (group-differentiated rights the minority is constrained from trying to attain). The time has now come for a brief discussion of the appropriateness of these taboo territories.

As we have seen, the binational state is the main, concrete idea that the Palestinian minority may not seriously strive to realize (whether in the Land of Israel/Mandatory Palestine or within Israel proper). I do not believe that this taboo is appropriate.

This belief is not based on the merits of the binational state idea. In fact, I am not sympathetic to this goal. A full-fledged justification for my objection cannot be given here, so I shall limit myself to following notes.

I believe that the establishment of the State of Israel in 1948, a short time after the most horrific genocide in human history, as a "Jewish and democratic" state instead of as a binational state is justified. . This, however, is not sufficient; one must cope with an additional question that pertains to the present. Why, after more than half a century, is it not now appro-

priate to change the state of affairs in the direction of a binational state?

This question is more difficult to answer, but, in a nutshell, my view is that the proposal for a binational state does nothing to help the sides to the Israeli-Palestinian conflict emerge from the vicious cycle of violence, counter-violence, and mutual self-righteousness.

Binationalism is a partnership. As such, it is quite fragile and needs certain favorable conditions.<sup>396</sup> These favorable conditions include cooperation of the elites, control of or cooperation among the respective constituencies, and a set of incentives that help to sustain this combination of cooperation and control on a prolonged basis.<sup>397</sup> The animosity and deep suspicion among the communities involved are likely to doom the effort to crystallize and sustain binationalism. Indeed, all three examples of binational states mentioned above—Canada, Belgium, and Switzerland—came to binationalism from the background of a non-bloody relationship, at least for decades prior to the adoption of binationalism. When, by contrast, the background was different, experiences in binationalism or multinationalism have collapsed into civil wars, as was the case in Cyprus in the 1960s and 1970s, in Lebanon in the 1970s, and in the former Yugoslavia.<sup>398</sup> In short, a comparative perspective warns against embracing noble ideas that might well be very inappropriate to resolve a protracted conflict.

The counter-argument, however, could be that, in recent years, a few binational arrangements seem to have come about despite a bloody background. Thus, Bosnia-Herzegovina (following Dayton agreement of 1995) and the Northern Ireland context (following Belfast agreement of 1998) could be

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396. See Brendan O'Leary, *The Limits to Coercive Consociationalism in Northern Ireland*, 37 POL. STUD. 562 (1989); Lustick, *Stability*, *supra* note 4, at 333-36.

397. See, e.g., Lustick, *Stability*, *supra* note 4, at 333-36.

398. See Oren Yiftachel, *The State, Ethnic Relations and Democratic Stability: Lebanon, Cyprus and Israel*, 28 GEOJOURNAL 319 (1992); Elizabeth Crighton & Martha Abele Mac Iver, *The Evolution of Protracted Ethnic Conflict: Group Dominance and Political Underdevelopment in Northern Ireland and Lebanon*, 23 COMP. POL. 127, 140-41 (1991); Reed Coughlan, *Cyprus: From Corporate Autonomy to the Search for Territorial Federalism*, in AUTONOMY AND ETHNICITY, *supra* note 149, at 219, 219-27.

pointed to as examples moving in the direction of a complex binational (or multinational) arrangement.<sup>399</sup> Due to limitations of space, I will only briefly refer to the Northern Ireland context.

There are at least two major differences between Northern Ireland and the Palestinian/Israeli case. First, the stabilizing factors of the Belfast agreement are substantial and impressive. The two kin-states (Britain and Ireland, and indeed the EU) are committed to the framework and spirit of the agreement and push the parties towards moderation. Moreover, the United Kingdom can resort to its sovereignty (direct rule) in Northern Ireland once troubles arise, as is the case at present.<sup>400</sup> Finally, Northern Ireland is Britain's fringe territory across the Irish Sea; reaching a binational arrangement there is very different than making Great Britain and Ireland a united binational country. These factors are totally absent in the Israeli/Palestinian context: There are no major stabilizing kin-states, and the whole territory is supposed to be transformed by the binational structure.

Indeed, the troubling problem with the advocacy of binationalism in the Israeli/Palestinian context is that it is genuinely perceived by Israeli Jews to be a variant of a long-standing Palestinian step-by-step strategy to do away with Israel altogether. Furthermore, it is in opposition to (and decreases the chances for acceptance of) the option that, in my view, constitutes the only hope for a resolution of the Israeli-Palestinian conflict. This is the partition of Israel and Palestine into two states on the basis of the 1967 borders (the two-state solution), accompanied by a substantial improvement of the status of the Palestinian minority within Israel. The binational proposal diminishes the odds of realizing this solution because it reinforces the Jewish Right's slippery slope argument against any substantial concessions to Palestinians of either group—the argument that once the Palestinians gain self-government vehicles they will use them to achieve the next stage, elimination of

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399. Carlos L. Yordan, *Resolving the Bosnian Conflict: European Solutions*, 27 THE FLETCHER FORUM OF WORLD AFF. 147 (2003); Gilbert, *supra* note 110, at 950 (regarding Northern Ireland); Thompson, *supra* note 110, at 250 (speaking of Northern Ireland).

400. Thompson, *supra* note 110, at 250-52.



the Jewish state.<sup>401</sup> In my view, partition is still the best hope for both sides: Disengagement or divorce—separating the twins that might live (basically) alone, instead of insisting that they are conjoined twins who must kill (or subdue) one another in order to live.

Nonetheless, I strongly object to the legal taboo on the ability to strive in the Knesset for a binational state by peaceful means for a number of interrelated reasons. The first stems from the liberal notion that the fact that a certain position is bad is not sufficient grounds to make it forbidden. Serious harm caused by the bad speech or act is a precondition for its restriction.<sup>402</sup> In other words, even for those who regard the call to make Israel binational as a bad position, there remains the burden of pointing to the harm that would result from the mere attempt to advance it. The marginalization of a better, more realistic, solution that would make it possible to emerge from the ongoing cycle of bloodshed is not sufficient to justify prohibiting such attempts. One should remember that the option of a binational state (as well as other radical options) exists in the hearts and minds of many Palestinians; the struggle must, therefore, be waged by means of persuasion, not suppression.

Second, Israeli law limits parties that act against Israel's democratic nature (racist Jewish parties being the main example), as well as parties that act against Israel's Jewish identity. There are, however, important differences between these two grounds for limitation. One major difference, which will suffice here, may be expressed as follows: Even one who strongly believes that there is justification for the two tenets of Israel—its democratic character and its national identity as Jewish—must agree that the justification for the national identity is more contingent. In other words, a change of circumstances could remove the justification for preserving Israel's national identity as is; whereas, according to the liberal conception, only an extreme change of circumstance (e.g., an emergency) could justify *temporarily* suspending *certain dimensions* of democracy. More concretely, even if one agrees that Israel's national

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401. See Dan Schueftan, *Voice of Palestine: The New Ideology of Israeli Arabs*, *AZURE* 73, 82 (Winter 2003).

402. See JOHN STUART MILL, *ON LIBERTY* 88-89 (Elizabeth Rapaport ed., 1978).

identity is beneficial and essential to the existence and cultural development of the Jewish people and that these interests of national existence and cultural continuity are important and legitimate, it still must be acknowledged that this value depends, in the final analysis, on other variables. Among these variables is the continued preservation by members of the majority community of their collective identity. Now, it is always possible that changes in this identity will be generated by peaceful means or that a growing number of people will become convinced that the Israeli Jewish cultural identity could be preserved sufficiently in a binational state (as the Flemish identity is preserved in Belgium, or the Anglophone identity in Canada). In sum, the contingent nature of the justification for Israel's national identity poses grave difficulties in regard to making that identity axiomatic.

Limitations on the political-parliamentary agenda regarding the national identity of the state are also very difficult to justify when they are applied to a homeland minority. As mentioned above, the distinction between homeland minorities and immigrant groups is that immigrants perform an individual act of transition—their acceptance into the new society assumes a kind of unwritten agreement. They are received into their new country as individuals who wish to integrate into it, not as a separate national community that seeks to maintain its original culture (and the separate national existence that it may have had) within the new territory, amid the new culture. Conversely, a homeland minority, such as the Arab-Palestinian minority in Israel, is not in the country by grace and does not owe loyalty to the basic framework of any sort of adopting nation. Thus, there does not appear to be any moral justification for seeking to deny such a minority the ability to work, in all the ways that democracy provides, for a transformation of this basic framework, of which it sees itself as a victim.

These cumulative points lead to a clear conclusion: Even those who believe that the insistence on a binational state (and/or a comprehensive Palestinian right of return to Israel) might lead to dire and fateful consequences for all sides must recognize the right of those pursuing that goal to strive for its realization by peaceful means.<sup>403</sup>

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403. The comparative law of Western democracies also seems to support the argument against granting a veil of sanctity to the national identity of a

#### IV. CONCLUSION

This Article has drawn a framework for analysis of group-differentiating rights of minorities in deeply-divided states. Equipped with this theoretical prism, it has attempted to critically analyze Israel's minority rights. The overall picture reveals a minority who has important group-differentiated rights. Those rights, however, are relatively few and undoubtedly limited.

The Arab-Palestinian minority possesses substantial rights in the sub-category of accommodation rights: the language rights that are granted to the minority on the basis of the official status of Arabic; the division of the public education system so that it contains elementary and high school systems that are conducted in the Arabic language; the group exemption from service in the Israeli army; the maintenance of the Ottoman *millet* system, in which each person is generally subject, in areas of personal status, to the law of the religious community to which she or he is affiliated, and sometimes to the

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state or its territorial integrity. The respectful way in which federal Canada approaches Quebec's separatist parties is a well known example. S. J. R. Noel, *Canadian Responses to Ethnic Conflict: Consociationalism, Federalism and Control*, in *THE POLITICS OF ETHNIC CONFLICT REGULATION*, *supra* note 134, at 41, 46-50; *see also* Stéphane Dion, *Explaining Quebec Nationalism*, in *THE COLLAPSE OF CANADA?*, *supra* note 10, at 77, 116-17; Kenneth D. McRae, *Canada: Reflections on Two Conflicts*, in *CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES*, 197, 212-13 (Joseph V. Montville ed., 1990). Certain democracies even practice tolerance toward radical national aims in situations where parts of the minority wage an armed struggle to attain these aims. In Northern Ireland, for example, both in the period of Protestant self-rule (1921-1972) and in the period of direct British rule (1972 until recently), Irish Catholic parties pursued, openly and unambiguously, the annulment of Northern Ireland (i.e., union with the Republic of Ireland). *See* Thompson, *supra* note 110, at 236-39. This pertains to the Republican Party in the past and to its successors in the recent past and the present, namely Sinn Fein and the moderate SDLP. *See* Clive Walker, *Political Violence and Democracy in Northern Ireland*, 51 *MOD. L. REV.* 605 (1988); Thompson, *supra* note 110, at 236-39. In Spain, separatist parties are active in the Basque country; the main one is the PNV (Basque Nationalist Party), which has long stood at the helm of the Basque country's autonomous government. Spanish law sets no limitation on these parties' pursuit, by peaceful means, of secession of their territory from Spain. *See* Keating, *supra* note 374, at 192-93. One should note, however, that intolerance is (justifiably) more common toward parties whose agenda is supportive of armed struggle and/or threats to the democratic character of the state. *See* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 *HARV. INT'L L.J.* 1, 51, 69-70 (1995).

exclusive jurisdiction of religious courts; and the right of workers and private business owners to observe the rest days and holidays that they practice.

However, the minority possesses few rights in the other two sub-categories of group-differentiated rights: self-government rights and special rights of representation and allocation. In the area of self-government rights, all it has is a partial degree of autonomy in the domain of the religious courts—an autonomy that in fact was recently diminished by reducing the exclusive jurisdiction of the *Shari'a* courts; a partial degree of autonomy resulting from its control of local government in the Arab communities; and limited dimensions of autonomy that stem from Arab private education.

The minority possesses even fewer rights of special representation and allocation. Apart from the status of Arabic as an official language—a status that, for many years, has had little practical impact on Israeli public life—the Palestinian minority lacks even meager representation in the symbolic order of the state. Discrimination toward the minority as a group in respect to the state's material goods is long standing, especially in regard to land allocation and immigration quotas. A similar paucity has prevailed with respect to political goods: No Arab or Arab-Jewish party has ever been part of the government, there has never been an Arab-Palestinian minister in an Israeli government (there was only one Druze minister), and Palestinian citizens' representation in the civil service has forever been scant.<sup>404</sup> Moreover, the symbols, contents, and institutions of Israeli law almost totally overlook or reject minority demands regarding historical rights: the return of the displaced (the internal refugees among the Israeli citizens); redress for the large-scale land expropriations experienced by many Palestinian citizens; and redress for the consequences of the ongoing routine discrimination against the Arab citizens for over half a century.

At the same time, this Article has pointed to a dynamic of moderate improvement that has occurred over the past decade. This dynamic has been reflected in a number of legislative and judicial developments that have somewhat changed the picture in the area of rights of special representation and allocation. Legislation has appeared requiring the inclusion

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404. See ADALAH REPORT, *supra* note 155, at 91-92.

of minority individuals in governmental and certain societal institutions. This has involved cautious legislative and judge-made provisions of affirmative action and obligations of appropriate representation in the civil service and the boards of governmental companies. How these developments will be translated into reality remains to be seen. A practice also appears to be developing of appointing an Arab judge as a member of commissions of inquiry. A beneficial trend has also appeared in the area of the state's symbolic allocation, particularly in rulings addressing the status of Arabic as an official language, with the Chief Justice of the Supreme Court invoking the fact that the minority is a homeland minority. A further development is the clarification by the Supreme Court that the state cannot discriminate against the minority community in the allocation of public material goods of any kind, with the exception of immigration quotas.

As for the minority's ability to change the situation in the area of group-differentiated rights, this Article has outlined the taboos that Israeli law establishes in this regard. These taboos concern both certain proscribed means (e.g., support for armed struggle) and goals. The Supreme Court has interpreted these proscribed goals quite narrowly. The minority is also prohibited from pursuing a practical, serious, and active program on the party-parliamentary level for the transformation of Israel into a binational state, from seeking the annulment of the Law of Return, and from promoting a comprehensive right of return of Palestinian refugees into Israel. The last section of the article criticizes these taboos, which are imposed on the minority goals even when the minority strives to attain them by peaceful means.

There is one remaining obligation: to attempt to explain the underlying causes of the somewhat positive dynamic that has occurred in the area of group-differentiated rights of the Arab minority over the past decade. This development induces a special curiosity, since some of it has continued even after the violent rupture of Israel-Palestinian relations in the occupied territories beginning in September 2000 and the events of October 2000 vis-à-vis the Arab Palestinian minority within Israel.

Three main factors appear to underlie these developments. The first is a combination of greater assertiveness and greater professionalism on the part of the Palestinian civil-soci-

ety actors in Israel, including political parties and NGOs. These actors have presented various demands more clearly and forcefully (non-discrimination, language rights, appropriate representation, and more), and the state has responded positively to some of them. The emergence of Adalah (the Legal Center for Arab Minority Rights in Israel) in the mid-1990s is a prominent example. Adalah and the Association for Civil Rights in Israel have played a significant part in the majority of the normative developments involving the Supreme Court.<sup>405</sup>

A second factor is more circumstantial: The period of 1993-2000 (and especially 1993-1996) was the good years of the Oslo agreement spirit, which helped the majority community accept the growing assertiveness of the minority without particular alarm.

But these explanations raise a riddle: Why, when violent rupture of relations with the Palestinians in the territories has occurred, and the intercommunal relations within Israel are seriously stressed, are certain positive developments continuing to occur in the legal realm? The answer lies partly in a third factor I wish to highlight—the Supreme Court itself. The Supreme Court, in a series of important rulings, has acted against a current powerful tendency towards polarization in Israeli public life (both Jewish and Arab). It has done this, in my view, through two processes that can be called anti-dichotomous. First, it has insisted on enabling the minority to give a complex, less-than-clear-cut answer to a dichotomous question with which certain Jewish sectors seek to confront it: On which side of the bloody struggle between the two peoples do you stand? Especially relevant here is the Court's ruling concerning the electoral eligibility of the *Balad* Party and Members of Knesset Bishara and Tibi. This ruling provides the minority a fairer path for reconciling its Israeli citizenship and its Palestinian nationality: It leaves it free to strongly express solidarity with its people and opposition to the policy that its country pursues toward its people, while at the same time

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405. See Payes, *supra* note 12, at 79-80; BARZILAI, COMMUNITIES AND LAW, *supra* note 155, at 134-143. Some of the Arab-Palestinian NGOs' activities were discussed above, especially as to the struggle to implement the legal status of the Arabic language. See *supra* text accompanying note 175.

prohibiting the minority's participation in its people's armed struggle.

A second anti-dichotomous move appears in some important rulings, such as *Kaadan* and *Adalah v. Municipality of Tel Aviv-Jaffa*, in which the Supreme Court implied a third way by strongly signaling that the status quo must change. Discrimination in land allocation cannot continue unhindered, and minority language rights need to gain new practical significance, meaning that Arabic must become a respectable part of Israel's public life. These are very important signals because they illustrate to both communities the fact that there exist possibilities, apart from leaving the status quo intact or opting for the opposite pole and becoming a binational state. These polarized options put both communities in Israel on a path that may culminate in a violent rupture of relations between them. On the other hand, the third, middle, way that emerges in some of the Court's rulings opens a door to a possibly different fate. It remains to be seen, however, how long this door will remain open and whether the two communities (and especially the Jewish majority, as the more dominant party) will be wise enough to go through it while there is still time.

